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Christopher Q. Cutler

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McNally Revisited: The "Misrepresentation Branch" of the Mail Fraud Statute a Decade Later *

*"To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart--and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling', but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it."*¹

I. INTRODUCTION

If conspiracy is indeed the darling of the prosecutor's nursery,² then mail fraud must surely be its younger sibling. The mail fraud statute has been used extensively to prosecute a multitude of criminal activities.³ Often, the applicability of the mail fraud statute is dependant only upon the prosecutor's creativity.⁴ When coupled with the nearly Draconian penalties of RICO,⁵ the mail fraud statute becomes a formidable weapon in the prosecutor's arsenal. However, due to consistently mistaken statutory construction and fundamental shifts in the Supreme Court's stance toward the breadth of the mail fraud statute, confusion abounds about which activities are punishable for mail fraud, and specifically, what elements constitute the offense of mail fraud. Nowhere is this uncertainty more evident than in questions concerning the meaning of the statute's misrepresentation clause.

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1. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980).

2. Judge Learned Hand first memorialized this mantra of prosecutors in *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925) ("conspiracy, that darling of the modern prosecutor's nursery").

3. At one point, courts described the extent of the mail fraud statute, and its twin, the wire fraud statute, as "seemingly limitless." *United States v. Von Barta*, 635 F.2d 999, 1001 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981) (noting also that "[t]he absence of legislative guidance has left the courts with broad discretion to apply the mail fraud statute to the myriad of fraudulent schemes devised by unscrupulous entrepreneurs"). *Id.* at 1005.

4. Mail fraud has been referred to as a "first line of defense" to new forms of fraud that are otherwise not conveniently prosecutable. *United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

5. Under RICO, mail fraud may be punished by up to twenty years imprisonment and significant forfeiture. See 18 U.S.C. § 1963. Civil remedies are also available under 18 U.S.C. § 1964. One study suggests that 57% of all civil RICO claims are predicated on mail or wire fraud. Brad D. Brian, *Predicate Acts of Mail and Wire Fraud*, 141 PLI/Crim 79 (1986).

Mail fraud, as history shows, has evolved significantly over time. Prior to 1909, the mail fraud statute was only implemented to prosecute "a scheme or artifice to defraud."⁶ However, the statutory language was later amended to include the misrepresentation clause, which prohibits "obtaining property or money through fraudulent pretenses, representations, or promises."⁷ The interplay between these two clauses has become a compelling area of jurisprudence and an influential guide to federal prosecutors.

Interpretation of the misrepresentation clause has evolved through three separate stages: (1) the Pre-*Durland* period of statutory purity; (2) the *Durland* mandated period of clearly separated clauses; and (3) Post-*McNally* confusion. Throughout these transitions, application of the statutory prohibition against "obtaining property or money through fraudulent pretenses, representations, or promises" has undergone a distinct maturation.⁸

This article analyzes the misrepresentation clause, principally by comparing judicial decisions and examining statutory construction. Part II focuses on the evolution of the mail fraud statute, from its historical impetus in the mid-1800s to the seminal *McNally* case in 1987. Important developments from both the courtroom and the halls of Congress are analyzed circumspectly. Part III studies the *McNally* decision and its immediate impact on interpretation of the misrepresentation clause, including Congressional reaction. Against this background, Part IV examines post-*McNally* prosecutions in their attempt to define the connection between the scheme-to-defraud and misrepresentation clauses. Finally, Part V is designed to serve as a pragmatic guide to future mail fraud jurisprudence, arguing that the two mail fraud clauses ought to be treated as independent prosecutorial alternatives.

II. HISTORICAL BACKGROUND OF THE MAIL FRAUD STATUTE

A. *Original Statutory Construction and Judicial Response*

The mail fraud statute has a long and colorful history in American jurisprudence. First instituted in 1872 as a portion of the recodified postal laws, the mail fraud statute has primarily served as a means of preventing the imposition of fraud on the postal system. Originally, the mail fraud statute proscribed anyone from "devis[ing] or intending to devise any *scheme or artifice to defraud*, or be effected by either opening or intend-

6. See Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323; Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873.

7. 18 U.S.C. §1341.

8. *Id.*

ing to open correspondence or communication with any other person . . . by means of the post-office establishment" and punished as a misdemeanor any such act.⁹ The purpose of this statute, as enunciated by the sponsor of the broad postal revisions, was "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions generally, for the purpose of deceiving and fleecing the innocent people in the country."¹⁰ When the validity of the recodified postal laws was first challenged in 1878, the Supreme Court upheld the constitutionality of the statutes, finding that Congress' power to "establish post offices and post roads"¹¹ included the right to regulate all functions of the postal industry.¹² The Court concluded that the "right to designate what shall be carried necessarily involves the right to determine what shall be excluded."¹³

Mail fraud, as created, was not a mere codification of the common law. While the common law initially resisted creation of a criminal offense of fraud,¹⁴ courts later permitted it.¹⁵ As originally constituted, the mail fraud statute did not contain language reflecting common law fraudulent offenses such as that of common law cheat or deceit.¹⁶ And even though mail fraud was not entirely the product of statutory construction, due to the unique addition of the requirement of the use of the mails, it was nearly interpreted as such. Understandably, a degree of confusion arose within the legal community as to how to treat this creature of the law.

Subsequent case law more clearly delineated the power to regulate fraud through the mail. In *United States v. Loring*,¹⁷ a federal district court elaborated on the species of fraud sufficient to support a conviction of mail fraud. The court noted that "the scheme or artifice to defraud . . . should be so fully stated as to enable the court to see, as a matter of law, that, if consummated, a fraud would be perpetrated."¹⁸ However, the court felt that "it need not . . . be a fraud either at common law or by stat-

9. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (emphasis added).

10. *McNally v. United States* 483 U.S. 350, 356 (1987) (quoting Remarks of Representative John Franklin Farnsworth of Illinois, CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870)).

11. U.S. CONST. art. I, § 8, cl. 7.

12. See *Ex parte Jackson*, 96 U.S. 727, 732 (1877).

13. *Id.* This reasoning upheld the constitutionality of the mail fraud statute as an integral portion of the recodified postal laws. See *United States v. Loring*, 91 F. 881, 882 (D. Ill. 1884).

14. For example, in *Regina v. Jones* it was stated that "we are not to indict one for making a fool of another." 91 Eng. Rep. 330 (1703).

15. For a comparison between mail fraud and common law offenses see Courtney Chetty Genco, *What Happened to Durland?: Mail Fraud, Rico, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 337-57 (1992).

16. See generally *id.*

17. 91 F. 881 (D. Ill. 1884).

18. *Id.* at 884-85.

ute. It was enough if it was a scheme or purpose to defraud any persons of their money.”¹⁹ This language reflected the popular sentiment of the time—an emphasis on the “scheme to defraud,” not an exact devotion to the common law.²⁰ Thus mail fraud became largely a creature of statute, warily enabled only to prevent those frauds perpetrated pursuant to a scheme.²¹

Loring represented an adherence to the statutory language and a careful view of the statute. Courts were reluctant to expand the extent of the statute during this period.²² While some argument can be made that several courts took a much more expansive view of the statute,²³ as a general rule courts confined themselves to the limits of the statutory language in defining which activities could be prosecuted as mail fraud.²⁴ In 1896, however, the Supreme Court in *Durland v. United States*²⁵ broadened the legal analysis of the statute and effectively gave birth to what would soon become another favorite in the prosecutor’s nursery.

19. *Id.* at 887.

20. *See, e.g.*, *United States v. Owens*, 17 F. 72, 74 (E.D. Mo. 1883) (recognizing a difference between mail fraud and “state statutes or a common law” and interpreting the statute by its plain language).

21. *See generally* *Stokes v. United States*, 157 U.S. 187, 188-89 (1895). *Stokes* delineated the three distinct elements of mail fraud under the particular version of the statute then in effect:

- (1) that the persons charged must have devised a scheme or artifice to defraud; (2) that they must have intended this scheme by opening or intending to open correspondence with some other person through the post office establishment, or by inciting such other person to open communication with them; (3) and that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or receive one therefrom.

Id. This statute-based framework reflected the contours of mail fraud prosecution at that time, circumspectly allowing those crimes to be prosecuted that clearly fell within the statutory range. *See id.*

22. *See, e.g.*, *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979) (noting that early cases attempted to “severely limit the term scheme to defraud”).

23. For example, some commentators feel that two competing schools of thought existed, a “broad constructionist” and “strict constructionist” school. *See Genco, supra* note 15. While this characterization may be correct in some contexts (as in the debate among the courts during that time as to the necessity of a mailing), I remain unconvinced that it is more valid than the one presented in this paper when applied to the substantive crimes that were prosecuted at that time.

24. *See generally* *United States v. Long*, 68 F. 348, 350 (S.D. Cal. 1895) (rejecting an indictment that did not accurately mirror the statutory scheme); *United States v. Beach*, 71 F. 160, 161 (D. Colo. 1895) (recognizing that “the statute is not limited to the particular deceits mentioned in it,” but limited to those generally regarded as a scheme or artifice to defraud); *United States v. Smith*, 45 F. 561, 563 (E.D. Wis. 1891) (noting that while the language of the statute may not accurately represent the intent of Congress, “*ita lex scripta est*, and it must be administered as declared”); *United States v. Mitchell*, 36 F. 492, 493 (W.D. Penn. 1888) (finding that “[w]hatever is not plainly within its provision shall be regarded as without its intendment”).

25. 161 U.S. 306 (1896).

B. Creation of the Misrepresentation Clause

1. *Durland v. United States: Genesis of the misrepresentation clause*

In 1889, Congress amended the mail fraud statute for the first time, an action that both enlarged the scope of the statute and specified behavior prohibited by the enactment. Congress declared that mail fraud could be committed by

any 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 of unlawful use . . . 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.²⁶

A few years later, *Durland v. United States* gave the Supreme Court its first opportunity to clarify exactly what behavior constituted mail fraud under the amended statute.²⁷

In *Durland*, the defendant argued that the mail fraud statute should only prohibit activities actionable under common-law fraud cases that “would come within the definition of ‘false pretenses,’ in order to make out which there must be a misrepresentation as to some existing fact.”²⁸ The Supreme Court disagreed with this characterization of the statute. Prophetically recognizing the future of mail fraud prosecution, the Court held that “[t]he statute is broader than is claimed. Its letter shows this: ‘Any scheme or artifice to defraud.’ Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud.”²⁹ The Supreme Court, for the first time, acknowledged the breadth of the statute, with resulting boundaries not confined by previous statutory interpretation. Any other reading of the statute, under the Court’s reasoning, would prevent the government from protecting the public against the various frauds propagated through the mail. The following explanatory language proved to be the guiding ensign of mail fraud jurisprudence for some time to come:

26. Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873 (emphasis added). This section specifically prohibits dealing in “sawdust swindle,” “counterfeit money fraud,” “green articles,” “green coin,” “bills,” “paper goods,” “Spurious Treasury notes,” “United States goods,” “green cigars,” and other misbegotten articles. *Id.* Subsequent revisions abrogated such specific language, replacing it with the current “counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article.” 18 U.S.C.A. § 1341 (1997).

27. 161 U.S. at 306.

28. *Id.* at 312.

29. *Id.* at 313.

It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurements of a specious and glittering promise.³⁰

Understandably, federal prosecutors reveled in the unprecedented breadth *Durland* promised; this sentiment echoed throughout the prosecutions of the next century. Mail fraud became more than just a traditional fraud; it evolved into a spectrum of fraudulent activity, with only the prosecutor's creative characterization of the statutory language delimitating the boundaries of the offense.³¹ For the first time the courts recognized an element of misrepresentation³² to be present in mail fraud, though this element was not a dispositive factor. Curiously, mail fraud became a statutory creature that not only devoured its legislative mandate in whole, it became a precocious dual entity -- the new sweetheart of the prosecutor's nursery, yet a ravenous and sanguine monster, roaming freely through the legal landscape.

In 1909, Congress added to the mail fraud statute a prohibition that included future misrepresentations, thereby codifying the holding in *Durland*.³³ Indeed, the legislature specifically emphasized the *Durland* decision by adding the phrase "or obtaining money or property by means of false or fraudulent pretenses, representations, or promises."³⁴ In 1948, Congress fine-tuned the mail fraud statute, eliminating superfluties. That

30. *Id.* at 314.

31. See generally *Horman v. United States*, 116 F. 350, 351-52 (6th Cir. 1902), cert. denied, 187 U.S. 641 (1902) (recognizing that the intent and purpose of those committing mail fraud outweighed statutory reliance on a technical definition of a scheme or artifice to defraud).

32. Recapitulating what the federal courts have said, misrepresentation has been defined as:

a statement or an assertion which concerns a material or important aspect of the matter in question and that was known to be untrue at the time it was made or used, or that was made or used with reckless indifference as to whether it was, in fact, true or false, and made or used with the intent to defraud. . . . The term . . . includes actual, direct false statements as well as half-truths, and includes the knowing concealment of facts that are material or important to the matter in question and that were made or used with the intent to defraud.

2 EDWARD J. DEVIIT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS, §40.13, at 521 (4th ed. 1990). For a substantive discussion of the differences between these two clauses in modern jurisprudence see *United States v. Goldberg*, 913 F. Supp. 629, 637-38 (D. Mass 1996).

33. Congress, however, did not extend the mail fraud statute to the full breadth the Court had implied it should be in *Durland*. Apparently, the revision was more narrow than the "everything designed to defraud" language found in the Court's decision. See *McNally v. United States*, 483 U.S. 350, 358 (1987). See also Act of March 2, 1889, ch. 393, § 5480, 25 Stat. 873.

34. Act of March 2, 1889, ch. 393, § 5480, 25 Stat. 873.

version, in many respects, resembles the statute in effect today.³⁵ The omission of specific crimes such as dealing in "green articles" and "green cigars" was induced by the Supreme Court's willingness to look beyond the statutory language in an attempt to find the "evil sought to be remedied."³⁶

2. *Legal ramifications of Durland*

From the revision of 1948 until 1987, the mail fraud statute changed little in form,³⁷ but prosecution under the statute evolved to meet changing prosecutorial concerns.³⁸ The Supreme Court in *Durland* had created an important new precedent, and Congress had codified it, apparently solidifying the expansive scope of the statute. In reality, the addition of a misrepresentation prohibition became the conduit for judicially broadening the mail fraud statute to govern crimes unanticipated prior to *Durland*. The Supreme Court had opened a Pandora's box with the addition of the misrepresentation proscription, freeing the judicial reins and allowing courts to broadly interpret the statute. Consequently, courts became quite liberal, allowing prosecutors to employ the statute in a variety

35. Act of June 25, 1948 ch. 645, 62 Stat. 763. The statute states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or obtaining money or property by means of false or fraudulent pretenses, representations, or promises to sell, dispose or, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful purposes any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

Id. The amendment notably also dismissed any requirement that the fraud "be effectuated by either opening or intending correspondence or communication . . . [through] the post office." *Id.*

36. *Durland*, 161 U.S. at 313.

37. The statute was amended in 1949, yet this was only to correct a typographical error. Also, during this interim, the statute was recodified under its present number. See Historical and Statutory Notes to 18 U.S.C.A. § 1341 (1997).

38. "The general language in the mail fraud statute has repeatedly been construed to cover novel species of fraud. . . [it] 'has been characterized as the first line of defense against virtually every new area of fraud to develop in the United States in the past century'" *McNally v. United States*, 483 U.S. 350, 374 (1987) (Stevens, J., dissenting) (quoting Rakoff, *supra* note 1, at 772-73).

of contexts.³⁹ Not surprisingly, the statute soon became the first line of defense against new forms of fraud.⁴⁰

Yet, as the statute encompassed more and more area, it also became more and more defined. Courts began to differentiate between the original scheme-to-defraud clause and the recently-added misrepresentation clause.⁴¹ Interpreting the misrepresentation and scheme-to-defraud clauses to constitute completely separate offenses, several courts held that a conviction would be upheld if based on either clause.⁴² Specifically, courts found

several alternatives in which the mail fraud offense may be committed, . . . [including] (1) a scheme or artifice to defraud, and (2) obtaining money or property by means of false or fraudulent pretenses, representations, or promises. The activities proscribed by either of these clauses constitute independent grounds for conviction of mail fraud.⁴³

Thus, "the defendant's activities [could] be a scheme or artifice to defraud whether or not specific misrepresentations [were] involved."⁴⁴ In

39. Recognizing that the statute was used to prosecute "novel and marginal forms of misconduct that have traditionally been viewed as involving only civil, ethical, or regulatory violations," it has been noted that the mail fraud statute has been employed in the prosecutions of "an attorney violating ethical rules . . . a politician favoring the interests of his political cronies . . . a union official arranging a 'sweetheart' labor contract . . . [and] a sexually frustrated man seeking to seduce women by promising to place them in modeling and acting roles." OTTO G. OBERMAIER & ROBERT G. MORVILLO, *White Collar Crime: Business and Regulatory Offenses* § 9.01, at 9-4 (1998).

40. See *United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting) (stating that "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").

41. See, e.g., *United States v. Frankel*, 721 F.2d 917, 921 (3d Cir. 1983) (recognizing that the clauses should be read independently); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1507 (D.N.J. 1985) (stating that "the statute discussed two separate types of mail/wire fraud offenses: one may act pursuant to a 'scheme of artifice to defraud' or one may act 'by means of false or fraudulent pretenses, representations, or promises'" and joining other courts that give the statute "such a disjunctive meaning"); *Lemon v. United States*, 278 F.2d 369, 373 (9th Cir. 1960) (noting that a conviction under the first prong of the statute does not require a misrepresentation).

42. Specifically, *Frankel* said that "[a]lthough the added clause was intended to identify and proscribe a particular course of conduct, it does not follow that the first and more general clause was restricted by the amendment." 721 F.2d 917, 920 (3d Cir. 1983). See also *United States v. Scott*, 701 F.2d 1340, 1343-44 (11th Cir.) (clarifying the components of the statute), *cert. denied*, 464 U.S. 856 (1983); *Lustiger v. United States*, 386 F.2d 132, 138 (9th Cir. 1967) (noting that mail fraud requires no misrepresentation if there is a scheme to defraud); *United States v. Classic*, 35 F. Supp. 457, 458 (E.D. La. 1940) (recognizing as separate the scheme or artifice to defraud and misrepresentation).

43. *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981) This court felt that ignoring the separate nature of both prongs "flies in the face of the language of 18 U.S.C. § 1341, which specified several alternative ways in which the mail fraud offense may be committed." *Id.*

44. *Id.* See also *United States v. Margiotto*, 688 F.2d 108, 121 (2d Cir. 1982) (finding the clauses to be independent), *cert. denied*, 461 U.S. 913 (1983); *United States v. Townley*, 665 F.2d 579, 585 (5th Cir. 1982) (requiring no showing that statements be false, fraudulent on their face,

1987, however, the Supreme Court handed down *McNally v. United States*,⁴⁵ a case that strongly questioned the structural independence of the two clauses in the mail fraud statute.

III. RECENT DEVELOPMENTS: *MCNALLY* AND AN IDENTITY CRISIS FOR THIS DARLING OF THE NURSERY

As the reach of the mail fraud statute extended into previously unforeseen realms, a specific and novel application of the statute developed that would set the stage for *McNally v. United States*, the first major reigning in of the roaming monster. Beginning with dicta in 1947,⁴⁶ an "intangible rights theory" developed and soon enveloped all of the federal circuits.⁴⁷ The intangible rights doctrine held that under the scheme-to-defraud element of mail fraud, the fraud need not only affect tangible property rights, it may affect the "intangible right to the 'honest services' of public officials."⁴⁸ This doctrine was predicated on the plain reading of the statute: the "scheme or artifice to defraud" language was independent, and separated by the disjunctive "or," from the "obtaining money or property by means of false or fraudulent pretenses" language.⁴⁹ As the two clauses of the statute were read independently, it was determined that the scheme to defraud need not involve the acquisition of money or property. The fraudulent gains could be intangible.⁵⁰

Howard W. Hunt, an active Democrat in the state of Kentucky, was made the chairman of the state Democratic Party after the gubernatorial election of 1974. Consequently, Hunt was entrusted with the responsibility of selecting the insurance policies for state workers. Hunt contacted a certain insurance company that was eventually granted the contract for

or involve a misrepresentation—all that is required is a scheme calculated to defraud others), *cert. denied*, 461 U.S. 913 (1983); *United States v. Bruce*, 488 F.2d 1224, 1229 (5th Cir. 1973) (same), *cert. denied*, 419 U.S. 825 (1974); *Fournier v. United States*, 58 F.2d 3, 5 (7th Cir. 1932) (requiring no misrepresentation for a scheme to defraud), *cert. denied*, 286 U.S. 565 (1932).

45. 483 U.S. 350 (1987).

46. "No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud." *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941).

47. While the intangible rights doctrine may seem merely ancillary to the analysis of the misrepresentation clause, the Supreme Court's treatment of this doctrine set the stage for *McNally's* major reversal in the application of the mail fraud statute, specifically relating to the relationship between the separate clauses of the statute.

48. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 187-88 (1993).

49. 18 U.S.C. § 1341.

50. See generally *United States v. Margiotta*, 688 F.2d 108, 120 (2d Cir. 1982) (stating that "[f]raudulent schemes designed to cause losses of an intangible nature clearly come within the terms of this statute"); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); *United States v. Rauhaff*, 525 F.2d 1170 (7th Cir. 1975) (upholding a conviction for defrauding the right of the public to loyal and faithful service by state officials).

the workers' compensation policy, but included a stipulation that the company share any commissions in excess of \$50,000 per year with other specified insurance companies. A company owned by Hunt with several other partners was one of those that received payments. Prosecutors charged Hunt and the other owners of the company with one count of conspiracy and seven counts of mail fraud. The prosecution based its case on the fact that the defendants had "devised a scheme . . . to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly."⁵¹ The trial court convicted the defendants on the conspiracy and mail fraud charges.⁵²

The Sixth Circuit Court of Appeals affirmed the convictions, finding support in the "line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government."⁵³ The Supreme Court, however, reversed these convictions, delivering what it perceived to be the death knell to widespread use of the intangible rights doctrine, by limiting the doctrine to cases where an economic loss accompanies the loss of honest governmental services. The mail fraud statute, it reasoned, protects property rights "but does not refer to the intangible right of the citizenry to good government."⁵⁴

Justice White, writing for the majority, found that while *Durland* had recognized broad applicability of the statute, this applicability extended only to property rights. *Durland* had spoken as to "everything designed to defraud by representations," but Congress had nevertheless subsequently reciprocated with "[any scheme or artifice] for obtaining money or property."⁵⁵ In essence, while broadening the scope of the statute, Congress had created a more limited standard than intimated under *Durland*. Thus, fraudulent representation became conditioned upon the defrauding of real property. While the majority recognized that the separate clauses of scheme to defraud and misrepresentation appear in the disjunctive in the statute, and thus arguably could be construed independently, it found language in earlier cases equating fraud with tangible fraud to be more per-

51. *McNally v. United States*, 483 U.S. 350, 353 (1987).

52. *See id.*

53. *Id.* at 355.

54. *Id.* at 356.

55. *Id.* at 357.

suasive.⁵⁶ The majority held that the first prong of the mail fraud statute is tempered and effectually conditioned by the second prong.

The majority's analysis of the two elements of the mail fraud statute is compelling because the majority interposes a confusing constructive juxtaposition. The statutory clauses are mutually exclusive, yet interdependent. Justice Stevens, in his dissent, persuasively critiqued this obfuscated analysis.

Justice Stevens recognized three different prohibitions advanced by the mail fraud statute: (1) scheme to defraud, (2) false pretenses (misrepresentation), and (3) counterfeiting.⁵⁷ To demonstrate the independence of each clause, he noted that a violation of one element does not necessarily constitute a violation of any of the others. Yet in its opinion, the majority had sought to apply the first clause in a context defined by the second. Stevens accused the majority of "show[ing] no fidelity to Congress' words or purpose" by intermingling the separate clauses.⁵⁸ He noted that, in essence, the majority had construed the "false pretenses" phrase as only "modifying the original prohibition."⁵⁹ Justice Stevens compared the statutory language to the judicial definitions of fraud the majority had presented, and astutely recognized that the case relied upon by the majority had held that to prove a conspiracy to defraud "[i]t is not necessary that the Government shall be subjected to property loss by the fraud, but only that its legitimate official action and purpose shall be defeated by *misrepresentation, chicane, or the overreaching* of those charged with carrying out the governmental intention."⁶⁰ Clearly, Justice Stevens felt that the majority had significantly muddied the waters as to the activities that constitute mail fraud. Also, the majority had proved itself an infidel to the common weight of authority among the federal circuits.⁶¹ He ominously concluded his dissent by predicting that "[i]n the long run, it is not clear how grave the ramifications of today's decision may be."⁶²

56. See *id.* at 358. The Court specifically cited language from *Hammerschmidt v. United States*, that interpreted "to defraud" to mean "wronging one in his property rights by dishonest methods or schemes." 265 U.S. 182, 188 (1924). *Hammerschmidt* was a case involving conspiracy to resist regulations requiring registration for selective service and was not prosecuted under the mail fraud statute. The dissent felt the applicability of *Hammerschmidt* to be inapposite in the context of mail fraud. Additionally, the dissent notes that *Hammerschmidt* "itself goes on to expressly reject the notion that fraud is limited to interference with monetary or property rights." *McNally*, 483 U.S. at 369 n.6 (Stevens, J., dissenting).

57. See *McNally*, 483 U.S. at 364-65.

58. *Id.* at 366.

59. *Id.* at 373.

60. *Hammerschmidt*, 265 U.S. at 188 (emphasis added).

61. Justice Stevens felt that *McNally* went against the prior judicial decisions and violated the venerable tenet that "it is the common opinion, and *communis opinio* is of good authority in law." *Brogan v. United States*, 118 S. Ct. 805, 818 (1998) (Stevens, J., dissenting).

62. *McNally*, 483 U.S. at 377. In a subsequent case decided that same term, the Court

In response to *McNally* and its progeny,⁶³ Congress amended the mail fraud statute to its present form. The present statute was intended to trump *McNally*—the Court had challenged Congress to speak more clearly if it wished to extend the mail fraud statute,⁶⁴ so Congress met this challenge.⁶⁵ Consequently, the mail fraud statute now embraces the intangible rights theory through 18 U.C.A. § 1346.⁶⁶ The amendment broadened the statutory language to reflect pre-*McNally* law among federal courts that subscribed to the intangible rights doctrine.⁶⁷ Once again, the sibling sweetheart of the prosecutor's nursery can rein in the activities of corrupt politicians.⁶⁸ However, the lingering effects of *McNally* continue to fester in the federal courts.⁶⁹

IV. POST-McNALLY

In the decade since *McNally*, a multitude of courts have played the judicial soothsayer, attempting to divine from the cryptic harbingers of the high Court and the Congress what fate has befallen the mail fraud

found that a property right existed in keeping information at a newspaper confidential until publication. *See* *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (reasoning that confidential business information was not comparable to an intangible right to impartial government). Commentators have felt that these two decisions seem inconsistent. *See, e.g.*, Craig M. Bradley, *Mail Fraud After McNally and Carpenter: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573 (1988).

63. The reasoning of the court in *McNally* was subsequently mirrored in several lower federal court cases. *See, e.g.*, *United States v. Covino*, 837 F.2d 65, 70-72 (2d Cir. 1988) (finding that *McNally* prohibited mail fraud convictions for deprivation of information concerning breaches of fiduciary duty); *United States v. Baldinger*, 838 F.2d 176 (6th Cir. 1988) (finding an indictment couched solely in terms of the intangible rights doctrine improper after *McNally*).

64. "If Congress desires to go further, it must speak more clearly than this." *McNally*, 483 U.S. at 360.

65. The refusal to "accept the widely held view of lower courts about the scope of fraud was quickly corrected by the 100th Congress." *West Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 114-15 (1991) (Stevens, J., dissenting) (citations omitted).

66. To mitigate judicial erosion of mail fraud through *McNally*, in 1988 Congress created 18 U.S.C. § 1346 which reads: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *Id.* *See* *State v. Davis*, 873 F.2d 900, 902 (6th Cir. 1989) (stating that Congress incorporated the intangible rights doctrine into § 1346), *cert. denied*, 493 U.S. 923 (1989); *United States v. Frost*, 125 F.3d 346, 364 (6th Cir. 1997) (holding that "§ 1346 has restored the mail fraud statute to its pre-*McNally* scope, according to its previous opinions interpreting the intangible right to honest services").

67. The recent amendments also have broadened the statute significantly in other areas. For example, the statute now protects against fraud that is delivered by mail "or other such carrier." 18 U.S.C. § 1346.

68. *See* *United States v. Brumley*, 116 F.3d 728, 732-35 (5th Cir. 1997) (finding that a Regional Director of Texas Worker's Compensation Commission could be found violating the public right to honest services).

69. *See* *United States v. Brumley*, 79 F.3d 1430, 1434-40 (acknowledging that § 1346 did not entirely eviscerate *McNally*).

statute. *McNally* sent shock waves throughout the legal community.⁷⁰ Many subsequent cases have dealt with specific procedural issues raised by *McNally*.⁷¹ Substantively, it appears that *McNally* has profoundly confused mail fraud jurisprudence. *McNally* has come to stand for two general propositions: (1) the jurisdiction of the mail fraud statute is not unlimited, and yet (2) the Court may reject the pre-*Durland* devotion to the statutory language completely. While the first proposition seems to be the most egregiously demanding of prosecutorial concern, the second may prove to be the most problematic. Conceivably, the Court has created a situation where the first prong of the statute is so conditioned by the second that every mail fraud must involve a misrepresentation. Also, the Court may have developed a scheme that reverses *Durland*, obviating the second prong completely. Only through a careful canvass of recent case-law do the true ramifications of *McNally* on the misrepresentation clause become apparent, and while unsure of many aspects of the relationship between *McNally* and § 1346, courts have unfailingly adhered to Justice Stevens' distinct clause analysis.

*United States v. Cooper*⁷² provides a crystalized exposé of the strict adherence to statutory independence. Not long after the Supreme Court delivered the *McNally* decision, two defendants were charged with wire fraud and, on the basis of *McNally*, requested that the jury be instructed on both clauses of the statute conjointly rather than in the alternative.⁷³ Specifically, the defendant requested that the jury be advised that mail fraud requires "(1) a scheme or plan to defraud of property or money, (2) to obtain by false pretenses, and (3) the use of the wire in furtherance thereof."⁷⁴ This request, clearly relying on *McNally*, sought to completely ignore the disjunctive between the scheme-to-defraud and misrepresentation clauses. The district court rejected this argument, finding that the statutory interpretation in *McNally* only required that the former clause involve the loss of "money or property,"⁷⁵ not that the latter also involve

70. The *McNally* decision "has been variously described as 'blockbusting,' as a 'total surprise,' as a 'wholly unexpected application of the law of mail fraud.'" *United States v. Ochs*, 842 F.2d 515, 521 (1st Cir. 1988) (citations omitted).

71. Many cases, for example, have dealt with the retroactivity of *McNally*. Some courts have overturned convictions due to the *McNally* decision. *See, e.g., United States v. Arrington*, 867 F.2d 122 (7th Cir.), *cert. denied*, 493 U.S. 817 (1989); *United States v. Mitchell*, 867 F.2d 1232 (9th Cir. 1989). Other courts, however, have distinguished *McNally* and allowed convictions to stand. *See, e.g., United States v. Utz*, 886 F.2d 1148 (9th Cir. 1989), *cert. denied*, 497 U.S. 1005 (1990); *O'Leary v. United States*, 856 F.2d 1142 (8th Cir. 1988); *Belt v. United States*, 868 F.2d 1208 (11th Cir. 1988).

72. 677 F. Supp. 778 (D. Del. 1988).

73. The wire fraud statute is interpreted "in pari materia" with the mail fraud statute. *United States v. Giovengo*, 637 F.2d 941, 944 (3d Cir. 1980), *cert. denied*, 450 U.S. 1032 (1981).

74. *Cooper*, 677 F. Supp. at 780.

75. *Id.*

a scheme to defraud.⁷⁶ The court found that intermingling the two phrases in such a manner “would be to rewrite the clear language of the statute and to undercut the intended purpose of its second phrase. That purpose, as we have seen, is to prohibit schemes . . . that don’t fall within the traditional definitions of fraud.”⁷⁷ The court in this instance intentionally resisted a “further narrowing” of the statute in order to fulfill the intent of the statute.⁷⁸

The *Cooper* decision has been consistently reflected throughout subsequent judicial decisions. Courts have noted that while the clauses are “overlapping” at times, they do nevertheless constitute separate elements.⁷⁹ The main difference between the two clauses is that the scheme to defraud “focuses on the end result . . . [and] the scheme to obtain money by means of false or fraudulent pretenses . . . focuses on the means by which the money was obtained.”⁸⁰ Courts have not intermingled the two statutory provisions, and have required separate evidence for the two offenses.⁸¹ Generally, the courts have held that the “elements of mail fraud remain unchanged” after *McNally*.⁸² Thus, Justice Stevens’ intimated fears that the two prongs of the statute would become indistinguishable were misplaced. Courts have not retreated from the pre-*McNally* separate prong analysis, and the ruling of *McNally* has been confined to have substantially affected only the intangible rights doctrine, and that of course only temporarily.⁸³

Further support for the distinction between the two clauses can be found in the model jury instructions given by the federal courts. The instructions for the federal circuits effectively mirror the case law that has

76. The court specifically stated that the second clause “is self-explanatory and should be interpreted as written—the obtaining by the misrepresentor, not the loss by the person defrauded, is the gist of the second phrase.” *Id.*

77. *Id.*

78. *Id.*

79. See *United States v. Cronic*, 900 F.2d 1511, 1514 (10th Cir. 1990) (finding that the two clauses, while overlapping in the substantive crimes that they prohibit, constitute different offenses). While *Cronic* was a case involving the bank fraud statute, “[t]he mail . . . fraud [statute makes] the same distinction as [the bank fraud statute] between schemes to defraud and schemes to obtain property by false or fraudulent pretenses, representations, and promises.” *United States v. Bonnett*, 877 F.2d 1450, 1454 (10th Cir. 1989).

80. *Cronic*, 900 F.2d at 1513-14. Consequently, the first offense does not require an affirmative misrepresentation, while the second is predicated on a misrepresentation. See *id.*; see also *United States v. Gelb*, 881 F.2d 1155, 1162 (2d Cir.), cert. denied, 493 U.S. 994 (1989) (finding that mail fraud does not only implicate “schemes that involve false promises and misrepresentations”) (quoting *McNally v. United States*, 483 U.S. 350, 359 (1987)).

81. See *United States v. Fontana*, 948 F.2d 796, 801 (1st Cir. 1991) (holding that while the prosecution indicted on both prongs of the statute, and the jury was instructed similarly, the prosecution did not have to prove a misrepresentation under both prongs).

82. *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989).

83. See *United States v. Brumley*, 79 F.3d 1430, 1440 (5th Cir. 1996) (noting that *McNally* has essentially been nullified by § 1346, yet some of its influence remains).

maintained the distinction between the two clauses. For example, the model jury instruction for the Eighth Circuit provides:

The crime of mail fraud, as charged in (Count ___ of) the indictment, has four essential elements, which are:

One, the defendant voluntarily and intentionally (*devised or made up a scheme to defraud another out of* (money, property or property rights) (the intangible right to honest services)) (*participated in a scheme to defraud with knowledge of its fraudulent nature*) (*devised or participated in a scheme to obtain* (money, property or property rights) (the intangible right to honest services) *by means of false representations or promises*) (which scheme is described as follows: (describe scheme in summary form or in manner charged in the indictment));

Two, the defendant did so with the intent to defraud;

Three, it was reasonably foreseeable that the mails would be used; and

Four, the mails were used in furtherance of some essential step in the scheme.⁸⁴

This instruction clearly establishes the ability to prosecute under either, or both, clauses of the mail fraud statute. While this seems to be the consensus among the jurisdictions, the Fifth Circuit's model jury instruction differs slightly. It requires that:

For you to find the defendant guilty of this crime (18 U.S.C.A. 1341), you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly created a scheme to defraud, that is _____ (describe scheme from the indictment);

Second: That the defendant acted with a specific intent to commit fraud;

Third: That the defendant mailed something (caused another person to mail something) for the purpose of carrying out the scheme.⁸⁵

This jury instruction does not specifically mention the misrepresentation clause. However, this seems to merely be an oversight, as the Fifth Circuit has routinely held that the clauses are independent of one another.⁸⁶

84. MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT, Instruction No. 6.18.1341 (1989) (emphasis added). The First, Seventh, Ninth, and Eleventh Circuits employ jury instructions mirroring that of the Eighth Circuit. See Devitt, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 40.03 (1990).

85. PATTERN JURY INSTRUCTIONS OF THE DISTRICT JUDGES ASSOCIATION OF THE FIFTH CIRCUIT, Instruction No. 2.54 (1990).

86. For instance, in *Pereira v. United States*, the Supreme Court lists the elements of mail fraud as "(1) a scheme to defraud, and (2) the mailing of a letter, etc. for the purpose of executing the scheme." 347 U.S. 1, 8 (1954). From the language of *McNally* and other cases, obviously the courts are aware of the second prong; courts merely will include the language of the second prong as a different element as the particular case demands. See generally *United States v. Moser*, 123 F.3d 813 (5th Cir.) (focusing on *some* scheme), *cert. denied*, 118 S.Ct. 642 (1997); *United States v. Coyle*, 943 F.2d 424, 427 (4th Cir. 1991); *United States v. Wallach*, 935 F.2d 445, 461 (2d Cir.

In part, this instruction represents a lazy shorthand that the courts often engage in, providing the "scheme to defraud" language and assuming that it includes the application of the scheme to "obtain money or property" as appropriate.⁸⁷

Recognizing that the two clauses of the statute are independent, however, raises the question of whether they constitute separate offenses, and implicitly, whether an individual could be charged with both as separate crimes. Can an individual concurrently propagate fraud through both a scheme to defraud *and* a scheme to obtain property or money through fraudulent pretenses, representations, or promises? While some courts have held that they may be presented as separate offenses,⁸⁸ not all courts agree.

In *United States v. Goldberg*,⁸⁹ the defendant was charged with committing mail fraud, and the indictment included two separate counts, one under each clause of the statute. While not directly argued by the defendant, the court discussed whether such a prosecution would be impermissible under the doctrine of duplicity.⁹⁰ The court felt that some dispute has existed concerning whether the two clauses represent different offenses. The court noted that while the Tenth Circuit in *Cronic* held that they were separate offenses, other courts have adopted "the considerably less controversial proposition" that both types of fraud are prohibited, but are not necessarily different offenses.⁹¹ Using the implicit theory presented in *McNally* that the two clauses are "components of the same crime," the court did not wish to hastily "align itself with a theory that would allow most counts of mail fraud . . . to be charged twice."⁹² However, the court let the conviction stand, ruling that it was no violation of the duplicity doctrine "for the jury to be presented with the two provisions as alternatives."⁹³

1991) (quoting the language of the statute and then condensing it into language similar to *Pereira*). *Accord* *United States v. Quadro Corp.*, 928 F.Supp 688, 695 (1996), *aff'd*, 127 F.3d 34 (5th Cir. 1997) (focusing on a "material representation" rather than the "scheme to defraud"). *Compare* *United States v. Miller*, 997 F.2d 1010 (2d Cir. 1993) (confusing the analysis and seemingly treating the two prongs as one).

87. This may also be viewed as an attempt by courts to judicially form the statute into a more traditional construction, as courts often do in recognizing the substantive and jurisdictional elements of an offense. This analysis is problematic with mail fraud because the first prong, the "scheme," is fulfilled by planning, not conduct. Also, the second element is much broader than a mere jurisdictional qualification. *See* Rakoff, *supra* note 1, at 774-76.

88. *See generally* *United States v. Cronic*, 900 F.2d 1511, 1514 (10th Cir. 1990).

89. 913 F. Supp 629 (D. Mass. 1996).

90. "The vice of a duplicitous indictment is that it fails to notify the defendant of the charges. . . . An indictment is duplicitous only if two offenses are alleged in the same count." *Id.* at 635-36.

91. *Id.* at 637 (quoting *United States v. Migliaccio*, 34 F.3d 1517, 1522 (10th Cir. 1994)).

92. *Id.* at 638.

93. *Id.*

V. THE FUTURE OF THE MAIL FRAUD STATUTE: PRAGMATIC POLICIES

For the federal prosecutor, the capability to indict under alternate clauses of the mail fraud statute is a powerful tool. As efforts to prosecute mail fraud are stepped up, newer frauds will emerge as more devious schemes are employed to cheat the public. Indeed, "[n]o crime is rooted out once and for all."⁹⁴ If interpreted to bestow upon prosecutors the power to aver separate offenses, the two clauses of the mail fraud statute would constitute a forceful tool in their hands to combat new crimes as they develop. The absence of either a scheme to defraud or a misrepresentation would then not be fatal to a prosecution. The jury, guided by the evidence, would simply have broader discretion to decide that the alleged criminal actions fall within those "evil[s] sought to be remedied."⁹⁵ As it now stands, however, the ability to charge a separate offense under each clause, while manifestly an awesome power, is still a relatively uncertain one.

Congress, the courts, and prosecutors should validate the ability to indict under alternative clauses and make it resoundingly clear that the power is necessary to combat ever-evolving mail fraud crime. With that power, federal prosecutors attempting to employ the mail fraud statute will be forced to consciously discern the true nature of the offending fraud (does the innate nature of the fraud more closely resemble a scheme to defraud or instead a scheme to obtain property or money through fraudulent pretenses, representations, or promises?) and adduce evidence that would support such a prosecution. Admittedly, prosecutorial interests at times might favor averring the statute in a general form,⁹⁶ and broad, unspecific allegations may result in convictions. However, the unsettling results of *McNally* will not be replicated so swiftly if strict adherence to statutory purity is honored on both the part of the bar and the judiciary. So long as the different clauses of the statute are presented as alternatives rather than as conjunctive components, courts will be apt to uphold mail fraud convictions.⁹⁷ Such a policy does not restrict the future of the mail fraud statute as a means of deterring fraud that would otherwise be unprosecutable. Rather it cements the mail fraud statute in bedrock, allowing future prosecutions to build upon the past without falling subject

94. THE QUOTABLE LAWYER § 35.13, at 68 (David Shrager & Elizabeth Frost eds., New England Publishing Associates 1986) (quoting TERTULLIAN, THE CHRISTIAN'S DEFENSE (c. 215)).

95. *Durland v. United States*, 161 U.S. 306, 313 (1896).

96. Indeed, most often courts will allow latitude as a measure of prosecutorial discretion. See *United States v. Bract*, 747 F.2d 1142, 1147 (7th Cir. 1984) (recognizing that the court uses a broad, not a technical standard determining the sufficiency of an indictment).

97. See generally *United States v. Goldburg*, 913 F. Supp 629 (D. Mass. 1996).

to unsupported pitfalls such as occurred in *McNally*. Fraud will continue, each time becoming more insidious and cunning, "for the children of this world are in their generation wiser than the children of light."⁹⁸ Only through a creative and malleable prosecutorial tool like the mail fraud statute can such fraud be regulated.

Courts in the future must cling to a policy of consistency, maintaining a sharp judicial distinction between the clauses. Defiance of the clear differences in the clauses will only further distort the legal process and create an illegitimate child of the judiciary, formed from the illicit union of consanguineous statutory components. Courts must concisely dispel the phantomlike specters of *McNally-esque* jurisprudence in order to effectively define the boundaries of the mail fraud statute. Only by maintaining the integrity of the disjunctive barrier between the clauses can the courts venerate the intents of Congress while taming any unwarranted expansion of the statute. Such reasoning is not a clarion call for unrestrained use of the mail fraud statute, but a summons for reason in determining its respective boundaries. Concomitantly, courts must further clarify the applicability of the statute, guiding the prosecutors in their quest for justice.

VI. CONCLUSION

In recent cases involving the misrepresentation branch of the mail fraud statute, the courts have grappled with the applicability of *McNally*. The Supreme Court never held that the two statutory clauses became indistinguishable; merely that their separation was not impermeable. In essence, the courts now attempt to honor the *Durland* decision while being governed by *McNally*. The misrepresentation clause of the mail fraud statute was intended as an amplification of the statute; it constitutes a departure from early mail fraud prosecutions. If courts were to hold that the two clauses were to be treated as one, then the mail fraud statute would become more narrow than at any time in its history. Truly, the nasty darling of the nursery would be reprimanded. However, this fate seems to have been at least reprieved as the Supreme Court has not since *McNally* attempted to rein in this critical prosecutorial power.

As John Stuart Mill said: "Laws and institutions require to be adapted, not to good men, but to bad."⁹⁹ Fraud, by its nature, adapts and changes. Fraud is chameleon-like, altering its appearance to the hopes and expectations of a naive public. As criminals become more creative,

98. *Luke* 16:8 (King James).

99. *Nelson v. Johnson*, 212 F. Supp. 233, 289 n.64 (D. Minn. 1963) (quoting *THE SUBJUGATION OF WOMEN* (1869)). See *THE QUOTABLE LAWYER supra* note 94, § 36.12, at 72 (quoting same).

prosecutors need a pliable instrument to implement the law. The mail fraud statute has provided that tool, allowing prosecutors to delve into the fray armed with broad statutory mandates and expansive judicial directives. While the integrity of the misrepresentation clause has been questioned in the past, post-*McNally* case law has supported its continued application and autonomy. Happily, the scheme-to-defraud and misrepresentation clauses still remain largely independent. Only if courts continue to honor and strengthen that deliniation will the mail fraud statute remain the true love of federal prosecutors.

Christopher Q. Cutler