THE "RIGHT TO CONTROL" THEORY OF FRAUD: WHEN DECEPTION WITHOUT HARM BECOMES A CRIME

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It is supposed to be well established that mere deceit is insufficient to convict someone of fraud and that there must also be proof the defendant intended to cause harm to a victim's "money or property." Yet, for many decades, federal prosecutors have persisted in pushing expansive theories of criminality to encompass all forms of deceptive behavior, even where the defendants intended no pecuniary harm. The so-called "right to control" theory of fraud is arguably the most extreme (and successful) of these theories. It holds that one's "right to control" his or her assets qualifies as "property." Thus, even if defendants did not intend harm, they may be convicted if they withheld from the putative victims "potentially valuable economic information," thereby depriving them of their right to control their assets. This Article examines the theory and argues that it is flawed on multiple levels. It confuses the right to control assets, which is normally thought to be an attribute of ownership of property, with the property itself, resulting in a conflation of the separate elements of "property," "intent to harm," and "materiality." A material misrepresentation about an economic factor can satisfy all three elements simultaneously. The doctrine thus effectively flouts the principle that mere deceit cannot suffice for fraud convictions. The Supreme Court's recent unanimous decision in Kelly v. United States *suggests that, when the Court addresses the right to control theory, it will reject the confused thesis. Such repudiation will be critical to returning the law of fraud to its core purpose of prohibiting the wrongful taking of property and realigning it with the Due Process Clause's demand for clear notice of criminal laws.*

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INTRODUCTION

For many decades, federal prosecutors have applied criminal statutes to increasingly ambiguous conduct, pushing the limits of the statutory elements and theories of criminality to encompass behavior they deem wrongful. The chief vehicle for such expansive prosecutions has been the mail or wire fraud statute, which many courts have held requires "moral uprightness" in commercial dealings. While other courts have rejected such language as too vague and the late Justice Scalia dismissed it as useless "grandiloquence,"[1] the broad, moralistic reading of the fraud statutes has endured. This is especially true in the Second Circuit, as demonstrated by the court's reiteration of that view earlier this year, in *United States v. Gatto*.[2] In this context, it is perhaps unsurprising that the legal elements of fraud have been steadily diluted, with none affected so much as the intent to harm element, that is, proof the defendant intended to deprive a victim of property. While fraud is typically viewed as a malum in se offense that involves a kind of theft of property through the use of lies, the "theft" prong has become increasingly vestigial, with fraud prosecutions regularly targeting defendants who intended no pecuniary harm. The result is that the deception prong now stands almost by itself as the sole element necessary for criminal conviction.

This conception of fraud runs directly counter to the well-established rule that mere deceit is not enough to establish fraud.[3] Unlike securities laws that criminalize the mere making of a materially false representation (in connection with the purchase or sale of securities),[4] fraud is supposed to require proof of an intent to cheat someone else of "money or property." Thus, implicitly repudiating the "moral uprightness" language embraced by lower courts, the Supreme Court in *Kelly v. United States*[5] recently stated: "The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct."[6]

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1 Skilling v. United States, 561 U.S. 358, 418 (2010) (Scalia, J., concurring).

2 986 F.3d 104, 130 (2d Cir. 2021).

3 Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987).

4 17 C.F.R. § 240.10b-5 (1951); *see also* United States v. Mittelstaedt, 31 F.3d 1208, 1217 (2d Cir. 1994) ("The mail fraud statute, however, does not enforce ethics in government in the way that the securities laws enforce ethics in business, certainly not prior to the addition of § 1346 in 1988.").

5 140 S. Ct. 1565 (2020).

6 *Id.* at 1568.

This principle and others like it, however, have been largely ignored by prosecutors who continue to push for expansive application of the fraud statutes. In their effort, no doctrine has proven more potent than the so-called "right to control" theory of property. It holds that one's "right to control" his or her assets qualifies as "property" such that, even if a defendant did not intend to inflict pecuniary harm, the defendant may yet be convicted if she deprived the victim of his right to control his assets by withholding from the victim "potentially valuable economic information."[7] While not uniformly accepted among the circuit courts, this theory of property is essentially black letter law in the Second Circuit, the court with jurisdiction over the financial capital of the world.

This Article examines the theory and argues that it is fundamentally flawed. After describing its history, the Article describes the theory's application in two recent Second Circuit decisions, *United States v. Johnson* and *United States v. Gatto*.[8] These cases illustrate how the doctrine can easily lead to convictions of defendants who intended no financial harm as long as their deception involved economic information. This Article suggests the theory is defective because the right to control is actually an attribute of *ownership* of property and not the property itself. Anytime someone lies in connection with a commercial negotiation, he attempts to affect his counterparty's decision-making and control over his asset in some way. Thus, the theory conceivably makes every material deception criminal fraud. It conflates the separate elements of "property," "intent to harm," and "materiality" into a single, blurred spectrum where a misrepresentation about an economic factor does the triple duty of satisfying all three elements simultaneously.

The doctrine has yet to be explicitly addressed by the Supreme Court, but the unanimous decision in *Kelly v. United States*[9] suggests that the Court will redirect the judiciary to return the law of fraud to its theft-through-lies core and reject the confused right to control thesis. In some ways, *Kelly* bookends *McNally v. United States*,[10] decided some thirty-four years ago, as the Court tried again to rein in prosecutorial efforts to criminalize the mere act of deception. Rejection of the right to control theory would comport with the plain language and purpose of the statutes and, more broadly, honor the constitutional requirement of clear notice of criminal laws.

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7 United States v. Wallach, 935 F.2d 445, 462–63 (2d Cir. 1991).

8 United States v. Gatto, 986 F.3d 104 (2d Cir. 2021); United States v. Johnson, 945 F.3d 606 (2d Cir. 2019).

9 140 S. Ct. 1565 (2020).

10 483 U.S. 350 (1987).

This Article proceeds in five Parts. Part I summarizes the expansive use prosecutors have made of the fraud statutes and the tendency of courts to view them as requiring "moral uprightness" in business affairs. Against this backdrop, the criminal elements of fraud have been substantially diluted, with none more so than the intent to harm element.

Part II examines the two separate theories of prosecution that were traditionally used to pursue defendants who intended no pecuniary loss: the honest services doctrine and the benefit of the bargain test. This Part examines how these two theories and the Supreme Court's rejection of the honest services doctrine in *McNally* eventually converged in *United States v. Wallach*[11] to give rise to the right to control doctrine. In the context of corporate shareholders who are owed fiduciary duties by corporate managers, the Second Circuit held that *McNally*'s "property" requirement could be satisfied by the shareholder's right to control their shares and that they are defrauded of that right when a defendant deprives them of "potentially valuable economic information."[12]

Part III examines the application of this theory in two recent Second Circuit decisions, *Johnson* and *Gatto*, where the absence of an intent to cause financial harm became largely irrelevant to the fraud analysis because the deceptive scheme deprived the victims of material economic information. This Part offers a critique of the theory suggesting that it is both analytically flawed and, when applied in a context outside *Wallach*'s unique corporate fiduciary setting, difficult to justify. It distorts the common understanding of property as an asset or object that is separate from an incident of ownership like the right to control the asset, and in so doing, conflates the separate elements of "property," "intent to harm," and "materiality."

Part IV considers the likelihood that the Supreme Court will reject the right to control theory just as it did the honest services doctrine in *McNally*. Just last year, the Court in *Kelly v. United States* rejected a theory of fraud that did not have as its direct object the deprivation of money or property.[13] It cited, with approval, the Seventh Circuit's decision in *United States v. Walters* where the court applied a commonsensical understanding of the fraud statutes to reverse the conviction of a defendant who deceived but did not intend to cause the victim any loss of money or property for his own use. In so ruling, *Walters* rejected the right to control theory.[14]

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11 935 F.2d 445 (2d Cir. 1991).

12 *Id.* at 463.

13 140 S. Ct. 1565 (2020).

14 United States v. Walters, 997 F.2d 1219, 1226 n.3 (7th Cir. 1993).

Part V argues that the Court's repudiation of the theory will be crucial to bringing the fraud statutes back in line with their theft-through-lies core purpose and due process requirements. Ordinary citizens can better discern the difference between immorality and criminality if the courts insist on proof of an intent to cause pecuniary harm through deception. The common law process of case-by-case judicial rulemaking may be unavoidable, but a reinvigorated intent to harm element helps to ensure fair notice to individuals and also to sustain the public's confidence in the integrity of the criminal justice system.

I. A CONCEPTION OF FRAUD STATUTES AS REQUIRING "MORAL UPRIGHTNESS"

A. *Prosecutions in Search of a Theory of Criminality*

To those who have either participated in or studied the development of white-collar criminal cases in federal courts, the term "overcriminalization" is all too familiar. With regularity and for many decades, scholars have warned against a persistent trend in federal courts toward criminalizing not only civil disputes but conduct having little moral blameworthiness attached.[15] Yet lower courts' approval of prosecutors' ever-expanding theories of crime has proceeded apace, and if anything, the trend has accelerated in recent years. This is remarkable when one considers the repeated efforts by the Supreme Court to rein in prosecutorial zeal through regular reversals of convictions founded on aggressive theories of criminality.[16] Confidence in the soundness of

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[15] *See, e.g.*, John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 197–98 (1991) [hereinafter Coffee, *Does "Unlawful" Mean "Criminal"?*] (citing prior articles warning against overcriminalization including Henry Hart, *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 422 (1958); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 249–364 (1968)); *see also* John C. Coffee Jr., *HUSH!: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005); Timothy P. O'Neill, *Confronting the Overcriminalization of America*, 48 J. MARSHALL L. REV. 757, 758 (2015); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012); Stephen F. Smith, Yates v. United States: *A Case Study in Overcriminalization*, 163 U. PA. L. REV. ONLINE 147 (2014).

[16] *See, e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696, 707–08 (2005) (reversing conviction for obstruction because the government failed to prove any corrupt intent behind the

our federal criminal justice system is undermined each time prosecutors win a conviction at trial, send the person to prison, or have a circuit court affirm the conviction, only to have the Supreme Court explain, years later, that the government had it all wrong: no crime was committed.

This unfortunate pattern, however, is sure to continue. While crimes are said to be defined by Congress, the reality is that judges "interpret" loosely formed statutes through common law adjudication so that a new theory of crime and its elements are regularly ascertained.[17] Their decisions are shaped by the cases prosecutors choose to bring and the theories they choose to espouse. Except in specialized areas of prosecution such as narcotics trafficking, securities fraud, sanctions law, and antitrust violations that require specific factual predicates, criminal investigations generally begin with evidence of some moral breach. Once found, the prosecutor turns to locating a statute that can be interpreted as prohibiting the conduct. The broader or more ambiguous the terms of a statute, the more wrongful-seeming conduct can be made to fit within its four corners. It is then left to the lower courts to decide, on a case-by-case basis, whether they agree with the prosecutor's theory or conclude it has burst the constraints of the statute's plain English. All too often, when presented with evidence of wrongful conduct, the lower courts are unwilling to check the government, with the result that its opinions push the envelope of criminality one measure further. This continues until the Supreme Court has occasion to review the prosecutor's handicraft and decide whether it has gone too far.

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document destruction at issue); Skilling v. United States, 561 U.S. 358, 414–15 (2010) (reversing conviction because the government was incorrect in claiming that the wire fraud statute prohibited defendant from engaging in self-dealing); Bond v. United States, 572 U.S. 844, 866 (2014) (reversing conviction of a woman who smeared harmful chemicals on a doorknob and mailbox belonging to her husband's lover for violating the Chemical Weapons Convention Implementation Act); Yates v. United States, 574 U.S. 528, 549 (2015) (reversing conviction of a fisherman who had been charged with violating a spoliation statute because he threw fish overboard as a fisheries agent approached his boat); McDonnell v. United States, 136 S. Ct. 2355, 2375 (2016) (reversing conviction of Virginia's Governor for bribery because the payments received by the defendant were not in return for any "official act"); Marinello v. United States, 138 S. Ct. 1101, 1110 (2018) (reversing conviction of defendant charged with obstructing a pending IRS proceeding because the government failed to prove he was aware that any IRS matter was pending).

17 *See* Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 761 (1999); Daniel C. Richman, *Defining Crime, Delegating Authority—How Different Are Administrative Crimes?*, 39 YALE J. ON REGUL. (forthcoming 2021) (manuscript at 10–24), https://scholarship.law.columbia.edu/faculty_scholarship/2719 [https://perma.cc/K2RW-S6RQ].

B. *The Fraud Statutes: The Prosecutor's "True Love"*

There is arguably no criminal law that has proven more accommodating to prosecutors than that of fraud. The broad language of the mail and wire fraud statutes imposes criminal penalties on "'[w]hoever, 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' uses the mail, 18 U.S.C. § 1341, or wires, [18 U.S.C.] § 1343, for such purposes."[18]

Jed Rakoff, now an influential district court judge, wrote a law review article in 1980 when he was a prosecutor in the Southern District of New York that described the importance of this statutory device:

> 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. . . . [W]e 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.[19]

Other colorful descriptions of this potent statute abound, with the late Judge Ralph Winter of the Second Circuit saying the mail and wire fraud statutes "rank by analogy with hydrogen bombs on stealth aircraft"[20] and Professor Ellen Podgor, a prolific writer on the problems of the generic fraud statutes, referring to them as "the prosecutor's Uzi."[21] Metaphors aside, there are few white-collar prosecutors who would disagree with the extraordinary utility of the fraud statutes.

Before and after Rakoff's study, generations of prosecutors have played the well-worn instruments to attack all forms of conduct in the commercial setting they deemed wrongful. Their efforts have spawned legions of cases as judges struggle with their limits. It is almost an academic ritual among legal scholars to write extensive law review

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18 United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 657 (2d Cir. 2016) (citing 18 U.S.C. § 1341 and 18 U.S.C. § 1343). The Supreme Court "construe[s] identical language in the wire and mail fraud statutes *in pari materia*." Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005).

19 Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980). When he wrote the article, Rakoff was Chief of Business Frauds Prosecutions of the U.S. Attorney's Office and about to leave for private practice. Thus, while he included the usual disclaimers about the views being his own and not necessarily those of the Department of Justice, he wrote from deep experience as head of the premier white-collar prosecuting unit in the country.

20 Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 954 (1993).

21 Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 224 (1992) [hereinafter Podgor, *Opening Letters*].

articles lamenting the vague and open-ended nature of the statutory language and the ever-new directions that prosecutors have taken the law.[22] And the courts themselves have sought at times to push against the tide of prosecutorial creativity by reversing hard-won convictions.[23] Yet, these efforts have seemed like howling in the wilderness, for federal

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[22] *See, e.g.*, Julie R. O'Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC. 23 (2010); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 735 (1999) [hereinafter Podgor, *Criminal Fraud*] ("[G]eneric fraud statutes exude ambiguity and promote prosecutorial indiscretions."); John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 4–5 (1983) (reviewing cases demonstrating the evolution of the mail fraud statute, the expansion of embezzlement to include misappropriation of partnership assets, the inclusion of computer fraud and other privacy invasions in fraud statutes, and the judiciary's disregard of the elements of criminal larceny in fraudulent misrepresentation cases); Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 438 (1995) (explaining the expansive nature of the mail fraud statute); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 160–61 (1994) (discussing the courts' broad interpretation of the "scheme to defraud" element of the mail fraud statute); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 151 (1990) (noting the "floating definition of 'a scheme to defraud'"); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 408 (1959) (noting that the terms "conspiracy" and "defraud" have taken on very broad and unspecific meanings); Podgor, *Opening Letters*, *supra* note 21, at 269 ("The mail fraud statute's uncertainty has exceeded the bounds of mere judicial activism and entered the arena of absurdity. A statute beset with legal complications as significant as those evidenced here can only serve to fortify the public's perception of disparity, confusion, and corruption within the legal process. Correction is therefore needed to properly place individuals on notice of what conduct is prohibited and to restore trust in the legal system. Recalibration of the statute is needed to provide consistency and predictability in the translation of the statute's language to actual cases."); Podgor, *Criminal Fraud*, *supra* at 739 ("Although judges differ on whether a narrow or broad application should be given to a fraud statute, there appears to be an acceptance of an 'I know it when I see it' approach.").

[23] *See, e.g.*, United States v. Starr, 816 F.2d 94, 101 (2d Cir. 1987) (reversing conviction because, while defendants had deceived their customers, there was no evidence of intent to harm); United States v. Walters, 997 F.2d 1219, 1227 (7th Cir. 1993) (reversing mail fraud conviction on the ground that the defendant did not seek to obtain the victim's property); United States v. Brown, 79 F.3d 1550, 1562 (11th Cir. 1996) (reversing mail fraud convictions and noting that "fraud statutes do not cover all behavior which strays from the ideal"); *see also* Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 560 (1998) (describing judicial efforts to define boundaries of mail fraud statute by overturning convictions won by prosecutors who applied novel theories); Dean Starkman, *Reversals Imply Government Acted With Too Much Zeal*, WALL ST. J. (July 2, 1997, 12:01 AM), https://www.wsj.com/articles/SB867801437694536500 (last visited Sept. 15, 2021) (discussing courts' reversals of convictions); *cf.* United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 666 (2d Cir. 2016) (reversing judgment, in civil fraud case, finding defendants liable under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 for mail and wire fraud because the government failed to demonstrate that defendants made contractual misrepresentations with a contemporaneous fraudulent intent).

prosecutors have only accelerated their use of this most malleable of instruments to target ever broader forms of conduct.

The problem is that there is no coherent principle in the fraud statutes distinguishing "mere" immorality from criminal conduct. As the Seventh Circuit puzzled in *United States v. Bloom*,[24] "if 'not every breach' is criminal fraud, where is the line drawn? Its location cannot be found by parsing § 1341 or § 1346 [of the mail fraud statute], a profound difficulty in criminal prosecution."[25] Professor Podgor explains that in reality the operative approach is: "I know it when I see it."[26]

Whether the "it" is obscenity[27] or criminal fraud much depends on the beholder. The cases reveal an unresolved tension between judges who view the statutes as requiring moral rectitude in commercial matters and others who find the risk of prosecutorial carte blanche unacceptable. As to the former category of judges, the Fifth Circuit led the way in the 1940s when it stated, "The law does not define fraud; it needs no definition; it is as old as falsehood and as versable as human ingenuity."[28] In *Gregory v. United States*,[29] the same court claimed that the term "scheme to defraud" is "a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society."[30] The Second Circuit agreed, as it cited to *Gregory* for that exact quote in *United States v. Von Barta*[31] and

24 149 F.3d 649 (7th Cir. 1998).

25 *Id.* at 654.

26 Podgor, *Criminal Fraud*, *supra* note 22, at 739.

27 Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

28 Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941).

29 253 F.2d 104 (5th Cir. 1958).

30 *Id.* at 109.

31 635 F.2d 999, 1005 n.12 (2d Cir. 1980).

then again in *United States v. Trapilo*.[32] The Third,[33] Fourth,[34] Sixth,[35] Seventh,[36] and Ninth Circuits[37] followed suit, at least for a time.[38]

Against this sweeping view are the contrary opinions of judges (sometimes in the same circuits) eager to find limiting principles to constrain prosecutorial discretion. For example, in *United States v. Urciuoli*,[39] the First Circuit warned that courts must apply interpretations that "assur[e] fair notice to those governed by the statute," and "cabin[] the statute—a serious crime with severe penalties—lest it embrace every kind of legal or ethical abuse . . . ."[40] The mail fraud statute "does not encompass every instance of official misconduct that results in the official's personal gain."[41] Similarly in *United States v. Brown*,[42] the Eleventh Circuit said, "[T]he fraud statutes do not cover all behavior which strays from the ideal; Congress has not yet criminalized all sharp conduct, manipulative acts, or unethical transactions."[43] In *United States v. Dial*,[44] the Seventh Circuit worried that: "[c]ourts have been more concerned with making sure that no fraud escapes punishment than with drawing a bright line between fraudulent, and merely sharp, business practices, even though the

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32 130 F.3d 547, 550 n.3 (2d Cir. 1997) ("Because the act of smuggling violates fundamental notions of honesty, fair play and right dealing, it is an act within the meaning of a 'scheme to defraud.'").

33 United States v. Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987) ("The term 'scheme to defraud,' however, is not capable of precise definition. Fraud instead is measured in a particular case by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community."); United States v. Schwartz, 899 F.2d 243, 246–47 (3d Cir. 1990).

34 United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir. 1979) (finding that the statute encompasses any scheme that is "contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing").

35 United States v. Van Dyke, 605 F.2d 220, 225 (6th Cir. 1979); United States v. Daniel, 329 F.3d 480, 486 (6th Cir. 2003).

36 United States v. Serlin, 538 F.2d 737, 744 (7th Cir. 1976); United States v. Keplinger, 776 F.2d 678, 698 (7th Cir. 1985).

37 United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir. 1980).

38 This broad, moralistic reading of the mail fraud statute appears to conform to Chief Justice Burger's view that the statute captures any and all forms of "new phenomenon" perpetrated by the "ever-inventive American 'con-artist,'" United States v. Maze, 414 U.S. 395, 406–07 (1974) (Burger, C.J., dissenting), and Rakoff's description of it as "the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit." Rakoff, *supra* note 19, at 772.

39 513 F.3d 290 (1st Cir. 2008).

40 *Id.* at 294 (internal citation omitted).

41 United States v. Sawyer, 85 F.3d 713, 725 (1st Cir. 1996).

42 79 F.3d 1550 (11th Cir. 1996).

43 *Id.* at 1562 (holding that defendants' conduct did not fall within the federal fraud statutes).

44 757 F.2d 163 (7th Cir. 1985).

universality of telephone service has brought virtually the whole commercial world within the reach of the wire-fraud statute."[45] And in *In re EDC, Inc.*,[46] the Seventh Circuit more explicitly rejected *Gregory*'s "hyperbole, of which we were guilty . . . but later repented" and urged that the language "must be taken with a grain of salt. Read literally it would put federal judges in the business of creating new crimes; federal criminal law would be the nation's moral vanguard."[47] For similar reasons, in *United States v. Leahy*,[48] the Third Circuit also regretted its prior decision that "defined fraud with reference to the elastic concepts of morality and fairness," noting that "the ambiguity inherent in concepts such as morality and fairness has been thought to provide constitutionally inadequate notice of what conduct is criminal, involve judges in the creation of common law crimes, and place excessive discretion in federal prosecutors."[49]

There is little question which side of this debate the Supreme Court is on. The late Justice Antonin Scalia dismissed the moralistic language as unhelpful "grandiloquence."[50] For a scheme to fall within the mail or wire fraud statutes, mere deceit is not enough.[51] The Court long ago warned prosecutors that not every scheme that is "calculated to injure another or to deprive him of his property wrongfully" falls within the scope of the mail fraud statute.[52] This caution was more recently reiterated by the Court in *Kelly v. United States*, in the context of public officials' unseemly conduct: "The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct."[53]

Yet, *Gregory*'s decades-old formulation stubbornly endures today among lower courts and has not been uniformly repudiated.[54] As

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45 *Id.* at 170.

46 930 F.2d 1275 (7th Cir. 1991).

47 *Id.* at 1281.

48 445 F.3d 634 (3d Cir. 2006).

49 *Id.* at 649–50; *see also* Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 15, at 207 (noting the unfortunate tendency of judges who "preferred the expansive view that section 1346 authorizes them to continue to 'condemn conduct which fails to match the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society'" (quoting Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (citing Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)))).

50 Skilling v. United States, 561 U.S. 358, 418 (2010) (Scalia, J., concurring).

51 Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) ("[To defraud] usually signif[ies] the deprivation of something of value by trick, deceit, chicane or overreaching.").

52 Fasulo v. United States, 272 U.S. 620, 629 (1926).

53 Kelly v. United States, 140 S. Ct. 1565, 1568 (2020).

54 This is best illustrated by the struggle within the Eleventh Circuit. In 1996, the court appeared to reject *Gregory* noting that "not all of the language of the judges in an opinion has the force of binding precedent." United States v. Brown, 79 F.3d 1550, 1556 (11th Cir. 1996). But in

recently as this year, in *United States v. Gatto*,[55] the Second Circuit reaffirmed its view that "[f]raud involves a departure from fundamental honesty, moral uprightness, or fair play, and depriving one of property through dishonest methods or schemes or trick, deceit, chicane or overreaching."[56] Thus, while some panels in the Second Circuit have occasionally expressed reservations about the perils of expansive interpretations of the fraud statute,[57] district courts within the Circuit regularly recite the view that the fraud statutes are broadly designed to forbid immoral conduct.[58]

The language is, to be sure, dicta, and one may not be able to draw a straight line between it and the adoption of an expansive theory of fraud.[59] But courts that equate fraud with any departure from "moral

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2011, the same court in *United States v. Bradley* had a relapse, claiming: "Our definition 'is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" 644 F.3d 1213, 1240 (11th Cir. 2011) (quoting Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)). And a few years later, in *United States v. Takhalov*, the same court asserted that the definition of "scheme to defraud" is a "broad one, 'broad[er] . . . than the common law definition of fraud.' It is a 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" 827 F.3d 1307, 1312 (11th Cir. 2016) (internal citations omitted).

55 986 F.3d 104 (2d Cir. 2021).

56 *Id.* at 130 (internal citations and quotation marks omitted). Similarly, in the context of a civil RICO lawsuit, the Second Circuit in *Empire Merchants, LLC v. Reliable Churchill LLLP*, 902 F.3d 132 (2d Cir. 2018), stated that "[t]he first element, the scheme to defraud, 'is measured by a nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" (quoting United States v. Trapilo, 130 F.3d 547, 550 n.3 (2d Cir. 1997)).

57 *See, e.g.*, United States v. Blackmon, 839 F.2d 900, 906 (2d Cir. 1988) (reversing a bank fraud conviction, the court cited to the House Judiciary Committee's expressed concerns about "the history of expansive interpretations of that language [i.e., 'scheme to defraud' . . .] by the courts. The current scope of the wire and mail fraud offenses is clearly greater than that intended by Congress.").

58 *See, e.g.*, United States v. Falkowitz, 214 F. Supp. 2d 365, 380 (S.D.N.Y. 2002) ("[T]he essence of the fraudulent scheme these hallmarks share reduces to the social evil the artifice defines: that it departs from moral norms; that it transgresses the rules of honest dealing and fair play and breaches the bonds of trust upon which human affairs ordinarily are grounded, and instead corrupts personal and business intercourse with pervasive deceit that falsely exploits and thus undermines these basic values." (citing *Gregory*, 253 F.2d at 109)); United States v. Martin, 411 F. Supp. 2d 370, 373 (S.D.N.Y. 2006) ("[B]reaking the rules of the horserace by doping a horse, like smuggling, violates fundamental notions of honesty, fair play and right dealing and is therefore an act within the meaning of a 'scheme to defraud.'"); Worldwide Directories, S.A. De C.V. v. Yahoo! Inc., No. 14-cv-7349, 2016 U.S. Dist. LEXIS 44265, at *22 (S.D.N.Y. Mar. 31, 2016) (noting in the civil RICO context: "The phrase 'scheme to defraud' does not imply common law fraud, but is instead 'measured by a nontechnical standard. It is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" (quoting *Trapilo*, 130 F.3d at 550 n.3)).

59 In *Takhalov*, for example, while the Eleventh Circuit intoned the moral language, it went on to reject the government's theory of fraud and reversed the conviction of a defendant who was

uprightness"[60] may be more receptive to theories of criminality that support prosecution of immoral conduct. Put another way, applying Podgor's lesson that judges "know [fraud] when [they] see it,"[61] courts like the Second Circuit that continue to adhere to *Gregory* appear more likely to see misconduct as criminal than those that do not.

C. *Dilution of the Elements of an Already Inchoate Offense*

The Second Circuit also happens to be a court where the criminal elements of fraud have steadily been diluted. This is particularly concerning when one considers that the statutory offense is already inchoate in nature. No actual loss need be proven as long as the defendant had the unlawful scheme or intent in mind,[62] and indeed, the offense could theoretically be doubly inchoate, for the statute targets anyone merely "*intending* to devise any scheme or artifice to defraud."[63] Moreover, there is no requirement that the victim actually rely on the misrepresentations, as "[t]he common-law requirement[] of 'justifiable reliance' . . . plainly ha[s] no place in the [mail, wire, or bank] fraud statutes."[64]

Still, the law by its plain terms should only be targeting those with criminal intent to harm someone. The statutes on their face prohibit conduct that essentially amounts to theft by deception. This, then, should be a classically malum in se offense implicating the two biblical prohibitions against lying and thieving. Thus, courts virtually always begin their analysis of the fraud statute by describing the elements of fraud in terms that appear robust and criminal to the core. The following is a typical recitation:

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involved in deceiving victim businessmen without causing them to lose the benefit of their commercial bargain. 827 F.3d at 1323–24.

60 *Gregory*, 253 F.2d at 109.

61 Podgor, *Criminal Fraud*, *supra* note 22, at 739.

62 United States *ex rel.* O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 662 (2d Cir. 2016) ("[U]nlike the common law, the statutes punish 'the *scheme*, not its success.'" (quoting United States v. Helmsley, 941 F.2d 71, 94 (2d Cir. 1991)); Durland v. United States, 161 U.S. 306, 313 (1896) (stating that the scheme's fraud lies in "the intent and purpose"); United States v. Males, 459 F.3d 154, 158 (2d Cir. 2006) ("[I]t is sufficient that a defendant's scheme was intended to deprive another of property rights, even if the defendant did not physically 'obtain' any money or property by taking it from the victim.").

63 *See* 18 U.S.C. §§ 1341, 1343 (2008) (emphasis added).

64 Neder v. United States, 527 U.S. 1, 24–25 (1999); *see also* Bridge v. Phoenix Bond & Indemn. Co., 553 U.S. 639, 648 (2008) ("Nothing on the face of the relevant statutory provisions imposes [a justifiable reliance] requirement. Using the mail to execute or attempt to execute a scheme to defraud is indictable as mail fraud . . . even if no one relied on any misrepresentation.").

> To prove a violation of the federal wire [or mail] fraud statute, the Government had to establish that [defendant] (1) had an intent to defraud, (2) engaged in a fraudulent scheme to obtain [victim's] money or property "involving material misrepresentations—that is, misrepresentations that would naturally tend to influence, or are capable of influencing," [victim's] decisionmaking, and (3) used the wires [or mail] to further that scheme.[65]

Once these elements are expressed, however, the courts run through the myriad ways in which the elements can be fairly easily satisfied.

First, courts have held that the defendant's deception need not be in the form of any actual statement. "[S]ilence without *any* affirmative statement while under a duty to disclose material information, can constitute fraud under the federal statutes."[66] Moreover, if there was a statement, the government need not necessarily prove that it was false.[67] It is enough if the statement was not made in good faith.[68] Deception, one court held, "irreducibly entails some act that gives the victim a false impression."[69] Thus, when expressing an opinion or an estimate, a defendant can be convicted even if she expressed and intended to express "reasonable, defensible, or even truthful" statements.[70] Indeed, statements may be deemed fraudulent "even where those statements, by . . . design, are factually defensible."[71]

Courts have similarly diluted the other pillar of fraud: the intent to cause property harm. It is this element that any layperson might readily grasp as the difference between merely self-serving deceit and criminal behavior, for it is easy to recognize intentionally injuring others by taking their property as misconduct so grave as to warrant criminal

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65 United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019).

66 *Countrywide*, 822 F.3d at 663 ("[N]ondisclosure is actionable under the federal fraud statutes where there is a duty to speak." (citing United States v. Gallant, 537 F.3d 1202, 1228 (10th Cir. 2008))) ("[F]ailure to disclose material information while in a fiduciary relationship constituted a scheme to defraud." (citing United States v. Altman, 48 F.3d 96, 102 (2d Cir. 1995))); United States v. Autuori, 212 F.3d 105, 119 (2d Cir. 2000) (ruling that "[a] duty to disclose can also arise in a situation where a defendant makes partial or ambiguous statements that require further disclosure in order to avoid being misleading").

67 *See* United States v. Connolly, No. 16 Cr. 370 (CM), 2019 U.S. Dist. LEXIS 77099, at *13 (S.D.N.Y. 2019) ("[C]riminal liability attaches to conduct intended to deceive another party, even when the statements uttered are reasonable, defensible, or even truthful.").

68 United States v. Allen, 160 F. Supp. 3d 698, 701–02 (S.D.N.Y. 2016) ("In the Court's view, the relevant issue was not the accuracy or inaccuracy of defendants' LIBOR submissions, but the intent with which these submissions were made." (citing United States v. Amrep Corp., 560 F.2d 539, 544 (2d Cir. 1977) ("The expression of an opinion not honestly entertained is a factual misrepresentation.")).

69 United States v. Finnerty, 533 F.3d 143, 148 (2d Cir. 2008).

70 *Connolly*, 2019 U.S. Dist. LEXIS 77099, at *13.

71 *Id.* at *12.

sanction, while merely using deception to gain an advantage without causing property harm to the counterparty may not be thought to be criminal. But here again the courts recite a well-established legal standard that suggests a high hurdle before promptly qualifying it into a mere formality. Mere deceit is not enough to establish fraud, the courts declare.[72] Instead, "the government must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims."[73] "[T]he purpose of the scheme must be to injure."[74] It turns out, however, that the requirement can be satisfied if there was a mere reasonable probability of an injury, "however slight,"[75] or if "the jury's finding of intent to deceive is the 'functional equivalent' of a finding of intent to harm."[76] More recently, the Second Circuit explained that "fraudulent intent may be inferred from the scheme itself if the necessary result of the actor's scheme is to injure others,"[77] and such "[i]ntent may be proven through circumstantial evidence, including by showing that [a] defendant made misrepresentations to the victim(s) with knowledge that the statements were false."[78]

A jury could be forgiven for concluding that, despite courts' protestations to the contrary, mere deceit is enough to convict for fraud because deceit can prove an intent to harm.

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72 Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); United States v. Regent Off. Supply Co., 421 F.2d 1174, 1181 (2d Cir. 1970); United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987).

73 United States v. Novak, 443 F.3d 150, 156 (2d Cir. 2006) (internal quotation marks omitted); *see, e.g.*, United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981); United States v. Rodolitz, 786 F.2d 77, 80 (2d Cir. 1986); United States v. Schwartz, 924 F.2d 410, 420 (2d Cir. 1991); United States v. Binday, 804 F.3d 558, 569 (2d Cir. 2015).

74 *Regent Off. Supply Co.*, 421 F.2d at 1181 (internal quotation marks omitted).

75 *Id.* at 1182 ("[W]e believe the statute does require evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations if they are successful."); United States v. Mandel, 415 F. Supp. 997, 1015 (D. Md. 1976) (denying dismissal of indictment as none of the cases cited by defendant stated "that the harm must be measurable in terms of money" but instead "that 'some actual injury, however slight' must either be intended by the actors or be a reasonably probable result of the deceitful representations if successful"); United States v. Allen, 160 F. Supp. 3d 698, 704 (S.D.N.Y. 2016) ("[A] jury could reasonably have concluded that defendants' scheme 'deprive[d] the victim of potentially valuable economic information' and 'depend[ed] for [its] completion on a misrepresentation of an essential element of the bargain.' The Court therefore determines that a reasonable juror could have found that defendants intended to cause actual harm." (citing *Binday*, 804 F.3d at 570)).

76 United States v. Chandler, 98 F.3d 711, 715 (2d Cir. 1996) (construing bank fraud statute § 1344, which was modeled on mail and wire fraud statutes and applying "helpful" precedents in fraud case law).

77 United States v. Gatto, 986 F.3d 104, 113 (2d Cir. 2021) (internal citations and quotation marks omitted).

78 *Id.*

II. PROSECUTIONS OF DEFENDANTS WHO INTENDED NO PECUNIARY HARM CULMINATE IN RIGHT TO CONTROL THEORY

The dilution of the fraud elements generally occurred in cases where the government prosecuted defendants who deceived without intending financial or pecuniary harm to the victim. Successful prosecutions of such defendants, however, also required a theory of fraud, a plausible explanation for how the harm element could be satisfied. One theory was the so-called right to honest services, which enjoyed success for decades until it was rejected by the Supreme Court in *McNally v. United States*.[79] There, the Court reminded prosecutors and lower courts that the object of the fraud had to be money or property, not something so intangible as honest services. On a different track entirely, another line of cases dealt with defendants who *did* target money or property but provided some benefit to the victim of real financial value. Rather than rejecting prosecutions of such defendants as necessarily insufficient to satisfy the intent to harm element, courts began to accept a theory that such intent could be inferred if the deception related to very important information. Eventually, these two strands of jurisprudence converged in *United States v. Wallach*,[80] giving rise to the right to control theory of fraud. When that happened, the "theft" prong of the fraud statute became largely immaterial, and fraud analysis focused almost exclusively on the nature of the deception.

A. *Intangible Right to Honest Services*

Starting in the 1940s, prosecutors persuaded courts to adopt a theory of fraud where the putative victims lost no money or property, but the defendants profited from corruption or other conflicts of interest. Courts held that employees of public or corporate entities who received an undisclosed kickback for favoring a party that wished to do business with the entity could be charged with fraud because they deprived the public or companies of the right to the employee's honest services. In *Skilling v. United States*, the Supreme Court traced the beginning of the doctrine to a Fifth Circuit case, *Shushan v. United States*,[81] where the court held that "[a] scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery,

79 483 U.S. 350 (1987).

80 935 F.2d 445 (2d Cir. 1991)

81 117 F.2d 110 (5th Cir. 1941).

but would also be a scheme to defraud the public."[82] While these cases involved bribery of public officials, courts began to recognize private-sector honest services fraud as well,[83] because

> [w]hen one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty [to his employer,] he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interests.[84]

This surely was a tenuous description of what the plain words of the fraud statute proscribe. Yet, by the 1980s, all the circuit courts had accepted some version of the theory that "'a recreant employee'—public or private—'c[ould] be prosecuted under [the mail-fraud statute] if he breache[d] his allegiance to his employer by accepting bribes or kickbacks in the course of his employment.'"[85]

In 1987, the Supreme Court "in *McNally v. United States*, stopped the development of the intangible-rights doctrine in its tracks. . . . [It] held that the scheme did not qualify as mail fraud."[86] "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," the *McNally* Court read the statute "as limited in scope to the protection of property rights."[87] Previously, courts had read the statute as permitting prosecution for either a "scheme or artifice to defraud" that could cause harm *or* "for obtaining money or property by means of false" statements.[88] *McNally* rejected that reading, holding that the disjunctive language must be construed as a unitary whole, so that "the money-or-property requirement of the latter phrase" also limits the former.[89]

The Court found support for this conclusion in both the legislative history evincing an intent to "protect the people from schemes to deprive them of their money or property,"[90] as well as the long-held understanding that the words "to defraud" meant "'wronging one in his property rights by dishonest methods or schemes,' and 'usually signify

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82 *Id.* at 115.

83 Skilling v. United States, 561 U.S. 358, 401 (2010).

84 *Id.* (quoting United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942)).

85 *Id.* (quoting United States v. McNeive, 536 F.2d 1245, 1249 (8th Cir. 1976)).

86 *Id.* at 401–02.

87 McNally v. United States, 483 U.S. 350, 360 (1987).

88 *Id.* at 356–57.

89 *Id.* at 358.

90 *Id.* at 356.

the deprivation of something of value by trick, deceit, chicane or overreaching.'"[91]

By requiring proof that deprivation of some property interest was the goal of a fraudulent scheme, the *McNally* Court effectively declared over forty years of criminal prosecutions, premised on a fraud theory embraced by all the circuit courts in the country, fundamentally defective.[92]

B. *"Harm" as the Deprivation of Economically Valuable Information*

Independent of the honest services doctrine, the government pursued a separate theory in its bid to prosecute deceivers who intended no pecuniary harm. These defendants owed no duties of honest services to corporations or government agencies but rather engaged in arms-length negotiations with counterparties. In deceiving such counterparties, however, the defendants sought some personal advantage. Rather than rejecting such prosecutions, courts began articulating legal standards for determining whether deception itself could give rise to an inference of an intent to harm.

1. The Problem of Deceiving Defendants Who Gave Value

Deceptive people who intend no pecuniary harm pose special challenges for the legal system because of the nature of fraud itself. In every business negotiation, one party offers the counterparty something of value in return for the counterparty's money or property. Fraud claims arise when a victim (or the government) contends that the defendant lied about the goods or services offered to induce the victim

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91 *Id.* at 358 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

92 Congress responded to *McNally* by enacting a new statute, § 1346, that simply said: "[T]he term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346 (2012). This legislation did nothing to clarify what honest services means or to otherwise resolve the myriad legal issues raised by the inherently ambiguous terminology pre-*McNally*. Thirteen years after the legislation, the Supreme Court addressed the scope of § 1346 in *Skilling*. Addressing defendant's claim that the statute was unconstitutionally vague, the Court declined to invalidate the statute, holding instead that, properly understood, the statute should be interpreted to prohibit only bribes and kickbacks. Skilling v. United States, 561 U.S. 358, 408–09 (2010). Justice Scalia would have simply adopted the defense position. *See Skilling*, 561 U.S. at 416 (Scalia, J., concurring in part) ("I agree that Congress used the novel phrase to adopt the lower-court case law that had been disapproved by *McNally*—what the Court calls 'the pre-*McNally* honest-services doctrine' . . . . The problem is that that doctrine provides no 'ascertainable standard of guilt.'" (citing United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921))).

voluntarily to transfer his or her property to the defendant in exchange. Where the victim gave much for nothing in return, the fraud analysis is easy, as the defendant's intent to wrongfully steal property is inescapable. Where the victim receives from the defendant goods or services of real value, however, the defendant's intent to harm becomes a difficult question.

In an oft-quoted passage, Judge Learned Hand stated in *United States v. Rowe*[93]:

> Civilly of course the action would fail without proof of damage, but that has no application to criminal liability. A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the [mail fraud] statute is directed.[94]

While *Rowe* was not a case involving the intent to harm element and the above language was dicta since the defendant there lied about worthless land, Hand made an important observation: parties to transactions might care about more than just the quid quo pro of a deal. Where defendants give economic value but knowingly misrepresent facts about an important consideration (economic or otherwise), the defendants are attempting to take the victim's assets on false pretenses.

When this happens, the government or the victim might claim the defendant intended to cause property harm even though the victim received substantive economic value. The problem with such cases is that the dispute requires the trier of fact to examine the parties' respective intent and expectations about the value of the goods or services exchanged. What did the defendant genuinely believe about his or her counterparty's expectations in the commercial transaction, and was that belief reasonable?

As between criminal and civil processes, there is little question about which one is likely to lead to more reliable and accurate judgements about intent. If private parties sue deceiving counterparties, civil procedures provide for adversarial discovery, including depositions, interrogatories and exchange of documents, and the trial testimony of both parties to the negotiation who can explain what they were thinking at the relevant time. Judges or juries can then assess which version is more credible and objectively reasonable. In contrast, criminal trials are ill-suited for accurate conclusions about

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93 56 F.2d 747 (2d Cir. 1932).

94 *Id.* at 749.

intentionality at such a subtle level. The criminal rules do not afford defendants broad rights of pretrial discovery, and, crucially, defendants rarely testify in criminal cases because of the risks of doing poorly during cross-examination and causing the jury to focus on their credibility rather than holding the government to its burden of proof beyond a reasonable doubt. After all, where the fact of deception is already established, it is the rare defendant who feels confident about testifying that he or she lied but did not intend any harm, even if it happens to be true. Thus, instead of a close assessment of each party's factual assertions about their respective intent and expectations, jurors are forced to decide based largely on lawyers' cross-examinations and arguments about inferences to be drawn.

Still, leaving it to private parties to sue for damages as a means of deterring gross dishonesty may seem inadequate to the task. If the victim received substantive economic value from the transaction, albeit through the defendant's deception, the victim may not be inclined to expend the time and money necessary to sue for damages or to unwind the transaction. Unpunished, the deceiver may be free to repeat his or her misconduct in the future. But some might say this is not an issue the criminal authorities should be trying to solve. If victims do not sue, it could mean that they determined the consideration they received was good enough and the deception not so important as to sue for damages or to unwind the deal to get their property back, or that the amount at issue was too small to justify the costs of litigation. Society might choose to adjust the laws to shift the legal costs to the defendant if the victim succeeds in proving material deception resulting in damages or unwinding the deal. Either way, society would arguably benefit if it left to private parties their decision to vindicate (or not) their legal rights where substantive economic value was exchanged. Criminal prosecutions would appear to be too draconian and unreliable an instrument for social reform in these circumstances.

Yet, instead of rejecting fraud prosecutions on the grounds that there must be clear evidence of intent to cause pecuniary loss, the approach that emerged in the Second Circuit was to examine intent based on the seriousness of the deception. If the deception pertained to very important information, ones that went to the nature of the bargain or potential economic value, the courts have held, the jury could infer intent to harm.

2. The "Nature-of-the-Bargain" Test

This approach appears to have its genesis in *United States v. Regent Office Supply Co*.[95] The Second Circuit rejected the government's bold contention that "false representations, in the context of a commercial transaction, are per se fraudulent despite the absence of any proof of actual injury to any customer."[96] The defendant corporation sold stationery supplies. They lied to the corporate customers about their connections to other members of the companies as a way to "'get by' secretaries on the telephone and to get 'the purchasing agent to listen to'" their pitch.[97] Once in the door, however, the defendants were entirely truthful about the products they were offering and the terms of any sales.[98]

The government nevertheless deemed this case worthy of criminal prosecution, claiming the victim was "entitled to give his patronage based on honest information, and if he wants to do somebody a favor and use his buying power for a charitable purpose or to reward his friends, he is entitled to do that, and not to be misled."[99] The court rejected this theory, but appeared to implicitly agree with the government's general proposition that lies about noneconomic considerations might be sufficient to establish an intent to harm. The standard it set (and held the facts of the case failed to satisfy) was that the deception must be "directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain."[100]

It concluded that the government had failed to prove that "some actual harm or injury was *contemplated* by the schemer."[101] While this can be shown by an "injury to the victim, however slight, [that] is a reasonably probable result of the deceitful representations if they are successful,"[102] the facts could not satisfy even this low standard because the deception only got the defendants in the door; it "was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception."[103] The conviction was vacated.

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95 421 F.2d 1174 (2d Cir. 1970).

96 *Id.* at 1181.

97 *Id.* at 1177.

98 *Id.*

99 *Id.*

100 *Id.* at 1179.

101 *Id.* at 1180 (emphasis added).

102 *Id.* at 1182.

103 *Id.*

While the prosecutors lost this case, the government had won an important principle: the intent to harm element need not be proven through evidence of an intent to cause pecuniary loss and could instead be shown by proof of a misrepresentation regarding the nature of the bargain. It bears pausing here to note that in every fraud case, one of the elements is materiality, that is, proof that the misrepresentation had "a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed."[104] The court's ruling could be seen as applying a kind of extra-materiality test, a lie that is not only material in the traditional sense but one that went to the bargain under negotiation. Put another way, deception can itself be sufficient for intent to harm, but only if it is *really* important.

The government tested the limits of this new standard in *United States v. Starr*,[105] where it pursued another defendant who intended no pecuniary harm to the victim but made misrepresentations to conceal the extent of his or her profit from the transactions. The *Starr* defendants provided bulk mail services to their customers. In return for packaging and sending out their customers' bulk mail to the United States Postal Service, the defendants received a fixed sum from their customers. Defendants falsely "represented that funds deposited with them would be used only to pay for their customers' postage fees. In fact, the Starrs used only a portion of those funds to pay postage; the remainder was appropriated to their own use."[106]

Over a strong dissent, the majority rebuffed the government again. While the defendants did deceive the customers, the court's majority concluded there was insufficient evidence of intent to harm. The majority reminded the government that "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim."[107] Reciting the principle announced in *Regent Office Supply*, the majority held:

> The Starrs in no way misrepresented to their customers the nature or quality of the service they were providing. . . . [B]ecause AMS customers received exactly what they paid for, there was no discrepancy between benefits "reasonably anticipated" and actual benefits received. An intent to defraud the lettershoppe customers was not demonstrated either directly or circumstantially.[108]

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104 United States v. Corsey, 723 F.3d 366, 373 (2d Cir. 2013).

105 816 F.2d 94 (2d Cir. 1987).

106 *Id.* at 99.

107 *Id.* at 98.

108 *Id.* at 99.

The majority made an important distinction between a defendant who seeks to enrich himself through deception and one who seeks to cause a loss to someone else. It is the latter that is necessary for a criminal conviction. Thus, the court rejected the trial judge's instruction to the jury that "[t]o act with intent to defraud means to act knowingly, and with a specific intent to deceive someone, ordinarily for the purpose of causing some financial loss to another *or* bringing about some financial gain to one's self."[109] The disjunctive "or" erroneously permitted jurors "to find an intent to defraud based solely on the defendants' appropriation of a benefit to themselves."[110] They must, instead, find the defendant contemplated some actual harm or injury to the victim.[111]

Judge Van Graafeiland issued a lengthy and detailed dissent. Like the majority, he accepted the *Regent Office Supply* standard of intent to harm but believed the government easily proved "customers were deprived of their chance to bargain with facts material to the bargain before them."[112] It was obvious to this judge that deceiving customers about the amount of money the defendants would be making by fooling the postal service through their scheme was important.

Starr illustrates that reasonable minds can differ about what level of materiality justifies an inference that the defendant intended harm. The defendants were fortunate to find two judges who saw it their way, but the fact of the dissent revealed the troubling indeterminacy of the legal standard.

3. The "No-Sale" Rule and the Economic Information Requirement

The analysis became more complex still when the Second Circuit put a finer point on the benefit of the bargain test by requiring that the deception must pertain to the economics of the bargain. The court imposed a kind of "no-sale" rule in *United States v. Mittelstaedt*,[113] a case that came after *McNally*'s holding that the object of fraud must be money or property.[114]

The defendant, a government employee, concealed his ownership interest in property that his agency agreed to purchase and was

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109 *Id.* at 101.

110 *Id.*

111 *Id.*

112 *Id.* at 108 (Van Graafeiland, J., dissenting).

113 31 F.3d 1208, 1218 (2d Cir. 1994).

114 The case was also decided after United States v. Wallach, 935 F.2d 445 (2d Cir. 1991), discussed *infra* Section II.C, which held that right to control was itself a property interest.

convicted of fraud for his nondisclosure. As the prosecution occurred after *McNally* but was premised on conduct prior to the enactment of Section 1346, the defendant could not be prosecuted on an honest services theory since some "property" interest was now required.[115] The court held the government's evidence was insufficient to support a conviction if all it proved was that the government agency, had it known the truth, "would have refused to deal with him on general principles."[116] Instead, "[t]o convict, the government had to establish that the omission caused (or was intended to cause) actual harm to the [purchaser] of a pecuniary nature *or* that the [purchaser] could have negotiated a better deal for itself if it had not been deceived."[117]

Interestingly, the court analyzed the issue in terms of the "materiality" of the information withheld.[118] The Second Circuit later explained:

> Our cases have drawn a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes.[119]

The "fine line" was drawn by economic considerations. If the lie causes a victim to spurn further negotiations on "general principles," such as mere moral scruples, the intent to harm element cannot be satisfied, but pecuniary considerations or striking a better economic deal suffices. As *Mittelstaedt* held, because the jury in that case "could have found that the [victim village] . . . would have been affected by the disclosure only because the village would have refused to deal with him on general principles,"[120] the fraud conviction could not stand.

A general "nature-of-the-bargain" test, then, was too broad, and only economic aspects of the bargain could support a finding of fraudulent intent. But why this should be so is unclear. If a defendant knows how important a noneconomic consideration is for the victim and still lies about it to induce the victim to part with his or her money, there appears to be no principled reason why an intent to harm cannot be found. The fact that *McNally* required the object of fraud to be property does not entirely explain this new requirement since the

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115 *Mittelstaedt*, 31 F.3d at 1217–18.

116 *Id.* at 1218.

117 *Id.* at 1217.

118 *Id.* ("To be material, the information withheld either must be of some independent value or must bear on the ultimate value of the transaction.").

119 United States v. Shellef, 507 F.3d 82, 108 (2d Cir. 2007).

120 *Mittelstaedt*, 31 F.3d at 1218.

deception about noneconomic considerations can deprive the victim of his or her money. Insisting on proof of a lie that had an economic component may make good *policy* sense because it cabins the volume of cases that can be prosecuted, but its analytic rationale is elusive.

In any event, whether *Regent Office Supply* and its nature-of-the-bargain test is better than the "no-sale" rule and its economic considerations test, these legal standards construct an oddly abstract framework within which jurors are to evaluate fraud prosecutions. Instead of judging proof of a defendant's mal-intent, jurors are instructed to focus on the importance of the facts that were omitted or misrepresented.

C. *Intent to Harm a "Property" Interest in One's Right to Control*

This focus on deception became virtually exclusive when the Second Circuit declared that right to control is itself a protected property interest. This theory emerged at the confluence of the above intent to harm case law and the *McNally* Court's rejection of the right to honest services doctrine. In response to *McNally*'s holding that fraud prosecutions must target defendants who sought to take "money or property," and not something so abstract and intangible as honest services, prosecutors persuaded the courts that one's right to control assets qualifies as protected property. Not only did this theory sidestep *McNally*'s "property" requirement, it simultaneously expanded, and further confused, the intent to harm element. Not surprisingly, unlike the honest services doctrine that was accepted by all the circuit courts before *McNally*, the right to control theory has not been uniformly embraced. The Supreme Court has yet to address the theory, but when it does, it will find a tangled mess.

It is the Second Circuit where the theory has been most fully developed since at least 1991. The doctrine has gained virtual black letter law status in that circuit, the seat of the world's financial capital.[121] Summarizing over two decades of development of the doctrine, the court in *United States v. Binday*[122] explained:

> "Since a defining feature of most property is the right to control the asset in question, we have recognized that the property interests

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121 *See, e.g.*, United States v. Gatto, 986 F.3d 104, 114 (2d Cir. 2021); United States v. Lebedev, 932 F.3d 40, 48 (2d Cir. 2019); United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019); United States v. Finazzo, 850 F.3d 94 (2d Cir. 2017); United States v. Binday, 804 F.3d 558, 569–70 (2d Cir. 2015); United States v. Carlo, 507 F.3d 799, 802 (2d Cir. 2007); United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996).

122 804 F.3d 558 (2d Cir. 2015).

> protected by the [mail and wire fraud] statutes include the interest of a victim in controlling his or her own assets." *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007). Accordingly, we have held that a cognizable harm occurs where the defendant's scheme "den[ies] the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998). It is not sufficient, however, to show merely that the victim would not have entered into a discretionary economic transaction but for the defendant's misrepresentations. The "right to control one's assets" does not render every transaction induced by deceit actionable under the mail and wire fraud statutes. Rather, the deceit must deprive the victim "of potentially valuable economic information." *United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991).[123]

The above quote implicates multiple elements and concepts, some of which are taken from the *Regent Office Supply* line of cases as well as the no-sale rule and its economic information requirement. But with the introduction of the concept that right to control assets is itself protected property, the discrete elements of property, intent to harm and materiality, appear to blur and meld into one another, with economic information as the core of each element.

The origin of this complex doctrine is *United States v. Wallach*.[124] The *Wallach* defendants were corporate managers who schemed to pay themselves undisclosed kickbacks using corporate funds, a classic instance of honest services fraud. At the center of the case was the Wedtech Corporation, a company that began as a small, local metal manufacturing facility in the Bronx that grew in size as it won increasingly lucrative federal government contracts. It became so successful it went public. The defendants were a group of conspirators including a number of corporate officers and directors of Wedtech, who worked with a lobbyist, Eugene Robert Wallach, to pay undisclosed kickbacks to themselves and various coconspirators for steering government contracts to the company. One scheme in particular involved undisclosed payments using Wedtech funds made to corporate insiders totaling $1.14 million. When these improper payments were discovered, the company eventually folded and declared bankruptcy.[125]

The facts of defendants' misconduct occurred before the *McNally* decision, and, but for *McNally*, would undoubtedly have been prosecuted under the honest services theory of fraud. But because they

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123 *Id.* at 570; *see also Johnson*, 945 F.3d at 612 (quoting *Binday*, 804 F.3d at 569–70, 575).

124 935 F.2d 445, 463 (2d Cir. 1991).

125 *Id.* at 452–53.

were charged after *McNally*, that theory was unavailable to the government, nor could the government retroactively apply Section 1346 to pre-*McNally* conduct. Required to allege and prove that the scheme targeted "money or property," the indictment "charge[d] that the victims of the alleged 'scheme and artifice' were Wedtech and its shareholders who were defrauded of the $1.14 million in payments as well *as the 'right to control' how the money was spent*."[126]

After a sixteen-week trial culminating in convictions, the Second Circuit reversed and remanded for a new trial because one of the government's key cooperating witnesses perjured himself during cross-examination.[127] Instead of merely remanding, however, the court went on to address the defendants' separate arguments that the indictment should be thrown out altogether as resting on a baseless theory of fraud. The defense arguments were essentially twofold. First, the government could not satisfy the intent to defraud element because "Wedtech received services in return for the payments and that, therefore, the shareholders were not defrauded of any property."[128] Second, *McNally* precluded the government's theory of fraud because the "right to control" is an intangible interest and not a tangible property right.[129]

The court rejected both arguments. Relying in part on Judge Hand's language in *Rowe*, the court gave short shrift to the notion that fraudulent intent could not be proven if the victims received some equivalent pecuniary value: "[P]roviding alternative services does not defeat a fraud charge because the fact remains that the corporation and its shareholders did not receive the services that they believed were being provided."[130] In effect, the court applied a nature-of-the-bargain test to conclude that the property lost by the victim company and its shareholders was the $1.14 million that was funneled to the defendant insiders. The fact that the victims purportedly received some derivative benefit as shareholders of a company that was winning government contracts did not diminish their loss of funds that they would not have released had they known what the fraudsters were really up to. This was largely consistent with the line of reasoning that the Second Circuit had long since established beginning with *Regent Office Supply* in 1970.[131]

The Second Circuit went further, however, to endorse the government's claim that shareholders' right to control was itself a protectable property right. First, it rejected the defense's suggestion that

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126 *Id.* at 461 (emphasis added).

127 *Id.* at 455–57.

128 *Id.* at 461.

129 *Id.*

130 *Id.*; *id.* at 463 (citing United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932)).

131 *See supra* Section II.B.2.

McNally's property element required some tangible good by citing *Carpenter v. United States*, where the Supreme Court recognized a business entity's intangible property right to commercially valuable confidential information.[132]

The *Wallach* court then said: "[T]he central focus of our inquiry is whether under the government's theory any property right was taken or placed at risk of loss as a result of the defendants' alleged scheme; if no property right was involved, the mail fraud charges cannot survive."[133] In response to the defense argument that shareholders do not have decision-making control over the affairs of a company, the court noted that "[w]hile shareholders have neither a right to manage the corporation nor a right to hold title to corporate property, their ownership of stock in the corporation is nonetheless a property interest."[134]

From this uncontroversial point, the court then analyzed what a shareholder's intangible property interest in company stock consisted of:

> "[S]hares of stock are property, but they are intangible and incorporeal property existing only in abstract legal contemplation." There are, however, other incidents accompanying the property interest that a stockholder owns. The government asserts that the actions taken by the defendants denied the shareholders the "right to control" how corporate assets were spent—an intangible property interest. The "right to control" has been recognized as a property interest that is protected by the mail fraud statute. Despite the recurrent references to a "right to control," we think that use of that terminology can be somewhat misleading and confusing. Examination of the case law exploring the "right to control" reveals that application of the theory is predicated on a showing that some person or entity has been deprived of potentially valuable economic information. Thus, the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution.[135]

This passage contains substantial ambiguity. The language could be read as an endorsement of the government's claim that right to control is itself a property interest, but the court criticizes the use of the phrase "right to control" as "somewhat misleading and confusing," and argues that "application of the theory is predicated on" the deprivation of

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132 *Wallach*, 935 F.2d at 461 (citing Carpenter v. United States, 484 U.S. 19 (1987)).

133 *Id.*

134 *Id.* at 462.

135 *Id.* at 462–63 (internal citations omitted).

"potentially valuable economic information."[136] Was the court concluding that the government was correct in claiming that right to control is itself the property, or was it identifying economic information as the property interest?

While not entirely clear, the court's analysis seemed to treat the shareholder's property interest as having different facets or characteristics in a "bundle of rights," as it went on to state that the right to accurate information is "one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest."[137] Thus, at various points, the court states that "[a] stockholder's right to monitor and to police the behavior of the corporation and its officers is a property interest,"[138] that "'[t]he stockholders' right of inspection of the corporation's books and records rests upon the underlying ownership by them of the corporation's assets and property' and is an incident of 'ownership of the corporate property,'"[139] and that "[t]he provision of complete information protects a shareholder's investment—a clear property interest."[140]

Taking all these strands as a whole, the right to control appears to be inextricably tied to the right to accurate information, a right that is an incident of stock ownership. The court's discussion goes on to ground its analysis on public corporate and fiduciary law:

> The importance of this right to information is recognized by the statutes and rules that govern the operation of a publicly held corporation. Indeed, the officers of a publicly held corporation are legally obligated to keep and to maintain books and records which "accurately and fairly reflect the transactions and dispositions of the assets" of the corporation. 15 U.S.C. § 78m(b)(2)(A); 17 C.F.R. § 240.1362-1; *cf. United States v. Siegel*, 717 F.2d 9, 14 (2d Cir. 1983) (mail fraud violation when "a fiduciary fails to disclose material information 'which he is under a duty to disclose to another under circumstances where the non-disclosure could or does result in harm to the other'") (citations omitted). . . . If corporate officers and directors, and those acting in concert with them, were free to conceal the true nature of corporate transactions, it is conceivable that the assets of the corporation could be so dissipated as to render a shareholder's investment valueless.[141]

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136 *Id.*

137 *Id.* at 463.

138 *Id.*

139 *Id.* (citing 5A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2213, at 323 (perm. ed. 1990)).

140 *Id.*

141 *Id.* at 463.

Applying corporate and fiduciary principles, the court appears to value equally (1) accurate information to which shareholders are entitled, (2) the value of the "shareholder's investment," and (3) the right to make informed decisions about the investment. It is this last item that the government's indictment identified as a protected property interest when it charged that shareholders were defrauded of the "'right to control' how the money was spent."[142] The court concluded that "the charges advanced in the indictment are legally sufficient."[143]

As a case that arguably overindulged prosecutorial efforts to evade the impact of *McNally*, *Wallach* makes for a challenging reading with unresolved ambiguities. Yet, if it is limited to the corporate/fiduciary context where the parties are a defendant corporate manager and a victim shareholder, there is some sense to the idea that the right to control is itself property. Under applicable laws, information about a company and a shareholder's right to accuracy of such information take on a special status, one that is inextricably tied to that "intangible and incorporeal property," a creature of law, called stock.[144] As the court said, the right to accurate information is "one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest."[145]

This concept, however, loses all coherence when the underlying asset is not stock but money or some other tangible item, and where the defendant/victim relationship is not fiduciary in nature but an arms-length relationship. Yet *Wallach*'s theory of property has since been lifted from its factual setting to apply in even the most arms-length of commercial transactions involving money, with no court explaining how that can be analytically justified.[146]

III. THE RIGHT TO CONTROL THEORY RENDERS THE HARM ELEMENT LARGELY IMMATERIAL

Two recent cases in the Second Circuit illustrate the ways in which the right to control theory can lead to counterintuitive results for defendants who deceived but without intent to cause financial harm to the putative victims. They also illustrate how the Second Circuit has never answered the basic question of how right to control can ever be

142 *Id.* at 461.

143 *Id.* at 473.

144 *Id.* at 462.

145 *Id.* at 463.

146 *See infra* Part III.

considered "property," as opposed to a mere incident of ownership of property, when taken out of *Wallach*'s corporate fiduciary context. Instead, the court has simply accepted and applied a doctrine where economically material deception satisfies both the elements of property and intent to harm.

A. *The Theory's Application in Two Recent Cases*

1. *United States v. Johnson*

In *United States v. Johnson*,[147] the defendant was convicted of fraud even though his counterparty in a commercial transaction received all the services that were required in a detailed, written contract between them and notwithstanding evidence that the defendant believed the counterparty got all it bargained for. The Second Circuit held that "the evidence was sufficient to convict Johnson of wire fraud and conspiracy to commit wire fraud for depriving [the victim] of the 'right to control' its assets."[148]

Defendant Johnson was the former global head of an international bank's (Bank) foreign exchange trading desk, and he was accused of deceiving a large oil and gas company (Company), during the course of negotiating a foreign exchange transaction (FX transaction).[149] The Company needed to convert approximately four billion dollars into British pounds.[150] It was advised by a sophisticated investment bank. After receiving proposals from several other financial institutions to execute this transaction, the Company selected Johnson and his Bank.[151]

The deception at issue occurred during discussions prior to selection of the Bank. Johnson made statements that strongly suggested that he would engage in a trading strategy that would "more quietly . . . accumulate" pounds for the Company, and avoid having "a lot to buy" that could "cause a lot of noise" in the market.[152] During this conversation, Johnson also said he was "horrified" when he saw other banks offering terms that meant they intended to "ramp the fix" at the expense of the counterparty.[153] Following the call with Johnson, the

147 945 F.3d 606 (2d Cir. 2019).

148 *Id.* at 612.

149 *Id.* at 608.

150 *Id.* at 608–09.

151 *Id.* at 609.

152 *Id.*

153 *Id.* The "fix" is a reference to the benchmark exchange rate set by WR Reuters at a set time and in accordance with a set procedure. *Id.*

Company agreed to engage the Bank and use one of two options to complete the currency exchange.[154]

While the court's opinion gives little attention to this fact, the Bank and the Company had spelled out in a written agreement (Mandate Letter), precisely what the Bank was committing to do for the Company.[155] Significantly, the agreement was silent on the trading methods the Bank may or may not employ to effectuate the transaction.[156] It made no representations that the Bank would in fact accumulate the pounds "quietly" in the marketplace or not "ramp the fix"; nor did it make any representation about how much the Bank would profit from the transaction or the mechanisms it would use for doing so.[157] The parties also incorporated the terms of a standard industry agreement, and both the Mandate Letter and the industry agreement made clear that the Bank "[was] not acting as fiduciary for or as an adviser to [the Company]," and that the agreement "shall not be regarded as creating any form of advisory or other relationship."[158] The agreement essentially stipulated that "[n]o communication (written or oral) received from the other party will be deemed to be an assurance or guarantee as to the expected results of that Transaction."[159]

Notwithstanding Johnson's oral assurances prior to the engagement, he caused one of his traders to engage in an aggressive trading strategy and "ramp the fix."[160] The Bank made approximately seven million dollars in profit from the transaction.[161] Moreover, after the trade, when the Company noted how much the market had moved prior to the designated time of the transaction, Johnson and his colleague falsely blamed the dollar-selling activity of the Russian Central Bank for the volatility.[162]

Nevertheless, the Company received the services the Mandate Letter required. Its four billion dollars was converted to pounds applying the fix as stipulated in the letter. The government did not proceed on a theory that the Company lost money or property or was financially disadvantaged by Johnson's conduct and if so, by how much. Presumably it did not do so because it could not prove beyond a

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154 *Id.*

155 *See id.* at 610.

156 Brief for Appellant at 18, United States v. Johnson, 945 F.3d 606 (2d Cir. 2019) (No. 18-1503).

157 *Id.* at 18–19.

158 *Id.* at 19.

159 *Id.*

160 *Johnson*, 945 F.3d at 610.

161 *Id.* at 611.

162 *Id.*

reasonable doubt any measurable pecuniary harm to the Company. Instead, the prosecutors staked their case on the theory that Johnson committed wire fraud when his deception deprived the Company of its right to control its assets. The defendant was convicted at trial.

In affirming, the Second Circuit accepted that the written agreement between the two parties was not breached but appeared to consider the fact largely irrelevant.[163] The court recited the right to control doctrine and described at length how Johnson was deceptive about the Bank's trading methods but provided no explanation of how Johnson could have intended harm to the Company, economically or otherwise, from his conduct.[164] Instead, the court reasoned that "fraudulent intent may be 'apparent' where 'the false representations are directed to the quality, adequacy or price of the goods themselves . . . because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain.'"[165]

The court did not explain how statements about the trading method or the Bank's profits can be considered "obviously essential" to the Company if the governing contract between two highly sophisticated institutional counterparties is entirely silent on such issues. As a matter of basic commercial law, any term that is an "essential element of the bargain" should have been set forth in the Mandate Letter.[166] The court also appeared to give no weight to the evidence that the defendant believed the Company was getting exactly the benefits it bargained for: "Johnson calculated, so long as the final cost of the Fixing Transaction that [the Company] requested stayed below what the cost of a Full-Risk Transfer—even with its extra charge—would have been, [the Company] had nothing to complain about."[167]

At bottom, the government's evidence established that Johnson deceptively hid from the Company his plan to have the Bank profit

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163 *Id.* at 613.

164 In the government's brief in opposition to Johnson's appeal, it asserts that the "evidence showed that the fraudulent scheme increased the price for Pounds that [the Company] paid to [the Bank]," Brief for United States at 32, United States v. Johnson, 945 F.3d 606 (2d Cir. 2019) (No. 18-1503), but understandably makes no effort to quantify this "increase" because that would have required proof of the price that would have been obtained had the Bank not engaged in ramping the fix and some proof that the Mandate Letter assured the Company of such lower price. There was no such base number. Thus, the government's brief relies instead on the legal argument that "[t]he law does not require proof that the victim of the fraudulent scheme in fact lost money, or was even actually defrauded." *Id.*

165 *Johnson*, 945 F.3d at 613 (quoting United States v. Regent Off. Supply Co., 421 F.2d 1174, 1182 (2d Cir. 1970)).

166 *See* U.C.C. § 2-202 (2021).

167 *See Johnson*, 945 F.3d at 611.

handsomely from the transaction by engaging in certain trading tactics he suggested he would not employ. But as *Regent Office Supply* and *Starr* had long since established, deception designed to cover up inordinate profits to the defendant does not establish an intent to harm; instead, harm to the victim must be contemplated.[168] Far from establishing such intent or contemplation, the evidence in *Johnson* tended to show the opposite. It is difficult to square these facts and a detailed written contract that the Bank fulfilled in every respect with a conclusion beyond a reasonable doubt that Johnson intended to harm the Company of a property interest.

The right to control theory closes the gap: because the property interest was the Company's right to control its money and Johnson deceived the Company in connection with a commercial transaction, he must have intended harm to the Company's property interest. The fact that Johnson may actually have thought the Company was getting all it bargained for, a belief supported by the written contract between the parties, became largely immaterial.[169]

2. *United States v. Gatto*

The Second Circuit's decision in *United States v. Gatto*[170] is a more recent fraud case presenting a right to control theory of fraud as a partial basis for the conviction. The defendant was an employee of an apparel company who was convicted of fraud on the theory, inter alia, that he participated in a scheme to deprive universities of the right to control their athletic scholarships. Gatto had made secret payments of cash to

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168 *See supra* Section II.B.2; United States v. Starr, 816 F.2d 94, 101 (2d Cir. 1987) (rejecting jury instruction that permitted jurors "to find an intent to defraud based solely on the defendants' appropriation of a benefit to themselves," rather than finding defendant contemplated actual harm or injury to victim).

169 Another feature to the *Johnson* opinion is its rejection of the defendant's due process challenge. He claimed that his conviction was "unconstitutionally standardless." In response, the court stated: "[T]he standard is clear: A defendant who executes a fixing transaction engages in criminal fraud if he intentionally misrepresents to the victim how he will trade ahead of the fix, thereby deceiving the victim as to how the price of the transaction will be determined." *Johnson*, 945 F.3d at 615. But this is an indictment of the lie alone. In an amicus brief filed by an industry organization, ACI-Financial Markets Association, the organization warned that the Second Circuit's decision effectively criminalizes the routine practice of trading ahead of the fix, to the surprise of market participants, who were "unaware of the potential criminal consequences" of trading ahead and that the decision created "uncertainty" that "threatens a near-term and substantial chilling of FX liquidity as bank dealers become less willing to face unpredictable personal legal peril." Brief for Amicus Curiae ACI-The Financial Markets Association in Support of Defendant-Appellant and Reversal at 26–27, United States v. Johnson, 945 F.3d 606 (2d Cir. 2019) (No. 18-1503).

170 986 F.3d 104 (2d Cir. 2021).

the father of a star high school basketball player to induce the player to join a university's basketball program, in violation of National Collegiate Athletic Association (NCAA) rules. The government had a number of different theories of fraud, but they centered around the accusation that the universities were defrauded by means of false certifications to them submitted by the athletes wherein the athletes represented that they had abided by NCAA rules.[171] The "money or property" identified by the government was the scholarships, as well as the right to control such assets.[172]

In response, the defendants did not dispute that their payments to parents or students violated NCAA rules, but argued such violations are not criminal and, besides, far from seeking to cause any harm to the universities, their conduct was designed to persuade nationally coveted athletes to attend such schools.[173] The apparel company had lucrative sponsorship arrangements with the putative victim universities and thus causing the star athletes to attend those universities would have profited both the universities and the company.[174] Defendants also disputed that the scholarships were a goal of their efforts and that at best the financial scholarships were purely incidental to the chief goal of persuading the athlete to play for the chosen schools.[175]

All defendants were convicted, and the convictions were affirmed on appeal. In a concurring and dissenting opinion, one judge on the panel would have reversed a limited number of counts due to evidentiary errors, while agreeing to affirm other counts of conviction.[176]

With respect to the "property" element, the court might have rested its decision exclusively on the traditional view of property, namely, that the defendants conspired with the athletes and their families to deprive the universities of the money that the scholarships represent through fraudulent misrepresentations (i.e., false certifications of NCAA eligibility). The court concluded that "depriving Universities of athletic-based [monetary] aid was at the *center* of the plan."[177]

Yet, just as in *Wallach*, rather than stopping there, the court went on to rely on the right to control theory of property as well: "Defendants

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171 *Id.* at 109–10.

172 *Id.* at 126 ("There is no doubt that the Universities' scholarship money is a property interest with independent economic value.").

173 *Id.* at 110.

174 *Id.*

175 *Id.* at 116.

176 *Id.* at 130 (Lynch, J., concurring in part and dissenting in part).

177 *Id.* at 116.

deprived the Universities of information that would have helped them decide whether to award the Recruits athletic-based aid. This deprivation was enough to support a wire fraud conviction."[178] The jury had been instructed:

> [A] victim can be deprived of money or property also when it is deprived of the ability to make an informed economic decision about what to do with its money or property—in other words, when it is deprived of the right to control the use of its assets. I instruct you that a victim's loss of the right to control the use of its assets constitutes deprivation of money or property if, and only if, the scheme could have caused or did cause tangible economic harm to the victim.[179]

In affirming this instruction, the court held: "[B]ecause the Universities would not have awarded the Recruits this aid had they known the Recruits were ineligible to compete, withholding that information is a quintessential example of depriving a victim of its right to control its assets."[180]

At various points in its opinion, the court rejected the defense theory that they lacked any intent to defraud or harm. It began by reciting the case law that sets the bar very low: "[F]raudulent intent may be inferred from the scheme itself if the necessary result of the actor's scheme is to injure others. Further, [i]ntent may be proven through circumstantial evidence, including by showing that [a] defendant made misrepresentations to the victim(s) with knowledge that the statements were false."[181]

The court then examined the harm element in the context of affirming the district court's preclusion of a defense expert witness who would have testified to the benefits the universities could obtain from the scheme. The court conceded that the evidence might have established that "universities come out net-positive when they commit recruiting violations."[182] But it went on to conclude that such evidence would not help the defendants:

> The law is clear: a defendant cannot negate the fraud he committed by wishing that everything works out for his victim in the end. . . . That the Universities might have ultimately benefitted monetarily from having top tier recruits would not have changed

178 *Id.* (citing United States v. Finazzo, 850 F.3d 94, 111 (2d Cir. 2017)).

179 *Id.* at 126.

180 *Id.*

181 *Id.* at 113 (internal quotations and citations omitted).

182 *Id.* at 118.

> whether Defendants were guilty of wire fraud, and the evidence might have clouded the issue for the jury.[183]

This analysis, however, did not answer the thrust of the defendants' arguments about intent. If there was objective evidence that the universities may be financially net-positive from the defendants' deception, how could that not be relevant to the issue of their intent to harm? The court weighed the probative value against its potential prejudice in "cloud[ing] the issue for the jury,"[184] but thereby discounted the importance of the expert's evidence. As for its reasoning that Gatto could not "negate the fraud he committed by wishing that everything works out for his victim in the end,"[185] the court appeared to dismiss the defense's argument. Gatto was not suggesting that wishing it all works out "negates the fraud"; what it does do is negate intent to harm, for how can harm be intended when the goal of the scheme was to benefit the universities? The money the university "loses" in granting financial aid is offset by the financial benefit the university obtains by having the star basketball player on its team, according to the expert witness. This "net-positive" undermines the claim of harm. It is true, of course, that the defendant should have been aware that the scheme may not work and that the deception would be uncovered, but that obviously is not the goal of the scheme. A defendant's awareness of risk is only relevant to criminal intent if foreseeability of harm is the same as intent to harm. But it plainly is not. As the court acknowledged, "[F]raudulent intent may be inferred from the scheme itself if the *necessary* result of the actor's scheme is to injure others."[186] Getting caught is not a necessary result. Moreover, "contemplating" harm means "to have in view as a purpose"[187] such harm, not mere foreseeability of it.

In the end, one is left with the disquieting question of how a defendant who may have believed the putative victim is no worse off for his deception can be said to have intended harm to that victim.[188] The court summed up its analysis by asserting that "the essence of fraud is misrepresentation, made with the intent to induce another person to

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183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.* at 113 (emphasis added) (internal quotations and citation omitted).

187 *Id.* (quoting United States v. Gabriel, 125 F.3d 89, 97 (2d Cir. 1997)).

188 The court also dealt with the intent to harm element in connection with defendants' challenge to the trial court's instructions on "apparent authority." The defense argued that the university coaches wanted the recruits and that defendants believed the coaches were acting for the universities. The court rejected the challenge, concluding that the evidence demonstrated the defendants "knew what they were doing was against the Universities' wishes." *Id.* at 129.

take action without the relevant facts necessary to make an informed . . . decision."[189] In support, the court explained:

> Fraud involves "a departure from fundamental honesty, moral uprightness, or fair play," and depriving one of property through "dishonest methods or schemes" or "trick, deceit, chicane or overreaching." Here, as the jury could have reasonably found, Defendants deprived the Universities of property—athletic-based aid that they could have awarded to students who were eligible to play—by breaking NCAA rules and depriving the Universities of relevant information through fundamentally dishonest means.[190]

The deception completes the crime and defendants' "contemplation" that the universities would actually be financially net-positive became largely irrelevant.

Judge Lynch's opinion, concurring in part and dissenting in part, disagreed with the majority only insofar as it affirmed the exclusion of certain evidence that supported the defense's position that they did not intend to *deceive* the universities.[191] Examining each of the challenged evidentiary rulings, Lynch concluded that evidence of certain calls between the defendants and certain university coaches might have led a jury to conclude that in fact the defendants did not have the requisite intent to deceive, and its exclusion was not harmless error.[192] "If [the coaches] were implicated in the defendants' activities, even as they insisted on hiding their approval, a jury could reasonably have inferred that the defendants held a good faith belief that the attitudes of these coaches reflected the view of the universities involved."[193] Based on this close examination, Lynch would have reversed certain of the counts of conviction. The majority did not disagree with his analysis, saying that

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189 *Id.* at 129–30 (internal quotations and citations omitted).

190 *Id.* at 130 (internal citations omitted).

191 *Id.* at 131 (Lynch, J., concurring in part and dissenting in part) ("The defendants offered evidence that they maintain would have supported their asserted lack of intent to deceive the universities . . . ."). There is, of course, a difference between intent to defraud and intent to deceive. The former requires proof of intent to harm, while the latter is, as the words imply, an intent to merely mislead someone. *See* United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987) ("Only a showing of intended harm will satisfy the element of fraudulent intent."). Lynch's analysis focused on intent to deceive and not the harm element. *See Gatto*, 986 F.3d at 131 (Lynch, J., concurring in part and dissenting in part) ("The defendants offered evidence that they maintain would have supported their asserted lack of intent to deceive the universities, but some of that evidence was excluded by the district court. A principal prong of their appeal relates to those evidentiary rulings.").

192 *Gatto*, 986 F.3d at 143–46 (Lynch, J., concurring in part and dissenting in part).

193 *Id.* at 140.

it gave them "pause," but concluded the district court's evidentiary rulings had not been an abuse of its broad discretion.[194]

B. *A Distorted Concept of Property that Conflates the Elements*

The right to control theory contradicts the core purpose of the fraud statutes to prohibit theft-through-lies as discussed in Part IV. But at a more threshold level, there are at least two distinct problems with the theory. First, it oddly distorts the meaning of "property," and second, even if linguistically plausible, the theory conflates the legal elements of mail and wire fraud in ways that contradict settled law. The result is a doctrine in profound disarray, with no clear explanation for how the Second Circuit came to this point.

1. A Distorted Concept of Property

As discussed *supra* Section II.C, while the *Wallach* right to control theory contains substantial ambiguities, there is some sense to it when applied to stock as the underlying asset and to victim corporate shareholders who are owed fiduciary duties of candor by defendant corporate managers. But the concept loses coherence when it is applied outside that context and in arms-length transactions involving money.

As a matter of common sense, "right to control" is an incident of *ownership* of property, not the property itself. Black's Law Dictionary defined "ownership" as, inter alia, "[t]he exclusive right of possession, enjoyment and disposal; involving as an essential attribute the *right to control*, handle, and dispose."[195] Likewise, it defines "possess" as, inter alia, "to have in one's actual control."[196] In contrast, in common parlance, "property" is understood to be the asset or thing that is owned

194 *Id.* at 120 n.8.

195 *Ownership*, BLACK'S LAW DICTIONARY (6th ed. 1990) (emphasis added). This had been the definition in prior editions as well, but, interestingly, in the seventh edition published in 1999, after the *Wallach* decision, the "right to control" reference was dropped from the definition of ownership. It is not clear what to make of this change. One might be tempted to infer that the editors of the dictionary, influenced by *Wallach*, decided that right to control should no longer be tied to "ownership," especially in light of the fact that in later editions, they added to the definition of ownership a reference to "bundle of rights," a phrase that the *Wallach* court had employed to describe property. *See Ownership*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[O]wnership" is "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others. Ownership implied the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable.").

196 *Possess*, BLACK'S LAW DICTIONARY (11th ed. 2019).

or possessed,[197] and thus capable of being controlled by the property owner. There is, thus, a thing (property) and certain attributes of owning that thing (such as the right to control it).

There are, of course, more abstract forms of property that are conferred by operation of law, which are called "rights" or "interests." Even common English dictionaries provide a secondary definition of property as: "the exclusive right to possess, enjoy, and dispose of a thing: ownership."[198] Instead of the "thing" that is owned, "property" is sometimes defined as a "right" and equated with "ownership." In *Pasquantino v. United States*,[199] the Supreme Court cited to Black's Law Dictionary defining "property" as "extend[ing] to every species of valuable right and interest."[200] Thus, for example, a right to access a driveway or other legally protected entitlements might be viewed as "property." But even so, there is a separate identity of the underlying thing (e.g., right to access) that is distinct from the attributes of owning it. The right to access a driveway is separate from my right to control it (by, for example, using it, selling it, or assigning the access right).

The duality may become obscure the more abstract the property interest becomes, as was the case in *Wallach*, but there is an obvious distinction in arms-length commercial transactions about money, as in *Johnson* and *Gatto*. In that setting the idea of an incident of ownership becoming property itself is insupportable, and, as explained *infra* Section III.B.3, no court has attempted to explain it.

2. Conflation of the Criminal Elements

The concept is particularly problematic in the context of the fraud statutes because it violates the principle that the elements of materiality, intent to harm, and property are distinct and must be separately proven. All material deception necessarily implicates a counterparty's right to control his or her asset: by definition, "material misrepresentations" are those "that would naturally tend to influence, or are capable of influencing, [a victim's] decision making" relating to an underlying asset.[201] Decision-making is the means by which assets are "controlled." Thus, lies designed to influence decisions *necessarily* target one's right to control one's asset, and if the protected property is right to control

197 *See, e.g.*, *Property*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2003) ("[S]omething owned or possessed.").

198 *Id.*

199 544 U.S. 349 (2005).

200 *Id.* at 356 (citing BLACK'S LAW DICTIONARY (4th ed. 1951)).

201 United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019).

an asset, every material lie deprives the victim of property, rendering the property element a nullity.

Yet in every case that applies a right to control theory of fraud, jurors are given instructions that effectively lead to that result. The jury instruction the Second Circuit endorsed in *United States v. Finazzo* is typical:

> [I]n order to prove a scheme to defraud, the government must prove that the alleged scheme contemplated depriving another of money or property. Property includes intangible interests such as the right to control the use of one's assets. This interest is injured when a victim is deprived of potentially valuable economic information it would consider valuable in deciding how to use its assets.[202]

Or, as the *Finazzo* court suggested as a further improvement on the above: "The loss of the right to control money or property only constitutes deprivation of money or property if the scheme could cause or did cause tangible economic harm to the victim."[203]

The requirement that the deception be "extra" material, relating to "potentially valuable economic information" may prevent all material deceptions from satisfying the property element, but the barrier is tissue thin. For jurors, it may be entirely indiscernible. The law already requires that the misrepresentation have "a natural tendency to influence,"[204] and when applied to the commercial context, that definition of materiality could be just another way of saying that the information wrongfully withheld from the victim must be "potentially valuable economic information." After all, in commercial negotiations, the misrepresentation that typically influences a party's decision is economic in nature.

Moreover, if right to control can be property, there is no doctrinal support for injecting an "economic" requirement as a gatekeeper. The economic nature of a lie cannot conceptually cause an incident of ownership to metamorphosize into property while noneconomic material lies do not. If right to control is the victim's property, it should be property even where the victim was affected by lies regarding noneconomic consideration of value to him or her.

If there is a sound explanation to this linguistic puzzle, it is inaccessible to the ordinary juror, and it is the height of legal fiction to presume they can follow the logic of this doctrine. Rather than parsing through the intellectual labyrinth, the juror is far more apt to conclude that a material lie about economic information is all that is needed to

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202 850 F.3d 94, 108 (2d Cir. 2017).

203 *Id.* at 113 n.20.

204 *Johnson*, 945 F.3d at 614.

convict the defendant of fraud. All the key elements of fraud appear to be proven at once, even if no pecuniary harm was intended: (1) there was a material misrepresentation; (2) there was "money or property" since the victim's right to control their asset is itself property; and (3) there was intent to harm since the defendant sought to deprive the victim of their right to control. The right to control "property" logically does the double-duty of satisfying the elements of property and intent to harm simultaneously as long as the lie was economically material.

It is not just jurors who are likely confused about how the elements are separate from each other. The complexity of this doctrine has led the courts themselves down disparate analytic paths. The *Finazzo* court collected the cases that construed the right to control as "being a question of fraudulent intent," and those that analyzed the theory under "the 'money or property' element."[205]

Separately, the courts have had to periodically remind themselves of the "subtle" or "fine" lines that they have had to draw in applying the theory. Thus, they have acknowledged a "subtle line" between the "question of whether a defendant's misrepresentation was capable of influencing a decisionmaker" (i.e., the standard for materiality), and the "requirement that that misrepresentation be capable of resulting in tangible harm" (i.e., the intent to harm standard), and that the two "should not be conflated."[206] There is also a "'fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid'—which do not violate the wire fraud statute—and those schemes that 'depend for their completion on a misrepresentation of an essential element of the bargain.'"[207]

Sorting through these distinctions is work suited for medieval scholastics, not lay jurors who are asked to conclude the factual distinctions unanimously and beyond a reasonable doubt. Even if seasoned lawyers and judges might be able to navigate the shoals successfully (a doubtful proposition), the risk of jurors getting lost in the maze of instructions and simply convicting on the basis of a material deception is indisputably high.

The theory's conflation of distinct elements is especially troubling in those cases where the government may not have needed to rely on the right to control theory at all. In *Gatto*, for example, the court affirmed the government's independent theory that the defendants schemed to deprive the university victims of scholarship money. Similarly, in *Wallach*, as discussed, the court affirmed the theory that

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205 *Finazzo*, 850 F.3d at 107 n.15.

206 *Johnson*, 945 F.3d at 615 (citing *Finazzo*, 850 F.3d at 109 n.16).

207 *Id.* at 613 (quoting United States v. Shellef, 507 F.3d 82, 108 (2d Cir. 2007)).

the defendants' deception deprived the corporate victim of $1.4 million in monies that were funneled to the coconspirators. Prosecutions involving financial institutions that extended loans also present a category of cases where they appear needlessly to rely on a right to control theory. For example, in *United States v. Dinome*, the government relied on a right to control theory as it "sought to prove [defendant's] fraudulent intent based upon the theory that [defendant] deprived Freehold Savings of information relevant to its decision whether it would extend him a loan; i.e., that he lied in order to deprive Freehold Savings of control over its own assets."[208] In rejecting the defendant's argument that the jury instruction on intent to harm was invalid, the court relied on evidence that the bank "would not make a loan to *any* applicant whose income did not constitute twenty-eight percent of the debt service on the mortgage."[209] In short, the defendant deceived the bank into giving him the bank's money without telling it about the potential risks to the bank. "The information withheld in this case significantly diminished 'the ultimate value of the [mortgage] transaction' to the bank as defined by its standard lending practices, whether or not a subsequent default ensued."[210] This surely satisfied both the benefit of the bargain and economic tests, and there appeared to be no need to resort to the idea that the bank's right to control its assets was itself property.

Similarly, in *Binday*, a case involving insurance policies, the government relied on a right to control theory, but, even as the court acknowledged the validity of that theory, it easily disposed of many of the defendant's arguments by applying traditional intent to harm analyses.[211] After reciting the well-established *Regent Office Supply* standard, and the evidence adduced at trial, the court concluded: "[T]he defendants knew that their misrepresentations induced the insurers to enter into economic transactions—ones that entailed considerable financial risk—without the benefit of accurate information about the applicant and the purpose of the policy."[212]

When, in addition to the benefit of the bargain or economic test, the jurors are told that right to control is itself property, whatever

208 86 F.3d 277, 283 (2d Cir. 1996).

209 *Id.* at 284.

210 *Id.* (internal citations omitted).

211 United States v. Binday, 804 F.3d 558, 569–71, 578–80 (2d Cir. 2015).

212 *Id.* at 579.

distinction the *Starr* court intended between mere deceit and criminality vanishes.[213]

3. A Theory Detached from Its Doctrinal Source

It is unclear how the Second Circuit reached this point. The only Second Circuit case to provide a detailed rationale for the right to control doctrine was *Wallach*, and no court has attempted to explain how that doctrine, which arose in the corporate fiduciary context, makes sense in arms-length transactions.

For example, *Johnson* asserts with now-typical certitude that "property interests protected by the [mail and wire fraud] statutes include the interest of a victim in controlling his or her own assets," citing to *United States v. Binday*.[214] *Binday*, in turn, relies on *United States v. Carlo*, for the same assertion.[215] *Carlo* claims: "Since a defining feature of most property is the right to control the asset in question, we have recognized that the property interests protected by the [mail and wire fraud] statutes include the interest of a victim in controlling his or her own assets."[216] *Carlo* does not cite *Wallach* in support of this assertion and instead cites to *United States v. Walker*,[217] and footnote five in *United States v. Rossomando*,[218] neither of which explained the theory of property as the right to control. Instead, they are more concerned with the intent to harm element as explored in *Regent Office Supply* and its progeny, discussed *supra* Section II.B.2, which emerged before *Wallach* and the right to control theory. *Walker* merely recites, without explanation, the proposition that "[t]he second element [which is concrete harm] can also be satisfied when the defendant's scheme is intended to deprive its victims of 'the intangible right of honest services,' 18 U.S.C. § 1346, or of the right to control their own assets."[219] In support, *Walker* cites as authority *Rossomondo*'s discussion in

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213 United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1987) ("Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim.").

214 United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019) (quoting *Binday*, 804 F.3d at 570). Other Second Circuit cases decided in 2019 cite to the same cases in reciting the right to control theory. *See* United States v. Calderon, 944 F.3d 72, 88–89 (2d Cir. 2019); United States v. Lebedev, 932 F.3d 40, 48 (2d Cir. 2019).

215 *Binday*, 804 F.3d at 570 (quoting United States v. Carlo, 507 F.3d 799, 802 (2d Cir. 2007)).

216 *Carlo*, 507 F.3d at 802.

217 191 F.3d 326, 335 (2d Cir. 1999).

218 144 F.3d 197, 201 n.5 (2d Cir. 1998).

219 *Walker*, 191 F.3d at 335.

footnote five and *United States v. Dinome*.[220] Like *Walker*, however, *Rossomando* offers no real discussion of the property element or the theory of right to control, other than taking it as a given. It too cites *Dinome* as "an example of a case in which the concrete harm contemplated by the defendant is to deny the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions."[221] But *Dinome* disappoints as well because it too sheds no greater light on the theory, merely citing to *United States v. D'Amato* as "quoting *Wallach*, 935 F.2d at 462–63."[222] Then, instead of examining the idea of right to control as a theory of property, the court turns to the materiality of the information that was deceptively withheld. Relying on *United States v. Mittelstaedt*,[223] discussed *supra* Section II.B.3, where the court required that "the information withheld either must be of some independent value or must bear on the ultimate value of the transaction,"[224] the *Dinome* court concluded that the jury instruction in that case was sufficient.

If *Dinome* does not illuminate the right to control theory outside the corporate/fiduciary context, one might have expected the case that both *Dinome* and *Walker* cited, *United States v. D'Amato*,[225] to do so. But *D'Amato* is also unhelpful because while it does cite *Wallach* extensively, it was a case that also involved deception in the corporate/fiduciary context. Thus, if anything, it reinforced the conclusion that the right to control doctrine is limited to that context.

Defendant D'Amato was an attorney who was hired to provide services for a public company but, at the instruction of a corporate manager, invoiced the company in a deceptive way to obscure the fact that the company sought access to the defendant's brother, Senator Alfonse D'Amato.[226] The Second Circuit reversed D'Amato's conviction because the government failed to establish an intent to defraud by showing intent to harm.[227] Not surprisingly, the government had relied heavily on the *Wallach* decision to ground their prosecution, but the court easily distinguished *Wallach* on the facts. First, it recounted *Wallach*'s theory of right to control[228] and said the property right was "defined by (i) state law concerning access to the company's books and

220 *Rossomando*, 144 F.3d at 201 n.5; United States v. Dinome, 86 F.3d 277, 283 (2d Cir. 1996).

221 *Rossomando*, 144 F.3d at 201 n.5.

222 *Dinome*, 86 F.3d at 283.

223 31 F.3d 1208 (2d Cir. 1994).

224 *Id.* at 1217.

225 39 F.3d 1249 (2d Cir. 1994).

226 *Id.* at 1254.

227 *Id.* at 1256–60.

228 *Id.* at 1257.

records and the fiduciary obligations of management and (ii) the law of fraud concerning corporate information that is public."[229]

It then went on to hold that where the corporate manager directed the contractor defendant to engage in deceptive billing in order to help the company avoid the embarrassing publicity of seeking access to a senator and where the manager was not receiving any kickbacks or laboring under any other conflict of interest, one could not infer an intent to harm shareholders' right to control:

> [U]nconflicted business decisions of management are protected from shareholder challenge by the business judgment rule. A policy of concealment that is protected by the business judgment rule, therefore, does not deprive shareholders of anything useful, and those responsible for the inaccuracy cannot have intended to defraud shareholders.[230]

Thus, tracing the right to control doctrine from *Johnson* in 2019 leads to the *D'Amato* and *Wallach* decisions that confine the theory to the corporate/fiduciary context, with no case in between explaining how or why that doctrine can extend to arms-length commercial transactions.

There is yet one other case that promises an answer but also fails to deliver: *United States v. Finazzo*.[231] Unlike the *Binday* line of cases discussed above, *Finazzo* addressed the right to control theory, not from the perspective of the intent to harm element but more directly under the "property" element.[232] Defendant Finazzo was an executive for an apparel company, who essentially steered supply contracts to a supplier in exchange for a secret kickback to himself.[233] He was convicted after trial of mail and wire fraud on a right to control theory of fraud. On appeal, among other challenges,[234] he argued that the jury instructions on "right to control" were erroneous.

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229 *Id.* at 1258.

230 *Id.* (citations omitted).

231 850 F.3d 94 (2d Cir. 2017). *Johnson* does cite this case for assertions related to the kinds of information necessary to infer intent to harm. *See* United States v. Johnson, 945 F.3d 606, 614, 615 (2d Cir. 2019).

232 *Finazzo*, 850 F.3d at 107 n.15 (noting that prior case law had examined the theory under either the intent to harm element or that of property and that "this case is best understood as a question of whether Aéropostale's property rights were implicated. Therefore, we analyze it under the 'money or property' element, while still applying our decisions under the fraudulent-intent requirement.").

233 *Id.* at 96.

234 He also challenged the right to control theory of property on the grounds that the fraud statutes require that the protected "property" must be "obtainable" by the defendant from the victim. *Id.* at 105–06. As discussed *infra* Part IV, the Second Circuit rejected this argument, and, in light of *Kelly v. United States*, that portion of *Finazzo* may no longer be good law.

In rejecting the defendant's challenge, the court cited *Wallach*:

> We explained that application of the [right to control] theory is predicated on a showing that some person or entity has been deprived of potentially valuable economic information. Thus, the withholding or inaccurate reporting of information that could impact on economic decisions can provide the basis for a mail fraud prosecution.[235]

The court then exhaustively examined the various Second Circuit cases subsequent to *Wallach* that stressed the importance of "potentially valuable economic information" as the key to the right to control "theory."[236] But notably absent from the discussion is any analysis of how or in what sense right to control assets becomes a "property" interest, or how that concept can apply when taken outside the context of a corporate shareholder who owns stock comprised of a "bundle" of legal rights including that of control and who is owed fiduciary duties by corporate managers.

Finazzo thus identifies *Wallach* as the source of the right to control doctrine, but just as in *Carlo*, *Binday*, and *Johnson*, the opinion fails to examine how that concept can transform from an incident of ownership into "property" or how the degree of economic value to the withheld information can add to or detract from the "propertyness" of the right to control when taken outside the corporate/fiduciary context.

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For all its legal subtleties and complexity, the right to control doctrine is now firmly rooted in Second Circuit jurisprudence.[237] Some

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235 *Finazzo*, 850 F.3d at 108 (internal citations and quotation marks omitted).

236 *Id.* at 108–13.

237 Two other recent Second Circuit cases, not discussed herein, similarly treat right to control as a given and affirm conviction on the basis that victims who were deprived of valuable information were harmed in their property right to control their assets. *See* United States v. Lebedev, 932 F.3d 40, 49 (2d Cir. 2019) (finding that defendant who disguised risky bitcoin company's transactions so that banks could process and approve them was guilty of fraud because he "deprived the financial institutions of the right to control their assets by misrepresenting potentially valuable economic information"); United States v. Calderon, 944 F.3d 72, 89 (2d Cir. 2019) (affirming fraud conviction of defendant who falsified letters of credit submitted to banks on right to control theory because the victim banks did not receive "'what they bargained for' because they bargained for [and did not receive] a set of documents that complied with the letters of credit and satisfied the USDA guarantee requirements").

circuits, like the Eighth,[238] Tenth,[239] and Fourth[240] Circuits, have similarly embraced the doctrine or variants of it. But others, like the Sixth[241] and Ninth[242] Circuits, appear to have rejected it. The Sixth Circuit called this property right to control "ethereal"[243] and, unlike the Second Circuit, declined to proceed down the increasingly complex lines of reasoning the doctrine requires. The Seventh Circuit,[244] like the Third Circuit,[245] has issued decisions that appear to go both ways.

Johnson pointed to this circuit split in his effort to get the Supreme Court to accept his certiorari petition.[246] The Court, however, declined to hear it,[247] and so participants in the criminal justice system are required to wait for another opportunity to learn the Court's judgment about the legitimacy of the right to control doctrine. Until then, we are

238 *See* United States v. Shyres, 898 F.2d 647, 652 (8th Cir. 1990) ("We determine that the right to control spending constitutes a property right. This position draws support from the Supreme Court's statement in *McNally* that there the jury instructions were flawed because the jury was not 'charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent.'").

239 United States v. Welch, 327 F.3d 1081, 1108 (10th Cir. 2003) ("[W]e have recognized the intangible right to control one's property is a property interest within the purview of the mail and wire fraud statutes.").

240 United States v. Gray, 405 F.3d 227, 234 (4th Cir. 2005) (recognizing victim's "right to control the disposition of its assets").

241 United States v. Sadler, 750 F.3d 585, 591 (6th Cir. 2014) ("[The] right to control" is "not the kind of 'property' right[] safeguarded by the fraud statutes"; the fraud statute "is 'limited in scope to the protection of *property rights*,' and the ethereal right to accurate information doesn't fit that description." (quoting McNally v. United States, 483 U.S. 350, 360 (1987))).

242 United States v. Bruchhausen, 977 F.2d 464, 468 (9th Cir. 1992) (reversing fraud conviction because "the interest of the [victim] manufacturers in seeing that the products they sold were not shipped to the Soviet Bloc in violation of federal law is not 'property' of the kind that Congress intended to reach in the wire fraud statute"); United States v. Lewis, 67 F.3d 225, 233 (9th Cir. 1995).

243 *Sadler*, 750 F.3d at 591.

244 *Compare* United States v. Catalfo, 64 F.3d 1070, 1077 (7th Cir. 1995) (recognizing victim's "right to control its risk of loss"), *with* United States v. Walters, 997 F.2d 1219, 1226 (7th Cir. 1993) (finding that a university's "right to control" who receives scholarships is not a cognizable property right under the fraud statutes: "[A] university that loses the benefits of [the] amateurism [of an athlete] . . . has been deprived only of an intangible right" not cognizable under the fraud statutes).

245 United States v. Zauber, 857 F.2d 137, 142 (3d Cir. 1988) (contrasting "[p]urely intangible rights" with "rights in intangibles which nevertheless constitute 'property'"); United States v. Henry, 29 F.3d 112, 113–14 (3d Cir. 1994) (affirming that under the mail and wire fraud statutes, property rights need not be tangible and can include intangible forms of property); United States v. Al Hedaithy, 392 F.3d 580, 603 (3d Cir. 2004) (distinguishing *Zauber* by stating that the deprivation of property in question related to the "right to *exclusive* use of [the] property," rather than the right to control its property in a manner different than the defendant).

246 Petition for Writ of Certiorari at 16–18, Johnson v. United States, 945 F.3d 606 (2d Cir. June 19, 2020) (No. 19-1412).

247 Johnson v. United States, 141 S. Ct. 687 (2020) *denying cert. to* 945 F.3d 606 (2d Cir. 2019).

left in the odd condition that, depending on where one is charged, a person engaged in identical conduct might either be found guilty of a federal crime (New York City) or not at all (Los Angeles), or maybe (Chicago).

IV. *WALTERS* AND *KELLY*: RETURNING THE FRAUD STATUTE TO THE BASICS

This intolerable ambiguity in a broadly applied federal criminal law cannot be remedied unless the Supreme Court steps in again, as it did in *McNally*, to restore the law to the core purposes of the fraud statutes. The Seventh Circuit's approach in *United States v. Walters*,[248] and that of the Supreme Court in *Kelly v. United States*,[249] offer a guide on how the judiciary may curtail the expansion of fraud law and reject the right to control theory of fraud.

A. United States v. Walters

The Seventh Circuit's straightforward analysis of fraud in *United States v. Walters* stands in stark contrast to the complex legal standards that have emerged in the Second Circuit after *Wallach*. Following just two years after *Wallach*, the *Walters* decision explained why the fraud statute is not violated unless the defendant's deceit was designed to wrongfully take a victim's money or property, and in so doing, dismissed the idea of right to control as a theory of property.

Walters was a consultant who used deceitful representations and processes to enable his client applicants to obtain or retain athletic scholarships at universities, in return for a fee. He was convicted of mail fraud on the theory that the universities were victimized by his conduct.[250]

A central question on appeal was whether the alleged victims, the universities, were deprived of any "money or property" by Walters's devious scheme. The court held they were, reasoning that the universities "lost their scholarship money [and that m]oney is property" within the meaning of the fraud statute.[251] Thus, it rejected Walters's argument that the schools lost no scholarship money because they "did

248 997 F.2d 1219 (7th Cir. 1993).

249 140 S. Ct. 1565 (2020).

250 *Walters*, 997 F.2d at 1221.

251 *Id.* at 1224.

not pay a penny more than they planned to do."[252] The court reasoned that had Walters's clients told the truth about their ineligibility, "the colleges would have stopped their scholarships, thus saving money. So we must assume that the universities lost property by reason of Walters' deeds."[253]

Yet, Walters could not be said to have committed criminal fraud because the universities "were not out of pocket *to Walters*; he planned to profit by taking a percentage of the players' professional incomes, not of their scholarships."[254] Quoting the mail fraud statute that prohibits "any scheme or artifice to defraud, or *for obtaining* money or property," the court asked, "If the universities were the victims, how did [Walters] 'obtain' their property?"[255] Answering this rhetorical question, the court rejected the government's contention that "neither an actual nor a potential transfer of property from the victim to the defendant is essential. It is enough that the victim lose; what (if anything) the schemer hopes to gain plays no role in the definition of the offense."[256]

As the court warned, "[A]ny theory that makes criminals of cheaters raises a red flag. Cheaters are not self-conscious champions of the public weal. They are in it for profit, as rapacious and mendacious as those who hope to collect monopoly rents."[257] The court found in the plain language of the mail fraud statute a requisite nexus between the scheming defendant and the victim's money or property: "'[A]ny scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' reads like a description of schemes to *get* money or property by fraud rather than methods of doing business that *incidentally* cause losses."[258]

Unlike the Second Circuit's contrary conclusion in *Finazzo*,[259] the *Walters* court held that the fraud statute requires proof that the defendant sought to obtain the victim's property. It found support in the Supreme Court's decision in *Tanner v. United States*,[260] "that [the conspiracy statute 18 U.S.C.] § 371 applies only when the United States is a '*target*' of the fraud; schemes that cause *indirect* losses do not violate that statute. *McNally* tells us that § 371 covers a broader range of frauds

252 *Id.*

253 *Id.*

254 *Id.*

255 *Id.*

256 *Id.*

257 *Id.* at 1225.

258 *Id.* (second emphasis added).

259 United States v. Finazzo, 850 F.3d 94, 105 (2d Cir. 2017) ("We . . . hold that the mail and wire fraud statutes do not require that the property involved in the fraud be 'obtainable.'").

260 483 U.S. 107, 130 (1987).

than does § 1341."[261] Hence, the court found, "[I]t follows that business plans causing incidental losses are not mail fraud."[262]

Moreover, the court addressed and rejected the government's belatedly "recast[]" theory of a "right to control."[263] The government had argued that Walters's scheme deprived the universities of "the benefits of amateurism," and thus "lost (and Walters gained) the 'right to control' who received the scholarships."[264] The court summarily rejected it as "an intangible rights theory once removed . . . because Walters was not the *universities' fiduciary*."[265] In this connection, the court cited, among other cases, to *United States v. Holzer*,[266] in which the Seventh Circuit had held that, in light of *McNally*, the honest services theory of fraud against a defendant state court judge who accepted bribes could not stand. The government's theory had been that the judge deprived the State of Illinois of its right to honest services from the judge and, in the principal appeal heard before *McNally*, the Seventh Circuit held:

> Fraud in its elementary common law sense of deceit . . . includes the deliberate concealment of material information in a setting of fiduciary obligation. A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud.[267]

The *Walters* court held that the government could not resort to this theory of fraud because unlike the defendant in *Holzer*, Walters had no fiduciary duty to the universities and thus could not be charged for having withheld material information.[268]

Walters offers a straightforward analysis that begins and ends with the question whether the defendant lied to commit what amounts to theft, a "design to separate the universities from their money."[269] If not, he could not be guilty of defrauding the universities, because "only a scheme to obtain money or other property from the victim by fraud violates § 1341. A deprivation is a necessary but not a sufficient

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261 *Walters*, 997 F.2d at 1225–26 (emphasis added) (citing McNally v. United States, 483 U.S. 350, 358–59 n.8 (1987)).

262 *Id.* at 1226.

263 *Id.* at 1226 n.3.

264 *Id.* at 1226 & n.3.

265 *Id.* at 1226 n.3 (emphasis added).

266 840 F.2d 1343 (7th Cir. 1988).

267 United States v. Holzer, 816 F.2d 304, 307 (7th Cir. 1987).

268 *Walters*, 997 F.2d at 1226 n.3.

269 *Id.* at 1226.

condition of mail fraud. Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement."[270]

B. Kelly v. United States

The Supreme Court's most recent case construing the fraud statutes in *Kelly v. United States*[271] effectively endorsed the *Walters* approach, clearly emphasizing the elements of property and defendants' intent and goal to obtain that property. In some ways, it provides a bookend to the *McNally* decision issued thirty-four years before, as the Court attempted again to limit the reach of the fraud statutes to its core purpose.

The Court reversed fraud convictions of two former officials in the administration of Governor Chris Christie of New Jersey.[272] Angered by the refusal of the mayor of a local town, Fort Lee, to support Christie's bid for reelection, the defendants Baroni and Kelly caused the Port Authority agency to shut down various traffic lanes on arguably the busiest bridge in the nation, the George Washington Bridge.[273] Timed to occur during rush hour, the result was major disruption to Fort Lee commuters.[274] To effectuate this scheme, the defendants made a number of misrepresentations to the agency to justify the lane closings.[275]

The government charged the defendants, inter alia, with wire fraud; a jury convicted them after trial, and the Third Circuit affirmed the conviction.[276] While the government had proceeded in part on the theory that the Port Authority victim had been deprived of its right to control its traffic lanes, and the circuit approved that theory,[277] the

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270 *Id.* at 1227.

271 140 S. Ct. 1565 (2020).

272 *Id.* at 1569.

273 *Id.* at 1569–70.

274 *Id.* at 1570.

275 *Id.* at 1569–70 (explaining that the defendants justified the lane change as part of a traffic study).

276 United States v. Baroni, 909 F.3d 550, 556 (3d Cir. 2018).

277 *Id.* at 566–67 ("[W]e recognize this traditional concept of property [i.e., right to control theory] provides an alternative basis upon which to conclude Defendants defrauded the Port Authority."). Citing Third Circuit precedent, the court noted that "[i]ncluded within the meaning of money or property is the victim's 'right to control' that money or property," and that the "Port Authority has an unquestionable property interest in the bridge's exclusive operation, including the allocation of traffic through its lanes and of the public employee resources necessary to keep vehicles moving." *Id.* at 567. The court went on to conclude that "Defendants invented a sham traffic study to usurp that exclusive interest, reallocating the flow of traffic and commandeering public employee time in a manner that made no economic or practical sense." *Id.* A review of the

government relied on a more standard theory of property in the Supreme Court, namely that the lane allocation and the employee wages that were diverted by the defendants' effort to sow chaos were the Port Authority "property" taken by the defendants.[278]

The Court thus did not have occasion to address the right to control theory, but as it turned out, even the more traditional theory of property fraud proved insufficient. In rejecting the government's theory, the Court emphasized throughout the opinion that the government "needed to prove *property* fraud."[279] The government "had to show not only that Baroni and Kelly engaged in deception, but that an 'object of the[ir] fraud [was] 'property.'"[280] Here, what the defendants wanted to achieve through their deception was to constrict traffic by reducing traffic lanes servicing Fort Lee, a "quintessential exercise of regulatory power" by the Port Authority, not a property right.[281]

Moreover, while "a public employee's paid time" is indeed a cognizable property interest, the defendants' "plan never had that as an object. The use of Port Authority employees was incidental to—the mere cost of implementing—the sought-after regulation of the Bridge's toll lanes."[282] For a scheme to fall within the proscription of the fraud statutes, the "property must play more than some bit part in a scheme: It must be an 'object of the fraud.' Or put differently, a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme."[283] This is true even if the "byproduct" property loss was necessary to the defendants' goal of effectuating a lane allocation change.[284] To rule otherwise would mean "the Federal Government could use the criminal law to enforce (its view of) integrity

government's brief in the Supreme Court reveals that it did not rely on this alternative basis for the Third Circuit's affirmance of the conviction. *See* Brief for the U.S. in Opposition, Kelly v. United States, 140 S. Ct. 1565 (2020) (No. 18-1059), 2019 WL 2153151. The government may have believed that the far surer footing for the conviction was the theory that the defendant deprived the Port Authority of actual money, in the form of employee wages that had been wasted on the lane diversion scheme, and that if it could not win on that theory, there was little chance of winning on the far more controversial theory that lane control was a separate property right protected by the fraud statute.

278 *Kelly*, 140 S. Ct. at 1572.

279 *Id.* at 1571.

280 *Id.* (quoting Cleveland v. United States, 531 U.S. 12, 26 (2000)).

281 *Id.* at 1572.

282 *Id.*

283 *Id.* at 1573 (internal citation omitted).

284 *Id.* at 1573–74. In so ruling, the Court rejected the Third Circuit's conclusion that "the Government presented evidence sufficient to prove Defendants violated the wire fraud statute by depriving the Port Authority of, at a minimum, its money in the form of public employee labor." United States v. Baroni, 909 F.3d 550, 562 (3d Cir. 2018).

in broad swaths of state and local policymaking. The property fraud statutes do not countenance that outcome."[285]

In an implicit repudiation of the "moral uprightness" principle still in vogue at the Second Circuit, the Court stated: "The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct."[286]

If this analysis sounds much like the Seventh Circuit's reasoning in *United States v. Walters*, it is no coincidence. The unanimous Court cited to *Walters* and a hypothetical *Walters* described to illustrate the absurdity of a government theory of fraud that would permit prosecutions even where the alleged victim suffered incidental pecuniary injury.[287]

C. *Will the Court Reject the Right to Control Theory?*

In light of this decision and *McNally*, when the right to control doctrine is addressed, the Court is likely to reject it. A conception of right to control, not as an incident of ownership, but rather a protected property in and of itself essentially nullifies the property requirement so important to both *Kelly* and *McNally*.[288] The *Kelly* Court's refusal to entertain analytic subtleties in an effort to support a fraud conviction follows the approach of the Court in *McNally* and *Cleveland v. United States*.[289]

Indeed, in its efforts to rein in prosecutorial theories, the Court has applied rather controversial reasoning. Thus, in *McNally*, the Court took pains to explain how the word "or" actually meant "and" so that the term "scheme to defraud" could not give rise to a crime independent of an effort to "obtain money or property." Justice Stevens's dissenting opinion understandably challenged this linguistic maneuver: "Until today it was also obvious that one could violate the first clause by devising a scheme or artifice to defraud, even though one did not violate

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285 *Kelly*, 140 S. Ct. at 1574.

286 *Id.* at 1568.

287 *Id.* at 1573 n.2 (citing United States v. Walters, 997 F.2d 1219, 1224 (7th Cir. 1993)).

288 The "obtaining" requirement of course was also important to the *Walters* court and *Kelly* Court as they concluded the defendant's scheme did not seek to obtain "money or property" from the victims. This requirement, however, is unlikely to be the basis for rejecting the right to control theory since one could argue that defendants seek to obtain for their own use the right to control the underlying asset. The argument would flout common sense, but the theory itself crossed that Rubicon long ago, and the argument would be just another one of many abstractions inherent in the theory.

289 531 U.S. 12 (2000).

the second clause by seeking to obtain money or property from his victim through false pretenses."[290] Stevens also attributed a much broader purpose to the fraud statute and quoted with approval Jed Rakoff's law review article: "[W]here legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit."[291] But the majority rejected Stevens's grammar and his expansive view of the fraud statute's purpose.[292] Its insistence on the core element of property deprivation was reiterated decades later in *Kelly*, this time unanimously.

The Court's analysis in *Cleveland v. United States*, a precedent key to *Kelly*'s outcome, also suggests that the right to control theory will not survive the Court's scrutiny. As in *McNally*, the question in *Cleveland* centered on whether the target of defendant's scheme was "money or property" within the meaning of the fraud statutes. The scheme involved deceiving the State of Louisiana to issue the defendants video poker licenses, and thus presented the question "whether, for purposes of the federal mail fraud statute, a government regulator parts with 'property' when it issues a license."[293] The Court held that the State's interest was solely regulatory in nature and not a property interest.[294] While the State clearly had an interest in ensuring that gaming activities "are conducted honestly and are free from criminal and corruptive elements,"[295] and, moreover, "[w]ithout doubt, Louisiana has a substantial economic stake in the video poker industry,"[296] the State got paid what it was due. As the Court noted, "[T]here is no dispute that TSG paid the State of Louisiana its proper share of revenue, which totaled more than $1.2 million, between 1993 and 1995. If Cleveland defrauded the State of 'property,' the nature of that property cannot be economic."[297]

Importantly, the Court expressly rejected a right to control argument: "[F]ar from composing an interest that has long been recognized as property, these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate."[298] Moreover, "[e]ven when tied to an expected

290 McNally v. United States, 483 U.S. 350, 365 (1987) (Stevens, J., dissenting).

291 *Id.* at 374 (citing Rakoff, *supra* note 19, at 772–73).

292 *See supra* Section II.A.

293 *Cleveland*, 531 U.S. at 20.

294 *Id.*

295 *Id.* at 20–21 (quoting LA. STAT. ANN. § 27:306(A)(1) (2000)).

296 *Id.* at 22.

297 *Id.*

298 *Id.* at 23 (internal quotations and citation omitted).

stream of revenue, the State's right of control does not create a property interest any more than a law licensing liquor sales in a State that levies a sales tax on liquor. Such regulations are paradigmatic exercises of the States' traditional police powers."[299] It concluded with the statement that "§ 1341 requires the *object* of the fraud to be 'property' in the victim's hands and that a Louisiana video poker license in the State's hands is not 'property' under § 1341."[300]

Notwithstanding the foregoing, there remain some reasons to question whether the Court will so readily discard the right to control theory. First, in *McNally* itself, the Court observed:

> Nor was the jury charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, the premium for insurance would have been paid to some agency, and what Hunt and Gray did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent.[301]

The Second Circuit in *Wallach* cited to this language as it endorsed the right to control theory of protected property.[302] Whether and how the Court addresses this language remains to be seen. One outcome might be to discard it as mere dicta or to limit its relevance to the public agency fiduciary context.

In another case, *Pasquantino v. United States*,[303] in affirming the conviction of a defendant charged with defrauding Canada of tax revenues, the Court cited to Black's Law Dictionary defining "property" very broadly as "extend[ing] to every species of valuable right and interest."[304] Moreover, in *Shaw v. United States*,[305] the Court endorsed

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299 *Id.*

300 *Id.* at 26–27 (emphasis added); *see also* Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 402 (2003) (expressing skepticism, in the context of the Hobbs Act, about the "right to control" as a cognizable right under criminal law: "We need not now trace what are the outer boundaries of extortion liability under the Hobbs Act, so that liability might be based on obtaining something as intangible as another's right to exercise exclusive control over the use of a party's business assets.").

301 McNally v. United States, 483 U.S. 350, 360–61 (1987).

302 *See* United States v. Wallach, 935 F.2d 445, 462 (2d Cir. 1991); *see also* United States v. Shyres, 898 F.2d 647, 652 (8th Cir. 1990) ("We determine that the right to control spending constitutes a property right. This position draws support from the Supreme Court's statement in *McNally* that there the jury instructions were flawed because the jury was not 'charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent.'").

303 544 U.S. 349 (2005).

304 *Id.* at 356 (citing *Property*, BLACK'S LAW DICTIONARY (4th ed. 1951)).

305 137 S. Ct. 462 (2016).

Judge Hand's language in *Rowe* that fraud can occur where the victim "has lost . . . his chance to bargain with the facts before him."[306]

These references, however, are isolated and fleeting. In contrast, *McNally*, *Cleveland*, and *Kelly* represent a consistent effort by the Court to limit the government's expansive reading of the fraud statutes. They portend a rejection of the right to control theory when the Court has occasion to address it.[307]

V. ALIGNING FRAUD PROSECUTIONS WITH DUE PROCESS REQUIREMENTS

This course correction from the Supreme Court would ensure more than doctrinal integrity. If the fraud statutes are construed to apply only when a defendant intends to cause a victim pecuniary harm through material deceptions, it would bring the fraud law back in line with basic principles of justice and due process requirements because people generally understand that such intentional efforts to harm someone else are criminal in nature. As Professor Julie O'Sullivan put it, the constitutional protections are

> designed to allow the average citizen to operate securely in the knowledge that he is free to act as he wishes unless he steps over a clearly defined legal, not moral, line. There are many other social means by which those who cross moral lines can be held to account. Prosecutions are, and should be, reserved for those who cause criminal harm.
>
> To contend that that line ought to depend, instead, on prosecutors' views of the "morality" of a defendant's actions is a repudiation of the framers' wisdom.[308]

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306 *Id.* at 467 (quoting United States v. Rowe, 56 F.2d 747, 749 (2d Cir. 1932)).

307 The ultimate impact of *Kelly* on the evolution of fraud law remains unclear. On the one hand, the Second Circuit easily distinguished *Kelly* in its decision upholding the conviction in *Gatto*, as it largely limited the *Kelly* decision to the facts of its case. United States v. Gatto, 986 F.3d 104, 116 n.4 (2d Cir. 2021). Inasmuch as *Kelly* was not presented with a right to control theory of fraud, the Second Circuit did not even mention the case as it reaffirmed the right to control theory, as discussed *supra* Section IV.B. The *Gatto* defendants are likely to seek certiorari. On the other hand, the Supreme Court relied on *Kelly* to remand to the Second Circuit the holding in *United States v. Blaszczak*, 947 F.3d 19, 45 (2d Cir. 2019), which concluded that confidential government information constituted protected property within the meaning of the fraud statutes. Blaszczak v. United States, 141 S. Ct. 1040 (2021). That matter is now pending in the Second Circuit.

308 Julie Rose O'Sullivan, Skilling*: More Blind Monks Examining the Elephant*, 39 FORDHAM URB. L.J. 343, 360 (2011). Similarly, in the context of criticizing the honest services doctrine, Professor Coffee asked rhetorically: "What is wrong with such an approach," whereby courts

A. *Constitutional Demand for Notice*

The Supreme Court's robust due process jurisprudence supports O'Sullivan's contention: "Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression."[309] The constitutional structure seeks to enhance liberty through a system of laws that enable rational decision-making with predictable outcomes. Vague statutes undermine this effort, as they cause people to "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked,"[310] and to "restrict[] their conduct to that which is unquestionably safe."[311] That enfeebling condition is what the Framers sought to avoid.

The need for legal clarity, then, is not only to give notice of what one cannot do, but perhaps more importantly to permit a range of freedom to avidly engage in pursuits that are not forbidden, without fear of a moralizing Javert. Thus, the Constitution prohibits vague laws that enable discriminatory enforcement by "policemen, judges, and juries for resolution on an ad hoc and subjective basis."[312]

Yet, with each expansion of the fraud statute to capture still another form of "property" or "scheme," prosecutors and judges draw a new line of criminality, one that did not have the imprimatur of democratic consensus. In the end, prosecutors and judges "condem[n] all that [they] personally disapprove and for no better reason than that [they] disapprove it."[313]

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impose their views of moral uprightness? *See* Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 15, at 207. He answered: "[A]s a matter of criminal law, this approach should be unacceptable, for several reasons. First, in traditional constitutional terms, it denies fair notice, invites arbitrary and discriminatory enforcement, and violates the separation of powers principle that has traditionally denied federal courts the power to make common law crimes." *Id.* Moreover, "[a]spirational standards imply that there will be shortfalls in performance, and this in turn means that to criminalize such a standard is to ignore the prudential constraint that criminal laws should be capable of even and general enforceability." *Id.*

309 Kolender v. Lawson, 461 U.S. 352, 357 (1983).

310 Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

311 *Id.*

312 Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

313 Jordan v. De George, 341 U.S. 223, 242 (1951) (Jackson, J., dissenting).

B. *Notice of Wrongfulness Is Insufficient*

Prosecutors and courts that endorse the "moral uprightness" view of the fraud statutes may brush aside these notice concerns on the basis that lying about economically material facts is malum in se and construing the fraud statute to prohibit such plainly wrongful behavior should catch no one by surprise. The ancient common law principle that ignorance of the law is no excuse[314] originates from "a demand that every responsible member of the community understand and respect the community's moral values."[315] As former Judge Richard Posner put it in a different context: "When a defendant is morally culpable for failing to know or guess that he is violating *some* law . . . we rely on conscience to provide all the notice that is required."[316] Moreover, prosecutors would argue, any due process concerns are further allayed by the mens rea element of willfulness. In each fraud case, the prosecution must prove that the defendant knew what he was doing was illegal.[317] Hence, conviction of the innocent due to vague laws is avoided,[318] as "culpable intent," often proven through evidence of so-called "consciousness of wrongdoing," is the assurance of justice.[319]

The trouble with these responses is that moral rectitude is aspirational in nature and thus cannot provide any reliable guide for when conduct passes from mere immorality to criminality. As Professor Coffee reminds us, "Aspirational standards imply that there will be shortfalls in performance, and this in turn means that to criminalize

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314 For a description of historical and theoretic sources of the doctrine *ignorantia legis non excusat*, see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 350–61 (1998).

315 *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 419 (1958).

316 United States v. Wilson, 159 F.3d 280, 295 (7th Cir. 1998) (Posner, C.J., dissenting).

317 LEONARD SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN, STEVEN A. REISS & NANCY BATTERMAN, 2 MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 44.01 (2021) ("'Willfully' means to act knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.").

318 *See, e.g.*, Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) (finding that the statute's "requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the [statute]" in new or unexpected circumstances is unjust); United States v. O'Hagan, 521 U.S. 642, 665–66 (1997) (reaching same conclusion in approving misappropriation theory under securities anti-fraud law).

319 For a detailed examination of this trend and its causes and problems, see Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 L. & CONTEMP. PROBS. 133, 150–51 (2012) (noting that consciousness of wrongdoing "could . . . make headway on the central problem of disentangling criminal behaviors in financial and market settings from their often benign background settings").

such a standard is to ignore the prudential constraint that criminal laws should be capable of even and general enforceability."[320] Put another way, if failure to meet the aspirational standards of moral rectitude were a crime, all but the most saintly would be wholly at the mercy of federal prosecutors and their potentially arbitrary decision to charge or not.

As for the argument that the "willfulness" element provides a safeguard against unjust convictions, it is, in practice, virtually useless in defending against a fraud charge. The jury is instructed that the element requires proof that the defendant knew what he or she was doing was "illegal."[321] Every deception (other than the whitest of lies) is in some sense immoral and understood to be wrong. Thus, the same evidence of deception to support a fraud charge doubles as evidence of willfulness, because any competent prosecutor inevitably begins and ends his or her jury presentation with a simple and compelling moral narrative about a privileged defendant who was greedy, cheated, and lied to steal from someone else. It is all too easy to argue, "Of course the defendant knew he was breaking the law." The prosecutor supports his or her narrative with some evidence that the defendant engaged in secretive behavior, commonly characterized as "consciousness of guilt,"[322] and jurors generally accept the narrative on the basis of such evidence,[323] because of their "tendency to overweigh indicators of moral failing[s]."[324] Against this narrative, the defense will rarely resort to the argument he knew it was wrong to lie but not illegal to do so. It is a singularly unpersuasive (though sometimes true) assertion. Most jurors, then, have little trouble concluding that the defendant must have understood his or her conduct was both wrong and illegal. Given these realities, treating the willfulness element as any safeguard from improper convictions for fraud is misplaced.

The clearest proof of this, of course, is the regularity with which fraud convictions are overturned on appeal. All the defendants in *Kelly* and the other cases in which the Supreme Court reversed the

320 Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 15, at 207.

321 SAND, SIFFERT, LOUGHLIN, REISS & BATTERMAN, *supra* note 317, at ¶ 44.01.

322 The term was perhaps first coined by Professor Wigmore. *See* JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 544 (2d ed. 1923).

323 *See* Buell & Griffin, *supra* note 319, at 158 ("[J]urors' basic competence at determining 'what happened' is tested in close cases with ambiguous evidence and amorphous legal standards—as fraud and obstruction cases tend to be. A coherent narrative in these cases is not necessarily a correct one. What makes it coherent is that it accords with expectations about how people usually act."); *id.* at 166 ("The use of stock narratives and the tendency to overweigh indicators of moral failings are risks that could render a consciousness of wrongdoing standard too error-prone to perform its potentially beneficial function.").

324 *Id.* at 166.

convictions were convicted because the jury concluded each of the elements, including willfulness, was proven. As Justice Owen Roberts observed decades ago:

> "Willfully" doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done "willfully." It is true also of a statute that it cannot lift itself up by its bootstraps.[325]

It is, then, mistaken to suggest that the wrongfulness of lies satisfies the Due Process Clause by notifying the perpetrator that he is about to commit a crime. As the First Circuit put it, the problem with the fraud statutes is that they can be "used to prosecute kinds of behavior that, albeit offensive to the morals or aesthetics of federal prosecutors, cannot reasonably be expected by the instigators to form the basis of a federal felony."[326]

C. *The Harm to Our Conceptions of Justice*

The continued expansion of theories of criminality catches citizens by surprise and affects permanent harm to persons who might have been deterred from the conduct had they received true notice of the law. In so doing, our criminal justice system as a whole is impaired as well.

On the whole, successful businesspeople typically are individuals who navigate social rules and who, while capable of taking risks, also appreciate that criminal consequences might be too high a cost. Federal prosecutors embrace this view: "[O]ne of the principal assumptions about the white-collar criminal is that he is calculating and therefore highly deterrable."[327] But this is only true if they are aware their conduct could lead to felony indictments with all the consequences that flow from such charges, including personal and financial ruin. The problem with prosecutors' expansive theories is that they move the criminal line, catching their targets by surprise. This, then, becomes an exercise not in criminal deterrence but retribution for moral infractions.

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325 Screws v. United States, 325 U.S. 91, 154 (1945) (Roberts, J., dissenting).

326 United States v. Czubinski, 106 F.3d 1069, 1079 (1st Cir. 1997).

327 EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL 97 (2016) (quoting former Department of Justice's fraud section chief). Professor Soltes questions this premise as he describes the various social, psychological, and other factors that can lead to conduct that was more intuitive than calculated. The implications of this assertion on the legitimacy of any criminal conviction and punishment are broad and well beyond the scope of this Article.

Take for example one of the defendants in *Kelly*, the New Jersey official who thought it appropriate to divert traffic to punish a local mayor. A Google search reveals that William Baroni was a successful, highly respected attorney and law professor who reportedly taught professional responsibility among other subjects.[328] The notion that such a person would have participated in this stunningly petty activity knowing that he could be charged with a federal crime and put his name, his family's reputation, and his liberty at risk, seems implausible. There was no evidence of any personal benefit to him that would have led him to calculate that the rewards of engaging in the activity was worth the risk of criminal indictment. To be sure, as the Supreme Court found, the conduct he engaged in was unseemly and wrong, but all objective factors suggest that prior notice the conduct would be deemed criminal might have led Baroni to a different decision altogether.

Johnson, the former global head of trading for a major bank's foreign exchange, presents another example. Distilled to its core, the case was about lying to a customer about how big a profit the bank (not he) would make on a trading strategy that, by the express terms of their contract, he was not prohibited from using. Had he understood that that lie would nevertheless subject him to criminal prosecution, it would be odd to conclude he knowingly risked indictment. Yet, even though the alleged victim institution got the services for which it contracted and apparently could not quantify any loss from the bank's aggressive trading, Johnson's extremely successful career and personal life, as he and his family knew it, are now over.[329]

The unnecessary infliction of such severe consequences is unduly harsh even for one whose conviction on a novel theory is never overturned. But it is especially cruel for the defendant who, like Baroni, was prosecuted for conduct that was deemed noncriminal. Writing about the fatally vague honest services doctrine in the fraud statutes, Professor O'Sullivan remarked:

> Hundreds if not thousands of individuals have been subjected to investigations and prosecutions and jail time for conduct that we know, only after the Court belatedly ruled in *McNally* and now *Skilling*, was not in fact criminal.
>
> These investigations and trials are humiliating and often financially disastrous: homes lost and savings ravaged. Such prosecutions are

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328 *Deputy Executive Director: Bill Baroni*, URB. LAND INST. N. N.J., https://ulidigitalmarketing.blob.core.windows.net/ulidcnc/2013/04/Baroni-Bio.pdf [https://perma.cc/S2LJ-B6BC].

329 Johnson was sentenced to twenty-four months in prison and ordered to pay a fine of $300,000. United States v. Johnson, 945 F.3d 606, 612 (2d Cir. 2019), *aff'g* No. 16-CR-457-1, 2018 U.S. Dist. LEXIS 71257 (Apr. 27, 2018).

> inevitably highly stressful: they can tear apart families and traumatize the defendant's children. The defendants usually lose their jobs and, not infrequently, their livelihood by virtue of the stigma and collateral consequences of a conviction. . . . It is cold comfort to these defendants—and should be a real scandal—that the Supreme Court, years after their convictions, can say that we were all wrong in believing that the statute covered such conduct.[330]

Apart from the obvious (though often ignored) toll on individual human lives, these surprising prosecutions lead to systemic harms as well. First, the uncertainty of the criminal law degrades respect for it. There is no realistic prospect that people will suddenly become honest en masse, when they feel the criminal laws are uncertain.[331] Instead, they are more likely to treat the criminal law like any tort law, a cost of doing business, as they weigh the sliding scale of risks against the reward. In his study of the deleterious expansion of the honest services doctrine into something that resembles tort liability, Professor Coffee explained that tort law tells us how far we may go at our own risk, while the criminal law is supposed to function as a clear prohibition that commands us to "halt."[332] If it loses that character, the deterrent force of criminal law will be undermined. Even back in 1980, then-prosecutor Jed Rakoff understood the dangers as he warned, if "a substantial element of outright irrationality creeps into the design or interpretation of a criminal statute, an added and more deep-seated difficulty arises: by becoming unfathomable, even to initiates, it ultimately ceases to command any moral force."[333] Yet, when he penned these words, the expansion was still in its early stages. The threat of diluting the moral force of the criminal laws is far greater today.

An alternative and equally deleterious outcome, depending on the risk appetite of the market participant, is an undue terror of criminal prosecution, not a contempt for it. This is perhaps an even worse

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330 O'Sullivan, *supra* note 308, at 358.

331 It is accepted among scientists that learning the skills of deception is a typical part of child development. *See* Marjorie Rhodes, *When Children Begin to Lie, There's Actually a Positive Takeaway*, NPR (Oct. 2, 2017, 10:11 AM), https://www.npr.org/sections/13.7/2017/10/02/552860553/when-children-begin-to-lie-theres-actually-a-positive-takeaway [https://perma.cc/Z3R7-NUFL]. *The New York Times* recently reported that, in a randomized experiment performed on 180 adults where a correct answer would reward the participants a mere five dollars, only twenty percent told the truth. The other eighty percent fell in one of three categories of deceiver: (1) they "flat-out lied," (2) they were "radically dishonest," or (3) they were "cheating non-liars," meaning they cheated in the game to avoid having to lie. *See* Benedict Carey, *The Good, the Bad and the 'Radically Dishonest,'* N.Y. TIMES (Sept. 15, 2020) https://www.nytimes.com/2020/09/15/science/psychology-dishonesty-lying-cheating.html [https://perma.cc/98Z8-HQXA].

332 Coffee, *Does "Unlawful" Mean "Criminal"?*, *supra* note 15, at 208.

333 Rakoff, *supra* note 19, at 779.

condition for our society for it would devolve into one the Supreme Court warned about decades ago, where citizens would "'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked."[334] They may decline to participate in the marketplace altogether. After all, they would need to worry not only about their personal conduct but that of their colleagues and foreign counterparts on global transactions; words can be easily misconstrued and later deemed sufficient to charge as a conspiracy.

In such conditions, the more risk tolerant participants in the economy might engage in risk analysis with little regard for the moral force of the criminal laws, while the less risk tolerant will leave the field altogether. A third outcome—the expectation that an ominous equivalence between honesty and criminality will eradicate dishonesty in the business community in this competitive global economy—is wholly unrealistic and even utopic. Notwithstanding decades-long, continued expansion of criminality, with ever more spectacular falls of business titans sentenced to ever-increasing terms of imprisonment,[335] there is no evidence that the financial community is any more honest than it was in bygone eras.

Yet another harmful effect of the current trend is that it undermines public confidence in the courts' ability to secure justice. The unresolved struggles with the honest services doctrine, the division among the circuits about the right to control doctrine, the divisions among judges within the same circuit about what constitutes a crime, have been a feature of federal fraud prosecutions for decades. Each time the Supreme Court sweeps aside years of investigation, trial, conviction, and appellate rigor to declare a prosecution completely wrong about something as elemental as whether a crime was committed, the system suffers. Scholars, practitioners, judges, and even the prosecutors and investigating agents themselves are left uncertain. The sense of systemic disarray and doctrinal incoherence is inescapable.

In rejecting the "moral uprightness" language of *Gregory*, the Seventh Circuit in *United States v. Holzer*[336] feared that such a broad definition of fraud "would put federal judges in the business of creating what in effect would be common law crimes, i.e., crimes not defined by

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334 Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

335 *See* SOLTES, *supra* note 327, at 17–44; *id.* at 42 (summarizing the decades-long progression of white-collar prosecutions, including research showing that a defendant convicted of inflating earnings and causing $12.5 million loss would have had a recommended prison sentence of 30–37 months in 1987, but by 2003, the same crime would have resulted in recommendation of 151–88 months, "a quintupling of penalties").

336 816 F.2d 304 (7th Cir. 1987).

statute."[337] This is a fear that courts periodically raise as improper derogation of legislative power, but as Professor Richman exhaustively explains, the entire federal criminal justice system has long been rife with examples of judicial rulemaking.[338] The question, thus, is not whether courts will continue to define the limits of fraud—they inevitably will—it is whether they will begin to constrain the law's reach to punish only those who engaged in theft-through-lies.

CONCLUSION

The Supreme Court can return the scope of fraud statutes to their intended purpose. One would have thought that the Court spoke clearly to this purpose in *United States v. Kelly*, but it can reinforce the point by accepting a case that squarely presents the right to control theory and rejecting the doctrine as one that improperly permits convictions based on material deception alone.

337 *Id.* at 309; *see also* United States v. Weimert, 819 F.3d 351, 357 (7th Cir. 2016) ("Not all conduct that strikes a court as sharp dealing or unethical conduct is a scheme or artifice to defraud." (internal quotations and citation omitted)).

338 For a recent description of judicial rulemaking, see Richman, *supra* note 17, at 10–24.