Dupes and Losers in Mail Fraud

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INTRODUCTION

Are practical jokes punishable under the federal mail fraud statute? Imagine that person A invites person B to a surprise party for their mutual friend C. A mails B an invitation, and B drives his automobile to the location specified in the invitation. But the joke is on B—there is no party, and B loses the value of the fuel spent driving his automobile to the location of the fictitious party. Most of us would think this joke is not terribly funny and perhaps a bit cruel, but no one would think it should be punished with five years in federal prison.[1] Yet the joke seems to satisfy all the elements of federal mail fraud. There was a scheme to deceive, financial loss caused by the deceit, and use of the mails in furtherance of the scheme.

In *United States v Walters*,[2] Judge Frank H. Easterbrook posed this hypothetical.[3] Many judges and commentators have noted the breadth of the federal mail fraud statute,[4] and the party hypothetical provides another vivid example of the statute's vast reach. But Judge

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1 Congress has raised the maximum punishment to twenty years. Sarbanes-Oxley Act of 2002 § 903, Pub L No 107-204, 116 Stat 804, 805, amending 18 USC §§ 1341, 1343.

2 997 F2d 1219 (7th Cir 1998).

3 Id at 1227.

4 See, for example, *Sorich v United States*, 129 S Ct 1308, 1309 (2009) (Scalia dissenting from denial of certiorari) (arguing that the Supreme Court should reevaluate the scope of 18 USC § 1346 "honest services" fraud); *United States v Margiotta*, 688 F2d 108, 139–44 (2d Cir 1982) (Winter concurring in part and dissenting in part) (noting the expansive reach of mail fraud statutes with regard to political actors); Carrie A. Tendler, Note, *An Indictment of Bright Line Tests for Honest Services Mail Fraud*, 72 Fordham L Rev 2729, 2731–50 (2004) (describing the development of honest services mail fraud and judicial efforts to limit its reach); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L Rev 505, 525 (2001) (describing expansions in mail fraud and other federal criminal statutes); John C. Coffee, Jr, *Hush!: The Criminal Status of Confidential Information after* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 Am Crim L Rev 121, 124–32 (1988) (arguing that the expansive interpretations of mail fraud are part of a broader growth of federal white collar criminal law); John C. Coffee, Jr, *The Metastasis of Mail Fraud: The Continuing Story of White Collar Crime*, 21 Am Crim L Rev 1, 4–10 (1983) (outlining the history of the mail crime offense); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duquesne L Rev 771, 773–79 (1980) (describing the flexibility of § 1341 for federal prosecutors).

Easterbrook's hypothetical did much more than that. In *Walters*, he attempted to define a limit on the scope of mail fraud that relies on the analytical structure of the fraudulent transaction. In addition, he provided a justification for placing this class of frauds beyond the scope of the federal mail fraud statute. Judge Easterbrook presented his analysis with a series of motivating examples, including the telling hypothetical of the party invitation. This Essay examines the *Walters* opinion and its limit on mail fraud, and suggests that it may have an unnoticed and wider application.

I. THE CASE AND THE DECISION

A. The Litigation

Norby Walters and Lloyd Bloom concocted a plan to become sports agents.[5] As agents, they would represent athletes in their dealings with professional sports teams in exchange for a percentage of the athletes' earnings. Fifty-eight college football players signed contracts hiring Walters and Bloom as their agents.[6] To induce the students to sign, Walters and Bloom offered them cash, cars, clothes, and other valuables.[7] But this plan had a problem. The rules of the National Collegiate Athletic Association (NCAA) prohibited student-athletes from contracting with agents to represent them and from receiving financial assistance from sources other than school-administered scholarship programs.[8] Under the NCAA rule, students were supposed to refrain from hiring agents and accepting payments from agents until they became professional athletes. Students who violated the rule would lose their eligibility to play college sports, and without college play, it would be impossible to market the students to professional teams.[9] Walters and Bloom had a solution to this problem. They dated the contracts at the end of the students' college eligibility and deposited the signed contracts in their office safe.[10] Walters was careful in developing the plan. He checked with sports attorneys at the prominent law firm of Shea & Gould as to the legality of their plan, and in the firm's opinion, it was lawful but in violation of NCAA rules.[11]

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5 *Walters*, 997 F2d at 1221.

6 Id.

7 Id.

8 *United States v Walters*, 775 F Supp 1173, 1175 (ND Ill 1991). For the current iteration of the regulations, see *2009–10 NCAA Division I Manual* Art 11.1.4 at 51, Art 16 at 195–212, online at https://www.ncaapublications.com/productdownloads/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf (visited Mar 26, 2010).

9 See *Walters*, 775 F Supp at 1175.

10 Id.

11 *Walters*, 997 F2d at 1221.

Walters and Bloom's plan soon encountered a practical problem. All but two of the players who had signed with them refused to honor their commitments upon completing their college careers.[12] Worse still, the students refused to return the cash and other goodies they had been advanced.[13] Walters and Bloom responded with threats, which included an alleged warning that a player's legs would be broken if he did not repay.[14] The government charged the pair in a seven-count indictment, alleging conspiracy, mail fraud, extortion, and racketeering.[15] The case attracted wide attention, including press speculation as to whether Walter and Bloom's activities were related to underworld figures and to the unsolved beating and slashing of a competitor sports agent.[16] At trial, a jury convicted them on six counts.[17]

They appealed. The Seventh Circuit reversed and held that the trial court erred by not instructing the jury that Walters's reliance on the advice of Shea & Gould could scotch the existence of intent to deceive. But Bloom preferred a defense strategy that did not involve waiving attorney-client privilege. This, too, made the district court's denial of Bloom's severance motion erroneous. On remand, the defendants were to be retried separately.[18] Walters moved to dismiss, arguing that the evidence presented during the first trial was insufficient to support a mail fraud conviction. When the district court denied his motion, Walters entered a conditional *Alford* plea.[19] In exchange for the government's dropping the racketeering charge and returning the property forfeited because of the racketeering conviction, Walters pleaded guilty to mail fraud while preserving his right to challenge the sufficiency of the evidence.[20]

B. The Mailing Requirement

The appeal came before a Seventh Circuit panel on which Judge Easterbrook sat. It presented two challenges to the adequacy of the evidence of mail fraud: whether the use of the mails was sufficiently connected to the scheme to defraud, and whether the scheme was de-

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12 Id.
13 Id.
14 Id.
15 *Walters*, 775 F Supp at 1174.
16 See, for example, Bruce Selcraig, *The Deal Went Sour*, Sports Illustrated 32–33 (Sept 5, 1988).
17 *United States v Walters*, 913 F2d 388, 389–90 (7th Cir 1990); *Walters*, 775 F Supp at 1174.
18 *Walters*, 913 F2d at 393.
19 *Walters*, 997 F2d at 1221. An *Alford* plea allows the defendant to plead guilty without an express admission of guilt. See *North Carolina v Alford*, 400 US 25, 37 (1970).
20 *Walters*, 997 F2d at 1221–22.

vised to obtain money or property.[21] Judge Easterbrook began, characteristically, with the text of the statute:

> Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or knowingly causes [such a matter or thing] to be delivered by mail [commits mail fraud].[22]

With respect to the mailing requirement, Judge Easterbrook recognized that Supreme Court precedent "expanded the statute beyond its literal terms,"[23] and he applied the two main tests the Court had articulated to assess the connection of the fraud to the mail. First, Judge Easterbrook applied the test of *Schmuck v United States*[24]—whether the mailing was part of a scheme at the time the defendant conceived it.[25] Judge Easterbrook stated that no reasonable juror could conclude that Walters conceived of a scheme in which the mail played a role.[26] The mailings were central to the scheme in *Schmuck*, while they were tangential in *Walters*. In *Schmuck*, the defendant, a used-car dealer, rolled back odometers on cars that he sold to other dealers who in turn retailed them to the public.[27] A sale to a member of the public required the dealer to mail a title application to the state department of transportation. The mailing was necessary to the scheme; without the change of title, the consumer could not obtain license plates. Even though the mailings in *Schmuck* were "essential" to the scheme, Judge Easterbrook noted that the case had divided the Court and concluded that the mail in *Walters* had less to do with the success of the scheme than that in *Schmuck*.[28]

A second test of the mailing requirement asks whether the mailing of the forms was reasonably foreseeable. The NCAA rules provided that students had to submit signed forms attesting to their eligibility to play college sports.[29] Walters had not caused the colleges or the athletes to mail the forms to the NCAA, and the evidence did not

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21 Id at 1222, 1224.
22 18 USC § 1341.
23 *Walters*, 997 F2d at 1222.
24 489 US 705 (1989).
25 Id at 710–11.
26 *Walters*, 997 F2d at 1222.
27 489 US at 1446.
28 *Walters*, 997 F2d at 1222.
29 See *Walters*, 775 F Supp at 1175.

show that Walters even knew of the forms' existence.[30] The only testimony about the forms came from one witness—in an "ambiguous reference to 'these forms'"—and the witness did not know what the colleges did with the forms.[31] The attorneys advising Walters on the legality of his plan were also unaware of the forms. But Supreme Court precedent does not require the government to prove a defendant's actual knowledge of mailings. Rather, it holds that when a defendant "acts with the knowledge that the use of the mails will follow in the ordinary course of business, or where such use can be reasonably foreseen," he "knowingly causes" the use of the mails.[32] Typical applications of this concept are mailings of fraudulently obtained insurance claims or bail refunds.[33] Here, the government argued that the mailings were reasonably foreseeable because the NCAA's size and interstate reach made mailings the ordinary course of business. Judge Easterbrook resisted this understanding of foresight because he saw it sweeping into the ambit of the federal mail fraud statute "all frauds involving big organizations . . . because big organizations habitually mail things."[34] Moreover, this approach could contradict the principle announced in prior Supreme Court decisions that most frauds fall under state rather than federal law. Judge Easterbrook concluded that the mailings were not sufficiently integral to the scheme to satisfy the mailing requirement.[35]

C. Was Walters's Scheme a Fraud under § 1341?

The second issue, which Judge Easterbrook termed the "deeper problem," was whether Walters's scheme was devised to obtain money or property. The government's view was that Walters's scheme caused the colleges to lose scholarship money, and Judge Easterbrook accepted that a reasonable juror could believe that the colleges lost property.[36] Although Walters's secret clients were the very students whom the colleges had selected for scholarships, the colleges might have suspended the scholarship payments had the students' agreements with Walters been discovered.

The central difficulty for the prosecution was that the funds that colleges lost did not accrue to Walters. Instead, Walters's gains were to

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30 *Walters*, 997 F2d at 1222–23.

31 Id at 1223.

32 Id, citing *Pereira v United States*, 347 US 1, 8–9 (1954).

33 *Walters*, 997 F2d at 1223, citing *United States v Richman*, 944 F2d 323 (7th Cir 1991) (insurance); *United States v Murphy*, 768 F2d 1518, 1529–30 (7th Cir 1985) (bail).

34 *Walters*, 997 F2d at 1223.

35 Id at 1223–24.

36 Id at 1224.

come from the future income of the students. Here, Judge Easterbrook presented his hypothetical about the practical joke. He reported that when asked about this possibility at oral argument, the prosecutor agreed it could constitute mail fraud and "his office pledges to use prosecutorial discretion wisely."[37] Judge Easterbrook took a skeptical view of this reassurance by noting that many would find it "unnerving (what if the prosecutor's policy changes, or A is politically unpopular, and the prosecutor is looking for a way to nail him?)."[38]

The opinion then presented another example, or "parallel." Imagine a trade association of plumbing fixture manufacturers whose members agree not to sell imperfect items, or "seconds," in order to protect the public from defective goods. The association further requires members to submit monthly reports of their sales by mail. One member secretly sells seconds without reporting these sales. Other members of the association lose profits as some consumers buy the seconds rather than new fixtures. Judge Easterbrook asked, "Has anyone committed a federal crime?"[39] The reader might be tempted to take the bait and reply, yes, the association member who did not report the sale of seconds committed mail fraud. But Judge Easterbrook had a surprise: "The answer is yes, but the statute is the Sherman Act, 15 USC § 1, and the perpetrators are the firms that adopted the 'no seconds' rule."[40] The example was drawn from the well-known antitrust case, *United States v Trenton Potteries Co*,[41] in which the trade association was a cartel and the hypothetical seller of seconds was a cheater, albeit a cheater whose actions would help undermine the cartel.[42] Judge Easterbrook observed that the effect of a mail fraud conviction "in our case would make criminals of the cheaters, would use § 1341 to shore up cartels."[43]

He quickly set aside the objection that the example might be "fanciful" by providing a string citation to numerous academic articles that studied the NCAA as a cartel.[44] The NCAA set the eligibility requirements for intercollegiate play and restricted the number and amount of

37 Id.

38 *Walters*, 997 F2d at 1224.

39 Id.

40 Id, citing *United States v Trenton Potteries Co*, 273 US 392 (1927).

41 273 US 392 (1927).

42 Id at 394.

43 *Walters*, 997 F2d at 1224.

44 Id at 1224–25. Judge Easterbrook was well prepared to evaluate the economic nature of the NCAA. Before his judicial appointment, he argued *NCAA v Board of Regents of the University of Oklahoma*, 468 US 85 (1980), which involved the question of whether the NCAA's restrictions on the television broadcast of games, a horizontal restraint, should receive per se treatment or be evaluated under a rule of reason.

athletic scholarships each school could offer. In so doing, the NCAA acted as a cartel that coordinated the production of college athletics. An effect of its market power was to lower student-athlete wages below the level that would prevail in a competitive market.[45]

Why did the position of the NCAA in the market for college athletics matter to Judge Easterbrook's analysis? A fundamental conclusion of microeconomics is that perfectly competitive markets provide for the efficient realization of gains from trade. In competitive markets, the price equals the marginal cost of production, and consumer and producer surplus are maximized.[46] Monopolies do not achieve the same level of efficiency as competitive markets because they raise prices above the competitive level and restrict output.[47] The degree to which a cartel can successfully exercise monopoly power depends on its ability to forestall the entry of new rivals and to prevent cheating by cartel members.[48] Cheaters enhance competition by eroding the power of monopolizing cartels, and, in this way, they advance the social good.[49]

Judge Easterbrook recognized that although cheaters provide this social benefit, they are at the same time an undesirable lot. "Cheaters are not self-conscious champions of the common weal. They are in it for profit, as rapacious and mendacious as those who hope to collect monopoly rents. Maybe more [so]."[50] Still, Judge Easterbrook emphasized that thanks to the competitive process, the relevant consideration was the aggregate outcome rather than the individual motivation. "Only Adam Smith's invisible hand turns their self-seeking activities to public benefit."[51] The social benefits of this heightened competition would be jeopardized if mail fraud applied to cartel cheaters.[52] A reduction in allocative efficiency might be the price of fidelity to the mail fraud statute. Judge Easterbrook conceded the possibility that two federal laws—the Sherman Act and the mail fraud statute—might

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45 *Walters*, 997 F2d at 1224–25.

46 See Hal R. Varian, *Microeconomic Analysis* 221–38 (Norton 3d ed 1992) (describing the welfare-maximizing properties of competitive markets).

47 Id at 238.

48 See Dennis W. Carlton and Jeffrey M. Perloff, *Modern Industrial Organization* 180–96 (HarperCollins 2d ed 1994) (describing the factors that facilitate the formation and maintenance of a cartel).

49 Id at 200–03 (describing the gains to consumers as a cartel collapses).

50 *Walters*, 997 F2d at 1225.

51 Id.

52 Id:

> [T]he prosecutor's theory makes criminals of those who consciously cheat on the rules of a private organization, even if that organization is a cartel. We pursue this point because any theory that makes criminals of cheaters raises a red flag. . . . It is cause for regret if prosecutors . . . use the criminal law to suppress the competitive process that undermines cartels.

be inconsistent and that it might be necessary for the court to "shrug [its] shoulders and enforce both laws."[53]

The tension between the statutes might be resolved by questioning the aptness of the extended analogy to antitrust law. In several ways, the analogy was an imperfect fit for Walters's situation. Walters was not a paradigmatic cartel cheater because he was not a member of any cartel. He was not even a producer of college athletic events or college athletes. Walters "cheated" in the sense that his scheme required his student confederates to violate the NCAA eligibility rules. More accurately, Walters was a participant in the sports-agency market, and Judge Easterbrook repeatedly characterized him as a new entrant in that market.[54] Unlike the cartel cheater, the proceeds that Walters hoped to enjoy from his fraud did not come, even indirectly, from the pockets of the NCAA or the colleges. But did the distinction between entrants and cheaters matter to the policy rationale of market competition? Not really. To succeed, cartels must both suppress cheating and limit entry. Moreover, Judge Easterbrook set this concern aside with another hypothetical: "Firms often try to fool their competitors, surprising them with new products that enrich their treasuries at their rivals' expense. Is this mail fraud because large corporations inevitably use the mail?"[55]

This hypothetical raised the policy stakes. A mail fraud conviction might loom not only over cartel cheaters but also over rival producers in a competitive market. Economic rivals typically seek to keep their future plans secret, and occasionally deception and obfuscation are necessary to maintain that secrecy. If these plans are successful, they secure business for one firm at the expense of others. Like a cartel cheater, the economic competitor is in it for profit, and its own profits may incidentally cause losses for other firms. In many instances, the winner's gains are the losses of the less enterprising. If an expansive understanding of foreseeable mailings were added to this standard jockeying for competitive advantage, then much of modern economic competition might become a federal felony.

After giving this wide-ranging explanation of his concerns, Judge Easterbrook moved swiftly to present his solution, a principle that would foreclose enforcement in situations like Walters's. In a single line, he read § 1341 as a "description of schemes to *get* money or property by fraud rather than methods of doing business that incidentally

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53 Id.

54 See *Walters*, 997 F2d at 1221 ("Norby Walters, who represents entertainers, tried to move into the sports business."); id at 1223 ("Recall that Walters was trying to break into the sports business.").

55 Id at 1225.

cause losses."[56] He observed that there was no existing precedent addressing whether mail fraud encompassed schemes in which the defendant did not seek the victim's property. He compared the mail fraud statute to 18 USC § 371, a statute that, among other things, criminalizes conspiracies to defraud the United States.[57] The Supreme Court has held that § 371 covers only frauds in which the United States is the target of the fraud, and that frauds causing only incidental or indirect losses to the United States lie outside the reach of § 371.[58] Judge Easterbrook then distinguished three prior Seventh Circuit decisions that the government characterized as imposing mail fraud liability when the victim suffers only incidental losses.[59] After reviewing these opinions, Judge Easterbrook concluded that "[n]ot until today have we dealt with a scheme in which the defendants' profits were to come from legitimate transactions in the market, rather than at the expense of the victims."[60] Following the Supreme Court's interpretation of § 371, the *Walters* court held that "only a scheme to obtain money or other property from the victim by fraud violates § 1341. . . . Losses that occur as byproducts of a deceitful scheme do not satisfy the statutory requirement."[61]

The rule announced in *Walters* would not affect § 1341's coverage of a paradigmatic fraud in which the offender cozens money out of an unsuspecting dupe. In that circumstance, the schemer's profits come directly at the expense of the misled party. The identities of the deceived party and the monetary loser are the same. Such a scheme could still be the basis of a prosecution under § 1341. But the *Walters* rule would leave the practical joker, the cartel cheater, the economic rival, and Walters himself outside the coverage of mail fraud.

In the hypothetical of the practical joke, person A did not seek to obtain money or other property. Instead, he sought to hoodwink B and have a laugh at his expense. Although B lost the value of his auto fuel, this amount was a mere byproduct that accrued to an unknown third-party fuel provider. Person A received no monetary gain from the scheme and certainly no monetary gain from the tricked B. The practical joke would fall outside of § 1341.

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56 Id.

57 Id at 1225–26.

58 See *Tanner v United States*, 483 US 107, 129–33 (1987).

59 See *Walters*, 997 F2d at 1226–27, discussing *United States v Ashman*, 979 F2d 469 (7th Cir 1992); *United States v Richman*, 944 F2d 323 (7th Cir 1991); *United States v Jones*, 938 F2d 737 (7th Cir 1991).

60 *Walters*, 997 F2d at 1227.

61 Id.

The cartel cheater sought to profit from selling slightly defective articles to consumers while lying to other cartel members about it. The cheater's gain came from third-party consumers in the market for plumbing fixtures, not from the other cartel members he betrayed. The other cartel members would suffer some reduction in the demand for their products as consumers snapped up the cheaper seconds. But these losses were incidental and not the object of the scheme. For the firm in a competitive market, the situation would be much the same. The consumers from whom it garners profits differ from the rivals whom it deceives about its strategic plans. While the competitors lose business, their losses are incidental to the firm's scheme to win customers in the marketplace. Mail fraud would not reach the cartel cheater or the economic rival.

Finally, Walters sought to delude the colleges and the NCAA into believing that the players who had signed with Walters had done no such thing. The colleges lost scholarship money that otherwise would have gone to students eligible for college play under NCAA rules. But, these losses were peripheral to the scheme because the monetary gains Walters sought were not to come from the colleges. Rather, they were to come from Walters's percentage of the athletes' income when they completed their collegiate careers and turned pro. Legitimate transactions in the market, rather than the deluded colleges, were to be the source of Walters's gains, and thus § 1341 did not reach Walters's scheme.

One way of describing the holding of *Walters* is that the identity of the deceived party and the source of the funds must converge or that there must be "a transfer where the victims' loss is the defendant's gain."[62] In order for § 1341 to apply, the target of the scheme's deception must also be the prey from whom the offender extracts his profits. The dupe of the scheme must be the loser whom the offender fleeces. But a convergence requirement seems too technical a description. Perhaps a better characterization is that when the identity of the dupe and the loser do not coincide, there arguably has been no fraud. In the practical joke hypothetical, person A led person B astray but did not swindle him. The cartel cheater and the economic rival deluded their fellow producers but not their customers. The customers who handed these producers their profits received presumably the

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62 Sarah N. Welling, Sara Sun Beale, and Pamela H. Bucy, 2 *Federal Criminal Law and Related Actions: Crimes, Forfeiture, the False Claims Act and RICO* § 17.8 at 16 (West 1998). See also Craig M. Bradley, *Mail Fraud after* McNally *and* Carpenter*: The Essence of Fraud*, 79 J Crim L & Criminol 573, 609–10 (1988) (arguing that the "fraud" language of § 1341 requires the transfer of property from the deceived party to the schemer, and that the "false pretenses" language requires gains for the schemer but not necessarily losses for the deceived).

best deals the market could offer them. Walters deceived the NCAA and the colleges. But he did not rook the players who would share a percentage of their earnings with him, and he did not scam the professional teams that would pay his players presumably handsome salaries. The central contribution of the *Walters* opinion is that it redefined which schemes count as fraud for purposes of § 1341.

II. ASSESSING *WALTERS*

A. The Judicial Craftsmanship of the *Walters* Opinion

There is much in *Walters* that deserves discussion. A reader is struck first by its style. The opinion has all the elements of Judge Easterbrook's rightly famous writing: a cinematic recitation of the facts;[63] crisp, punchy phrasings spiced with slang;[64] an appreciation for the ironies in both facts and doctrine;[65] hypotheticals that strip away superfluous facts and expose a core analytical problem; unexpected analogies to seemingly dissimilar areas of law; unambiguous and bluntly stated opinions of the litigants, which often contrast with the legal outcomes;[66] and an unequivocal, almost scolding, view of losing arguments.[67] The tone of the opinion is one of breezy confidence; such confidence that a reader might wonder how sensible prosecutors brought a case on such a flawed theory. A bit more judicial hand-wringing might give readers a finer appreciation for which issues were close and which were not. But the tone does not impair the opinion's careful exposition of mail fraud's nuances, and arguably, it even helps draw them out. What is more, no one could complain that Easterbrook's opinion in *Walters* is not delightful and stimulating to read.

Turning from style to substance, the reasoning that Judge Easterbrook employed presents a wealth of issues that deserve closer inspection. For example, a reader might doubt Judge Easterbrook's conclusion that the evidence would not permit a reasonable juror to infer that the mailings were foreseeable to Walters. The unambiguous nature of this

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63 See, for example, *Walters*, 997 F2d at 1221.

64 See, for example, id at 1224 (contemplating a "prosecutor . . . looking for a way to nail him"); id at 1225 ("[C]heaters' glasses must have been washed with cynical acid.").

65 See, for example, id at 1221 ("Having recruited players willing to fool their universities and the NCAA, Walters discovered that they were equally willing to play false with him."); id at 1224 ("[T]he idea that practical jokes are federal felonies would make a joke of the Supreme Court's assurance that § 1341 does not cover the waterfront of deceit.").

66 See, for example, id at 1225 (considering the NCAA as a cartel that uses its "monopsony power to obtain athletes' services for less than the competitive market price"); id at 1227 ("Walters is by all accounts a nasty and untrustworthy fellow . . . .").

67 See, for example, *Walters*, 997 F2d at 1224 ("The prosecutor must *prove* that the use of the mails was foreseeable, rather than calling on judicial intuition to repair a rickety case.").

conclusion contrasts with Judge Easterbrook's own acknowledgement that the circuit's precedent on the mailing requirement was conflicting and that "[e]verything turns on matters of degree."[68]

Judge Easterbrook did not discuss several Supreme Court decisions that arguably strengthen the view that the colleges' mailings were incident to an essential part of the scheme. For example, he gave a single "cf." citation to *United States v Maze*.[69] In *Maze*, the defendant stole a roommate's credit card and financed a winter vacation with it.[70] The merchants who accepted the credit card mailed requests for payment to the bank that issued the credit card, and, in turn, the issuing bank mailed the roommate for payment.[71] The Court held that the scheme had come to fruition before the mailings, and hence, they were not in furtherance of the scheme.[72] Arguably, *Walters* is unlike *Maze* in that the scheme was not complete until the students finished their college careers and began earning income as professional athletes. The mailing of the students' signed eligibility forms was necessary for the success of the fraud, and the mailings were not merely a post-fraud accounting of payments. The complicity of the students was necessary for these mailings, and Walters had secured it with illicit payments. From this perspective, Judge Easterbrook's view that the eligibility forms "create[d] a risk that [the scheme would] be discovered if a student should tell the truth" seems inapposite.[73]

For the district court, the NCAA's requirement that colleges submit students' signed eligibility forms was sufficient to support a conclusion that mailings were reasonably foreseeable.[74] In contrast, Judge Easterbrook emphasized that the prosecution had not proven that the specific defendant, Walters, knew that the forms would be mailed.[75] This exacting demand for proof contrasts with the usual way of assessing foresight, say in tort cases, where the factfinder predicts

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68 Id at 1222.

69 414 US 395 (1974). See *Walters*, 997 F2d at 1222.

70 414 US at 396.

71 Id at 397.

72 Id at 400–03. Two similar cases are *Kann v United States*, 323 US 88 (1944), and *Parr v United States*, 363 US 370 (1970). In *Kann*, corporate officers caused the corporation to issue them checks, which would be mailed for collection upon cashing. The Court reversed the officers' convictions and held that their plan "reached fruition" before the mailings, and the mailings were therefore "immaterial to [the scheme]." *Kann*, 323 US at 94. In *Parr*, employees of a school district bought fuel for personal use on the district's credit card. The oil company mailed the district for payment, and the district mailed a check to the oil company. The Court concluded that these mailings were not part of the execution of the scheme, because they pertained only to the collection of payment. *Parr*, 363 US at 391.

73 *Walters*, 997 F2d at 1222.

74 *United States v Walters*, 775 F Supp 1173, 1181 (ND Ill 1991).

75 *Walters*, 997 F2d at 1223 ("The record is barely sufficient to establish that Walters knew of the forms' existence; it is silent about Walters' knowledge of the forms' disposition.").

what a reasonable person in the defendant's situation would foresee.[76] Judge Easterbrook was unwilling to subscribe to this more generalized notion of foresight. He reasoned that if the size and scope of the NCAA was sufficient to make the mailings reasonably foreseeable, "all frauds involving big organizations necessarily are mail frauds, because big organizations habitually mail things."[77] One might argue that the plasticity of the foresight concept and the ensuing confusion in the mailing requirement precedents provide for exactly this possibility.

But this doctrinal flexibility does not imply that Judge Easterbrook was wrong. A pliable doctrine need not always be stretched. It can also be constricted. Perhaps the Court and Congress tolerate the hodgepodge of precedent on foresight because it gives courts discretion to pick and choose the cases in which mail fraud will apply, and in *Walters*, Judge Easterbrook simply exercised this discretion.

In addition to his treatment of the mailing requirement, one might also question the textual basis for Judge Easterbrook's conclusion that in order to violate § 1341 the scheme must deprive the victim of money or other property. A sensible reading of the phrase "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" precludes prosecutions for incidental losses. But, on its face, the text does not say that the money or other property must come from the pockets of the deceived party. The statute is silent on whether the offender's gains must originate from the deceived party or from a third party. A critic might argue that Judge Easterbrook has read "obtaining money or property *from the deceived party*" where the statute says only "obtaining money or property."

Another interpretative move that warrants discussion is whether it was appropriate to look to interpretations of an entirely different federal statute, § 371, in construing the mail fraud statute. When two texts differ, the *expressio unius* canon cautions against borrowing a pinch of precedent from one provision to construe the other. Section 371 prohibits two or more persons from conspiring "to defraud the United States, or any agency thereof in any manner or for any purpose."[78] The text of § 371 shows that Congress could specify the target of a fraud if it wished, and it declined to do so in § 1341. One could argue that this difference in the texts shows that Congress intended

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76 See, for example, *Palsgraf v Long Island Railroad Co*, 162 NE 99 (NY 1928); *Overseas Tankship (UK) Ltd v Miller Steamship Co (Wagon Mound No 2)*, 1 App Cas 617 (PC 1967).

77 *Walters*, 997 F2d at 1223.

78 18 USC § 371.

mail fraud to cover situations in which the target of deception and the source of the deceiver's financial gain differed.[79]

B. Is the Distinction between Dupes and Losers Workable?

These potential objections are secondary, however, to the core idea that Judge Easterbrook advances in *Walters*: in order for a defendant's conduct to violate § 1341, the target of the defendant's deception must also be the source of the defendant's gain.[80] That idea deserves closer inspection because it addresses a perennial problem in courts' efforts to construe the mail fraud statue: the difficulty of defining the scope of mail fraud. For a statute that some think is so amorphous that it may be unconstitutionally vague,[81] the establishment of a principled limit on its reach would be a significant contribution. The limit the *Walters* decision places on mail fraud has many advantages, and its greatest may be its rule-like clarity. Under *Walters*, the structure of the fraudulent transaction determines whether mail fraud governs. Unless the schemer's gains are the dupe's losses, the statute does not apply. A court can assess whether this requirement is met by looking at the indictment and need not wait for the parties to present evidence. An advantage of *Walters* is that it provides clear guidance to courts and permits resolution of cases early in the adjudicative process.

But this clear guidance is also a potential problem with the *Walters* rule. Fraud is unlike other criminal activities in that it is not defined by a relatively fixed set of behaviors. In a prosecution for a bank robbery, the central issue is commonly whether the particular defendant robbed the bank. The question—what is a bank robbery?—is typically not at issue. But, in a fraud prosecution, the question of whether the alleged conduct constitutes fraud is often contested, in addition to the factual issue of whether the defendant engaged in the alleged actions. Fraud differs from other criminal offenses in this way because it changes in response to social conditions and to criminal prohibitions. The person who commits fraud "by definition structures her conduct in an effort to avoid legal restraint."[82] In the setting of

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79 Moreover, the Supreme Court had previously taken care to distinguish § 371 from § 1341 in that the former encompassed conspiracies directed at interests other than property interests. See *United States v McNally*, 483 US 350, 362 (1987).

80 *Walters*, 997 F3d at 1227.

81 See *Sorich v United States*, 129 S Ct 1308, 1309 (2009) (Scalia dissenting from denial of certiorari) (favoring direct consideration of whether mail fraud is unconstitutionally vague because the breadth of the statute invites arbitrary prosecutorial decisions and may fail to provide notice).

82 Samuel W. Buell, *Novel Criminal Fraud*, 81 NYU L Rev 1971, 1973 (2006) (describing how the adaptive quality of fraudulent conduct presents difficulties in prohibiting it). See also *Maze*, 414 US at 407 (Burger dissenting) ("The criminal mail fraud statute must remain strong to

nonfraudulent transactions, a purported advantage of rules over standards is that they provide straightaway guidance to parties and allow individuals to conform their behavior to the law more readily.[83] But, the clear instruction of the *Walters* rule may also help to guide fraudsters in designing their future schemes. To put this objection differently, the savings in decision costs that the rule provides may over time be swamped by an increase in error costs, as the incidence of frauds that go unpunished because of the *Walters* rule grows.

A further point is that this tradeoff between decision and error costs does not depend on the dynamic response of fraudsters to the legal rule. The *Walters* rule may simply draw the limit on mail fraud in the wrong place. It may leave out of § 1341's reach conduct that Congress would prefer be punished under the statute. Consider the following hypothetical. Persons X and Y are competitors, and they are invited to an elaborate party thrown by Z, a tycoon with whom both X and Y seek to do business. X sends Y a letter purporting to be from Z stating that the location of the party has changed. Fooled by the letter, Y goes to the wrong location and never makes it to the party. X attends the party and secures Z's business. According to the *Walters* rule, X's conduct is not punishable under § 1341. Y is the dupe, and the business with Z is the source of X's gain.

It is not clear that X should escape from mail fraud liability. X advanced a scheme to defraud Y and used the mails in furtherance of the scheme. An argument against liability is that no one has lost money or property. But Y has lost a business opportunity, which is at least as concrete as the sales the members of the plumbing fixtures association lost in the cartel-cheater hypothetical.[84] Moreover, X's scheme has the same effect and purpose as the cartel did: to reduce competition by removing economic rivals from the marketplace. The point here is not to claim that X's conduct clearly warrants punishment under federal mail fraud. Rather, it is more modestly to raise the possibility that the *Walters* rule may place outside of § 1341's reach some conduct that arguably should fall within it.

Another potential objection to *Walters* pertains not to the consequences of the limit the opinion assigns to mail fraud but to an unstated assumption in the analysis. Again, begin with a hypothetical. In a certain county, property owners who are delinquent on their proper-

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be able to cope with the new varieties of fraud that the ever-inventive American 'con artist' is sure to develop.").

83 See Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L J 557, 569–84 (1992) (analyzing the conditions under which a rule may induce greater compliance by presenting a reduced cost of learning the law).

84 See *Walters*, 997 F2d at 1224 (implying that such losses are sufficient to support a mail fraud conviction).

ty taxes face liability for their back taxes plus interest and a penalty. The County holds public auctions to sell tax liens on the delinquent taxpayers' properties. Bidders in the auction state their bids as a percentage of the penalty that they will accept from the owner (plus the back taxes and interest) in order to clear the lien. The bid demanding the lowest percentage of the penalty wins the auction. The winner pays the back taxes to the County and receives the lien. The winning bidder informs the delinquent taxpayer by mail that the lien has been sold and payment must be made. If the delinquent taxpayer fails to pay, the winning bidder can get the tax deed, and the winning bidder becomes the new owner of the delinquent taxpayer's property. The County's auction allows winning bidders effectively to purchase the delinquent properties for the value of the back taxes plus interest.

Commonly, the lowest bid is 0 percent of the penalty, and there are multiple bids in that amount. In these instances, the County awards the properties by lot among the lowest bidders. A bidder in a tied auction could increase his chance of being selected from among the winning bids by submitting multiple bids of 0 percent. The County forbade this practice by establishing a rule that each bidder must submit bids only in his own name and must not use agents to submit additional bids. The rule further provided that each bidder must submit an affidavit affirming compliance with this rule.

A bidder named Phoenix regularly violated this rule by submitting simultaneous bids, and consequently, he received more properties from the county than he ought to have. Another bidder named Bridge who complied with the county's rule believed that as a result of Phoenix's deceit, he received fewer properties than he ought to have. Did Phoenix commit mail fraud? Under the *Walters* rule, the answer would be no. The deceived party was the county because Phoenix submitted to the county an affidavit falsely affirming compliance with the single-bid rule. But the county lost no money or property because it was faced with equivalent bids. As a result of Phoenix's deception, the county unwittingly gave additional liens to Phoenix that ought to have gone to Bridge. Like the colleges in *Walters*, it would have chosen different individuals to do business with had it known the truth, but it suffered no monetary loss. The party from whom the fraudster extracted his gains was Bridge. Here, the dupe and the loser do not coincide, and Phoenix's conduct, while underhanded, should not be punishable under the *Walters* interpretation of § 1341.

The hypothetical is, of course, lifted from an actual case, *Phoenix Bond & Indemnity Co v Bridge*.[85] It involved a private plaintiff suing

85 477 F3d 928 (7th Cir 2007).

under the civil enforcement provision of the Racketeer Influenced and Corrupt Organizations Act[86] (RICO). The plaintiff, Bridge, alleged that Phoenix's violations of the County's bidding rule constituted a pattern of racketeering activity in which the predicate act was mail fraud.[87] The plaintiff further argued that he was entitled to treble damages under the RICO statute.[88] The county was Cook County, Illinois, and Judge Easterbrook wrote the decision for the Seventh Circuit.[89] Did the court follow the *Walters* reasoning and conclude that Phoenix's conduct did not amount to mail fraud and thus could not form a predicate offense under RICO? No. Instead, the court reversed the district court's dismissal of the plaintiff's claims and held that the scheme to submit extra bids and obtain additional liens amounted to mail fraud. Judge Easterbrook wrote, "[I]t is unnecessary to show that the false statement was made to the victim. A scheme that injures D by making false statements through the mail to E is mail fraud, and actionable by D through RICO if the injury is not derivative of someone else's."[90]

On first inspection, the conclusion of the *Phoenix* court contrasts jarringly with *Walters*. The passage quoted from Judge Easterbrook in *Phoenix* appears directly at odds with his statements in *Walters*. Moreover, *Phoenix* nowhere cites *Walters*. The temptation to seize on the apparent inconsistency of these decisions is hard to resist. Perhaps the earlier case was simply forgotten. Or, perhaps the latter decision is a *sub rosa* overruling of the earlier one. But there are good reasons to see if they can be reconciled before shouting "gotcha." A clue that the tension between these cases may not be as sharp as first appears is provided by the eerie continuation of the alphabetic names. The party hypothetical in *Walters* ended with person C, and the example in *Phoenix* begins with person D. Nearly fifteen years separate these decisions, but the harmony of their naming conventions makes it appear that each was written with the other in mind.[91]

A way to reconcile these cases begins with the observation that they construe different statutes, civil RICO and criminal mail fraud. The RICO statute has many unusual features. It is primarily a criminal

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86 Organized Crime Control Act of 1970 § 901(a), Pub L No 91-452, 84 Stat 922, 941, codified at 18 USC § 1961 et seq.

87 *Phoenix*, 477 F3d at 930.

88 Id at 929–30 (reciting the alleged facts).

89 Id at 929.

90 Id at 932.

91 In another parallel, Judge Easterbrook distinguishes the conduct of Phoenix (and his codefendants) from a monopsony cartel. *Phoenix*, 477 F3d at 932. The Supreme Court unanimously affirmed the Seventh Circuit's decision. *Bridge v Phoenix Bond & Indemnity Co*, 128 S Ct 2131, 2144 (2007) (resolving a split among the circuits as to whether a direct victim who is not also a direct recipient of false statements may recover through civil RICO).

statute, but unlike most criminal prohibitions, it has a complex-compound structure. It also permits private civil enforcement and even encourages private attorneys general by providing for treble damage awards. The availability of alternative plaintiffs to enforce the statute influences courts' willingness to allow actions to proceed.[92] The statute further instructs courts to construe it "liberally . . . to effectuate its remedial purposes."[93] In view of these differences, it is not surprising that a court would interpret the mail fraud statute more narrowly for the purpose of a criminal prosecution than for the purpose of a predicate offense in a civil RICO action.

Moreover, *Walters* and *Phoenix* presented different interpretative questions. In *Walters*, the question was whether the alleged conduct was sufficient to support a criminal conviction under § 1341. In *Phoenix*, it was whether the defendant's conduct proximately caused the plaintiff's injury for the purpose of a civil RICO action. Proximate cause is a label for a set of "judicial tools used to limit a person's responsibility for the consequences of that person's own acts."[94] It is most prominent in tort law, where it resolves questions such as whether the connection between a train conductor shoving one passenger and the toppling of penny scales onto another passenger is sufficiently close to hold a railroad liable.[95] While tort law has a plethora of tests for proximate cause, civil RICO "demand[s] some direct relation between the injury asserted and the injurious conduct alleged."[96]

The concept of proximate cause provides another perspective on whether *Walters* and *Bridge* are inconsistent. First, recall the hypothetical of the cartel cheater. Judge Easterbrook concluded that the cartel cheater should not be liable for mail fraud.[97] The cartel cheater's gains came from sales of the slightly defective goods in the marketplace, which reduced demand for the other cartel members' products. The cheater's deception was, in vernacular terms, the cause of the other cartel members' losses. But the question for proximate cause is whether the cheater's gains are sufficiently connected to the losses to assign lia-

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92 Note the caveat attached to the passage quoted from Judge Easterbrook. *Phoenix*, 477 F3d at 932 (" . . . if the injury is not derivative of someone else's"). See also *Anza v Ideal Steel Supply Corp*, 547 US 451, 458 (2006) (rejecting a civil RICO claim from economic competitors of a tax delinquent because the tax authority was the more direct victim).

93 Organized Crime Control Act of 1970 § 904(a), 84 Stat at 947. See also *Russello v United States*, 464 US 16, 26–27 (1983) (noting the unusual nature of this congressional directive).

94 *Holmes v Securities Investor Protection Corp*, 503 US 258, 268 (1992) (describing the reach of proximate cause as a combination of what is just and what is "administratively possible").

95 See *Palsgraf*, 162 NE at 99 (describing the unique chain of events that led to the plaintiff's injury).

96 *Holmes*, 503 US at 268–69.

97 *Walters*, 997 F2d at 1225 ("It is cause for regret if prosecutors . . . use the criminal laws to suppress the competitive process that undermines cartels.").

bility to the cheater. A fact that highlights the remoteness of the connection is that the behavioral response of another set of actors, consumers, lies between the deception and the loss. In order for cheating to reduce demand for the cartel's products, consumers must choose to purchase the cheater's goods rather than the cartel's, and large numbers of consumers must do this. These additional steps make the connection between the cheating and the cartel's losses appear attenuated.[98]

The cartel cheating contrasts with *Phoenix*. There, the transactions did not occur in an unfettered marketplace. Instead, they occurred in a highly regimented auction in which the County set the terms and conditions of participation. Importantly, the allocation of liens by lot in the case of ties was a zero-sum game. An additional tying bid in violation of the single-bid rule directly reduced the other bidders' chances of winning. The reduction in the plaintiff's chance of winning resulted mechanically from the County's process for allocating liens among tied bids, and it did not depend on the behavioral choices of unseen decisionmakers. This reduced chance of winning could be calculated with mathematical precision. The connection between the fraudulent bids and the plaintiff's losses appears quite close and favors liability in *Phoenix*.[99]

In contrast, the connection between the deception and the gain appears even more remote in *Walters*. Walters's deception occurred in an entirely different market than the source of his gains, and the two were separated by a significant passage of time. His gains were subject to considerable uncertainties. The monetary value of representation varied with each student's athletic development and performance in college and with the capricious demands of professional teams. A further and unanticipated risk was that students would defect from Walters and seek other representation. Walters's deception appears distantly connected to his gains, and from the viewpoint of proximate causation, the decision to exclude him from liability appears consistent with the decision to assign liability to Phoenix.

Proximate cause may be a somewhat unsatisfying device through which to reconcile the cases. It is unavoidably a policy judgment by the court, and it lacks the analytical crispness of a rule like the one

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98 There are also reasons to doubt whether the cheating is the but-for cause of the cartel's losses. Consumers may not be as willing to buy defective "seconds" as cartel members believe, and consumers may have other opportunities to obtain substitutes for the cartelized products. These considerations may make it difficult for a court to calculate the proper amount of damages.

99 The hypothetical of the tycoon and the deceitful party invitation is a closer case. It seems to lie between the cartel cheater and *Phoenix*. Like the auction, there is seemingly a limited number of bidders (X and Y). But there is substantial uncertainty as to whether the tycoon entertained other bids outside of the party and whether X's presence at the party was crucial to the tycoon's decision.

advanced in *Walters*. But some commentators believe that the adaptive nature of fraud implies that it is ill-suited to regulation by rules.[100]

C. An Unnoticed Implication

To all of these criticisms, a reader might sensibly reply by asking, so what? Whatever the vices or virtues of *Walters*, be they substantive or stylistic, the trifling facts of the case make them academic. Sports—and even more inconsequentially, college sports—are hardly the stuff of great opinions. The occasional fraud in athletic qualifications is far from a pressing social issue, and it makes the intellectual firepower brought to bear in the opinion seem hardly worth it. A tepid response to this objection is to look to the extended analogy to antitrust for a larger implication. After *Walters*, the government cannot use mail fraud to prosecute a cartel cheater or a secretive competitor. What makes this response tepid is that cases in which the government has used mail fraud to prosecute cartel cheaters are rare, and rarer still are prosecutions of firms in competitive markets who deceive their rivals. They are so rare that Judge Easterbrook did not cite any. Like dragons and firms that engage in predatory pricing, they may be mere classroom hypotheticals.[101] On this view, the opinion, while a stimulating read, appears devoid of great consequences.

But this view could be wrong. To cabin *Walters* to its facts is perhaps to miss what may be most important about it, because the implication that is potentially most far-reaching was mentioned nowhere in the opinion. To see this, consider a different type of fraud: insider trading. Insider trading is governed primarily by § 10(b) of the Securities Exchange Act of 1934,[102] which prohibits the use "in connection with the purchase and sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe."[103] Pursuant to this authority, the SEC promulgated Rule 10b-5, which provides:

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100 See Buell, 81 NYU L Rev at 1996–2013 (cited in note 82) (arguing that when confronted with novel frauds, courts inquire whether the defendant had consciousness of wrongdoing); Tendler, 72 Fordham L Rev at 2751–65 (cited in note 4) (arguing that in practice courts rely on a series of factors rather than bright-line rules in assigning limits to mail fraud and that this approach is normatively desirable).

101 See Frank H. Easterbrook, *Predatory Pricing Strategies and Counterstrategies*, 48 U Chi L Rev 263, 264 (1981) (concluding that there is "no sufficient reason for antitrust law or the courts to take predation seriously").

102 Securities Exchange Act of 1934, Pub L No 73-291, 48 Stat 881, codified at 15 USC § 78a et seq.

103 Securities Exchange Act of 1934 § 10(b), 48 Stat at 891, codified at 15 USC § 78j(b).

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails or any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud, [or] . . .
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase and sale of any security.[104]

The SEC and the federal courts have construed Rule 10b-5 to prohibit an officer, director, controlling shareholder, or other insider of a corporation from trading in that corporation's securities while in possession of material, nonpublic information.[105] A corporate insider must abstain from trading in the securities of his corporation unless he has first disclosed all material, nonpublic information known to him.[106] The SEC saw this duty to abstain or disclose arising from the existence of a relationship affording access to inside information intended only for corporate purposes and from the unfairness of permitting a corporate insider to use that information to trade without disclosure.[107] A trader who is not an insider has no duty to reveal material facts to a prospective counterparty. A duty to disclose arises when the prospective trader is a fiduciary of the corporation in whose securities he wishes to trade, or if some other similar relationship of trust and confidence exists between them. Insiders who have obtained information by reason of their position within the corporation occupy a position of trust and confidence with respect to the corporation's shareholders.[108]

But not all circumstances of insider trading fit into this paradigm. For example, consider two scenarios. The first scenario involves a man we will call Chiarella. He works for a financial printer. The printer prepares legal documents for corporate mergers, and it leaves the names of companies involved out of the documents. Chiarella handles these documents as part of his employment, and he is able to guess the identities of the companies. Before the public announcement of certain takeover bids, he buys shares of the target companies. After the bids are announced, the share prices rise, and Chiarella sells his shares at a profit. He makes tens of thousands of dollars in a matter of weeks.

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104 17 CFR § 240.10b-5.

105 See, for example, *Dirks v SEC*, 463 US 646, 654 (1983); *Chiarella v United States*, 445 US 222, 228–29 (1980).

106 See *In re Cady, Roberts & Co*, 40 SEC 907, 911–12 (1961); *SEC v Texas Gulf Sulphur Co*, 401 F2d 833, 848 (2d Cir 1968), cert denied, 404 US 1005 (1971).

107 See *Cady, Roberts*, 40 SEC at 912.

108 See id at 911–12.

Next, consider a scenario involving a man named O'Hagan. He is a partner in a law firm that represents a large company that is preparing to make a takeover bid for a second company. O'Hagan does not work directly for the law firm's client, but, in the office, he hears of its takeover plans. O'Hagan buys call options in the target company. When the client company's plans for the takeover are announced, the share prices of the target company rise. The value of O'Hagan's call options rises, and he makes millions of dollars in profits.

These two scenarios do not fit into the classic or traditional theory of insider trading. Neither Chiarella nor O'Hagan was an insider with regard to the corporation in whose securities he traded.[109] Chiarella and O'Hagan obtained material, nonpublic information about impending mergers through their relationships with the acquiring corporations, and each of them bought securities of the respective target corporations, not the securities of their employers' clients. Neither Chiarella nor O'Hagan occupied any position of trust or confidence with regard to the target corporations, and neither was a fiduciary to the target corporations.

Rather than classic insider trading, Chiarella and O'Hagan are the leading examples of the misappropriation theory. They are drawn from two prominent Supreme Court cases involving insider trading: *Chiarella v United States*[110] and *United States v O'Hagan*,[111] respectively. According to misappropriation theory, a person who takes confidential information for the purpose of trading in securities in breach of a fiduciary duty owed to the *source* of the information violates § 10(b) and Rule 10b-5.

But, for several years, doubt lingered as to whether the Supreme Court would accept the misappropriation theory. Before *Chiarella* reached the Supreme Court, the Second Circuit affirmed Chiarella's conviction under § 10(b) for two reasons. In the appeals court's view, the possession of material, nonpublic information by an insider created a duty to abstain or disclose, and Chiarella's superior information gave him unfair advantage in trading. Also, Chiarella had obtained this information by misappropriating it. The duty to keep the employer's confidences was akin to a fiduciary duty, and Chiarella breached it.[112]

The Supreme Court reversed Chiarella's conviction, and in so doing, it rejected one of the Second Circuit's rationales and declined to rule on the other. It rejected the view that a duty to abstain or dis-

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109 *Chiarella*, 445 US at 232–34; *O'Hagan v United States*, 521 US 642, 653 n 5 (1997).
110 445 US 222 (1980).
111 521 US 642 (1997).
112 *United States v Chiarella*, 588 F2d 1358, 1366–68 (2d Cir 1978).

close attached whenever a trader held an informational advantage. Trading without disclosing constituted a fraud only when the trader had a duty to disclose. Chiarella faced no duty to disclose because he had no relationship with the sellers of the target companies' stock with whom he traded.[113] With respect to the misappropriation theory, a majority of the Supreme Court refused to address it because it had not been presented to the jury.[114] Following *Chiarella*, there was significant uncertainty as to whether misappropriation theory could support an insider trading prosecution.[115]

Seventeen years after *Chiarella*, the Supreme Court resolved this uncertainty in *O'Hagan*. A jury had convicted O'Hagan under a misappropriation theory, and the Eighth Circuit had reversed and rejected that theory.[116] But the Supreme Court upheld the conviction because it accepted misappropriation theory as "complementary" to the classic insider trading concept.[117] The Court reasoned that misappropriators deal in deception because they feign loyalty to the principal while secretly using the principal's confidential information for personal gain.[118] Under misappropriation theory, the trader's duty to abstain or disclose arises from a duty to the source of the information, not to the parties with whom he trades.

The development of misappropriation theory in insider trading is relevant to mail fraud because when prosecuting insider trading, the government commonly brings mail or wire fraud charges in addition to securities charges.[119] Moreover, until the Supreme Court's decision in *O'Hagan*, the circuits were split as to whether misappropriation could form the basis of a conviction under § 10(b).[120] This uncertainty left mail fraud as a leading federal statute under which misappropriators might be criminally punished without risk that the Court might

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113 *Chiarella*, 445 US at 226–30.

114 Id at 235–37.

115 See, for example, *United States v O'Hagan*, 92 F3d 612, 617 (8th Cir 1996) ("Neither the Supreme Court nor this court has yet determined whether the misappropriation theory is a permissible basis upon which to impose § 10(b) liability.").

116 Id (concluding that the misappropriation theory would not necessarily involve the "deception" required for insider trading liability).

117 *O'Hagan*, 521 US at 652–53 (noting that both theories "address[] efforts to capitalize on nonpublic information through the purchase or sale of securities").

118 Id at 653–54.

119 For example, O'Hagan was also charged and convicted of twenty counts of mail fraud. Id at 648–49.

120 The Second, Third, and Ninth Circuits accepted the misappropriation theory. See *United States v Newman*, 664 F2d 12, 17 (2d Cir 1981); *Rothberg v Rosenbloom*, 771 F2d 818, 825 (3d Cir 1985); *SEC v Clark*, 915 F2d 439, 453 (9th Cir 1990). The Seventh Circuit accepted the theory in *SEC v Cherif*, 933 F2d 403, 410 (7th Cir 1991). The Fourth and Eighth Circuits rejected the misappropriation theory. See *United States v Bryan*, 58 F3d 933, 943–59 (4th Cir 1995); *O'Hagan*, 92 F3d at 618, revd, 521 US 642 (1997).

later reject the theory of prosecution. A significant and little-noted feature of *Walters* was its potential to curb the application of mail fraud in misappropriation cases.

This potential is evident when the transactions in *Chiarella* and *O'Hagan* are compared to the scheme in *Walters*. In the misappropriation cases, the party who is deceived, the employer, suffers some loss, specifically from the disloyalty of the employee and the breach of client confidentiality. Losses of this sort are difficult to quantify in the same way that in *Walters* the precise nature of the colleges' loss was hard to pin down. In all three cases, the schemer's gains were monetary, and they came from otherwise legitimate market transactions. Chiarella and O'Hagan traded profitably in shares of the target companies, and Walters planned to receive a portion of his athletes' professional earnings. From this perspective, insider trading of the misappropriation variety has a similar analytical structure as *Walters*. This similarity suggests that a mail fraud prosecution of Chiarella, O'Hagan, or other insider-trading misappropriators would suffer the same deficiency as *Walters*. The misappropriator's gains are not a transfer from the deceived party. The dupe was not the source of the schemer's gains. Where the *Walters* framework applies, trading on the basis of misappropriated information should be beyond the reach of mail fraud.

This interpretation of the mail fraud statute is arguably buttressed by a set of policy reasons that parallel those in *Walters*. The analogy to antitrust law in *Walters* presented the virtues of the cartel cheater: The chiseling of his fellow cartel members erodes the market power of the cartel, stimulates competition, and aligns prices with marginal cost. Similarly, some commentators, most notably Henry Manne, have argued that insider trading provides social benefits, particularly an improvement in the accuracy of stock prices.[121] In his academic writing, Judge Easterbrook carefully weighed these views and the responses to them.[122] He remained circumspect about the net social benefits of insider trading.[123] But, like the preference for reduced in-

121 See Henry G. Manne, *Insider Trading and the Stock Market* 78–104 (Free Press 1966).

122 See Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 S Ct Rev 309, 323–39.

123 Id at 338:

> Chiarella's [trading was] unambiguously detrimental to shareholders. The more frequent cases of trading by managers on the basis of knowledge about their own firms are much more difficult to judge. The arguments are closely balanced. Although I think it likely that legal restrictions on such trading are beneficial, the questions ultimately are empirical. I may be singing a different tune tomorrow.

tervention in antitrust policy, a sympathetic view of insider trading is commonly associated with the "Chicago School."[124]

The parallels in the transactional structure and policy rationales of misappropriation cases and *Walters* raise an intriguing possibility. Had *Walters* been fully appreciated, should it have foreclosed the use of mail fraud in prosecuting inside traders for misappropriation?

D. Alternative Foundations for Mail Fraud Convictions in Misappropriation Cases

The possibility that *Walters* might curtail mail fraud prosecutions of misappropriators could easily be overstated. As in securities law, mail fraud gives the government multiple theories of prosecution from which to choose. The so-called honest services or intangible rights doctrine is one alternative theory. This doctrine was developed in the context of public corruption. When a government official takes a bribe or otherwise profits illicitly from his office, a difficulty in bringing a traditional mail fraud prosecution was showing that a monetary loss had occurred. Yet, this sort of corruption contains an element of deception in that the office holder has secretly made official decisions for personal gain rather than for the public interest. Honest services doctrine overcomes this obstacle by positing that the public has an intangible right to the honest services of government officials. The official's failure to disclose his crookedness may then constitute the basis of a mail fraud conviction.[125]

The theory soon spread to private settings in which courts concluded that an agent owed an intangible right of honest and faithful services to the principal.[126] When the agent failed to reveal material information, such as the existence of a conflict of interest, his silence could support a mail fraud conviction. This model applied readily to the situations of employees misappropriating their employers' confidential information and trading on it. "Prosecutors had won easy convictions against securities professionals who violated duties of loyalty,

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124 See, for example, James D. Cox, *Insider Trading and Contracting: A Response to the "Chicago School*,*"* 1986 Duke L J 628, 642–55.

125 See, for example, *United States v Bush*, 522 F2d 641, 646–48 (7th Cir 1975) (holding that the intent to deceive, combined with the deprivation of honest services, creates the basis for a mail fraud conviction); *United States v Isaacs*, 493 F2d 1124, 1149–50 (7th Cir 1974) (upholding the conviction of the governor of Illinois for defrauding the citizens of his honest and faithful services by accepting a bribe).

126 See John C. Coffee, Jr, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am Crim L Rev 427, 427 (1998) (comparing the spread of intangible rights prosecutions in the private sector to the growth of kudzu).

by trading for their own accounts based on their employers' information, without a showing of economic harm to the employer."[127]

The application of honest services doctrine to insider trading cases experienced a brief interregnum in 1987 when the Supreme Court decided *McNally v United States*.[128] In *McNally*, the Court held that deprivations of intangible rights were not protected by the mail fraud statute. But, the following year, Congress overruled *McNally*. It enacted 18 USC § 1346, which expanded the definition of a scheme or artifice to defraud to include schemes that deprived another of the intangible right of honest services.[129] Senator Joseph Biden, then chairman of the Senate Judiciary Committee, included in the legislative history a statement that the purpose of § 1346 was to "reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change."[130] As a result of the passage of § 1346, honest services doctrine remains available as an alternative prosecutorial theory in misappropriation cases that avoids the convergence requirement of *Walters*.[131]

Another theory that the government may apply in a misappropriation case relies on the Supreme Court's decision in *Carpenter v United States*.[132] In *Carpenter*, the defendant wrote a column for a widely read business newspaper. The column discussed the prospects for particular stocks, and although it relied on purely public information, the column was popular and influenced the prices of the stocks mentioned in it. The defendant conspired with friends to share in advance of publication the names of the stocks appearing in upcoming columns. This information permitted the conspirators to trade in the stocks on the basis of the market's likely reaction to the contents of the column.[133] The case was another instance of misappropriation.[134]

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127 Michael Drebeen, *Insider Trading and Intangible Rights: The Redefinition of the Mail Fraud Statute*, 26 Am Crim L Rev 181, 193 (1988).

128 483 US 350 (1987).

129 Anti-Drug Abuse Act of 1988 § 7603, Pub L No 100-690, 102 Stat 4181, 4508, codified at 18 USC § 1346.

130 124 Cong Rec S 17360-02 (daily ed Nov 10, 1988). See also 134 Cong Rec H 11251 (daily ed Oct 21, 1988) (Rep Conyers) (declaring that the purpose was to "restore the mail fraud and wire fraud provision to where that provision was before the *McNally* decision").

131 In *Walters*, intangible rights were not part of the analysis. The government did not argue this issue on appeal: "The United States tells us that the universities lost their scholarship money. Money is property; this aspect of the prosecution does not encounter a problem under *McNally v United States*." *Walters*, 997 F2d at 1224. Even if the government had argued this theory, it likely would have been unavailing. Judge Easterbrook noted that even if the universities lost the "right to control" which students received the scholarship money, Walters was not their fiduciary. Id at 1226 n 3.

132 484 US 19 (1987).

133 Id at 22–23.

The Court held that the mail fraud statute protects intangible property interests, such as an employer's interest in confidential information.[135] The Court decided *Carpenter* a mere six months after *McNally* and before Congress enacted § 1346, and thus it could not be resolved under the intangible rights doctrine.

Carpenter gives another route to prosecute misappropriators that avoids the potential obstacles of *Walters*. Under a *Walters*-like interpretation, the employer's loss of confidential information is incidental to, or a mere byproduct of, the scheme. The employer suffers a deception, a mistaken belief that the scheming employee is loyal, while the schemer captures profits from otherwise legitimate market transactions with third parties. But *Carpenter*'s more embracing conception of property resists this view and assigns greater weight to the deprivation of the employer's confidences. The employee's deception induces the direct transfer of confidences from the employer, and the breach of those confidences itself constitutes a loss. The *Carpenter* decision redefines what constitutes a loss for purposes of mail fraud, and in so doing, limits the force of *Walters* in misappropriation cases.

CONCLUSION

Judge Easterbrook's opinion in Walters is an underappreciated gem. Its impact is circumscribed by other more expansive doctrines, such as honest services fraud. But, the core idea of *Walters*—that the schemer must obtain money or other property from the deceived—perennially reappears in mail fraud jurisprudence as courts try to circumscribe the statute's reach. At this writing, the Supreme Court is considering new restrictions on the scope of mail fraud,[136] and in particular, whether under an intangible rights theory, the government must establish that the offender received a gain at the expense of the party to whom the honest services are owed.[137] The reappearance of the question of gains and losses, dupes and losers, in the midst of another mail fraud doctrine is remarkable. Whatever the resolution of that case, the persistence of the limiting principle of *Walters* is a testament to the prescience of Judge Easterbrook's analysis.

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134 *Carpenter* arose a decade before *O'Hagan*. The *Carpenter* Court was split evenly on whether convictions under § 10(b) on a misappropriation theory should be affirmed. See 484 US at 24.

135 Id at 28.

136 See *Skilling v United States*, 554 F3d 529 (5th Cir 2009), cert granted, 130 S Ct 393 (2009); *Weyhrauch v United States*, 548 F3d 1237 (9th Cir 2008), cert granted, 129 S Ct 2863 (2009); *Black v United States*, 530 F3d 596 (7th Cir 2008), cert granted, 129 S Ct 2379 (2009).

137 See Brief for the Petitioners, *Black v United States*, No 08-876, *22 (US filed July 30, 2009) (available on Westlaw at 2009 WL 2372920).