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THE FEDERAL MAIL FRAUD STATUTE: THE GOVERNMENT'S COLT 45 RENDERS NORBY WALTERS AND LLOYD BLOOM AGENTS OF MISFORTUNE

I. INTRODUCTION

In a current trend which threatens the entire agency profession, sports agents are finding themselves subject to criminal prosecution in situations where they have not violated criminal legislation. Specifically, agents have faced criminal charges[1] as a result of violating National Collegiate Athletic Association ("NCAA") regulations.[2]

It is a scene which has become increasingly familiar to the campuses of America's major colleges and universities: a sports agent[3] visits a school with a successful sports program and seeks out its most promising student-athletes.[4] The agent makes this visit to gain an advantage over fellow agents in the competitive race to represent those precious few athletes who are destined for professional careers in the National Football League ("NFL"). The agent promises the player future millions[5] in the NFL and assures the athlete that his present financial and material needs will be satisfied.[6] In exchange, the student is to sign a representation

1. This casenote will focus upon the use of the federal mail fraud statute (18 U.S.C. § 1341) as a means of subjecting agents to accountability.

2. *See, e.g.,* Abernethy v. State, 545 So.2d 185 (Ala. Ct. App. 1988).

3. An agent is defined as "[o]ne who acts for or in place of another by authority from him," or "[o]ne who deals not only with things . . . but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons," or "[a] business representative, whose function is to bring about, modify, affect . . . contractual obligations between principal and third persons." BLACK'S LAW DICTIONARY 59 (5th ed. 1979). A sports agent is any person who represents, or attempts to represent, in negotiation of professional sports services contracts professional athletes or potential professional athletes in any sport. *See* J. WEISTART & C. LOWELL, THE LAW OF SPORTS §§ 3.17-.19 (1979 & Supp. 1985); *Id.* § 320 (Supp. 1985); Comment, *The Agent-Athlete Relationship In Professional And Amateur Sports: The Inherent Potential For Abuse And The Need For Regulation,* 30 BUFFALO LAW REV. 815 (1981).

4. The National Collegiate Athletic Association defines a student-athlete as "a student whose matriculation was solicited by a member of the athletic staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program." NCAA CONST. art. 3, § 1 O.I. 1.

5. Players are able to capitalize on large advertising budgets by endorsing particular products. In addition, it is not uncommon for athletes to receive annual salaries of more than one million dollars to play professional sports. Dunn, *Regulation Of Sports Agents: Since at First It Hasn't Succeeded, Try Federal Legislation,* 39 HASTINGS L. J. 1031, 1033 (July 1988) [hereinafter Dunn, *Regulation Of Sports Agents*].

6. Sports agents' contracts with student-athletes included bonuses and monthly pay-

contract[7] with the agent, a clear violation of NCAA regulations,[8] which terminates his eligibility to continue participating in college athletics.[9]

Millions of dollars in advertising revenue are available to college football programs, due largely to the American public's fascination with star athletes.[10] To take advantage of this revenue, it is necessary for universities to attract star players and maintain a successful athletic program.[11] The success of the program and the school's ability to realize the substantial profits available to it is threatened when students become ineligible to participate in the school's athletic program.

With millions of dollars at stake, the threat of losing star athletes because of agent-induced ineligibility has forced universities to be increasingly vigilant in preventing violations that can jeopardize a potentially lucrative season. In the absence of specific legislation to control agent activity, universities are turning to broad criminal statutes to find a means of controlling agent activity on their campuses.[12] By discouraging the representation of star student-athletes, universities are insuring that students will be eligible to participate in college sports, helping to generate revenue.[13] In maintaining the eligibility of these young athletes, the university protects its prospects for a lucrative athletic program.[14] Thus,

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ments. One such contract called for the student-athlete to receive $500 a month, $1,000 Christmas bonus, a $200 Thanksgiving bonus and disability insurance. Another provided a $75 bonus for each touchdown scored. *Agent: Players' Contracts Had Bonuses Of $175 To $1,100,* USA TODAY, Dec. 16, 1987, at C9, col. 3.

7. A representation contract enables the agent to perform various functions such as player contract negotiations; obtaining, reviewing and negotiating contracts; investment advice and income management; and legal and tax counseling. Sobel, *The Regulation Of Sports Agents: An Analytical Primer,* 39 BAYLOR L. REV. 701 (1987).

8. NCAA CONST. art. 3, § 1 (a), (c), states in pertinent part: (a) An individual shall not be eligible for participation in an intercollegiate sport if the individual: (1) Takes or has taken pay, or has accepted the promise of pay, in any form, for participation in that sport, including the promise of pay when such pay is to be received following completion of the intercollegiate career; or (2) Has entered into an agreement of any kind to compete in professional athletics in that sport or to negotiate a professional contract in that sport . . . . (c) Any individual who contracts or who has ever contracted orally or in writing to be represented by an agent in the marketing of the individual's athletic ability or reputation in a sport no longer shall be eligible for intercollegiate athletics in that sport. *Id.*

9. *Id.*

10. Advertisers spend more than $100 million yearly to obtain commercial air time during college sporting events. *See* Dunn, *Regulation Of Sports Agents, supra* note 5, at 1033 n.17.

11. Woods and Mills, *Tortious Interference With An Athletic Scholarship: A University's Remedy For The Unscrupulous Agent,* 40 ALA. L. REV. 141, 168-69 (1988).

12. *See, e.g.,* State v. Abernethy 545 So.2d 185 (Ala. Ct. App. 1988); United States v. Walters and Bloom, 711 F. Supp. 1435 (N.D. Ill. 1989).

13. Woods and Mills, *Tortious Interference With An Athletic Scholarship: A University's Remedy For The Unscrupulous Agent,* 40 ALA. L. REV. at 160-61 (1988).

14. *Id.*

an agent who violates NCAA regulations in his rush to obtain clients may be one step away from an unexpected mail fraud conviction.

The preceding scenario mirrors the factual content of *United States v. Norby Walters and Lloyd Bloom*[15] ("*Walters*"), in which an Illinois state court made an unprecedented decision, holding that sports agents Norby Walters and Lloyd Bloom conspired to commit and committed mail fraud after signing student-athletes to representation contracts.[16] The court's decision potentially brings aggressive agent behavior into the realm of criminal conduct in instances where their initial act was not a violation of any criminal legislation.[17]

This note focuses upon the use of the federal mail fraud statute[18] as a means of regulating agent behavior, specifically the behavior of Walters and Bloom, who signed athletes to representation contracts before the students' eligibility had expired. Additionally, this note will discuss the problems which are present in the mail fraud statute as it exists today, the misapplication of the mail fraud statute by the *Walters* court, and the need for federal legislation to regulate sports agent conduct like that of Walters and Bloom.

II. STATEMENT OF THE CASE

The student-athletes who contracted with Walters and Bloom were members of NCAA Division I football teams.[19] The NCAA, the Mid-American Athletic Conference, the Intercollegiate Big Ten Conference, and individual colleges and universities each have their own regulations governing the amateur status of student-athletes who are eligible to compete in events sponsored by any one of these agencies.[20] These regulations provide that a college athlete will be ineligible to participate in a school's athletic program if he or she contracts to be represented by an agent, accepts payment for participation in college athletics, is promised compensation following the completion of his or her collegiate career, or receives any financial assistance other than that administered by the

15. 711 F. Supp. 1435 (N.D. Ill. 1989).

16. *Id.*

17. Sobel, *The Regulation Of Sports Agents: An Analytical Primer*, 39 BAYLOR L. REV. at 783.

18. 18 U.S.C. § 1341 (1976).

19. The NCAA Division I is a voluntary association composed of major four-year colleges and universities. Membership obligates the individual athletic departments to comply with NCAA legislation and allows the departments to offer a limited number of full athletic scholarships. Woods and Mills, *Tortious Interference With An Athletic Scholarship: A University's Remedy For The Unscrupulous Agent*, 40 ALA. L. REV. at 143 n.6 (1988).

20. NCAA CONST., art. 3 § 1.

school and his or her family.[21]

Each year, universities require every student-athlete to sign and submit statements containing information relating to eligibility, amateur status, and financial aid.[22] The various schools use this information to determine the athlete's eligibility to compete in the school's athletic program and to receive one of a limited number of athletic scholarships the school is allowed to distribute.[23] The student-athletes who signed representation contracts with Walters and Bloom were beneficiaries of such scholarships.[24]

Walters and Bloom approached college football players offering money and other inducements to sign representation contracts with World Sports & Entertainment, Inc. ("WSE"), an entity of which Walters and Bloom were principal executive officers.[25] Walters and Bloom sought to sign the student-athletes to representation contracts while the athletes were eligible to play and in the process of playing college football for their respective universities.[26] In the spring of 1986, Walters and Bloom signed Robert Perryman and Garland Rivers of the University of Michigan and Roderick Woodson of Purdue University to representation contracts.[27] To conceal this violation and help preserve the athletes' eligibility, the agents postdated the contracts to take effect after the players' amateur eligibility expired and they were to be drafted by professional teams.[28]

In order to maintain their eligibility, the students who had contracted with the agents filed false eligibility and financial statements with their universities and with the NCAA.[29] Early in the summer of 1986, Michigan and Purdue offered Perryman, Rivers and Woodson scholarships for the 1986-1987 school year, through a form entitled "Big Ten Conference Tender of Financial Aid."[30] The players all accepted the offers of financial aid in August, 1986.[31] Both Michigan and Purdue required the students to complete forms entitled "Big Ten Statement of Eligibility," "Big Ten Statement of Financial Support," and "NCAA

21. *Id.*
22. *Id.*
23. NCAA Bylaw 6-1-(a), *reprinted in* 1988-89 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, at 129 (1988).
24. United States v. Walters and Bloom, 711 F. Supp. at 1438 (N.D. Ill. 1989).
25. *Id.* at 1437.
26. *Id.*
27. Brief for Appellant at 5-6, United States v. Walters and Bloom (Nos. 89-2352, 2353).
28. *Walters* at 1437.
29. *Id.* at 1438.
30. Brief for Appellant at 5-6, United States v. Walters and Bloom, (Nos. 89-2352, 2353).
31. *Id.*

Student-Athlete Statement" after they accepted the scholarship offers from the schools.[32] Michigan and Purdue administrators reviewed the forms, created a separate document entitled "Certified Eligibility List" and mailed both to the Big Ten Conference offices.[33]

III. THE COURT'S DECISION

A. Holding

The *Walters* court held that Walters and Bloom committed mail fraud under the federal statute[34] by implementing a scheme to defraud universities of tangible property, a scheme which was furthered by use of the mails.[35] The court found that Walters' and Bloom's fraudulent scheme consisted of student-athletes signing both agent representation forms and Statements of Eligibility and Statements of Financial Support, which the students then mailed to their respective universities.[36] The court ruled that the agents' scheme was executed when "particular student-athletes obtained tangible property from their universities based on fraudulent misrepresentations of material fact concerning the student-athlete's eligibility status."[37]

B. Reasoning

The court reasoned that by having student-athletes sign representation contracts while bound by the rules and regulations of the NCAA, Walters and Bloom caused the universities to rely upon false statements in deciding whether to award scholarship money to various athletes.[38] As a result, the *Walters* court determined that the universities were defrauded of this scholarship money and the right to distribute athletic scholarships to those individuals who were eligible to compete on behalf of the universities.[39]

The *Walters* court found that the scholarship money and the right to distribute it constituted tangible property[40] and thus escaped the excep-

32. *Id.*
33. *Id.*
34. 18 U.S.C. § 1341 (1976).
35. 711 F. Supp. 1435.
36. *Id.* at 1439-40.
37. *Id.* at 1444.
38. *Id.* at 1438.
39. *Id.* at 1446.
40. 711 F. Supp. at 1443-44. The court defined scholarship money as room, board, and fees. The right to distribute scholarships was defined as the university's right to control the allocation of a limited number of athletic scholarships to student-athletes who the university

tion established by *McNally v. United States.*[41] In *McNally,* the Supreme Court held that the federal mail fraud statute applies only when a party is deprived of tangible property.[42] The *Walters* court found that because the universities were defrauded of tangible property, Walters and Bloom committed mail fraud under the federal statute.[43]

The court found that Walters and Bloom used the mail system to further their fraudulent scheme when the false statements were sent by the universities to the NCAA.[44] The *Walters* court, citing *United States v. Castor,*[45] held that a person "causes" a mailing either when he makes use of the mails or when he causes someone else to do so.[46] Thus, because the agents knew or should have known that the universities would have to mail the documents to the NCAA, Walters and Bloom caused the universities to mail the documents to the NCAA, thereby using the mail system to bring their fraudulent scheme to fruition.[47]

The *Walters* court found that the agents' conduct fit within the definition of a "fraudulent mailing" under the federal mail fraud statute.[48] The court in *United States v. Wormick*[49] stated:

> [u]nder this definition, mailings made after the scheme has reached its fruition are not in furtherance of the scheme (citation omitted) . . . [o]n the other hand, mailings made to promote the scheme (citation omitted), or which relate to the acceptance of the proceeds of the scheme (citation omitted), or which facilitate concealment of the scheme (citation omitted), have been found to have been in furtherance of the scheme under this definition.[50]

The *Walters* court found that a jury could reasonably conclude that the mailings in this case are an essential part of the scheme because they facilitate concealment of the scheme.[51] The success of the agents' fraud-

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considered to be eligible under the rules and regulations of the NCAA and the conference which governs that school. *Id.*

41. 483 U.S. 350 (1987). The Court narrowed the application of U.S.C. § 1341 (1976) by holding that it only applies to tangible property. *Id.* For a discussion on the student-athlete as property of a university, see Woods and Mills, *Tortious Interference With An Athletic Scholarship: A University's Remedy For The Unscrupulous Agent,* 40 ALA. L. REV. 141 (1988).

42. 383 U.S. 350 (1987).

43. 711 F. Supp. at 1445-46.

44. *Id.* at 1440.

45. 558 F.2d 379 (7th Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978).

46. *Id.* at 385.

47. 711 F. Supp. at 1440.

48. *Id.* at 1441.

49. 709 F.2d 454 (7th Cir. 1983).

50. *Id.* at 462.

51. 711 F. Supp. at 1440.

ulent scheme depended upon the student-athletes' receipt of the scholarship monies and the mailings allowed the students to receive this money.[52] Thus, based on *Wormick,* the *Walters* court held that the agents' mailings were in furtherance of a fraudulent scheme because they were an essential part of that scheme.[53]

IV. BACKGROUND: THE FEDERAL MAIL FRAUD STATUTE

A. The Original Mail Fraud Statute

As originally enacted, the federal mail fraud statute served to deter the actual and intentional misuse of the mails.[54] This statute was comprised of three elements: 1) persons charged must have devised a scheme or artifice to defraud; 2) they must have intended to effect 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; and 3) that in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom.[55]

The original statute clearly contains mail-emphasizing language. The statute makes reference to the misuse of the "post office establishment"[56] and requires punishment to be proportional to "the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme."[57] The mail-emphasizing language of the original mail fraud statute was evidence of a congressional concern for misuse of the mails and for prosecuting only those fraudulent schemes

52. *Id.* at 1441.

53. *Id.* at 1439-40.

54. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

55. Stokes v. United States, 157 U.S. 187, 188-89 (1895).

56. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

57. *Id.* The original mail fraud statute reads:

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

that involved such misuse.[58]

B. The 1909 Amendment

At the turn of the century, concern turned from stemming misuse of mails toward controlling fraud in general.[59] In 1909, Congress amended the mail fraud statute[60] and in doing so, eliminated the language which demonstrated concern for abuse of the mails.[61] In the absence of the mail-emphasizing language, the amended statute focused on obtaining money or property by false or fraudulent means.[62] Since its amendment, the sole purpose of the mail fraud statute has been to prosecute all types of fraudulent conduct. The use of mails, no longer the nexus of the crime of mail fraud, has served primarily as a basis for invoking federal jurisdiction.[63] Courts have been able to fulfill this purpose because judges have been free to interpret the statute very broadly.[64] As a result, the law of mail fraud is generally judge-made.[65]

The language of the amended statute focuses upon obtaining property, and the courts which interpret the statute have defined this language broadly.[66] Thus, the mail fraud statute applies to a wider spectrum of illicit activity than it would had it been strictly construed.[67] The amended statute is a result of Congress' concern for controlling unethical business practices in a rapidly expanding business environment.[68]

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58. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 786 (1980).

59. United States v. Young, 232 U.S. 155 (1914).

60. Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130.

61. *Id.* As amended, the statute read in pertinent part as follows:

> 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 . . . shall, 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 not more than one thousand dollars, or imprisoned not more than five years, or both. *Id.*

62. *Id.*

63. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 816 (1980).

64. *See, e.g.*, United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974), *cert. denied*, 417 U.S. 976 (1979); United States v. Mandel, 602 F.2d 653 (4th Cir. 1979) (en banc), *mandamus denied*, 445 U.S. 959 (1980); United States v. United Brands Co., No. 78 Crim. 538 (S.D.N.Y. July 19, 1978).

65. Badders v. United States, 240 U.S. 391 (1916).

66. *See supra* note 64.

67. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. at 772 (1980).

68. *See supra* note 46.

Because of this legislation, the mail fraud statute is now an important weapon against numerous types of fraud.[69]

C. *The Modern Mail Fraud Statute*

> The modern mail fraud statute[70] provides in pertinent part: 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 whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1000.00 or imprisoned not more than five years, or both.[71]

The mail fraud statute currently consists of two elements which must be satisfied to sustain a conviction: a scheme to defraud and the use of the mails.[72]

1. Scheme To Defraud

The first element of the mail fraud statute is a "scheme to defraud."[73] A "scheme to defraud," is defined as behavior calculated to deceive persons of ordinary prudence and comprehension.[74] This element has two components: fraudulent intent and contemplation of harm or injury.

The first component of a "scheme to defraud" is the intent to commit a fraud.[75] In order to sustain a mail fraud charge, the government must show a scheme to defraud by proving that the defendant actually

69. United States v. Maze, 414 U.S. 395, 406 (1974) (Burger, C.J., dissenting).

70. 18 U.S.C. § 1341 (1976).

71. 714 F.2d at 422 (quoting 18 U.S.C. § 1341 (1976)).

72. Pereira v. United States, 347 U.S. 1 (1954).

73. United States v. Bruce, 488 F.2d 1224 (5th Cir. 1973).

74. United States v. Beitscher, 467 F.2d 269, 273 (10th Cir. 1972). A further example is Speigel v. Continental Illinois Nat'l Bank, 609 F. Supp. 1083 (D.C. Ill. 1985) in which the court noted that fraudulent schemes typically involve covering up illicit acts through false pretenses, failing to disclose material facts when there is some duty to do so, making false statements or ones with reckless disregard to their truth. *Id.* at 1088.

75. United States v. Brickey, 296 F. Supp. 742, 747-48 (E.D. Ark. 1969).

devised or intended to devise such a scheme.[76] This component does not focus upon conduct but on state of mind or scheme.[77] Fraudulent intent need not relate directly to the mailing itself; a defendant need not intend that the mails be used, only that a fraudulent scheme be committed.[78]

The second component of a "scheme to defraud" is the contemplation of harm or injury.[79] Such contemplation may be inferred when a scheme has an injurious or harmful effect as a necessary result of its execution.[80]

2. Use Of The Mails

The second element necessary for a mail fraud conviction is causing the use of the mails for the purpose of executing the fraudulent scheme.[81] One causes the mails to be used when he or she acts with the knowledge that use of the mails will follow in the ordinary course of business, or where use of the mails can reasonably be foreseen even though not actually intended.[82] Numerous rules facilitate the prosecutor's burden of proving the mailing element of the crime.[83] For example, mailings need not be either an essential part of the scheme,[84] actually effective in executing the scheme,[85] or actually conducted by the offender.[86] An offender must merely cause the use of the mails and must use the mails for the purpose of executing the scheme.[87]

The courts, however, have imposed limitations on the mailing element of the statute. For example, letters mailed before the scheme is conceived or after it is completed are not subject to the mail fraud statute because a mailing made either before a scheme is conceived or after it has reached fruition does not further the scheme and cannot support a mail fraud conviction.[88] Despite these limitations, judicial latitude in apply-

76. United States v. Brien, 617 F.2d 299, 311-12 (lst Cir. 1980) *cert. denied,* 446 U.S. 919 (1980).

77. Rakoff, *The Federal Mail Fraud Statute (Part I),* 18 DUQ. L. REV. 771 (1980).

78. *Brickey* at 747-48.

79. United States v. London, 753 F.2d 202 (2d Cir. 1905).

80. *Id.*

81. 347 U.S. 1 (1954).

82. *Id.* at 8-9.

83. Crumbaugh, *Survey Of The Law Of Mail Fraud,* 2 ILL. LAW FORUM 237, 248 (1975).

84. 296 F. Supp. at 747.

85. Newingham v. United States, 4 F.2d 490, 492 (3d Cir. 1925), *cert. denied,* 268 U.S. 703 (1925).

86. United States v. Castor, 558 F.2d 379, 385 (7th Cir. 1977), *cert. denied,* 434 U.S. 1010 (1978).

87. 240 U.S. at 394.

88. 609 F. Supp. at 1090.

ing the statute is virtually unrestrained.[89]

V. ANALYSIS: APPLICATION OF THE MODERN MAIL FRAUD STATUTE

The lack of a hard and fast rule for application of the mail fraud statute has been criticized in the last decade. Jed Rakoff, a former federal prosecutor, has noted that "the idiosyncrasies of design and interpretation that make the mail fraud statute so effective in combatting fraud likewise render it more liable to irrational, unpredictable or extreme applications and hence, to abuse."[90]

A. Drawbacks To Broad Interpretation

In recent years, the most controversial mail fraud cases have revolved around the statute's lack of a precise definition of a "scheme to defraud."[91] While the vague concept of a "scheme to defraud" may make the mail fraud statute an important law enforcement tool, it also allows for abuse and for anomalous results because the statute can be applied in a variety of unforeseeable and undesirable ways.[92] The result of the lack of a precise definition of a "scheme to defraud" has been to "extend the net of the federal criminal sanction over an extraordinarily vast terrain and to arm the federal prosecutor with a weapon substantially different in character from any previously known to the substantive criminal law."[93] However, courts have been able to bypass the difficult task of establishing a definition of "scheme to defraud" by reiterating the mail-emphasizing language of the original statute.[94]

The re-emphasis of the mailing aspect of the statute has allowed courts to avoid the real questions underlying most of the controversial cases brought under the present mail fraud statute, most notably the pre-

89. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980).

90. *Id.* at 779.

91. *Id.* at 819.

92. Barbur, *Mail Fraud And Free Speech*, 61 N.Y.U. L. REV. 942, 952 (Nov. 1986). In his article, Barbur includes a discussion of several cases in which courts used the mail fraud statute to curb free speech rights. *Id.* at 953 n.70. *See also*, In re Grand Jury Matter, Gronowicz, 764 F.2d 983 (3d Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 793 (1986) (the mail fraud statute extended to breaches of fiduciary duty by public and private employees, even where no monetary or property loss was threatened); United States v. Margiotta, 688 F.2d 108, 121-30 (2d Cir. 1982) (affirming mail fraud conviction of Republican party country committee chairman for arranging kickbacks on public insurance commissions); United States v. George, 477 F.2d 508 (7th Cir. 1973), *cert. denied*, 414 U.S. 827 (1973).

93. Coffee, *The Metastasis Of Mail Fraud: The Continuing Story Of The Evolution Of A White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983).

94. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. at 819.

cise definition of a "scheme to defraud."[95] The Supreme Court found that the common law development of the mail fraud statute has become so unbounded that virtually any unethical conduct could be subject to its penalty.[96]

Although many of the schemes prosecuted under the federal mail fraud statute are devious, harmful, and otherwise reprehensible, such an empirical observation is not consistent with the purpose the mail fraud statute was designed to serve,[97] that is, to control the fraudulent taking of property by use of the postal system.[98] Federal prosecutors today employ the statute in situations that might have been inappropriate or even bizarre only a few years ago.[99]

Modern courts have been unwilling to undertake the formidable task of determining whether there are substantive limitations which may be imposed on the term "scheme to defraud" in order to limit the statute's scope.[100] Obviously, the only way to effectively limit the scope of what is an overly broad application of the federal mail fraud statute is to address the "scheme to defraud" language itself.[101]

VI. ERRORS OF THE *WALTERS* COURT

The *Walters* court erred in failing to define the terms of the statute literally. Other courts have held that criminal statutes are to be defined in their literal senses: "no person is to be made subject to penal statutes by implication and all doubts concerning their interpretation are to predominate in favor of the accused."[102]

In an analogous case, *Abernethy v. State*,[103] a sports agent appealed his conviction for tampering with a sporting event.[104] The *Abernethy*

95. *Id.*

96. 483 U.S. 350 (1987).

97. Hurson, *Limiting The Federal Mail Fraud Statute - A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 436 (1983).

98. 18 U.S.C. § 1341 (1976).

99. Hurson, *Limiting The Federal Mail Fraud Statute - A Legislative Approach*, 20 AM. CRIM. L. REV. at 425 (1983). For further examples of the expanding use of the mail fraud statute see Dreeben, *Insider Trading And Intangible Rights: The Redefinition Of The Mail Fraud Statute*, 26 AM. CRIM. L. REV. 181 (1988); Weintraub, *Crime Of The Century: Use Of The Mail Fraud Statute Against Authors*, 67 B.U.L. REV. 507 (1987); Eskridge, *Public Values In Statutory Interpretation*, 137 U. PA. L. REV. 1007 (April 1989).

100. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. at 819 (1980).

101. "A concrete and comprehensive definition of the term 'scheme to defraud' is necessary if the statute is to have meaningful and discernible limits." Hurson, *Limiting The Federal Mail Fraud Statute - A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 458 (1983).

102. Fuller v. State, 257 Ala. 502, 60 So.2d 202 (1952).

103. 545 So.2d 185 (Ala. Ct. App. 1988).

104. *Id.* at 186.

court recognized that the applicable statute was being stretched to its limits to bring the sports agent's conduct within its scope and found that the agent's conviction must be reversed under a literal reading of the statute because of the agent's lack of criminal intent.[105] The *Walters* court, facing an analogous situation, came to a different and erroneous result by failing to address the literal meaning of the statute. The *Walters* court must be reversed.

A. Walters And Bloom Do Not Have Requisite Scheme To Defraud

The first element of the mail fraud statute focuses upon the existence of a scheme. An essential component of such a scheme is the intent to defraud.[106] It is clear that Walters' and Bloom's conduct does not satisfy the first requirement of the mail fraud statute because they did not have an identifiable scheme to defraud the universities of tangible property.

1. Intent To Defraud

In *Walters,* there is no demonstrable fraudulent intent which is consistent with an acceptable definition of a "scheme to defraud."[107] If a viable definition of "scheme to defraud" is applied to the demonstrated intent of Walters and Bloom, it is apparent that neither agent intended to take or withhold the property of the universities.

The Supreme Court defines a scheme to defraud as "wronging one in his property rights by dishonest methods or schemes."[108] The *Walters* court held that, in this case, the scholarship monies were a form of property rights.[109] The *Walters* court acknowledged that the agents did not scheme to obtain scholarships.[110] Therefore, it follows that Walters and Bloom have not committed mail fraud under the Supreme Court's definition of a "scheme to defraud,"[111] because they did not scheme to wrong the universities in their property rights. The agents' intent was to sign the student-athletes to representation contracts, not to obtain scholarship

105. *Id.* at 190.

106. *See supra* text accompanying notes 76-79.

107. The verb "to defraud" - the term actually used in the mail fraud statute - is predominantly used in the context of wrongdoing by misrepresentation. *See* WEBSTER'S THIRD INTERNATIONAL DICTIONARY 593 (1961) (defining "to defraud" as "to take or withhold from one some possession, right, or interest by calculated misstatement or perversion of truth, trickery, or other deception"). *See also* BLACK'S LAW DICTIONARY 511 (rev. 4th ed. 1968).

108. 483 U.S. at 358 (1987).

109. 711 F. Supp. at 1444.

110. *Id.*

111. The Court stated that the term "usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching (citation omitted)." 483 U.S. at 358 (1987).

money from the universities.[112]

It is uncontested that the agents' conduct was dishonest and unethical. Yet, the express language of the statute indicates that Congress did not intend the definition of a "scheme to defraud" to be merely an intent to injure or be dishonest.[113] The mail fraud statute does not forbid the use of the mails in any "scheme to injure" or any "dishonest scheme" but specifically and expressly forbids a "scheme to defraud."[114] While Walters and Bloom may be liable in a civil action by the schools for interference with contractual or advantageous economic relations,[115] they did not commit fraud under a literal reading of the statute.[116]

Signing student-athletes to representation contracts does not constitute behavior calculated to deprive the universities of money or property by the use of deception. The agents' intent was to sign college athletes before their eligibility expired. Dishonest as this may be, the agents did not intend to receive nor did they actually receive any of the money of which the universities claim to be defrauded.

2. Universities Were Not Deprived Of Tangible Property

As previously discussed,[117] the *Walters* court found that the scholarship money and the right to distribute it constituted tangible property[118] and thus escaped the exception established by *McNally.*[119] The *Walters* court's finding is in error.

In *Toulabi v. United States,*[120] the Seventh Circuit Court of Appeals found that an individual charged with furnishing prospective taxi drivers with the answers to a taxi licensing test administered by the city of Chicago did not deprive the city of a tangible property right by undercutting its ability to decide who shall receive a taxi license.[121] The court found that Chicago's right to taxi drivers who had passed the exam honestly was not a property right.[122]

Toulabi is directly analogous to the situation Walters and Bloom face. However, the *Walters* court held that a similar right, the right to

112. 711 F. Supp. at 1437.
113. 18 U.S.C. § 1341 (1976).
114. Rakoff, *The Federal Mail Fraud Statute (Part I),* 18 DUQ. L. REV. 771, 805 (1980).
115. Woods and Mills, *Tortious Interference With An Athletic Scholarship: A University's Remedy For The Unscrupulous Agent,* 40 ALA. L. REV. 141 (1988).
116. 18 U.S.C. § 1341 (1976).
117. *See supra* text accompanying note 37.
118. 711 F. Supp. at 1439. *See supra* note 40.
119. 483 U.S. 350 (1987).
120. 875 F.2d 122 (7th Cir. 1989).
121. *Id.* at 126.
122. *Id.*

distribute scholarships, was a tangible property right.[123] The holdings of *Toulabi* and *Walters* are inconsistent; the deprivation of the university's right to allocate scholarships based upon accurate eligibility information is no different than the deprivation of the city of Chicago's right to allocate taxi licenses based upon honest test results. As *Toulabi* was an appellate decision in the same circuit as the *Walters* court, and the *Toulabi* court reversed a conviction identical to that of Walters and Bloom, the agents' convictions must similarly be reversed.

B. Use Of The Mails

Walters and Bloom did not use the mails to further a fraudulent scheme. Upon close investigation it is apparent that the evidence in *Walters* also fails to satisfy the second element of the mail fraud statute as the agents' use of the mails was not in furtherance of a fraudulent scheme. In *Parr v. United States,*[124] the Supreme Court held that a scheme is executed when a defendant receives the money or goods which are the object of his scheme.[125] Walters and Bloom signed the student-athletes to representation contracts before the players submitted the false documents. Thus, the object of their scheme was realized before the mails were used.[126] It is well-founded that letters mailed after a scheme has been completed are not subject to the federal mail fraud statute.[127]

C. True Fraud Perpetrators: Student-Athletes

A literal reading of the terms of the mail fraud statute reveals that only the players are possible perpetrators of mail fraud. The *Walters* court found that a fraudulent scheme existed in which ineligible[128] student-athletes signed and mailed falsified Statements of Eligibility and Statements of Financial Support and subsequently received undeserved scholarships from the universities.[129] Based on this reasoning, holding Bloom and Walters criminally liable is incorrect because the students falsified the documents, mailed them to the universities, and obtained tangible property, in the form of scholarship money, from the universities

123. 711 F. Supp. at 1444.

124. 363 U.S. 370 (1960).

125. *Id.* at 393.

126. 711 F. Supp. at 1437.

127. Newingham v. United States, 4 F.2d 490, 491 (3d Cir. 1925), *cert. denied,* 268 U.S. 703 (1925).

128. The athletes were ineligible because they had signed representation contracts. *See supra* text accompanying notes 21-27.

129. 711 F. Supp. at 1438-40.

based on these fraudulent documents.[130]

Under the literal application of the mail fraud statute, the players possessed the requisite intent to deceive the universities in order to obtain scholarship money, thus satisfying the scheme to defraud element of the mail fraud statute.[131] In addition, the players used the mails to further this scheme to defraud as the mailings allowed the players to receive the scholarship money, thus satisfying the statute's mailing element.[132] The logical conclusion of *Walters,* given the court's definition of the fraudulent scheme, is to find the players guilty of mail fraud under 18 U.S.C. § 1341.

VII. IMPLICATIONS OF THE CASE

Scholars have pointed out that it is often the case that federal prosecutors' use of the mail fraud statute is the result of the fact that there is simply no other recourse available to them.[133] Prosecutors often find that a defendant's conduct amounts to improper or dishonest activity but does not fit the traditional criteria for a federal offense.[134] Mail fraud is frequently the only federal criminal charge available to bring against a private individual involved in corrupt activity.[135] Prosecutors are especially prone to applying the mail fraud statute when combatting newly developing areas of fraud where Congress has been slow to enact specific prohibitory legislation.[136] As the agent profession in general, and sports agency in particular, has realized substantial growth over the past twenty-five years, it clearly falls within the newly developing areas in which the mail fraud statute is liberally applied.

A. The Agency Profession In General

The *Walters* decision potentially brings aggressive agents in any industry within the scope of the federal mail fraud statute.[137] As one author notes, the courts have:

> brought within the ambit of the federal mail fraud statute virtually the entire range of commercial activity in this country. Al-

130. *Id.* at 1444.

131. *See supra* text accompanying notes 74-81.

132. *See supra* text accompanying notes 82-89.

133. Hurson, *Limiting The Federal Mail Fraud Statute - A Legislative Approach,* 20 AM. CRIM. L. REV. 423, 434 (1983).

134. *Id.* at 435.

135. *Id.*

136. Rakoff, *The Federal Mail Fraud Statute (Part I),* 18 DUQ. L. REV. 771, 772 (1980).

137. Agents are frequently used in the entertainment industry for purposes of negotiation and money management, *see supra* note 4.

> most any action undertaken by a fiduciary, agent or employee which causes detriment to his beneficiary, principal, or employer and which involves some material deception, will likely trigger a responsibility to make disclosure. Failure to disclose will be construed as a breach of fiduciary duty and subject the actor to federal prosecution for mail fraud.[138]

Such application of the statute will force agents to become more cautious and to curtail interaction with clients in order to avoid federal prosecution. If agents are forced to practice in this manner, their effectiveness as advocates of their client's best interests is greatly diminished.

B. Sports Agency In Particular

The incredible growth of sports agency has forced professional and amateur athletics alike to attempt to regulate the activity of the agents.[139] In the professional realm, player agents are accepted as a permanent, highly visible, and occasionally beneficial element in the sports labor relations process.[140] However, at the amateur level, sports agents are often seen as a threatening element to both the integrity and the financial well-being of college athletic programs.[141]

As neither agents nor student-athletes are members of the NCAA, the NCAA has no authority to regulate player agents either directly or through student-athletes.[142] The current NCAA regulations remove a registered agent from a registration list if he or she acts to jeopardize the student-athlete's eligibility by signing a representation contract with the athlete.[143] Nothing in these regulations forbids student-athletes from hiring agents who are unregistered or even "deregistered" because of a rule violation.[144] The NCAA's sanctioning power is only effective over athletes and colleges, not over agents.[145] In an attempt to regulate agent activity, the NCAA has desperately resorted to criminal statutes which are subject to broad interpretation by the courts. The mail fraud statute

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138. Hurson, *Limiting The Federal Mail Fraud Statute - A Legislative Approach,* 20 AM. CRIM. L. REV. 423, 429 (1983).

139. Sobel, *The Regulation Of Sports Agents: An Analytical Primer,* 39 BAYLOR L. REV. at 703-05 (1987).

140. *Id.* at 709.

141. *Id.* at 710.

142. *Id.* at 728.

143. *Id.* at 730.

144. *See* Dunn, *Regulation Of Sports Agents, supra* note 5, at 1042, citing letter from the NCAA to "Individuals Acting in the Capacity of Player Agent" (September 11, 1985) (discussing "1985-1986 Player Agent Registration Program").

145. *Id. See supra* text accompanying note 141 for discussion of NCAA's sanctioning power.

used in *Walters* is an example of this misguided attempt at control, as the statute was stretched beyond a reasonable application in this case.

Clearly, the broad application which the *Walters* court gave the statute has its drawbacks. The danger in the newly-expanded scope of the mail fraud statute lies in the possibility that federal prosecutors will select prosecutions for political or other illegitimate motives.[146] With the development of college athletics as a big business, large universities are apt to protect their investments in student-athletes by any means available. Without specific federal legislation, sports agents' conduct will be susceptible to haphazard criminal prosecution.

1. The Need For Federal Legislation

A number of state legislators have attempted to regulate the conduct of sports agents.[147] However, all of these attempts have proven ineffective in providing protection for the athletes and uniform guidelines for the agents.[148]

Existing legislative attempts at regulation cover all agents and all sports and each state has statutory authority to impose criminal sanctions and enforce regulatory measures.[149] However, this state-by-state legislation is rendered ineffective by severe limitations in their scope and jurisdictional reach.[150] Because sports agency is an interstate profession, state-by-state legislation has proved to be confusing, burdensome and inconsistent.[151] Federal regulation would eliminate the jurisdictional limitations inherent in state legislation by governing agents on a nationwide scale, a scale consistent with the manner in which agents operate.[152]

Primarily, federal legislation would create uniformity in the law governing agents, eliminating jurisdictional battles between states and confusion on the part of agents and athletes as to the laws of a particular

146. United States v. Margiotta, 688 F.2d at 144 (2d Cir. 1982) (Winters, J., dissenting). *See supra* text accompanying note 91.

147. The states which presently have legislation regulating sports agents are California (Athlete Agencies Act, CAL. LAB. CODE §§ 1500-47 (West Supp. 1987)); Oklahoma (The Oklahoma Athlete Agent Act, OKLA. STAT. ANN. tit. 70, § 821.62 (A) (1) - (2) (West 1986)); and Texas (TEX. REV. CIV. STAT. ANN. art. 8871 (Vernon Supp. 1988)). Other states are presently contemplating legislation to regulate sports agents. Among these are Nebraska, Illinois, Alabama, Louisiana, Michigan, Ohio, Pennsylvania, Georgia, Arizona and Tennessee. *See* Dunn, *Regulation Of Sports Agents, supra* note 5, at 1065.

148. *See* Dunn, *Regulation Of Sports Agents, supra* note 5.

149. *Id.* at 1057.

150. *Id.*

151. *Id.* at 1065.

152. *See* Dunn, *Regulation Of Sports Agents, supra* note 5, at 1065.

forum.[153] In addition, federal legislation would replace the multiple application and fee requirements of a state-by-state legislative scheme with one application and one fee to the federal government.[154]

Only federal legislation will provide an effective means of controlling agent behavior. A federal measure addressing the regulation of sports agents would abolish the jurisdictional ambiguities and substantive inconsistencies of the existing state legislation while possessing the enforcement power of federal legislation.

VIII. CONCLUSION

Under a literal reading of the federal mail fraud statute, Norby Walters and Lloyd Bloom did not commit mail fraud. The agents lacked a "scheme to defraud," did not deprive the universities of tangible property, and did not use the mails to further a fraudulent scheme. A literal reading of the statute is required in this case because the courts' interpretation of the statute has grown too broad. This broad application of the statute allows prosecutors to bring a much wider range of conduct within the ambit of criminal conduct but the statute also becomes subject to use for political motives and, hence, to abuse.

While a more precise application of the mail fraud statute will ensure more uniform application, it will not suffice to regulate the activities of sports agents like Walters and Bloom. The solution to the pressing problem of agent regulation lies in federal legislation. Through such legislation, agents, their clients and their client's employer or university will be apprised of the "rules of the game." Each party will know what his or her rights and responsibilities are and what the consequences of breaking the rules will be. This sort of uniform code of conduct is a vast improvement over the existing system where agents must play a "guessing game" in conducting their search for clients, and the results of playing the game can have unexpected and disastrous results.

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153. *Id.*

154. *Id.* at 1066. *See Id.* at 1041-63 for a discussion of the fee and bond requirements of the various states which presently have regulatory legislation.

* The author wishes to thank Cliff and E.J., my best friends.