Deciphering the "Traditional Property Interests" Test for Property-Based Mail and Wire Fraud

Grant Delaune†

The mail and wire fraud statutes are the "first line of defense" against fraudulent activities. Adaptable and broadly written, they are go-to tools in the white-collar prosecutor's arsenal. But this flexibility has also raised concern about their expansive and indeterminate scope—leading the Supreme Court to eliminate certain honest-services theories of fraud and limit property-based theories of fraud to the protection of "traditional property interests."

Unfortunately, the vagueness of the traditional property interests test has resulted in a confusing morass of inconsistent judgments. With limited guidance from the Supreme Court on how to conduct such an inquiry, lower courts have struggled to consistently determine whether alleged property interests are covered by these statutes. This has led to overturned convictions in high-profile mail and wire fraud cases ranging from the Varsity Blues college admission scandal to the Buffalo Billion bid-rigging scheme.

This Comment aims to aid courts conducting the traditional property interest analysis by synthesizing the Supreme Court's property-based case law and proposing a hallmarks-of-property test. By providing structure to the currently amorphous analysis, the hallmarks-of-property test should minimize lingering constitutional vagueness concerns and provide increased deterrence to the would-be fraudsters across the United States.

† B.A. 2019, University of California, Los Angeles; Certified Fraud Examiner (CFE); J.D. Candidate 2025, The University of Chicago Law School. I would like to thank Professor Sharon Fairley and the editors and staff of the *University of Chicago Law Review* for their thoughtful advice and edits.

INTRODUCTION

The federal wire fraud[1] and mail fraud[2] statutes form the cornerstone of white-collar criminal enforcement. While the number of federal white-collar prosecutions has declined over the past several decades, wire fraud prosecutions are at an all-time high—making up nearly half of the lead charges in white-collar cases.[3] In particular, wire and mail fraud have formed the basis for convictions ranging from scams with international notoriety, including the prosecutions of FTX founder and CEO Sam Bankman-Fried[4] and Theranos founder and CEO Elizabeth Holmes,[5] to local public corruption scandals.[6]

Prohibiting "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," these broadly worded statutes provide a flexible tool for prosecutors to go after misconduct.[7] All

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1 18 U.S.C. § 1343.

2 *Id.* § 1341.

3 *Wire Fraud Charges and Convictions Projected to Reach Record Levels in FY 2023*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (July 21, 2023), https://perma.cc/HYE9-8EV4 (projecting more than thirteen hundred prosecutions with wire fraud as the most serious, or lead, charge as well as an additional four hundred prosecutions with wire fraud conspiracy as the lead charge out of a total of approximately four thousand white-collar prosecutions in 2023). Note, this source does not separately identify mail fraud prosecutions.

4 *See Statement of U.S. Attorney Damian Williams on the Conviction of Samuel Bankman-Fried*, U.S. DEP'T OF JUST. (Nov. 2, 2023), https://perma.cc/WYR7-3ZDB (describing Bankman-Fried's conviction of, inter alia, two counts of wire fraud and two counts of wire fraud conspiracy).

5 *See* United States v. Holmes, 2022 WL 16748611, at *1 (N.D. Cal. Nov. 7, 2022) (noting that Holmes was convicted of three counts of wire fraud and one count of wire fraud conspiracy).

6 *See, e.g.*, United States v. Arroyo, 75 F.4th 705, 706–07 (7th Cir. 2023) (discussing an Illinois State Representative's wire fraud conviction for accepting bribes in return for pushing legislation favorable to the sweepstakes gaming industry).

7 18 U.S.C. §§ 1341, 1343.

manner of traditional frauds have been prosecuted using these statutes including fraudulent investment schemes, false insurance claims, and misrepresentations on loan applications.[8] As former Assistant U.S. Attorney and current Federal District Judge Jed Rakoff once famously quipped, "[t]o 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."[9] Inspired by this famous quote, academics have described the wire fraud statute in similar, but modernized, terms as "the white-collar prosecutor's newest, truest love: her Stratocaster, her Nikes, her Dyson, her iPhone."[10]

However, the "adaptability" of the mail and wire fraud statutes extolled by prosecutors[11] has been the subject of persistent academic and judicial hostility. Early mail fraud jurisprudence in the late 1800s was filled with debates over how mail-centric the charged fraudulent schemes needed to be to sustain convictions.[12] These disputes were eventually resolved when the statute was amended in 1909,[13] but judicial skepticism of expansive readings of the amended statute would soon rear its head again. Despite the unanimous view of the courts of appeals that the text of the 1909 amendment encompassed schemes to defraud not "aimed at causing [the] deprivation of money or property" [14] (so-called intangible rights–based theories of fraud), the Supreme Court limited

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[8] Todd Kowalski, *Mail and Wire Fraud*, 60 AM. CRIM. L. REV. 1051, 1061 (2023) (citing cases).

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

[10] Yakov Malkiel, *The Wire Fraud Boom*, 75 OKLA. L. REV. 531, 537 (2023). Other vivid descriptions of these statutes include the claim they have become "the prosecutor's Uzi," Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 224 (1992), and that "they rank by analogy with hydrogen bombs on stealth aircraft" in the corporate and securities law contexts, Ralph K. Winters, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 954 (1993).

[11] Rakoff, *supra* note 9, at 771; *see also* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126 (1981) ("Among prosecutors, a well-known maxim says 'when in doubt, charge mail fraud.'").

[12] *See infra* Part I.A.

[13] *See id.*; Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 (codified as amended at 18 U.S.C. § 1341).

[14] McNally v. United States, 483 U.S. 350, 358 (1987), *superseded by* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346).

the statutes' protection to property rights in 1987, largely on constitutional vagueness grounds.[15] In response, Congress quickly intervened and passed an amendment defining "scheme or artifice to defraud" to include those that "deprive another of the intangible right of honest services."[16] However, this amendment was soon subjected to its own vagueness challenge in *Skilling v. United States*,[17] in which the Court held that the reinstated honest-services theories needed to be limited to their "bribe-and-kickback core" to pass constitutional muster.[18]

This dynamic process of Congress drafting and prosecutors deploying the mail and wire fraud statutes broadly and, in return, facing persistent judicial concerns regarding overcriminalization and vagueness continues to this day. In recent years the battleground has merely shifted to the scope of property protected by the fraud statutes. After the Supreme Court neutered the familiar tool of honest-services fraud in *Skilling*, prosecutors have attempted to reframe cases they would have previously charged under an honest-services theory using property-based theories.[19] This past term in *Ciminelli v. United States*,[20] however, the Court invalidated a significant doctrine supporting such tactics. The case centered on the wire fraud conviction of real estate developer Louis Ciminelli for his role in a bid-rigging scandal.[21] The Court found the prosecution's "right-to-control" theory of property-based wire fraud, which allowed for a conviction if the defendant denied "the victim the [property] right to control its assets by de-

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15 *See id.* at 358–60; *see also infra* Part I.C.

16 18 U.S.C. § 1346; *see also* Skilling v. United States, 561 U.S. 358, 402 (2010).

17 561 U.S. 358 (2010).

18 *Id.* at 409. Bribery can occur in many forms. In a kickback scheme, a contractor pays a portion of an awarded contract back to the awarding party as a bribe. *See Potential Scheme: Bribes and Kickbacks*, GUIDE TO COMBATING CORRUPTION & FRAUD IN INFRASTRUCTURE DEV. PROJECTS, https://perma.cc/7QJG-VPQE.

19 *See, e.g.*, James M. Cole, *Mail and Wire Fraud*, *in* PROSECUTION OF PUBLIC CORRUPTION CASES 445, 447–51 (1988) (suggesting the use of property rights to salary, control over property, and constructive trusts as a basis to continue prosecuting intangible rights–based theories of fraud).

20 598 U.S. 306 (2023).

21 *See id.* at 308–12. In coordination with a board member of the nonprofit in charge of disbursing state development grants, Ciminelli ensured that his construction company was selected for contracts worth hundreds of millions of dollars by "tailor[ing]" the bid process to favor his company. *Id.* at 310.

priving it of information necessary to make discretionary economic decisions,"[22] strayed too far from "traditional property interests" to form the basis for a conviction.[23] As a result, Ciminelli's conviction had to be reversed.[24]

While the right to control doctrine had been heavily criticized by many academics,[25] it is not the only property-based prosecutorial theory to have recently been rebuffed by the judiciary. Notably, the First Circuit's reversal of the mail and wire fraud convictions of two parents involved in the Varsity Blues college admissions scandal generated headlines across the gamut of popular media outlets.[26] In *United States v. Abdelaziz*,[27] the court held that the "admission slots" central to the government's theory of the case were not property within the scope of the mail and wire fraud statutes.[28] The court felt that to hold otherwise would be inconsistent with the Supreme Court's dictate that only "traditional notions of property" are protected by the statutes.[29] The First Circuit also rejected the government's proposed definition of property protected against mail and wire fraud.[30] This reversal was surprising given the Sixth Circuit's decision in *United States v. Frost*,[31] which had found "unissued degrees" to constitute property within these statutes' scope in a prior prosecution addressing a separate higher education scandal.[32]

The inconsistency between the holdings of *Abdelaziz* and *Frost* illustrates the confusing morass the outer boundaries of

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22 *Id.* at 313 (quoting United States v. Binday, 804 F.3d 558, 570 (2d. Cir. 2015)). The right to control theory was "virtual black letter law" in the Second Circuit, Tai H. Park, *The "Right to Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 CARDOZO L. REV. 135, 160 (2021), but its propriety was the subject of a circuit split, *see Ciminelli*, 598 U.S. at 313 n.3.

23 *Ciminelli*, 598 U.S. at 316.

24 *Id.* at 317. For a more in-depth discussion of *Ciminelli*, see Part II.A.4.

25 *See generally, e.g.*, Park, *supra* note 22.

26 *See, e.g.*, Anemona Hartocollis, *Appeals Court Overturns Fraud and Conspiracy Convictions in Varsity Blues Scandal*, N.Y TIMES (May 10, 2023), https://www.nytimes.com/2023/05/10/us/varsity-blues-convictions-college.html; Alanna Durkin Richer, *Appeals Court Tosses Convictions of Two Parents in 'Varsity Blues' College Admission Scandal,* AP NEWS (May 10, 2023), https://perma.cc/K9JS-3WYL.

27 68 F.4th 1 (1st Cir. 2023).

28 *Id.* at 12–13. The court rejected the government's categorical assertion that university admission slots are always property and found the case-specific evidence insufficient to support the jury instructions stating admission slots were property. *See id.* at 33–34.

29 *Id.* at 34–35.

30 *Id.* at 36. For a detailed analysis of this proposed test, see *infra* Part III.A.

31 125 F.3d 346 (6th Cir. 1997).

32 *Id.* at 367. For a more detailed comparison of these cases, see *infra* Part II.

property-based mail and wire fraud have become.[33] Lower courts are put in the unfortunate position of determining if property-based theories are consistent with the Supreme Court's "traditional property interests" test without a clear framework for answering this question.[34] Extrapolating from Supreme Court case law, courts have identified "potentially relevant guideposts" for this inquiry, such as dictionary definitions and case law.[35] However, these sources are often indeterminate, in the case of dictionaries,[36] or undermined by a failure of prior cases to "ground" their analysis in "traditional property notions."[37]

The resulting uncertainty has fanned the flames of academic and judicial criticism. Notably, at least some Justices of the Supreme Court appear to have ongoing vagueness concerns with the scope of mail and wire fraud statutes.[38] They view the statutes' uncertain outer boundaries as "leav[ing] people with no sure way to know what consequences will attach to their conduct."[39] On the other hand, the legal uncertainty—coupled with the perception that the Supreme Court is sympathetic to white-collar defendants[40]—likely undercuts the deterrence value of the mail and wire fraud statutes.[41]

This Comment aims to address the confusion surrounding property-based theories of wire and mail fraud. Specifically, it proposes a novel test that can assist future courts' analysis of property-based theories of mail and wire fraud, focusing attention on whether a given interest is (1) economically valuable, (2) obtainable, (3) exclusive, and (4) nonregulatory. These elements are

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33 The First Circuit recognized as much in *Abdelaziz*, acknowledging that its holding "leaves considerable uncertainty as to how district courts should apply the mail and wire fraud statutes' property requirement." 68 F.4th at 40.

34 *See Ciminelli*, 598 U.S. at 316 ("In sum, the wire fraud statute reaches only traditional property interests.").

35 *Abdelaziz*, 68 F.4th at 35.

36 For example, the oft-cited *Black's Law Dictionary* defines "property" as "extend[ing] to every species of valuable right and interest." Pasquantino v. United States, 544 U.S. 349, 356 (2005) (quoting *Property*, BLACK'S LAW DICTIONARY (4th ed. 1951)).

37 *Ciminelli*, 598 U.S. at 314.

38 *See, e.g.*, Percoco v. United States, 598 U.S. 319, 333 (2023) (Gorsuch, J., concurring) ("To this day, no one knows what 'honest-services fraud' encompasses.").

39 *Id.* (quoting United States v. Davis, 139 S. Ct. 2319, 2323 (2019)).

40 *See, e.g.*, Lena Streisand & Vince Farhat, *U.S. Supreme Court Continues to Limit White Collar Fraud Prosecutions*, JEFFER MANGELS BUTLER & MITCHELL LLP (May 16, 2023), https://perma.cc/GDF3-2RMY.

41 A decline in perceived enforcement is particularly important in the white-collar context. The decision to undertake white-collar crime is generally understood to be calculated and, as such, is a "prime candidate[ ] for general deterrence." *Arroyo*, 75 F.4th at 708 (quoting United States v. Brown, 880 F.3d 399, 405 (7th Cir. 2018)).

drawn not only from the Supreme Court's decisions about the scope of property in its mail and wire fraud case law, but also from its parallel property jurisprudence in the federal antiextortion context. By centering the traditional property interest inquiry on these hallmarks of property, courts should be able to evaluate creative prosecutorial theories of property-based fraud in a more consistent and predictable manner—minimizing concerns of unconstitutional vagueness and providing appropriate deterrence to the "the ever-inventive American 'con artist.'"[42]

This Comment proceeds in three parts. Part I details the historical development and evolution of the mail and wire fraud statutes. Part II highlights the disjointed and inconsistent case law of property-based prosecutorial theories. It then identifies and summarizes several seminal decisions addressing how property is defined in the mail and wire fraud statutes, as well as in the Hobbs Act,[43] the federal antiextortion statute that contains a similar property requirement. Part III derives the principles guiding the Supreme Court's interpretation of property and its scope, culminating with a proposed hallmarks-of-property test. Finally, Part III concludes with two illustrative applications of the hallmarks-of-property test.

I. EVOLUTION AND EXPANSION OF THE MODERN MAIL AND WIRE FRAUD STATUTES

To support a conviction under the mail and wire statutes, the government must prove the following four elements:

> [1] a scheme to defraud by means of a material deception;
> [2] with the specific intent to defraud;
> [3] while using the mails, private commercial carriers, and/or wires in furtherance of that scheme;
> [4] that did result or would have resulted in the loss of *money or property* or the deprivation of honest services.[44]

This Comment focuses on the fourth requirement—that the scheme resulted in or aimed to cause the loss of money or property. Importantly, while the mail and wire fraud statutes have

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42 United States v. Maze, 414 U.S. 395, 407 (1974) (Burger, C.J., dissenting).

43 18 U.S.C. § 1951.

44 *See* Kowalski, *supra* note 8, at 1052–53 (emphasis added).

different jurisdictional hooks, the "money and property" clause of each statute has been interpreted identically.[45]

As their similar elements suggest, the modern wire fraud statute is the "lineal descendent" of its predecessor, the mail fraud statute.[46] Therefore, to understand the evolution and importance of the modern wire fraud statute, one must start with the development of the mail fraud statute. Part I.A details this history, with a focus on the early controversies surrounding the scope of the mail fraud statute. Part I.B then details the creation and expansive coverage of the wire fraud statute. Finally, Part I.C provides an overview of the development and decline of the intangible rights doctrine, an alternative, nonproperty basis for mail and wire fraud convictions.

A. Passage and Amendment of the Mail Fraud Statute

The enactment and evolution of the mail fraud statute illustrates the interpretive crosscurrents that continue to be exerted upon the statute today. The mail fraud statute is best understood as a product of the broader expansion of federal authority in the wake of the Civil War.[47] Historically, Congress's power over the Postal Service was understood not to extend to the contents of the mail.[48] Nevertheless, in response to the "common swindle" of fraudulent lotteries,[49] the Reconstruction Era Congress passed the lottery law, which outlawed the mailing of letters or circulars "concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever."[50] This initial foray in combating fraud was shortly followed by the passage of the first iteration of the mail fraud statute in 1872.[51] As originally enacted, the statute prohibited the use of the post

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45 Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005) ("[W]e have construed identical language in the wire and mail fraud statutes *in pari materia*.").

46 Rakoff, *supra* note 9, at 772.

47 *See id.* at 779. Other expansions of federal power in the post-war period include the passage of various civil rights laws. *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27; Civil Rights Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

48 *See* Rakoff, *supra* note 9, at 781.

49 *Id.* at 782; *see also John A. Morris, Lottery King: History of the Great Louisiana Gambling Concern*, N.Y. TIMES, Feb. 11, 1894, at 17 (discussing the Louisiana State Lottery Company, the most notorious lottery of the era, which allegedly secured its state charter through bribery and kept more than 48% of the placed wagers for itself).

50 Act of July 27, 1868, ch. 246, § 13, 15 Stat. 194, 196.

51 Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323.

office to further "any scheme or artifice to defraud," but did not include the modern money or property clause.[52]

Lingering concerns about the mail fraud statute's constitutionality were allayed when the Supreme Court upheld the earlier lottery law in a decision affirming Congress's right to regulate the content of the mails.[53] But soon after the constitutional issues were resolved, an interpretive dispute arose over the scope of the statute's coverage. While strict constructionists believed the statute only outlawed frauds that depended on the use of the mails, broad constructionists viewed schemes that utilized the mails in any form as violative.[54] This early interpretive dispute highlights the ongoing, unresolved tension in mail and wire fraud jurisprudence between the expansive text of the statute and general concerns about overcriminalization and federal government overreach into an area of law traditionally policed by the states.[55] Because this dispute remained unaddressed by the Supreme Court, Congress amended the mail fraud statute in 1889 to expressly include certain enumerated schemes, such as the "sawdust swindle" and "green cigar" ploys, that the courts had inconsistently addressed.[56] However, the amendment did not

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[52] *Id.* Unlike its current iteration, the original mail fraud statute also contained "'mail-emphasizing' language" that scholars believe was added to minimize the likelihood of the law being overturned as an unconstitutional extension of federal power into the policing of fraud. *See* Rakoff, *supra* note 9, at 783–85. *But see generally* Norman Abrams, *Uncovering the Legislative Histories of the Early Mail Fraud Statutes: The Origin of Federal Auxiliary Crimes Jurisdiction*, 2021 UTAH L. REV. 1079 (analyzing newly unearthed documents suggesting the mail fraud statute, prior to the 1909 amendment, was "self-defensive" and focused on protecting the postal system from abuse by mass-mailing schemes).

[53] *See* Ex Parte Jackson, 96 U.S. 727, 732 (1877).

[54] *See* Rakoff, *supra* note 9, at 790. For example, some strict constructionists held that only schemes that could not have been executed "but for" the use of the mails were covered by the statute. *Id.* at 793; *see also* United States v. Clark, 121 F. 190, 190–91 (M.D. Pa. 1903) ("What is sought to be prevented is an abuse of the post office facilities of the country to carry out schemes to defraud . . . . But, as stated above, this use must be an *essential* of the scheme." (emphasis added)).

[55] *Compare* United States v. Owens, 17 F. 72, 73–74 (E.D. Mo. 1883) ("There may have been an attempt to cheat, cognizable, possibly, by some state statutes or a common law. [But] [w]ere the postal laws designed to draw within federal jurisdiction each and every individual transaction . . . when postal correspondence ensues . . . if any [fraud] were designed?"), *with Abdelaziz*, 68 F.4th at 33 ("[E]mbracing the government's reading . . . would . . . stretch [the wire fraud statute] to potentially criminalize such parental actions as, for example, donations to preschools by parents who hope to gain admission for their children.").

[56] Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873, 873. These "green goods" scams promised to send victims significant amounts of counterfeit money in exchange for an up-front payment. However, victims would instead receive a box full of sawdust, bricks, or

conclusively resolve the broader dispute, with both camps finding support for their interpretation in this congressional action.[57]

As this interpretive dispute simmered in the lower courts, the Supreme Court addressed a related issue with the mail fraud statute in *Durland v. United States*.[58] In *Durland*, the petitioner claimed the mail fraud statute only criminalized fraud punishable at common law—which required a misrepresentation of a current fact and did not include false promises about the future.[59] The Court rejected this argument and held that the statute's broad language of "any scheme or artifice to defraud" extended coverage beyond the limitations of common law fraud and encompassed misstatements about future events.[60] To many broad constructionists, this decision also appeared to favor an expansive understanding of the mail-intensive language elsewhere in the statute. But the issue of how restrictively to construe the mail-intensive language in the statute remained not squarely addressed.

Finally, in 1909, Congress intervened to settle the dispute by passing an amendment that provided the statute its modern form.[61] As amended, the statute criminalizes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[62] The amendment was largely viewed as codifying the Court's expansive interpretation of the statute from *Durland*,[63] but it also settled the raging interpretive dispute in favor of the broad constructionists by removing the mail-intensive language of the 1872

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strips of green paper. This scheme was the "most common" fraud of the nineteenth century as the victims rarely reported the scam out of fear of being prosecuted themselves. *The Ages of Fraud Part 1*, U.S. POSTAL INSPECTION SERV., https://perma.cc/6Q54-VPDF.

57 *See* Rakoff, *supra* note 9, at 809–10 (noting strict constructionists viewed the amendment as an acknowledgement that the statute has previously been limited, while broad constructionists saw this as evidence that Congress intended more coverage than the strict constructions previously allowed).

58 161 U.S. 306 (1896).

59 *Id.* at 312.

60 *Id.* at 313–14.

61 Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130 (codified as amended at 18 U.S.C. § 1341). There have been additional stylistic and jurisdictional modifications since 1909. *See* Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 683, 763 (removing surplusage elsewhere in the statute without changing the statute's meaning); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 03-322, § 25006, 108 Stat. 1796, 2087 (extending the mailing element beyond use of the U.S. Postal Service to include "any private or commercial interstate carrier"). Nevertheless, the 1909 amendment has been described as the "last substantive amendment of the statute." McNally v. United States, 483 U.S. 350, 357 n.6 (1987), *superseded by* 18 U.S.C. § 1346.

62 18 U.S.C. § 1341.

63 *See McNally*, 483 U.S. at 357–58.

version.[64] As a result, the use of the mails element no longer meaningfully restricts the types of frauds punishable under federal law and, in its modern form, merely serves as what is best understood as a combined "jurisdictional" and "overt act" element.[65]

B. Wire Fraud and Jurisdictional Expansion

Federal criminal jurisdiction over fraudulent activities continued to expand with the enactment of the wire fraud statute in 1952.[66] Proposals for this new statute originated within the Federal Communications Commission following concerning reports of fraudulent radio advertising.[67] The legislative debate on the proposed law similarly focused on false advertising that utilized the radio, and supporters argued the statute would merely equalize the treatment of frauds across mediums.[68] The resulting wire fraud statute "self-consciously mimicked" the mail fraud statute and contains the same operative language.[69] As a result, the only difference between the statutes is the jurisdictional hook—that is, the means of communication utilized.[70]

While initially conceived of as a means to combat misleading radio advertising, the statute's inclusion of all wire communications has swept in many forms of communications colloquially referred to as "wireless" within its jurisdictional grasp. This includes bank transfers, emails, phone calls, text messages, and

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64 The current statute still requires the placement "in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service," 18 U.S.C. § 1341, but removed the mail-intensive clause "so misusing the post-office establishment" found in the original iteration, Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323. The Supreme Court has since interpreted the current statute to only require the use of the mails to "reasonably be foreseen" as part of the scheme to defraud. Pereira v. United States, 347 U.S. 1, 8–9 (1954). For a historical account of the legislative process suggesting Congress was unaware of the impact the 1909 amendment would have on mail fraud jurisprudence, see Abrams, *supra* note 52, at 1118–24.

65 *See* Rakoff, *supra* note 9, at 816–18.

66 Communications Act Amendments, 1952, Pub. L. No. 82-554, § 18, 66 Stat. 711, 722 (codified as amended at 18 U.S.C. § 1343).

67 Malkiel, *supra* note 10, at 534.

68 *See id.* at 533–35.

69 *Id.* at 533. Most relevant for purposes of this Comment, both statutes criminalize "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343.

70 *Compare* 18 U.S.C. § 1341 ("[P]laces in any post office or . . . deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier."), *with* 18 U.S.C. § 1343 ("[T]ransmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce.").

electronic messaging via applications like WhatsApp.[71] Additionally, although the statute requires *interstate* communication,[72] this requirement is rather toothless. Prosecutors have satisfied this requirement when the sender and receiver of a message were located in the same state by reference to out-of-state servers,[73] and some courts have held that Internet-based communications are categorically interstate, obviating the need to identify an out-of-state connection.[74] Given the ubiquity of Internet-based communications in the modern world, the wire fraud statute has tremendous reach—a reach that some academics have criticized as encompassing all "American financial crime, no matter how local."[75]

C. Development and Decline of the Intangible Rights Doctrine

Ever since its 1909 amendment, the mail fraud statute, and later the wire fraud statute, has been phrased disjunctively—"scheme or artifice to defraud, *or* for obtaining money or property."[76] Starting in the 1940s, this phrasing was interpreted to allow the prosecutions of fraudulent schemes where the victims suffered no loss of "money or property," but rather deprived victims of intangible, nonproperty rights.[77] One such intangible right is the right to "honest services," which by 1982 was accepted by every court of appeals.[78] Conceptually, this theory encompasses schemes where an offender fraudulently profited from their position of trust but the betrayed party suffered no direct loss of money or property.[79] Cases prosecuted under an honest-services theory generally involve the bribery of public officials, but have

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71 *See* Malkiel, *supra* note 10, at 540.

72 Wire fraud's additional statutory requirement of *interstate* communication is necessary to bring the conduct within Congress's constitutional authority to regulate interstate commerce. *See* Kowalski, *supra* note 8, at 1053.

73 *See* Malkiel, *supra* note 10, at 543–44.

74 *See id.* at 544–45 (citing United States v. Fumo, 2009 WL 1688482, at *9 (E.D. Pa. June 17, 2009) ("[T]he Internet, standing alone, is an instrumentality of interstate commerce.")).

75 *Id.* at 549.

76 18 U.S.C. § 1341 (emphasis added).

77 *See Skilling*, 561 U.S. at 400.; *see also* C.J. Williams, *What Is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287, 297 n.69 (2014) (listing cases).

78 *Skilling*, 561 U.S. at 400–01. Other previously recognized intangible rights theories include the right to "fair elections," United States v. Clapps, 732 F.2d 1148, 1153 (3d Cir. 1984), *abrogated by McNally*, 483 U.S. 350, and a client's right to their attorney's loyalty, United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981), *abrogated by McNally*, 483 U.S. 350.

79 *See Skilling*, 561 U.S. at 400.

also been used to prosecute private actors who violated their fiduciary duties.[80]

However, in 1987, the Supreme Court rejected intangible rights–based prosecutorial theories in *McNally v. United States*.[81] The Court found the statute, as applied to the honest-services fraud alleged in the case, to be ambiguous and applied the rule of lenity.[82] As such, the Court interpreted the mail fraud statute "as limited in scope to the protection of property rights."[83] Concerns about the increasingly broad application of these prosecutorial theories undergird the decision.[84] The Court went on to state that "[i]f Congress desires to go further, it must speak more clearly than it has."[85]

In response, Congress attempted to do just that. The following year, it enacted 18 U.S.C. § 1346 as part of the Anti-Drug Abuse Act of 1988,[86] which explicitly states that the term "scheme or artifice to defraud" in both the mail and wire fraud statutes includes "the intangible right to honest services."[87] As might be expected, the breadth of § 1346 was rather quickly the subject of interpretive dispute.[88] Despite what appears to be a rather straightforward congressional intent to overturn *McNally* in toto,[89] an influential Second Circuit opinion parsed the language

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80 *See id.* at 401; *see also, e.g.*, United States v. Arroyo, 75 F.4th 705, 706–07 (7th Cir. 2023) (affirming the defendant's sentence for bribery of a governmental official); United States v. Bryza, 522 F.2d 414, 415–16, 421–22 (7th Cir. 1975) (finding a purchasing agent's receipt of kickbacks violated his fiduciary duties of loyalty and honest services).

81 483 U.S. 350 (1987).

82 *See id.* at 359–60 ("Rather than construe the statute in a manner that leaves its outer boundaries ambiguous . . . we read [the statute] as limited in scope.").

83 *Id.* at 360.

84 *See id.* (noting the contrary holding would result in the "Federal Government [ ] setting standards of disclosure and good government for local and state officials"). This restrictive impulse and concern about overcriminalization mirrors that of the strict constructionist judges discussed above in Part I.A.

85 *Id.*

86 Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346).

87 *Skilling*, 561 U.S. at 402 (quoting Cleveland v. United States, 531 U.S. 12, 19–20 (2010)); 18 U.S.C. §§ 1341, 1343.

88 *See Skilling*, 561 U.S. at 403 n.36.

89 *See* 134 CONG. REC. 33,297(1988) (statement of Rep. John Conyers, Jr.) (stating the amendment "restores the mail fraud provision to where that provision was before the *McNally* decision"); 134 CONG. REC. S17376 (daily ed. Nov. 10, 1988) (statement of Sen. Joe Biden) (declaring that the "intent [of § 1346] is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change"); *see also Skilling*, 561 U.S. at 422 (Scalia, J., concurring in part) ("It is entirely clear (as the Court and I agree) that Congress meant to reinstate the body of pre-*McNally* honest-services law; and entirely clear that that prohibited much more . . . than bribery and kickbacks.").

of § 1346 so as to only reinstate honest-service theories rather than all of the pre-*McNally* intangible-right theories.[90]

Eventually, even this cabined interpretation of § 1346 was further pared back by the Supreme Court in *Skilling v. United States*.[91] Jeffrey Skilling, the disgraced ex-CEO of Enron, had been convicted of participating in an "elaborate conspiracy to prop up Enron's short-run stock prices"—which allowed Skilling to reap millions in salary and bonuses—under an honest-services theory of wire fraud.[92] On appeal, Skilling challenged § 1346 as unconstitutionally vague.[93] Consistent with its prior skepticism of aggressive interpretations of the mail and wire fraud statutes, the Supreme Court narrowed the scope of honest-services fraud. Specifically, the Court construed the statute to "criminalize[ ] *only* the bribe-and-kickback core of the pre-*McNally* [honest-services] case law" in order to avoid vagueness issues.[94] That is, absent an offender participating in a bribe or kickback scheme that violated fiduciary duties, there can be no violation of the intangible right of honest services.[95] To illustrate the still proscribed conduct, the Court pointed to *McNally*'s "paradigmatic" example of a kickback scheme,[96] wherein a Kentucky state official steered the state's insurance business to a third party in exchange for a share of the profits.[97] However, since Skilling's conviction rested on undisclosed self-dealing, not a bribery and kickback scheme, his conduct did not constitute honest-services fraud.[98]

More recently, the Supreme Court further restricted the scope of the mail and wire fraud statutes in *Kelly v. United States*.[99] The defendants in *Kelly* were state government officials who engaged in a political retaliation scheme later dubbed

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90 *Skilling*, 561 U.S. at 404–05 (quoting United States v. Rybicki, 354 F.3d 124, 137–38 (2d Cir. 2003) (en banc)).

91 561 U.S. 358 (2010).

92 *Id.* at 368–69.

93 *Id.* at 399.

94 *Id.* at 408–09 (emphasis in original).

95 *See id.* at 404, 407–08.

96 *Skilling*, 561 U.S. at 407.

97 *See id.* at 401–02, 410. Conceptually, kickback schemes are just a variant of a classic bribery scheme, with the "thing of value" given to influence a fiduciary's decision-making merely delayed rather than paid upfront. *See Potential Scheme: Bribes and Kickbacks*, *supra* note 18.

98 *See Skilling*, 561 U.S. at 413. On remand, the Fifth Circuit nevertheless upheld Skilling's conspiracy conviction, finding the improper honest-services fraud jury instructions constituted harmless error given the "overwhelming evidence" Skilling conspired to commit securities fraud. United States v. Skilling, 638 F.3d 480–81, 483–84 (5th Cir. 2011).

99 140 S. Ct. 1565 (2020).

"Bridgegate."[100] The defendants ordered the closing of several lanes of traffic on the "busiest motor-vehicle bridge in the world" to get back at a local mayor for refusing to endorse then-Governor Chris Christie's reelection campaign.[101] The lane closures caused crippling traffic and prompted a federal prosecution of the defendants under a property-based theory of wire fraud.[102] However, a unanimous Court reversed the wire fraud convictions, even though it was undisputed that the defendants expended government resources (i.e., government employees' time and labor) in order to carry out their scheme.[103] The Court held that the money or property at issue must be the object of the fraud, not merely incidental to the scheme, as it was in *Kelly*.[104]

All told, the scope of federal fraud liability has expanded enormously—potentially problematically so[105]—since the mail fraud statute's enactment in 1872. No longer restricted to the misuse of the federal post office, the mail and wire fraud statutes now criminalize nearly all fraudulent schemes given the ubiquity of modern wire communications.[106] In light of this expansive jurisdictional reach, courts have been loath to bless creative intangible rights–based prosecutorial theories. This impulse is best seen in the wholesale rebuke of these theories in *McNally*[107] but has continued—seemingly in tension with congressional intent—with more recent holdings in *Skilling* and *Kelly*.[108]

II. PROPERTY-BASED CASE LAW CHAOS

Faced with the newfound restrictions on the scope of honest services-based prosecutions following *Skilling*, many prosecutors

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100 Ariane de Vogue & Jamie Ehrlich, *Supreme Court Throws Out Convictions of New Jersey Officials in Bridgegate Scandal*, CNN (May 7, 2020), https://perma.cc/SVL8-V54Q.

101 *Kelly*, 140 S. Ct. at 1568–69.

102 *See id.* at 1571.

103 *Id.* at 1574.

104 *Id.* The Court noted that a scheme in which a mayor used "on-the-clock city workers" to renovate his daughter's home would still be punishable, as the government's property right to its employees' time and labor would be the object of the fraud. *Id.* at 1573 (citing United States v. Pabey, 664 F.3d 1084, 1089 (7th Cir. 2011)).

105 *See* Malkiel, *supra* note 10, at 548–50 (raising questions about the federal government near ubiquitous wire fraud jurisdiction due to technological advancements).

106 *See supra* Part I.B.

107 *See McNally*, 483 U.S. at 360 ("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, we read [the mail fraud statute] as limited in scope to the protection of property rights.").

108 *See supra* text accompanying notes 84–104.

have reformulated the mail and wire fraud cases they bring. Rather than charging cases under the increasingly limited honest-services theory—that is, alleging the victim was deprived of their right to honest services as part of a bribe or kickback scheme—prosecutors now often allege the scheme deprived the victim of some form of tangible or intangible property.[109] Unsurprisingly, these efforts to expand the scope of property-based wire fraud have been received with skepticism by courts.[110] This has resulted in a confusing jumble of seemingly inconsistent judgments and no unifying definition of "property."

This uncertainty is of particular importance given the gap-filling role the mail and wire fraud statutes play in the broader federal criminal law regime. As Chief Justice Warren Burger observed, the mail and wire fraud statutes serve an important role as the "first line of defense" against fraudulent activity.[111] "When a 'new' fraud develops—as constantly happens—the mail [and wire] fraud statute[s] become[ ] a stopgap device to deal . . . with the new phenomenon, until particularized legislation can be developed and passed to deal directly with the evil."[112] This pattern has been repeated numerous times, with securities fraud, loan sharking, and credit card fraud among the schemes originally prosecuted using the federal mail and wire fraud statutes before targeted legislation could be enacted.[113] However, this important gap-filling role is undermined if "the ever-inventive American 'con artist'" is allowed to avoid sanction due to the uncertainty surrounding the scope of property-based theories of mail and wire fraud.[114]

As an illustrative example, consider the inconsistent holdings of *Frost* and *Abdelaziz*. In *Frost*, the defendants were convicted of

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[109] *See* Cole, *supra* note 19, at 447–51 (suggesting prosecutors use property rights to salary, control over property, and constructive trusts to continue prosecuting public corruption cases they previously would have brought under intangible rights–based theories of fraud); Brette M. Tannebaum, Note, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After* Skilling, 112 COLUM. L. REV. 359, 393–95 (2012).

[110] Examples of skeptical treatment include the Supreme Court's rejection of the right to control doctrine of property-based fraud in *Ciminelli*, *see infra* Part II.A.4, and lower courts' rejection of salary maintenance theories of property-based fraud, *see infra* Part II.A.5.

[111] United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting); *see also* Coffee, *supra* note 11, at 126 ("Among prosecutors, a well-known maxim says 'when in doubt, charge mail fraud.'").

[112] *Maze*, 414 U.S. at 405–06 (Burger, C.J., dissenting).

[113] *See id.* at 406.

[114] *Id.* at 407.

participating in a "degrees-for-contracts" scheme at the University of Tennessee Space Institute, a graduate school that primarily serves students who were military or governmental personnel.[115] As part of the scheme, the professor-defendants approved the student-defendants' plagiarized theses and dissertations in exchange for the student-defendants steering "lucrative government research contracts" their way.[116] The Sixth Circuit upheld the challenged convictions based on a finding that the school had a property right in "unissued degrees."[117] The court reasoned that the university was "[u]ltimately . . . a business" and, therefore, the decision to issue one of the school's finite number of degrees was at least partially a business decision.[118] More broadly, the court held:

> Awarding degrees to inept students, or to students who have not earned them, will decrease the value of degrees in general. More specifically, it will hurt the reputation of the school and thereby impair its ability to attract other students willing to pay tuition, as well as its ability to raise money. The University of Tennessee [Space Institute] therefore has a property right in its unissued degrees.[119]

However, this expansive interpretation of university property rights has not been universally accepted. In *Abdelaziz*, the government charged two parents with wire fraud in conjunction with payments purportedly made to university accounts that secured admission for their nonathlete children at the University of Southern California (USC) as athletic recruits.[120] The case arose from a nationwide investigation into college admissions practices

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115 *Frost*, 125 F.3d at 352–53.

116 *Id.* at 353.

117 *Id.* at 366–67. It is worth noting that the professor defendants were prosecuted under a pre-*Skilling* honest-services theory. However, the fiduciary duty alleged to have been violated was the duty to protect an employer's property. As such, the relevant question the Sixth Circuit addressed was if the university had a "property right in a degree which it has not issued yet." *Id.* at 367.

118 *Id.*

119 *Frost*, 125 F.3d at 367. While not explicitly described as such, the court appears to consider unissued degrees property due to their impact on the school's goodwill, an intangible property right recognized as within the scope of the mail and wire fraud statutes by other courts. *See* United States v. Alsugair, 256 F. Supp. 2d 306, 315–17 (D.N.J. 2003) (holding a business's goodwill is a "traditional property right"); United States v. Hedaithy, 392 F.3d 580, 600 (3d Cir. 2004) ("[The company] developed substantial goodwill due to the integrity of its TOEFL testing process, [and] we conclude that such goodwill makes [their] score reports valuable.").

120 *Abdelaziz*, 68 F.4th at 12–19.

named "Operation Varsity Blues."[121] The district court found "[t]he logic of *Frost* neatly applies" to the admission slots at issue, deeming them property properly within the scope of the mail and wire fraud statutes.[122] The defendants were found guilty on all counts at trial.[123]

On appeal, however, the First Circuit vacated the mail and wire fraud convictions, which the government had defended on both honest-services and property-based grounds.[124] With respect to the property-based theories, the circuit court found admissions slots to be "meaningfully different" from the unissued degrees in *Frost*, describing admission slots as merely "an offer to participate in [a] transaction."[125] Persuasive precedent set aside, the First Circuit then held the jury had been incorrectly instructed that "admission slots" were property without evidence that "dictionaries, case law, treatises, or other legal sources establish that similar interests are treated as property."[126] "[M]uch more detail, both legal and factual," would be required to support the jury instructions[127] in light of the Supreme Court's case law suggesting that "courts should resort to traditional notions of property in construing the mail and wire fraud statutes."[128] Following the reversal, the U.S. Attorney's Office dismissed the mail and wire fraud charges against the defendants.[129]

Despite the similar settings of *Abdelaziz* and *Frost*, their disparate outcomes illustrate the uncertainty prosecutors and criminal defendants face when applying the mail and wire fraud statutes. Often prosecutors will want to prosecute normatively bad conduct that does not clearly violate a more targeted federal criminal law provision—such as conduct of the Varsity Blues defendants—so they turn to the stopgap mail and wire fraud statutes. But in light of recent decisions such as *Ciminelli* and *Abdelaziz*, it is unclear if these charging decisions will withstand judicial scrutiny.

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121 *See* Graham Kates, *Lori Loughlin and Felicity Huffman Among Dozens Charged in College Bribery Scheme*, CBS NEWS (Mar. 12, 2019), https://perma.cc/AC63-9SVQ.

122 United States v. Sidoo, 468 F. Supp. 3d 428, 441 (D. Mass. 2020), *rev'd sub nom. Abdelaziz*, 68 F.4th 1.

123 *Abdelaziz*, 68 F.4th at 21.

124 *Id.* at 12–13.

125 *Id.* at 36.

126 *Id.* at 34.

127 *Id.*

128 *Abdelaziz*, 68 F.4th at 35.

129 *See* Notice of Dismissal at 1, United States v. Abdelaziz, No. 19-10080-NMG (D. Mass. June 29, 2023).

To resolve this uncertainty, this Part reviews the most relevant Supreme Court and circuit decisions addressing the scope of property—identifying along the way the guiding principles behind the jurisprudence. Part II.A specifically focuses on the breadth of coverage in cases addressing the mail and wire fraud statutes while Part II.B addresses the scope of property in the Court's Hobbs Act jurisprudence, a related federal statute proscribing extortion.

A. Property in Mail and Wire Fraud Prosecutions

In searching for clarity on the scope of the term "property" as used in the mail and wire fraud statutes, a good starting point is a review of relevant decisions by the Supreme Court.[130] Following its holding in *McNally*, the Court has addressed the scope of property-based mail and wire fraud in four prominent cases: *Carpenter v. United States*,[131] *Cleveland v. United States*,[132] *Pasquantino v. United States*,[133] and *Ciminelli v. United States*. Additionally, this Part reviews a recent D.C. Circuit case, *United States v. Guertin*,[134] that evaluated the so-called salary maintenance theory of property-based fraud. Each of these cases is summarized below, with a focus on the scope of the "money or property" clause of the mail and wire fraud statutes.

1. *Carpenter v. United States*.

While the Supreme Court held in *McNally* that intangible rights are not protected by the mail and wire fraud statutes, the Court subsequently held that *intangible property rights* are covered. In *Carpenter*, the defendants participated in an insider trading ring where individuals at a New York City brokerage firm were given advance information about the contents of their coconspirator's popular *Wall Street Journal* column, "Heard on the Street."[135] Given the column's "perceived quality and integrity," its content had the power to move markets.[136] Capitalizing on this

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[130] *See Abdelaziz*, 68 F.4th at 34 (identifying "case law" as relevant evidence for establishing the scope of protected property).

[131] 484 U.S. 19 (1987).

[132] 531 U.S. 12 (2000).

[133] 544 U.S. 349 (2005).

[134] 67 F.4th 445 (D.C. Cir. 2023).

[135] *Carpenter*, 484 U.S. at 22–23.

[136] *Id.*

inside information, the defendants placed twenty-seven prepublication trades and netted a tidy profit of approximately $690,000 before the scheme was discovered.[137] Following a Securities and Exchange Commission (SEC) investigation, the government charged the defendants with mail and wire fraud under a theory that the defendants' scheme had deprived the *Wall Street Journal* of its intangible property—specifically, its confidential business information.[138]

Less than five months after its *McNally* decision, the Supreme Court unanimously held that the "[c]onfidential business information" defendants misappropriated was an interest that "has long been recognized as property."[139] This assertion was supported by citations to previous Supreme Court cases recognizing property rights in trade secrets in noncriminal contexts as well as to a prominent corporate law treatise.[140] The Court then rejected the defendants' arguments that the *Wall Street Journal* was not deprived of its right to the first public use of the information, holding the newspaper had "a property right in keeping confidential and making exclusive use" of the information.[141] The Court further stated that the lack of any monetary loss to the *Journal* was irrelevant as the deprivation of the "right to exclusive use" was sufficient.[142] As such, the defendants' convictions were affirmed.[143]

As the Court's holding in *Carpenter* illustrates, there is no requirement that property be tangible to fall within the mail and wire fraud's scope. Further, there is no presumption against, or heightened scrutiny of, prosecutorial theories rooted in such intangible property rights, as some circuits appear to

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137 *Id.* at 23.

138 *See id.* at 23–24.

139 *Id.* at 25–26.

140 *Carpenter*, 484 U.S. at 26 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001–04 (1984) (recognizing trade secrets, as defined by state law, constitute a property interest protected by the Takings Clause)); Bd. of Trade of Chi. v. Christie Grain & Stock Co., 198 U.S. 236, 250–51 (1905) (holding the plaintiff's collection of pricing quotas was akin to a trade secret and, as such, was entitled to protection); 3 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF LAW OF PRIVATE CORPORATIONS § 857.1 (rev. ed. 1986) ("Confidential information acquired or compiled by a corporation in the course and conduct of its business is a species of property to which the corporation has the exclusive right and benefit.").

141 *Carpenter*, 484 U.S. at 26.

142 *Id.* The Court went on to state "exclusivity is an important aspect of confidential business information and most private property for that matter." *Id.* at 26–27.

143 *Id.* at 28.

have implicitly adopted.[144] Such a presumption is contra to the plain text of the statute, which makes no such tangibility distinction.[145] Additionally, as of the passage of the wire fraud statute, *Black's Law Dictionary* explicitly defined property to include both tangible and intangible property.[146] More practically, categorizing property as either tangible or intangible is an arbitrary exercise in many cases, as the boundary separating the two categories is often murky. For example, consider government business or liquor licenses. In an attempt to strengthen the claim that these licenses are property within the scope of mail and wire fraud, some federal prosecutors have—largely unsuccessfully—argued the physical pieces of paper memorializing the granting of a government license constituted tangible property within the scope of the mail and wire fraud statutes.[147]

2. *Cleveland v. United States.*

Following *Carpenter*, the Supreme Court was faced with the question of whether state permits and licenses qualify as "property" as used in the mail and wire fraud statutes. In another unanimous opinion, the Court held that such pre-issuance interests were outside the statutes' scope.[148] In *Cleveland*, the defendants were charged with mail fraud after making false statements to the Louisiana State Police for the purpose of obtaining a state license to operate video poker machines.[149] In their license application, the defendants concealed information related to their history of tax and financial problems that likely would have run afoul of the state's suitability requirements for the license.[150] The initial misrepresentation, along with three subsequent misrepresentations on renewal paperwork, formed the basis for four mail

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144 *See, e.g.*, *Abdelaziz*, 68 F.4th at 39–40 (only identifying "intangible right[s]" as subject to the Supreme Court's traditional notions of property analysis).

145 *See* 18 U.S.C. §§ 1341, 1343.

146 *Property*, BLACK'S LAW DICTIONARY (4th ed. 1951) ("[Property] is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible."). This edition of *Black's Law Dictionary* has been used by the Supreme Court in subsequent cases addressing the scope of mail and wire fraud "property." *See infra* Part II.A.3.

147 *See, e.g.*, United States v. Schwartz, 924 F.2d 410, 417–18 (2d Cir. 1991); United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990). Whether the intangible rights embodied in the physical licenses qualify as "property" is explored in the following Section. *See infra* Part II.A.2.

148 *Cleveland*, 531 U.S. at 15.

149 *Id.*

150 *See id.* at 15–17.

fraud charges.[151] On appeal, the defendants challenged the district court's determination that the "licenses constitute property even before they are issued."[152] The Fifth Circuit affirmed the district court's holding that the video poker licenses constituted property—deepening a six-to-three circuit split over the question of whether unissued government licenses constitute property.[153]

The Supreme Court sided with the majority of the circuit courts, holding that the unissued license did not constitute "property" within the meaning of the mail and wire fraud statutes based on two key principles.[154] First, the Court held that for purposes of mail and wire fraud, the object of the fraudulent scheme must be "property in the hands of the victim."[155] Second, the Court held that the unissued license at issue did not constitute property in the government's hands because the state's "core concern" in operating the licensing system was regulatory, not proprietary.[156]

The Court acknowledged that Louisiana would receive a stream of revenue after issuing the license, in the form of fees and profit-sharing proceeds, but found post-issuance revenue was irrelevant to whether the pre-issuance licenses constituted property.[157] Additionally, the Court rejected the argument that the state's entitlement to application fees prior to the issuance of the license established the license itself as property.[158] Such an interpretation would be overly broad and inappropriately apply to "purely regulatory" licensing regimes that incidentally require an upfront fee, such as driver's licenses.[159] Finally, since there was no claim of unpaid fees or other economic injury, the alleged deprivation of property rights rested in arguments over the state's "intangible rights of allocation, exclusion, and control."[160] However, the Court again deemed these rights to be regulatory—

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[151] *Id.* at 16–17. These mail fraud charges also served as the predicate acts supporting a racketeering and conspiracy charge. *Id.* at 16.

[152] United States v. Cleveland, 951 F. Supp. 1249, 1261 (E.D. La. 1997), *aff'd sub. nom.* United States v. Bankston, 182 F.3d 296 (5th Cir. 1999), *rev'd sub. nom.* United States v. Cleveland, 531 U.S. 12 (2000).

[153] *See Cleveland*, 531 U.S. at 17–18 (listing cases).

[154] *Id.* at 15.

[155] *Id.*

[156] *Id.* at 20.

[157] *Id.* at 22.

[158] *Cleveland*, 531 U.S. at 22.

[159] *Id.*

[160] *Id.* at 23.

rejecting comparisons to a patent holder's interest in an unlicensed patent and a franchisor's right to select its franchisees.[161]

Cleveland provides important guidance to courts analyzing property fraud prosecutorial theories. Most importantly, it centers the property analysis on the status of the interest in question as it existed *before* the scheme to defraud. This chronology can be of paramount importance as illustrated by *Cleveland*, wherein the Court recognized that, once issued, "video poker licensees may have property interests in their licenses."[162] Additionally, *Cleveland* effectively imposes a higher level of scrutiny on mail and wire fraud prosecutions premised on schemes that defraud the government. Despite Louisiana's "substantial economic stake" in the video poker licensing, the fact that the state's "core concern" was regulatory trumped this economic interest.[163]

3. *Pasquantino v. United States*.

While *Cleveland* significantly curtailed the government's ability to prosecute property-based fraud cases involving governmental victims, the Court's subsequent cases have made clear that some schemes to defraud the government can still constitute property fraud. In *Pasquantino*, the Supreme Court upheld a wire fraud conviction based on the defendants' smuggling of alcohol from the United States into Canada without paying taxes.[164] Specifically, the Court found that the unpaid excise taxes constituted property in the hands of the Canadian government.[165] This holding was based on a review of *Black's Law Dictionary*, several legal treatises, and an eighteenth-century English court case, all of which supported the claim that the "right to be paid money has long been thought" to be property.[166] Viewed collectively, *Pasquantino* and *Cleveland* illustrate the principle that "any benefit which the Government derives from the [mail and wire fraud] statute[s] must be limited to *the Government's interests as property holder*."[167] That is, government as property owner is protected, but government as regulator is not.

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[161] *Id.* at 23–24. For a discussion of a mail fraud prosecution premised on a similar deprivation of intellectual property, see text accompanying notes 239–243.

[162] *Cleveland*, 531 U.S. at 25.

[163] *Id.* at 20, 22.

[164] *See Pasquantino*, 544 U.S. at 353.

[165] *Id.* at 355–56.

[166] *Id.*

[167] *Cleveland*, 531 U.S. at 26 (emphasis in original) (quoting *McNally*, 483 U.S. at 359 n.8).

Most relevant for purposes of this Comment are the methods by which the Supreme Court determined that Canada's right to excise taxes constituted "property" within the scope of the statute. As lower courts have explained, the Court's analysis in *Pasquantino* "offer[s] several potentially relevant guideposts" when conducting an analysis of alleged property.[168] Notably, the Court adopted an originalist lens while conducting this inquiry and attempted to determine if Canada's interest was "'property' as that term ordinarily [was] employed."[169] In answering this question, the Court turned to the 1951 edition of *Black's Law Dictionary*—an edition published contemporaneously with, but predating, the passage of the wire fraud statute in 1952.[170] The Court also reviewed common law sources, including Blackstone's *Commentaries on the Laws of England*.[171] Finally, the Court contrasted the facts of this case from those in *Cleveland*, where the state was not deprived of any money.[172] This analysis, along with a similar analysis in *Carpenter*, provides the starting point for lower courts when conducting the traditional property-interest inquiry: contemporaneous dictionary definitions, prior case law, and "traditional attributes of property."[173]

4. *Ciminelli v. United States*.

During the 2022 Term, the Supreme Court rejected the right-to-control theory of property. In *Ciminelli*, the Supreme Court considered the conviction of Louis Ciminelli for his role in the "Buffalo Billion" bid-rigging scandal.[174] Buffalo Billion was a billion-dollar government initiative aimed at stimulating development in upstate New York.[175] The program was administered by the Fort Schuyler Management Corporation, a nonprofit organization.[176] Ciminelli and his two coconspirators, a lobbyist and a

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168 *Abdelaziz*, 68 F.4th at 35.

169 *Pasquantino*, 544 U.S. at 356.

170 *See id.* (citing *Property*, BLACK'S LAW DICTIONARY (4th ed. 1951)); *see also supra* Part I.B.

171 *Pasquantino*, 544 U.S. at 356 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 153–55 (1768) (classifying a right to sue on a debt as personal property); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *351 (1827) (same)).

172 *See id.* at 356–57.

173 *Abdelaziz*, 68 F.4th at 35.

174 *See Ciminelli*, 598 U.S. at 309–11.

175 *Id.* at 309.

176 *Id.*

member of Fort Schuyler's board of directors, colluded to set qualifications for "preferred developers" in such a manner that only Ciminelli's construction company, LPCiminelli, would qualify, "effectively guarantee[ing]" his company would be selected for the program's development contracts.[177] As a result, LPCiminelli was selected for the $750 million "Riverbend project" in Buffalo, New York.[178]

After the scheme came to light, Ciminelli was charged with wire fraud and conspiring to commit wire fraud.[179] At trial, the district court instructed the jury that property includes "intangible interests such as the right to control the use of one's assets."[180] Since the deprivation of "potentially valuable economic information that [one] would consider valuable in deciding how to use its assets" would impair the "right to control . . . one's assets," withholding such information would be sufficient to support a wire fraud conviction.[181] This instruction was consistent with the Second Circuit's right-to-control doctrine, and Ciminelli was found guilty on all counts based on the theory that he withheld valuable economic information from Fort Schuyler during the bidding process.[182]

The Supreme Court reversed the Second Circuit, holding the right-to-control theory strayed too far from "traditional property interests" to form the basis for a mail or wire fraud conviction.[183] Notably, despite relying on the theory below, the government conceded before the Supreme Court that the right-to-control theory was insufficient to sustain the conviction on its own.[184] The Court agreed, criticizing the Second Circuit's failure to justify the theory by reference to "traditional property notions."[185] Additionally, the Court found the doctrine's potential to expand federal jurisdiction into areas traditionally governed by state law to be inconsistent

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177 *Id.* at 310.

178 *Id.*

179 *Ciminelli*, 598 U.S. at 310.

180 *Id.* at 311.

181 *Id.*

182 *Id.*

183 *Id.* at 316.

184 *Ciminelli*, 598 U.S. at 316 ("The Government frankly admits that, 'to the extent that language in the [Second Circuit's] opinions might suggest that depriving a victim of economically valuable information, without more, necessarily qualifies as "obtaining money or property" within the meaning of the fraud statutes, that is incorrect.'").

185 *Id.* at 314–15.

with federalism principles "[a]bsent [a] clear statement by Congress."[186] Finally, the Court conceptualized the doctrine as authorizing convictions under intangible, nonproperty rights theory foreclosed by *McNally*.[187] The Court ended with the following summation:

> In sum, the wire [and mail] fraud statute[s] reach[ ] only traditional property interests. The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. Accordingly, the right-to-control theory cannot form the basis for a conviction under the federal [wire and mail] fraud statutes.[188]

Ciminelli makes clear that property must not be defined at too high a level of abstraction. Under the right-to-control theory, "property" was broadly defined to include the right to control an asset. This impermissibly added a layer of abstraction on top of traditional notions of property—transforming an "attribute[ ] of owning [a] thing" into property in its own right.[189] This stretched the term property too far.[190] As the Court explained, "the right to information necessary to make informed economic decisions, while perhaps useful for protecting and making use of one's property, has not *itself* traditionally been recognized as a property interest."[191]

5. *United States v. Guertin*.

As mentioned above, in the wake of *McNally* and *Skilling*, prosecutors have looked for "money or property" hooks in cases they would have previously prosecuted under an honest-services or intangible-rights theory of fraud.[192] One prominent alternative basis is the so-called "salary maintenance" theory of fraud. The genesis, or at least the popularization, of this prosecutorial theory appears to be Justice John Paul Stevens's dissent in *McNally*, where he argued that breaches of an employee's duty of honest

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186 *Id.* at 315–16 (quoting *Cleveland*, 531 U.S. at 27).

187 *Id.* at 315.

188 *Id.* at 316.

189 Park, *supra* note 22, at 175.

190 *See Ciminelli*, 598 U.S. at 315 ("Because the theory treats mere information as the protected interest, almost any deceptive act could be criminal.").

191 *Id.* at 314 n.4 (emphasis added).

192 *See, e.g.*, United States v. Goodrich, 871 F.2d 1011, 1012–13 (11th Cir. 1989) (discussing a superseding indictment, made in the wake of *McNally*, replacing an honest-services mail fraud charge with a money or property charge resting on, inter alia, the deprivation of salaries paid to various allegedly bribed governmental personnel); *see also* Cole, *supra* note 19, at 447–51.

services likely deprive an employer of money in the form of employee salary.[193] Under this theory, employees who engage in workplace misconduct—thereby depriving their employer of their honest services—can be charged with property-based mail or wire fraud.

In *Guertin*, the D.C. Circuit was faced with, and rejected, one such prosecutorial theory. The defendant in *Guertin* was a Foreign Service Officer at the U.S. Department of State who had allegedly made several material misrepresentations on his background check, including failing to disclose a sexual relationship with a Chinese national whose visa he adjudicated and misrepresenting his financial situation.[194] However, rather than being charged under 18 U.S.C. § 1001, which prohibits making false statements to the government, the defendant was charged with wire fraud and obstruction of an official proceeding.[195] The wire fraud charge was premised on the claim that the defendant sought to deprive the State Department of property in the form of "maintaining his State Department employment and salary."[196]

The district court rejected this salary maintenance theory of wire fraud, relying heavily on the statutory language requiring that money or property be "obtain[ed]" to constitute a violation.[197] As the defendant was charged with "maintaining" his salary rather than "obtaining" something new, such as landing a new job or promotion, the indictment was dismissed for failing to state an offense.[198] On appeal, the D.C. Circuit affirmed the dismissal.[199] The appellate court emphasized that the prosecutor's theory impermissibly revives honest-services theories of fraud foreclosed by *McNally* and *Skilling*.[200] As the Foreign Service was not deprived

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193 *See McNally*, 483 U.S. at 377 n.10 (Stevens, J., dissenting) ("When a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer—who is not getting what he paid for.").

194 *Guertin*, 67 F.4th at 447.

195 *Id.* at 447–48, 453.

196 *Id.* at 448.

197 *See* United States v. Guertin, 581 F. Supp. 3d 90, 92–94 (D.D.C. 2022), *aff'd*, 67 F.4th 445 (D.C. Cir. 2023); *see also* 18 U.S.C. § 1343.

198 *See Guertin*, 581 F. Supp. 3d at 92–94, 96. The district court's opinion favorably and extensively cites *United States v. Yates*, a Ninth Circuit case that rejected a salary maintenance theory in an analogous bank fraud case. *See* 16 F.4th 256, 266–68 (9th Cir. 2021).

199 *See Guertin*, 67 F.4th at 449–52.

200 *See id.* at 451–52.

of its "benefit of [the] bargain" (i.e., its employees' labor), the defendant's lie "merely deprives the employer of honesty . . . which cannot serve as the predicate for a wire fraud conviction."[201]

B. Property in Hobbs Act Prosecutions

In addition to the mail and wire fraud statutes, the scope of the term "property" as defined by a related federal statute, the Hobbs Act,[202] has also generated substantial controversy. The Hobbs Act is the federal antiextortion statute, which prohibits "*the obtaining of property* from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[203] Notably, for purposes of this Comment, cases interpreting the scope of property in the Hobbs Act have often cited the Supreme Court's mail and wire fraud jurisprudence.[204] Similarly, several courts have found that the Hobbs Act jurisprudence provides guidance when examining the scope of property in the mail and wire fraud context.[205] Admittedly the statutory language in the Hobbs Act is not identical to the text of the mail and wire fraud statutes[206] and, as such, their scope is not necessarily coterminous.[207] Nevertheless, the Supreme Court's Hobbs Act jurisprudence usefully supplements the Court's analysis of property in the mail and wire fraud statutes given the similarly worded statutes have faced similar judicial concerns of overcriminalization.[208]

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[201] *Id.* at 451.

[202] 18 U.S.C. § 1951.

[203] *Id.* (emphasis added).

[204] *See, e.g.*, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 402, 415 (2003) (citing *Carpenter*); Sekhar v. United States, 570 U.S. 729, 737, 740–41 (2013) (citing *Cleveland*).

[205] *See Alsugair*, 256 F. Supp. 2d. at 311–12 (holding, based on *Scheidler*, that a defendant must "obtain[ ] money or property" as part of a mail fraud scheme and citing cases holding similarly).

[206] *Compare* 18 U.S.C. § 1951 (defining "extortion," in relevant part, as "the obtaining of property from another"), *with* 18 U.S.C. § 1341, 1343 (defining mail and wire fraud, in relevant part, as a "scheme or artifice to defraud, or for obtaining money or property").

[207] *See Sekhar*, 570 U.S. at 741 (Alito, J., concurring) ("I do not suggest that the concepts of property under the mail fraud statute and the Hobbs Act are necessarily the same.").

[208] *See, e.g.*, United States v. Enmons, 410 U.S. 396, 411 (1973) ("Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended . . . such an unprecendented [sic] incursion into the criminal jurisdiction of the States.").

In a leading case, *Scheidler v. National Organization for Women, Inc.*,[209] the Supreme Court was faced with the question of what constitutes "property" under the Hobbs Act. The case involved a civil claim against a group of antiabortion organizations accused of engaging in racketeering activities in violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act[210] for their conduct in attempting to "shut down" abortion clinics.[211] Specifically, the plaintiff-respondents alleged that the antiabortion groups participated in acts of extortion prohibited by the Hobbs Act that, when combined, constituted a RICO violation.[212]

The Supreme Court acknowledged the antiabortion groups committed various criminal acts but held that the Hobbs Act had not been violated. Specifically, while the antiabortion groups' trespasses and threats against abortion clinic workers were criminal, they did not violate the Hobbs Act because they did not "obtain" any of the plaintiff-respondents' property.[213] The Court further clarified that property within the scope of the Hobbs Act must be "'something of value from' [the victim] that [the defendant] could exercise, transfer, or sell."[214] "[M]erely interfering with" someone's property, as the antiabortion group did, is insufficient to "obtain" property.[215] Therefore, the judgement against the antiabortion groups was reversed.[216]

This obtainability requirement has since been reaffirmed in a subsequent Supreme Court case, *Sekhar v. United States*.[217] In *Sekhar*, the defendant attempted to blackmail the general counsel of the New York State Comptroller into recommending the

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209 537 U.S. 393 (2003).

210 18 U.S.C. §§ 1961–1968.

211 *Scheidler*, 537 U.S. at 397–98.

212 *Id.* at 398.

213 *Id.* at 404–05. The plaintiff-respondents had alleged the "right to control the use and disposition of an asset is property, [and] petitioners, who interfered with, and in some instances completely disrupted, the ability of the clinics to function, obtained or attempted to obtain respondents' property." *Id.* at 401.

214 *Id.* at 405 (quoting *United States v. Nardello*, 393 U.S. 286, 290 (1969)).

215 *Scheidler*, 537 U.S. at 405. In many ways, this holding follows the same logic as *Ciminelli*. Interference with an owner's right to control an asset is not the same as obtaining a property right from the owner—regardless of whether the interference comes in the form of misrepresentation or threat. *Compare Ciminelli*, 598 U.S. at 314 n.4 ("[T]he right to information necessary to make informed economic decisions, while perhaps useful for protecting and making use of one's property, has not itself traditionally been recognized as a property interest."), *with Scheidler*, 537 U.S. at 405 ("Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property.").

216 *Scheidler*, 537 U.S. at 410–11.

217 570 U.S. 729 (2013).

state pension invest in the defendant's fund.[218] The defendant was convicted at trial after the jury found the general counsel's "recommendation to approve the [investment]" constituted extorted property.[219] The Supreme Court reversed this conviction, holding that the recommendation was not obtainable property within the scope of the Hobbs Act.[220] While the defendant had attempted to force the general counsel to make a favorable recommendation, the defendant had not attempted to acquire any property right in, or to make, the recommendation.[221] The opinion went on to reaffirm the so-called *Scheidler* principle; Hobbs Act property must be something that can be "exercised, transferred, or sold."

* * *

The Supreme Court has been clear: only traditional property interests are protected by the mail and wire fraud statutes. But despite this explicit instruction, lower courts have struggled to define the outer boundaries of protected property. Thankfully, a review of the Supreme Court's property-fraud case law provides a few guardrails for this otherwise amorphous inquiry. First, there is no tangibility requirement. Second, frauds in which the government is deceived are only proscribed if the government is harmed as a property owner. Third, property must not be defined at such a high level of abstraction that all forms of deception become criminal. Finally, the Hobbs Act jurisprudence clarifies that property must be "something of value from the victim that can be exercised, transferred, or sold."[222]

III. DERIVING A UNIVERSAL TEST

As discussed in Part II, the guidance from the Supreme Court on the scope of property has largely been high-level, such as the oft-repeated dictate that "federal fraud statutes criminalize only

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218 *See id.* at 730–31.

219 *Id.* at 737.

220 *Id.* The opinion frames the obtainability requirement as a question of whether the property in question is "transferable." *Id.* at 734 (emphasis omitted). However, this appears to be merely a semantic, rather than a substantive, distinction. *See Sekhar*, 570 U.S. at 736–37 ("*Scheidler* rested its decision, as we do, on the term 'obtaining.'").

221 *See id.* at 737–38 (noting it is unclear what property exactly the defendant was alleged to have obtained for himself).

222 *Id.* at 736.

schemes to deprive people of *traditional property interests*."[223] Without more detailed guidance, lower courts face a difficult task when attempting to apply the Court's traditional property interests test. In *Abdelaziz*, for example, the district court instructed the jury that admission slots are property for purposes of the mail and wire fraud statutes based on analogous persuasive precedent.[224] However, on appeal, this analysis was deemed insufficient. "[M]uch more detail, both legal and factual," the First Circuit proclaimed, would be needed to justify such an instruction, such as evidence that "dictionaries, case law, treatises, or other legal sources establish that similar interests are treated as property."[225] But prior case law can only aid a court if the cited case undertook an analysis "ground[ing]" the prior interest at issue "in traditional property notions"[226] and the dictionaries referenced by the Supreme Court are not of much use in most cases given their expansive definitions of property.[227]

Aiming to put some flesh on this rather bare-bones standard, several attempts have been made to create a more comprehensive test defining property in the mail and wire fraud statutes.[228] However, no test has received general adoption, resulting in lingering uncertainty over the scope of the statutes. This uncertainty creates a serious constitutional vagueness problem, as "the Constitution's promise of due process does not tolerate that kind of uncertainty in our laws—especially when criminal sanctions loom."[229] Additionally, the legal uncertainty surrounding the

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[223] *Ciminelli*, 598 U.S. at 309 (emphasis added); *see also Cleveland*, 531 U.S. at 24 ("We reject the Government's theories of property rights . . . because they stray from traditional concepts of property."); *Pasquantino*, 544 U.S. at 356 ("The right to be paid money has long been thought to be a species of property.").

[224] *See* United States v. Sidoo, 468 F. Supp. 3d 428, 441 (D. Mass. 2020), *rev'd sub nom. Abdelaziz*, 68 F.4th 1.

[225] *Abdelaziz*, 68 F.4th at 34–35.

[226] *Ciminelli*, 598 U.S. at 314–15 (criticizing the Second Circuit's right-to-control case law for failing to "establish[ ]" potentially valuable economic information was a "traditionally recognized property interest").

[227] *See, e.g.*, *Property*, BLACK'S LAW DICTIONARY (4th ed. 1951) ("[Property] is also commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible.").

[228] For a discussion of previous judicial attempts to craft a universal definition, see *infra* Part III.A. There has also been some scholarly exploration of this topic, but nothing incorporating more recent Supreme Court decisions. *See generally* Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683; Craig M. Bradley, *Foreword: Mail Fraud After* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573 (1988).

[229] Percoco v. United States, 598 U.S. 319, 333 (Gorsuch, J., concurring).

fraud statutes' scope likely impacts the deterrence value and social impact of the mail and wire fraud statutes.[230] When coupled with the perception that the Supreme Court is sympathetic to white-collar defendants[231] and the rule of lenity,[232] rational would-be white-collar criminals might figure their chance of facing punishment is minimal, and, as such, choose to engage in more fraudulent schemes. This concern is particularly acute given the mail and wire fraud statutes' role as the "first line of defense" against innovative fraudulent schemes.[233]

Given the need to provide a more workable standard and resolve some of the legal uncertainty surrounding the scope of "property," this Part develops a new test to guide the resolution of future property-based disputes. The proposed hallmarks-of-property test draws heavily from the common law sources used by the Supreme Court in its mail and wire fraud jurisprudence as well as from Hobbs Act case law addressing property in the extortion context. In doing so, the hallmarks-of-property test avoids sweeping too broadly—as prior unsuccessful attempts to define property have—while retaining sufficient flexibility to deter "the ever-inventive American 'con artist.'"[234]

This Part will proceed in three sections. Part III.A discusses previous judicial attempts to create a universal definition of "property" within the scope of the mail and wire fraud statutes. Part III.B builds on these earlier efforts and proposes a hallmarks-of-property test, focusing attention on whether a given interest is (1) economically valuable, (2) obtainable, (3) exclusive, and (4) nonregulatory. Finally, Part III.C applies the hallmarks-of-property test to the fact patterns in *Abdelaziz* and *Guertin* to demonstrate how the test would work in practice.

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230 The decision to undertake white-collar crime is generally understood to be calculated and, as such, is a "prime candidate[ ] for general deterrence." United States v. Arroyo, 75 F.4th 705, 708 (7th Cir. 2023) (quoting United States v. Brown, 880 F.3d 399, 405 (7th Cir. 2018)).

231 *See, e.g.*, Streisand & Farhat, *supra* note 40.

232 The rule of lenity is a canon of statutory interpretation stating that ambiguity in criminal laws should be interpreted in the manner most favorable to the defendant. *See Cleveland*, 531 U.S. at 25 ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." (quoting Rewis v. United States, 401 U.S. 808, 812 (1971))).

233 United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

234 *Id.* at 407.

A. Previous Unsuccessful Attempts to Create a Universal Test

Despite the uncertainty surrounding the scope of mail and wire fraud property, a review of the case law identified only two instances where courts have addressed a proposed universal definition of protected property. Most recently, in *Abdelaziz*, the First Circuit considered the government's proposed two-part test that an interest must satisfy to be considered property within the scope of the mail and wire fraud statutes: (1) "exclusivity" and (2) "economic value."[235] The government referred to these two factors as "the primary traditional hallmarks of property."[236]

The First Circuit was unpersuaded by this proposed test. The court found the test "too broad" because several interests which would satisfy the government's test had previously been held to "fall outside the statutes' scope" by the Supreme Court or other appellate courts.[237] In particular, the court noted that the intangible right to honest services would appear to satisfy this test of property rights: the entity to which honest services were owned (for example, a corporate entity) has the exclusive right to honest services, the deprivation of which "plainly held economic value."[238]

Similarly, in *United States v. Alsugair*[239] the district court identified the "hallmarks of traditional property" as (1) "exclusivity" and (2) "transferability" in a notable mail fraud opinion.[240] Using this framework, the court evaluated the alleged deprivation of various property interests as part of a scheme where imposters took an English language proficiency exam on behalf of the defendant's foreign student clients.[241] The court rejected the government's arguments that "scoring services" constituted property, but found the alleged deprivation of a testing company's trademark and business goodwill constituted a cognizable property

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[235] *Abdelaziz*, 68 F.4th at 36 (first citing *Carpenter*, 484 U.S. at 26–27, and then citing *Pasquantino*, 544 U.S. at 355–57).

[236] *Id.*

[237] *Id.*

[238] *Id.* at 37. The court also cited *United States v. Sadler*, 750 F.3d 585, 591 (6th Cir. 2014) (holding that the "right to accurate information" did not constitute a covered property right), and *United States v. Bruchhausen*, 977 F.2d 464, 467–68 (9th Cir. 1992) (holding that the right to control the "destination of [its] products after sale" did not constitute a covered property right), as additional examples of interests that would satisfy the government's test but have been determined to be outside the scope of property by other courts of appeals. *Abdelaziz*, 68 F.4th at 37–38.

[239] 256 F. Supp. 2d 306 (D.N.J. 2003).

[240] *Id.* at 313.

[241] *Id.* at 309–10.

right.[242] The testing service had the exclusive right to its trademark (and the associated goodwill) and exploitation of the mark by the defendants transferred some of the value of the goodwill and mark into their own hands.[243]

While the *Alsugair* framework remains good law and could serve as persuasive precedent to a court analyzing a similar edge case, its reasoning has not been widely adopted—not even within the Third Circuit.[244] Additionally, this framework suffers from the same defect as the government's test in *Abdelaziz*: overbreadth. For example, nearly all government licenses—including the poker licenses *Cleveland* held to be outside of the mail and wire fraud statutes' scope—would impermissibly satisfy the *Alsugair* framework, as the government has the exclusive right to issue the licenses and the licenses are transferable.

B. The Hallmarks-of-Property Test

After a thorough review of the case law detailed in Part II and an analysis of the shortfalls of the previously proposed tests in Part III.A, a few guiding principles become clear. This Part consolidates these principles into a multifactor hallmarks-of-property test,[245] which aims to provide guidance to courts addressing the scope of "property" within the mail and wire fraud statutes.

First, cognizable property must have economic value in the hands of the victim. This requirement is grounded in the Supreme Court's decision in *Pasquantino*, where the Court used *Black's Law Dictionary* as an aid in determining that unpaid excise taxes constituted property.[246] *Black's* defines property as "extend[ing] to every species of *valuable* right and interest."[247] This prong of the test is also consistent with the Court's dictate that the "money or property" clause of the mail and wire fraud statutes be read in

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[242] *Id.* at 314–17.

[243] *See id.* at 316–17.

[244] A review of cases where *Alsugair* is cited identified only one case where the district court's property framework is favorably referenced. *See* Dent v. State, 125 So. 3d 205, 208–09 (Fla. Dist. Ct. App. 2013) (evaluating the scope of property in a state law analog to the federal wire fraud statute using the *Alsugair* framework).

[245] This nomenclature is based the parties' agreement in *Abdelaziz* that "[i]ntangible rights can qualify [as property] . . . if they have historically been treated as property or bear its traditional *hallmarks*." 68 F.4th at 35 (alterations in original) (emphasis added).

[246] *Pasquantino*, 544 U.S. at 356 (citing the definition of property in the 1951 edition of *Black's Law Dictionary*).

[247] *Id.* (alteration in original) (emphasis added). The Court appears to have selected the 1951 version of *Black's Law Dictionary* so as to be contemporaneous with the passage of the wire fraud statute in 1952. *See supra* Part I.B.

conjunction with the statutes' other fraud-targeting clauses.[248] As such, the common law understanding of "to defraud," which "usually signif[ies] the deprivation of *something of value* by trick, deceit, chicane or overreaching," counsels in favor of an economic value prong.[249]

Practically speaking, economic value can be established where the property in question has more than a de minimis value. This concept is best seen in *United States v. Hedaithy*.[250] In *Hedaithy*, the defendants participated in a scheme where an imposter took an English proficiency exam on the defendants' behalf and a coconspirator doctored the resulting score reports in order to qualify the defendants for foreign student visas.[251] The court rejected a de minimis challenge to the sufficiency of the alleged property interest—the score reports—in part on the basis that the reports were the "physical embodiment" of the testing company's business goodwill.[252] As a result, the sixty score reports "exceed[ed] any potential *de minimis* threshold that may be required by the mail fraud statute."[253]

On the other hand, this prong does provide a meaningful limitation on prosecutorial theories that attempt to creatively avoid the other prongs of the test. For example, courts have rejected attempts to evade the restrictions on regulatory interests by reference to physical pieces of paper they are printed on—deeming them "plainly inconsequential" and "de minimis as a matter of law."[254] This limiting principle would also apply to end runs around post-*Skilling* honest-services fraud, in the vein of salary maintenance theories of liability, that rely on minor misuses of employer resources.[255]

Second, cognizable property must be obtainable. That is, property-based prosecutorial theories must allege the scheme targeted a property interest capable of being "obtained" by the

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[248] *See McNally*, 483 U.S. at 358–60.

[249] *Id.* at 358 (emphasis added) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

[250] 392 F.3d 580 (3d Cir. 2004).

[251] *Id.* at 582.

[252] *Id.* at 599–600.

[253] *Id.* at 600.

[254] United States v. Schwartz, 924 F.2d 410, 418 (2d. Cir. 1991).

[255] *See, e.g.*, United States v. Yates, 16 F.4th 256, 267–68 (9th Cir. 2021) (discussing, and ultimately rejecting, potential wire fraud liability for a lazy "Internet-surfing employee").

defendant. This prong is primarily rooted in the Hobbs Act jurisprudence discussed above.[256] Notably, both the Hobbs Act and the mail and wire fraud statutes contain language criminalizing illicit efforts aimed at, inter alia, "obtaining . . . property."[257] As such, it makes sense to interpret the obtaining language in the mail and wire fraud statutes similarly. Therefore, a cognizable property interest must be capable of being "exercised, transferred, or sold."[258]

The obtainability requirement, while not described as such in mail and wire fraud jurisprudence, can be seen operating in the background in the recent *Ciminelli* decision. Consider the parallels between *Scheidler*, the Hobbs Act case finding antiabortion protestors did not "obtain" any of the abortion clinics' property,[259] and *Ciminelli*, the bid-rigging conviction premised on the right-to-control theory.[260] In both instances, the prosecutorial theory of the case rested on the deprivation of the "alleged property right of exclusive control of [ ] business assets."[261] And, in both cases, the Court rejected classifying the right to control an asset as a property interest in its own right.[262] The unifying principle is clear: the deprivation, due to either threats or deception, of the fully informed and unimpeded use of property—while normatively bad and likely punishable under state law—does not result in the *obtaining* of any property that can be exercised, transferred, or sold.

Admittedly, importing the *Scheidler* test from Hobbs Act jurisprudence is less supported by the case law than the other prongs of this test.[263] For example, in 2017, the Second Circuit rejected importing *Scheidler*'s obtainability requirement over to

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[256] *See supra* Part II.B.

[257] 18 U.S.C. §§ 1341, 1343, 1951.

[258] *Sekhar*, 570 U.S. at 736.

[259] *See supra* Part II.B.

[260] *See supra* Part II.A.4.

[261] *Scheidler*, 537 U.S. at 405; *see Ciminelli*, 598 U.S. at 311 ("[T]he District Court instructed the jury that the term 'property' in § 1343 'includes intangible interests such as the right to control the use of one's assets.'").

[262] *See Ciminelli*, 598 U.S. at 314 n.4 ("[T]he right to information necessary to make informed economic decisions, while perhaps useful for protecting and making use of one's property, has not itself traditionally been recognized as a property interest."); *Scheidler*, 537 U.S. at 405 ("Petitioners may have deprived or sought to deprive respondents of their alleged property right of exclusive control of their business assets, but they did not acquire any such property.") .

[263] *But see Alsugair*, 256 F. Supp. 2d. at 311–12 (holding a defendant must "obtain[ ] money or property" as part of a mail fraud scheme, and citing cases holding similarly).

the mail and wire fraud context.[264] But the Second Circuit's rejection of the *Scheidler* test came in the context of a challenge to jury instructions based on the right-to-control theory[265]—a theory now thoroughly rejected by the Supreme Court in *Ciminelli*. Despite a lack of definitive case law, this prong's strong textual support cannot be ignored. Further, the exchange of property concepts between the Hobbs Act and the mail and wire fraud jurisprudence is consistent with Supreme Court's references to mail and wire fraud case law in *Scheidler* and *Sekhar*.[266]

Third, cognizable property rights must be exclusive. As the Supreme Court has stated, the "right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[267] This prong is further supported by the 1910 edition of *Black's Law Dictionary*, which defines property as "the unrestricted and *exclusive* right to a thing."[268]

The significance of this requirement is best illustrated by the Supreme Court's decision in *Carpenter*, where the deprivation of the exclusive right to confidential information formed the basis of a mail fraud conviction.[269] In contrast, consider the nonconfidential business information contained in the published "Heard on the Street" columns. This information appears to satisfy the other prongs of the hallmarks-of-property test (i.e., economically valuable, can be traded on, and nonregulatory). However, the *Wall Street Journal* does not retain a property right in the factual information contained in the published column.[270] Here, exclusivity defines the scope of protected property—confidential business information is property; public information is not.

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[264] *See* United State v. Finazzo, 850 F.3d 94, 105–07 (2d Cir. 2017). Other circuits have also rejected similar arguments. *See, e.g.*, *Hedaithy*, 392 F.3d at 602; United States v. Welch, 327 F.3d 1081, 1108 (10th Cir. 2003).

[265] *See Finazzo*, 850 F.3d at 105.

[266] *See Scheidler*, 537 U.S. at 402 (citing *Carpenter*, 484 U.S. at 27); *id.* at 415 (Stevens, J., dissenting) (citing *Carpenter*, 484 U.S. 19); *Sekhar*, 570 U.S. at 737 (citing *Cleveland*, 531 U.S. at 20–22); *id.* at 740–41 (Alito, J., concurring in judgment) (citing *Cleveland*, 531 U.S. at 15).

[267] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 673 (1999) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

[268] *Property*, BLACK'S LAW DICTIONARY (2d ed. 1910) (emphasis added). Given wire and mail fraud's coterminous scope, a dictionary contemporaneous with the mail fraud's 1909 amendment, during which the "money or property" clause was first added, appears to be the most relevant. *See supra* Part I.A.

[269] *See Carpenter*, 484 U.S. at 26–28 (1987).

[270] *Cf.* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 347–48 (1991) (discussing the inability to copyright factual information).

Fourth and finally, cognizable property must be nonregulatory when the victim of the scheme is the government. This principle is derived from the holding of *Cleveland* and sets the government apart from other victims.[271] As the Court discussed in *Cleveland*, the decision to issue and allocate regulatory licenses is inherently different from the decision of a franchisor to license its intellectual property to franchisee.[272] The government's ability to issue a license is an exercise of its sovereign powers. This stands in stark contrast with the franchisor's ability to license, which comes from the development of business goodwill and trademark rights through the investment of time and capital.[273] While this exception to the general rule might seem like a loophole for white-collar criminals to exploit, it is important to remember that other criminal statutes outside of mail and wire fraud generally prohibit lying to the government in the licensing and regulatory contexts.[274]

C. Application of the Hallmarks-of-Property Test to *Abdelaziz* and *Guertin*

As an illustrative case study, this Section re-evaluates the holdings of *Abdelaziz* and *Guertin* using the hallmarks-of-property test proposed above. In *Abdelaziz*, the defendants were charged with making payments securing admission at USC for their nonathlete children as athletic recruits.[275] Despite persuasive precedent indicating otherwise, the First Circuit held the "admission slots" at issue were not property within the scope of the mail and wire fraud statutes.[276] Applying the hallmarks-of-property test, however, suggests a different result. Conversely, in *Guertin*, the hallmarks-of-property test aligns with the D.C. Circuit's holding that salary-maintenance theories of mail and wire fraud are not within the statutes' gamut.

Turning to *Abdelaziz*, the hallmarks-of-property test suggests that the court should have deemed the admission slots property and upheld the convictions under a property-based theory of

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[271] *See supra* Part II.A.2.

[272] *Cleveland*, 531 U.S. at 23–24.

[273] *See id*.

[274] *See, e.g.*, *id.* at 23 (noting Louisiana's ability to impose penalties under state law for making false statements in a license application); *Guertin*, 67 F.4th at 453 (noting that lying on a security questionnaire likely violates 18 U.S.C. § 1001).

[275] *See supra* text accompanying note 115.

[276] *See supra* text accompanying notes 119–123.

wire fraud. First, it is unquestionable that admission slots have economic value—the willingness of parents to pay hundreds of thousands of dollars to obtain an admission slot at USC provides direct evidence of this fact.[277] While the First Circuit described the admission slots derisively as a "mere offer to transact,"[278] the same phraseology could be applied to stock options—a commonly traded financial instrument that is almost certainly cognizable property.[279] Second, the admission slots satisfy the *Scheidler* test of obtainability. Specifically, admission slots are an interest that can be "exercised," such as when Abdelaziz's daughter utilized the slot to enroll at USC.[280] Admittedly, admission slots are not generally transferable by admission recipients, but as we are instructed in *Cleveland*, the focus of the property inquiry is the status of the interest in "the hands of the victim."[281] Defendants themselves argued that USC "regularly sold slots to anyone willing to pay."[282] This undercuts any argument to the contrary with respect to the economic value and obtainability prongs. Third, the ability to offer admission was the exclusive right of the university in the same way that the confidential business information in *Carpenter* was exclusive to the *Wall Street Journal*. Finally, as discussed in *Frost*, universities make a business decision when offering admission slots.[283] The non-regulatory nature of admission slots is particularly clear here, as USC is a private institution. Since the admission slots satisfy all the prongs of the hallmarks-of-property test, they should be considered a cognizable form of property protected against schemes to defraud by the federal mail and wire fraud statutes.

The First Circuit also faulted the government for failing to consider the various subcategories of university admission slots,

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[277] *Abdelaziz*, 68 F.4th at 15 (noting Abdelaziz paid $300,000 for the admission services provided by Signer).

[278] *Id.* at 38.

[279] *See* James Chen, *What Are Stock Options? Parameters and Trading, with Examples*, INVESTOPEDIA (Sept. 29, 2023) https://perma.cc/PB8N-8BEN (defining a stock option as "the right, but not the obligation, to buy or sell a stock at an agreed-upon price and date"). Other financial instruments have been recognized as property within the scope of the mail and wire fraud statutes. *See* United States v. Wallach, 935 F.2d 445, 462 (2d Cir. 1991), *abrogated on other grounds by Ciminelli*, 598 U.S. 306 ("[O]wnership of stock in [a] corporation is [ ] a property interest."); United States v. St. Gelais, 952 F.2d 90, 92–93 (5th Cir. 1992) (affirming a wire fraud conviction premised on scheme to fraudulently obtain surety bonds).

[280] *Abdelaziz*, 68 F.4th at 15; *Scheidler*, 537 U.S. at 405.

[281] *Cleveland*, 531 U.S. at 15.

[282] Brief for the United States at 76, *Abdelaziz*, 68 F.4th 1 (1st Cir. 2023) (No. 22-1129).

[283] *Frost*, 125 F.3d at 367.

such as "early admission, rolling admission, conditional admission, waiting-list admission, and deferred admission."[284] Admittedly, there might be a meaningful distinction with respect to waiting-list and conditional admission slots that cannot be unilaterally exercised and, therefore, likely fail the obtainability prong of the hallmarks-of-property test. Wait-list and conditional admission also appear to fail the economic value prong given their value is conditioned on the university—not the holder—excising the option. However, it is unclear if there is any meaningful distinction between the other subcategories of admission slots with respect to satisfying the hallmarks-of-property test. Most importantly, any overbreadth issues with the categorical pronouncement by the district court in *Abdelaziz* that admission slots are property would appear to be a harmless error because the defendants did not obtain waitlist or conditional admission slots.

Moving on to *Guertin*, the hallmarks-of-property test is consistent with the D.C. Circuit's rejection of the salary-maintenance theory of property-based fraud. Recall that the defendant in *Guertin* was a Foreign Service officer charged with lying on his background checks in order to maintain his State Department employment and salary.[285] Significantly, the defendant's actions only served to "maintain" his employment rather than to "obtain" employment by deceit. While this distinction could be viewed as merely semantic, it is important to note that the State Department was not deprived in any meaningful way of its employee's labor—in fact, the defendant performed his assigned tasks in such a manner as to receive "glowing performance reviews."[286] As such, the only potential property interest lost by the State Department was information about its employee. But potentially valuable information does not, standing alone, constitute property within the scope of the mail and wire fraud statutes.[287] Such information appears to fail several of the prongs of the hallmarks-of-property test. Specifically, the economic value is highly speculative (given his otherwise stellar performance reviews) and the government's "core concern" with respect to the information is almost certainly regulatory.[288]

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[284] *Abdelaziz*, 68 F.4th at 34.

[285] *See supra* text accompanying notes 188–190.

[286] *Guertin*, 67 F.4th at 452.

[287] *See Ciminelli*, 598 U.S. at 315–16.

[288] *Cleveland*, 531 U.S. at 20.

As these examples illustrate, the hallmarks-of-property test provides a useful framework for working through the edge cases bedeviling lower courts. This test allows for the statutes to continue to be a flexible tool in the battle with innovative white-collar criminals. But critically, as the analysis of *Guertin* illustrates, the test also restrains the government's ability to creatively charge rejected honest-services theories—ensuring compliance with Supreme Court's instruction that mail and wire fraud only reach traditional property interests.

CONCLUSION

As Justice Neil Gorsuch recently noted, the uncertainty surrounding the scope of the mail and wire fraud statutes "leave[s] people with no sure way to know what consequences will attach to their conduct."[289] This uncertainty is both under- and over-inclusive—unwary defendants charged under aggressive theories of property-based fraud are unlikely to have understood the potential consequences of their actions, while well-heeled, would-be fraudsters are unlikely to be deterred from undertaking white-collar crimes. The stakes are further heightened by the sweeping reach of the mail and wire fraud statutes and their role as the "first line of defense" against new forms of fraudulent activity.[290]

This Comment attempts to address this legal uncertainty by organizing the disjoined mail and wire fraud case law and proposing the hallmarks-of-property test. Focusing attention on whether a given interest is (1) economically valuable, (2) obtainable, (3) exclusive, and (4) nonregulatory gives structure to the currently amorphous and unsettled "traditional property interest" analysis. Using this framework, courts will be able to evaluate creative prosecutorial theories of property-based fraud in a more consistent and predictable manner—minimizing concerns of unconstitutional vagueness while still providing appropriate deterrence to the "the ever-inventive American 'con artist.'"[291]

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[289] Percoco v. United States, 598 U.S. 319, 333 (Gorsuch, J., concurring) (quoting United States v. Davis, 139 S. Ct. 2319, 2323 (2019)).

[290] United States v. Maze, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

[291] *Id.* at 407.