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The Metastasis of Mail Fraud: The Continuing Story of the Evolution of a White-Collar Crime

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THE METASTASIS OF MAIL FRAUD: THE CONTINUING STORY OF THE "EVOLUTION" OF A WHITE-COLLAR CRIME

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Justice Cardozo observed that legal principles have a tendency to expand to the limits of their logic, and Judge Friendly has added the corollary that sometimes the expansionary momentum carries the principle even beyond those limits.[1] So it has been with the recent growth in the federal mail fraud law, as courts have applied a standardized formula—known as the "intangible rights" doctrine—to a broad range of fact patterns having relatively little in common. The result has been both to extend the net of the federal criminal sanction over an extraordinarily vast terrain and to arm the federal prosecutor with a weapon substantially different in character from any previously known to the substantive criminal law.

Under the "intangible rights" doctrine, a public or private fiduciary can be prosecuted on the theory that his conduct has deprived his beneficiaries of their right to his "honest and faithful services."[2] Critical to this doctrine's significance is its assertion that the nondisclosure of a conflict of interest by a person characterizable as a fiduciary can amount to a deprivation of the "honest and faithful services" owed by the fiduciary to the beneficiary.[3] As a practical matter, the operative effect of this

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1. United States v. Borelli, 336 F.2d 376, 380 (2d Cir. 1964) ("[T]he instant case... exemplifies in Judge Cardozo's phrase, the 'tendency of a principle to expand itself to the limit of its logic'—and perhaps beyond").

2. For a fuller discussion, see Coffee, *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 (1981) [hereinafter cited as Coffee]. Among the cases that have recently recognized this doctrine, the following are of particular importance: United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 57 U.S.L.W. 3789 (1983); United States v. Newman, 664 F.2d 12 (2d Cir. 1981); United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), *cert denied*, 102 S.Ct. 1796 (1982); United States v. Barta, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981); United States v. Mandel, 591 F.2d 1347 (4th Cir. 1978), *aff'd in relevant part on reh'g en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); United States v. Bush, 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976).

This Article will not retrace the steps of my prior article. Further emphasis on the potential for inconsistent results or on the overbreadth latent in some judicial dicta interpreting the federal fraud statutes seems unnecessary. Rather, the focus of this article will be on how to achieve sensible reform without crippling the ability of the federal prosecutor to respond to serious instances of official corruption or intra-corporate fraud.

3. In United States v. Bush, 522 F.2d 641, the Seventh Circuit formulated a test, which most subsequent courts have followed, that finds a violation of the mail fraud statute only when the breach of duty is combined with a material misrepresentation. *Id.* at 648. *See also* United States v. Barta, 635 F.2d 999, 1006 (salesman in small securities firm under a duty to apprise his employer of material information concerning trading in bonds by an undercapitalized firm in which he had interest; breach of duty subjects him to prosecution for mail and wire fraud). In United States v. Mandel, 591 F.2d 1347, the Fourth Circuit similarly stated that nondisclosure of material information by the fiduciary must be linked to some "actionable fraud." *Id.* at 1363. However, the Fourth Circuit would find "actionable fraud" when a public official "fails to disclose the existence of a direct interest in a matter he is passing on" or makes a "fraudulent statement of facts, with a deliberate concealment thereof to a public body, in order to receive a benefit by action of the public body." *Id.* at 1363-64. As so defined, "actionable fraud" could arise even where the public fiduciary remained wholly passive. For example, if a state governor held a hidden in-

disclosure requirement is to simplify the prosecutor's case by substituting proof of nondisclosure for proof of loss or illicit gain. At the same time, the protean character of the term "fiduciary" has enabled the prosecutor to reach areas that Congress never contemplated would be subject to federal criminal sanctions.[4]

Without here restating the author's earlier analysis of the case law,[5] two conclusions seem justified from recent decisions involving mail fraud prosecutions. First, although doctrinal conflict is apparent, courts generally seem to be accepting the "intangible rights" theory, both with respect to private and public fiduciaries.[6]

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terest in property that was to be condemned or purchased by the state, and he deliberately failed to disclose his interest to secure favorable action by the legislature, this nondisclosure would seem to constitute "deliberate concealment" and hence "actionable fraud" under the *Mandel* test. Thus, although the facts of the *Mandel* decision involved deliberative conduct, the language of the opinion suggests that a simple failure to disclose could violate the statute. There is, however, a suggestion in United States v. Bronston, 658 F.2d 920, that more than simply a failure to disclose is necessary. *Id.* at 926 ("a mere breach of fiduciary duty, standing alone, may not necessarily constitute a mail fraud"). In any event, in most instances it will be possible for the prosecutor to allege that the defendant deliberately placed himself in a conflict of interest position and then failed to disclose that conflict. Under all the recently decided cases, an indictment so pleaded would appear sufficient to withstand a motion to dismiss.

4. *See infra* notes 65-81 and accompanying text.

5. A little over a year ago, this author analyzed the development of the intangible rights doctrine and argued that this transition had over-extended the reach of the federal criminal law, without giving sufficient consideration to either the severity of the threatened injury to the victims or the nature of the federal interest in prosecution of the defendants. To mitigate the resulting danger of over-criminalization without disarming the federal prosecutor, this author suggested two relatively modest statutory reforms: First, the statute should be construed to require the prosecutor to prove a sufficient causal nexus between the fiduciary breach and some cognizable loss to victims. Coffee, *supra* note 2, at 134-35, 163-69. The test would require three distinct findings before liability is imposed: (1) breach of duty, (2) actual or threatened loss, and (3) "a causal link of requisite proximity between the breach and the loss." *Id.* at 134. Traditionally, in the criminal law, the prosecutor had to prove beyond a reasonable doubt the element of causation only in those crimes that contained a result as an element of the crime (i.e., homicide). Still, some decisions, such as United States v. Dixon, 536 F.2d 1388 (2d Cir. 1976), have suggested that in the case of mail fraud, the fiduciary breach must further the fraud and "cause the asserted harm." *Id.* at 1460. Given the recognition of a role for causation, this author's proposal was to formalize it. Concededly, courts have sometimes tolerated curiously strained chains of causation. *See, e.g.*, People v. Kibbe, 35 N.Y.2d 407, 362 N.Y.S.2d 848, 321 N.E.2d 773 (1974) (evidence showing that defendants left helplessly drunken man at side of dark highway where he was struck by vehicle and killed was sufficient to sustain murder conviction); Stephenson v. State, 205 Ind. 141, 179 N.E. 633 (1932) (in homicide prosecution, defendant who had kidnapped and raped decedent could be convicted of her death, even though death directly resulted from her suicide, where suicide was foreseeable product of her depression). Nonetheless, in the absence of statutory reform, even this attenuated approach has a practical utility in that a causation charge could be given by the court to the jury without the need for overruling prior decisions.

However, if statutory reform is to be pursued, then a focus on causation is less important, and this author would instead recommend that the same approximate result be achieved differently by introducing into the the crime of mail fraud the same requirement of proximity to success as is required for proof of a criminal attempt. *See also infra* text accompanying notes 46-64 (as discussed *infra*, mail fraud is an inchoate crime, and, as such, should be subsumed under the law of attempt if recodification is undertaken).

The second suggested reform of the statute would formalize procedures under which the prosecutor would be expected to use alternative remedies such as restitution, dismissal, other civil remedies, and state criminal prosecution before commencing a federal criminal prosecution. Coffee, *supra* note 2, at 170-72. Part IV of this Article will expand on this proposal that greater attention be given to the use of alternative noncriminal sanctions, both as part of the plea bargaining process and as a criterion for a prosecutor's decision not to prosecute in a case.

6. In United States v. Dixon, 536 F.2d 1388, Judge Friendly suggested that the "intangible rights" theory was not applicable to private fiduciaries, such as the corporate president who was the defendant

Second, the reach of the statute continues to be extended further into sensitive areas not previously thought to be subject to the criminal law of fraud.[7]

At its current pace of expansion, the mail fraud statute seems destined to provide the federal prosecutor with what Archimedes long sought—a simple fulcrum from which one can move the world. Useful as this expansion may be to the prosecutor, its consequence is also to dwarf and trivialize much of the remainder of substantive federal criminal law. Statutory defenses in other more limited statutes would thereby be circumvented,[8] and the power of the prosecutor over the defendant would be measurably enhanced. Yet conversely, if we freeze the evolution of the statute, new forms of predatory behavior will appear to which the legislature cannot realistically be expected to respond quickly. What compromise then is possible between strict construction and infinite expansion?

Accordingly, the case for statutory reform is strong. A recent article in this Review by Mr. Daniel Hurson has made a serious effort to curb the reach of the mail fraud statute.[9] Nonetheless, this author disagrees with the specifics of Mr. Hurson's proposal, believing them to be both ambiguous and overly limited, but shares his sense that the statute's potential reach should be checked.

In overview, this Article submits that any effort to reform the statute should proceed from three core premises. First, the crime of mail fraud must be coherently integrated with the law generally governing inchoate crimes. To do so, a requirement of proximity between the "scheme" and the threatened loss, should be imposed that is at least equal to that required by the law of attempt. Second, an obligation to disclose all conflicts of interest by anyone characterizable as a fiduciary is an impossibly broad standard for the criminal law to enforce. Thus a failure to make disclosure should lead to criminal liability only where personal gain or benefit is sought. Finally, prosecutorial discretion should be better formalized to conserve on scarce resources, to utilize more equitable intermediate sanctions, and to activate available state criminal resources. This Article will first place the mail fraud statute in perspective and then address each of these premises.

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therein, but rather was limited to cases involving public fiduciaries. *Id.* at 1399–1400. However, in United States v. Barta, 635 F.2d 999, the Second Circuit appears to have abandoned this distinction and applied the doctrine to an employee of a securities firm who failed to disclose his interest in loans that he was making on the firm's behalf. *See also* United States v. Bronston, 658 F.2d 920 (evidence sufficient to sustain conviction of attorney based on breach of duty of loyalty for failing to disclose conflict of interest).

Since 1980 the only circuit court that has substantially rejected the "intangible rights" doctrine appears to be the Fifth Circuit. *See* United States v. Ballard, 663 F.2d 534 (5th Cir. 1981), *modified on reh'g*, 680 F.2d 352 (5th Cir. 1982) (requiring the prosecutor to prove financial loss to the corporate employer where employees received kickbacks). *See also* United States v. Rabbitt, 583 F.2d 1014 (8th Cir. 1978) (evidence that state representative accepted commission upon award of architectural contract and that he failed to disclose his interest in the contract did not establish the substantive crime of mail fraud where conduct neither injured the Government nor affected the performance of his duties as a state representative), *cert. denied*, 439 U.S. 1116 (1979).

7. *See infra* cases cited in text accompanying notes 37–40.

8. For an example of this in the specific case of the mail fraud statute, *see* Trowbridge, *Enforcement of Criminal Sanctions for the Violation of Federal Controls on the Prices of Crude Oil and Petroleum Products*, 17 AM. CRIM. L. REV. 201, 222–23 (1978) (describing preference of prosecutors to use mail fraud statute over more specific statutes passed by Congress to regulate oil pricing and subsequent nullification of special defenses adopted by Congress in such statutes).

9. Hurson, *supra* note 21, at 456–63.

I. MAIL FRAUD IN PERSPECTIVE: PAST, PRESENT, AND FUTURE

Historically, Congress has intended that the mail fraud statute[10] evolve over time to reach novel forms of misconduct not contemplated by the legislature at the time the statute was enacted.[11] Chief Justice Burger has described the statute as both a "stopgap device to deal on a temporary basis with the new phenomenon until particularized legislation can be developed and passed to deal directly with the evil," and also as a "first line of defense" against new frauds.[12] Although this evolutionary gloss on the mail fraud statute has been widely accepted,[13] the question remains whether judicial expansion is justifiable in light of principles of fair notice and limited jurisdiction.

A. EVOLUTION AND THE LAW OF FRAUD

Both at the state and federal levels, the law of mail fraud has steadily grown through judicial expansion. Major modern developments in the evolution include judicial recognition of information as a form of property that may be illegally converted,[14] the expansion of embezzlement to include misappropriation by one partner of partnership assets,[15] the expansion of fraud statutes to include computer fraud and other invasions of privacy,[16] and the deliberate disregard by courts of the tradi-

10. 18 U.S.C. § 1341 (1976) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud..., for the purpose of executing such schemes...places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail...any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

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

12. *Id.* at 405-06. Such an ability to evolve with the times was necessary, he added, "to cope with the new varieties of fraud that the ever-inventive American 'con-artist' is sure to develop." *Id.* at 407. Although Chief Justice Burger was writing in dissent, his view has frequently found acceptance in majority opinions as well. *See* Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980). *See also* Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) (construing the crime of mail fraud broadly and measuring the fraudulent aspect of the scheme to defraud by a nontechnical standard requiring only that the scheme be reasonably calculated to deceive persons of ordinary prudence and comprehension).

13. *See infra* text accompanying notes 14-16 and 37-40.

14. *See* People v. Kunkin, 9 Cal. 3d 245, 249, 507 P.2d 1392, 1395 (1973) (roster of undercover agents constitutes "property"); United States v. Bottone, 365 F.2d 389, 393-94 (2d Cir. 1966) (Friendly, J.) (copies and notes made by thieves with own copying devices considered "stolen goods"); United States v. Girard, 601 F.2d 69, 70 (2d Cir. 1969) (statute prohibiting sale of "record or thing" violated by sale of information).

15. People v. Sobiek, 30 Cal. App. 3d 458, 106 Cal. Rptr. 519 (1973). Prior law in California had held that a partner could not embezzle from a partnership because the common law rule required that the property taken be that of "another," whereas the partnership was not a legally separate entity from its partners. *See* People v. Brody, 29 Cal. App. 2d 6, 83 P.2d 952 (1938) (general partner cannot be convicted of embezzling partnership property which comes into his possession or under his control during course of partnership business by reason of his being a partner).

16. Computer fraud is a protean form of crime which is not easily defined, but the mail and wire fraud

tional elements of the crime of larceny when confronted with cases involving fraudulent misrepresentation.[17] In each case, adherence to the maxim that penal statutes are to be strictly construed would have led to the acquittal of the defendant.[18]

In this light, the recent expansion of the mail fraud statute is not unique. Rather, what is distinctive is both the amount of expansion that has occurred and its impact on specific contexts when behavior not previously thought criminal is now arguably so. A review of three recent cases will illustrate this point. In the best known, *United States v. Margiotta,*[19] the Second Circuit expanded the "intangible rights" doctrine in two important respects by holding that (a) payments which were in substance channeled to a political party in return for patronage amounted to kickbacks which

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statutes have so far been able to reach its various forms without great difficulty. *See, e.g.*, United States v. Alston, 609 F.2d 531 (D.C. Cir. 1979) (deletion of adverse credit information in computerized files and substitution of false information in return for bribe held within statute). Similarly, invasion of privacy has been held to be a cognizable injury under these statutes. *See* United States v. Louderman, 576 F.2d 1383, 1387 (9th Cir. 1978) (invasion of privacy through use of pen register); United States v. Condolon, 600 F.2d 7, 9 (4th Cir. 1979) (use of telephone in connection with operation of bogus talent agency established to meet and seduce young women violates wire fraud statute).

17. The most recent example of this is Bell v. United States, 103 S.Ct. 2398 (1983), in which the Court simply read the traditional asportation requirement of larceny out of a statute which clearly seemed to require it. A provision of the Federal Bank Robbery Act (18 U.S.C. § 2113(b)) provided that "whoever takes and carries away... any property or money" belonging to a federally insured bank could be sentenced to up to ten years in prison. The issue in *Bell* was whether the statute applied to the crime of obtaining money through false pretenses or whether the references to "takes and carries away" limited its applicability to the common law offense of larceny. A strong dissent by Justice Stevens, however, persuasively argued that the congressional intent was to reach only burglaries and larcenies in response to a wave of armed bank robberies committed by John Dillinger and others. 103 S. Ct. at 2402-03. From the perspective of this Article, however, the relevant fact is that this judicial expansion occurred in a context where there could not be justifiable reliance on the prior construction because state law would clearly penalize the conduct at issue.

18. Clearly, the maxim that penal statutes are to be strictly construed is often honored by courts in the breach as well as in the observance. A basic tension exists between decisions such as United States v. Nash, 229 U.S. 373 (1913), in which the Supreme Court has tolerated imprecision and warned that "the law is full of instances where a man's fate depends on his estimating rightly... such matters of degree," *id.* at 377, and stricter decisions, such as McBoyle v. United States, 283 U.S. 25 (1931), in which the Court construed the statute before it with an almost mindless literalism. The fact that both of these decisions were written by Justice Holmes underscores this inconsistency.

At issue in *Nash* was § 1 of the Sherman Act, which declared illegal "every contract, combination... or conspiracy in restraint of trade or commerce...." The Supreme Court had previously confined this overbroad language by a "rule of reason," and the issue in *Nash* was whether a rule of reason was sufficient to withstand a vagueness attack on the defendant's criminal conviction. 229 U.S. at 373.

In *McBoyle,* the defendant was convicted of interstate transportation of a stolen "motor vehicle," which was defined to include any "self-propelled vehicle not designed for running on rails." 283 U.S. at 26. Defendant had stolen an airplane. In writing for the Court, Justice Holmes said that "in everyday speech, 'vehicle' calls up the picture of a thing moving on land." *Id.* This may be so, but it is far from clear that the usual policies behind strict construction of penal statutes apply in this case, where the act was clearly illegal under state law and there could not have been any reliance on a limited construction of the federal statute. If one thinks that *McBoyle* was correctly decided, one should ask whether in "everyday speech" (Holmes' test in *McBoyle*) the term "fraud" includes the secret political patronage scheme employed by Margiotta or, more generally, the failure to disclose a material fact by a fiduciary subject to a conflict of interest.

19. 688 F.2d 108.

a fiduciary is obligated to disclose;[20] and that (b) the scope of the term fiduciary included not only public officials, but also private citizens (such as a political party chairman) who, although holding no public office, relied upon or exercised de facto control over governmental officials.[21]

In contrast, in *United States v. Boffa,*[22] the Third Circuit held that a scheme to deprive employees of certain collective bargaining rights guaranteed by the Taft-Hartley Act did not fall within the scope of the "intangible rights" doctrine.[23] However, the court found that the same conduct defrauded the union employees of seniority and wage rights contained in their collective bargaining agreement. These rights, it said, were deemed protected by the mail fraud statute because they amounted to economic benefits rather than intangible rights.[24] Thus, although the decision shows some skepticism about the intangible rights doctrine, the net result is

20. Defendant Margiotta, the Republican Party Chairman of Nassau County, directed the distribution of rebates on insurance commissions paid by Nassau County to its "broker of record," whose appointment Margiotta had arranged. Under the arrangement, a patronage appointee kicked back half of the insurance commissions he received from his position; however, the recipients of these payments were chiefly the Republican Party and various officials thereof (as designated by the defendant). 668 F.2d at 115-19. On one occasion, the recipient of a $10,000 payment shared it with Margiotta, who was also a licensed real estate broker. *Id.* at 119. The Second Circuit's opinion leaves little doubt, however, that all the payments (and not just those that personally benefitted Margiotta) were required to be disclosed, lest material information be concealed by a fiduciary.

21. *Id.* at 122. It is apparent that the reliance and de facto control tests adopted by the Second Circuit were borrowed from this author's prior Article on this subject. *See* Coffee, *supra* note 2, at 147-48. As others have noted, this is ironic because the author basically concurs with the dissent of Judge Winter in *Margiotta. See Margiotta,* 688 F.2d at 139-44. *See also* Hurson, *Limiting the Federal Mail Fraud Statute —A Legislative Approach,* 20 AM. CRIM. L. REV. 423, 438 n.129 (1983) [hereinafter cited as Hurson]. However, as Part II of this Article argues, the ominous implications of the decision do not lie in its extension of the fiduciary obligation to those formally outside of government who possess the de facto power to control governmental decisions. Indeed, this aspect of *Margiotta* is, as a practical matter, a fairly trivial extension of the mail fraud statute because the prosecutor could ordinarily reach such persons, even if they were not deemed fiduciaries, by alleging either that (a) such persons are parties to a conspiracy involving a public fiduciary, or (b) they were accessories to a mail fraud violation by a public fiduciary. Indeed, Margiotta was also charged with aiding and abetting, a mail fraud violation, *see* 18 U.S.C. § 2(b) (1976), but this theory of accessorial liability was not presented to the jury. *Margiotta,* 688 F.2d at 115, 136. In this light, those who see grave implications in the Second Circuit's adoption of the reliance and de facto control tests, *see* Hurson, *supra* note 21 at 441-42, have been misled by a red herring. The real dangers lie in the first amendment implications and the potential for selective and retaliatory prosecutions emphasized by Judge Winter in dissent in *Margiotta,* 688 F.2d at 143-44 and in an earlier article, Coffee, *supra* note 2, at 144-48.

22. 688 F.2d 919 (3d Cir. 1982).

23 *Id.* at 926-30. At issue in *Boffa,* was a "labor switch" where, by means of a bribe to a corrupt official, an employer was able to replace one union with another and thereby secure lower wages and fewer fringe benefits. The court, correctly in this author's judgment, saw the entire transaction as a sham substitution of one leasing company for another in order to fire higher paid employees. However, the simpler theory by which to conceptualize the transaction would have been to describe it as a bribe paid to a fiduciary (the union official) to induce him to violate his duties to his union members. In this view, the employer would be the accessory who aided and abetted the violation, and the union leader would be the principal. This would obviate the need for alleging that the employer directly defrauded the workers by seeking lower paid employees—a dangerous theory because most employers would rationally and properly desire to save unnecessary labor costs.

24. *Id.* at 930 (scheme to deprive employees of rights guaranteed by Section 7 of Labor Act not a violation of mail fraud statute, but scheme to defraud employees of "economic benefits, such as wages and seniority rights lies squarely within the ambit of the mail fraud statute").

that the traditionally rough-and-tumble world of collective bargaining is now also subject to the reach of the mail fraud statute. Even more inconsistent with the tenor of *Margiotta* is the Fifth Circuit's recent decision in *United States v. Ballard*.[25] In *Ballard*, the Fifth Circuit rejected the government's theory that defendant employees defrauded their employer by failing to disclose the existence of a manipulative system of reselling oil under which the employees received payoffs. The decisive factor for the Fifth Circuit was that the corporate employer itself was precluded from reselling the oil at a higher price and thus suffered no economic loss.[26] Absent such a deprivation of a potential profit, it was unwilling to accept the "intangible rights" doctrine in a case involving private parties rather than public officials.

B. CONSEQUENCES OF THE EVOLUTION OF THE MAIL FRAUD STATUTE

The preceding discussion shows chiefly what the legal realist might have suspected: namely, that courts sometimes do expand criminal statutes, even though they know they are acting without legislative authority. But what normative principles emerge by which a court can judge when expansion is appropriate? In general, when courts have expanded a statute beyond the scope clearly intended by the legislature, they have justified their extension by denying that defendants' reliance on the prior state of the law was reasonable. In support of this thesis they have cited phrases such as Holmes' classic line in *United States v. Nash*: "The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested more circumspect conduct."[27] Viewed in this light, the defendants in *Bronston*[28] and *Margiotta*[29] can be characterized by the tough-minded as modern examples of individuals who misjudged the point where courts would draw the line on "common social duty." In short, courts have often shown little sympathy for those who overstep clear civil or moral lines in the belief that their conduct fell just short of conduct classified as criminal.

But if realism teaches that courts often tolerate expansion of an ambiguous penal statute, this still does not resolve the normative issue. To address these issues, it is useful to pose a continuum of cases. At one extreme, the facts of *McBoyle v. United States*[30] supply the best illustration of what would have been a legitimate expansion. At issue in *McBoyle* was whether the term "motor vehicle" should have been construed to cover an aircraft which had been stolen.[31] Speaking for the Court, Justice Holmes emphasized that the term "vehicle" did not, "in everyday speech" on the date the statute was passed, include an aircraft.[32] Thus, the conviction was overturned. However, given the lack of unfair surprise (in part because the defendant was certainly subject to state prosecution) and the apparent legislative intent to focus on

25. 663 F.2d 534 (5th Cir. 1981), *modified on reh'g*, 680 F.2d 352 (5th Cir. 1982).

26. 663 F.2d at 540–42.

27. 229 U.S. at 377. Taking a typically tough-minded view, Justice Holmes also indicated that proof of bad faith was not necessary and that "a man could find himself in prison because his honest judgment did not anticipate that of a jury of less competent men...." *Id.* at 376.

28. United States v. Bronston, 658 F.2d 920.

29. United States v. Margiotta, 688 F.2d 108.

30. 283 U.S. 25 (1931).

31. *Id.*

32. *Id.* at 26.

interstate transport of stolen goods, a more liberal construction of the statute would have worked little harm and prejudiced no legitimate reliance interest.[33]

People v. Sobiek[34] illustrates an intermediate case. In *Sobiek*, the California Court of Appeal reversed earlier law by ruling that a partner could be convicted of embezzling assets from his own partnership.[35] Although the distinction between a partner and a stockholder (who could be convicted of embezzling from his corporation) was a senseless one, a defendant who believed that his transgression would only subject him to civil penalities might have relied on this distinction. Reasonable people might disagree on how one may justifiably rely on conduct known to constitute a civil wrong. Still, the arguments for judicial expansion are strong.

Still, in none of the foregoing cases did the introduction of the criminal sanction threaten to change significantly the future relationship between similarly situated persons. It is, however, precisely this contextual impact that stands out when one examines the recent use of the "intangible rights" theory.[36] In these latter cases, the context was one into which the criminal law had rarely intruded: the attorney-client relationship in *Bronston*,[37] political patronage in *Margiotta*,[38] labor-management relations in *Ballard*,[39] and even sexual relations in *Condolon*.[40] Although the conduct of these defendants undoubtedly fell below minimum ethical standards, the overriding issue is whether the introduction of the threat of criminal sanctions would affect future relationships within these contexts. Unlike the relationship between partners in *Sobiek*, the relationship between labor and management or between political rivals, for example, has always had a character better described in adversarial terms than in terms of fiduciary duty. Similarly, a certain amount of puffing

33. The MODEL PENAL CODE takes a substantially different approach from that in *McBoyle* as to the issue of strict construction. Section 1.02(3) of the MODEL PENAL CODE specifies that its provisions "shall be construed according to the fair import of their terms" and the "general purposes" of the code in defining offenses. These "general purposes" (set forth in § 1.02(1)) give coequal status to the goals of deterrence and prevention as well as to the need "to give fair warning of the nature of the conduct declared to constitute an offense." The conviction in *McBoyle* would have been sustained under such a statutory provision. *See also* N.Y. Penal Code § 5.00 (N.Y. penal law not to be strictly construed). Compare also the expansion of a traditional larceny statute in Bell v. United States, 103 S. Ct. 2398 (1983), which shows that the *McBoyle* approach of strict construction is not always followed by the Supreme Court.

34. 30 Cal. App. 3d 458, 106 Cal. Rptr. 519.

35. *Id.* at 462, 106 Cal. Rptr. at 521.

36. *See, e.g.*, cases cited *supra* note 2 (recent cases construing intangible rights doctrine).

37. 658 F.2d 920.

38. 688 F.2d 108.

39. *Id.* at 119. *See supra,* notes 22, 24 and accompanying text.

40. United States v. Condolon, 600 F.2d 7. Here, the defendant seduced a series of young women by falsely promising them acting roles. In fact, the defendant's talent agency was a sham, and he had neither the capacity nor the intent to find them positions in the movie industry. Note, however, that if this behavior is criminalized, the United States Attorney for Los Angeles would have authority to indict any number of Hollywood directors whose use of the "casting couch" involved false representations about their intentions to cast the "victimized" starlets in future roles. In *Condolon,* the court recognized this potential expansion and attempted to distinguish this construction by pointing to the defendant's inability to help the women in addition to his lack of intention to do so. This is a bizarre distinction, because it gives greater immunity to liars who possess power than to those who do not; presumably, the former are more dangerous. The court also found an economic injury in the fact that some of the women took time off from work and incurred baby-sitting expenses. This rationale is flawed because economic injury so broadly defined can always be found; there will always be a taxi ride, subway expenditure, or similar expense connected with any seduction.

and even deception has long characterized the contexts of labor negotiations, politics, and lovemaking. Yet, by introducing the threat of criminal sanction, there is an impact not only on those who are guilty of misconduct, but also on those who are risk averse and insist on arranging their affairs so as to avoid any chance of entanglement with the criminal law. It is this latter class, on whom the impact is invisible and unknowable, that supplies the strongest argument for statutory reform.[41]

The arguments over strict versus liberal construction of penal statutes have been debated many times before and will undoubtedly continue.[42] The significant point here is that context is critical. Unintended and low visibility consequences can result when the process of evolution brings the threat of the criminal law to bear on sensitive relationships. In particular, three such consequences seem predictable: first, because "evolution" typically occurs in the context of egregious cases, the court may believe that the only consequence of its liberal construction of an ambiguous statute is that a culpable defendant will be justly punished. Instead, the hidden and more important effect of liberal construction may be on the plea bargaining that subsequently occurs in other, more marginal cases, and on those risk averse citizens who change their behavior to stay comfortably distant from a vague, shifting line. "Bad" cases make sloppy law, and in the case of the mail fraud statute, this process has

41. So long as the parties bargain in the shadow of the law, the full impact of a statutory change cannot be assessed simply by looking at those who are prosecuted. This point is underscored when one learns that at the same time that the reach of the mail fraud statute has been extended, it has also been invoked by prosecutors with increasing frequency. *See* Hurson, *supra* note 21, at 423 n.3. By his count, filings under the mail and wire fraud statutes have risen from 3.4% of all criminal filings in fiscal 1980 to 3.8% of all criminal filings in fiscal 1981, an almost 12% increase in one year. Others have reported mail fraud to be the second most frequently charged white-collar crime in the Southern District of New York during the years 1963–76. *See* Hagan and Nagel, *White-Collar Crime, White-Collar Time: The Sentencing of White-Collar Offenders in the Southern District of New York,* 20 AM. CRIM. L. REV. 259, 286 (1982) (Table 6).

42. *See* Hall, *Strict or Liberal Construction of Penal Statutes,* 48 HARV. L. REV. 748 (1935) (historical overview of statutory construction of penal statutes. *See supra* note 18 and accompanying text (comparing construction of penal statutes in United States v. Nash, 229 U.S. 373 and McBoyle v. United States, 283 U.S. 25). *But see* Bell v. United States, 103 S. Ct. 2398 (1983).

Nash is generally seen as a vagueness decision which tolerates considerable imprecision in an area not involving the exercise of first amendment rights. Decisions such as *McBoyle* are classically cited by text writers as involving a different principle: the maxim of strict construction of penal statutes. But, as the context of the mail fraud statute shows, the line between these two doctrines is more arbitrary than real. In *Nash*, the statute (Sherman Act) proscribed any "restraint of trade," subject to an uncertain rule of reason test; the mail fraud statute, 18 U.S.C. § 1341, prohibits any "scheme to defraud" which is furthered by use of the mails. Both phrases—"restraint of trade" and "scheme to defraud"—are ambiguous and potentially overbroad, and both are subject to a critical judicial gloss (the "rule of reason" doctrine in *Nash* and the "intangible rights" doctrine in recent mail fraud prosecutions). The difference is that the *Nash* gloss is restrictive, and the mail fraud gloss is expansive.

The point here is that the evolutionary gloss on mail fraud, by which courts can reach new forms of predatory behavior, rests on the constitutional foundation of the *Nash* decision and exists in tension with the major constitutional counterprinciple to *Nash*—the holding in Bouie v. City of Columbia, 378 U.S. 347 (1964), that unforeseeable judicial enlargement of the scope of an existing penal statute violates due process. The critical issue, then, with respect to any expansion of the scope of the mail fraud statute is whether *Bouie* or *Nash* is the more relevant precedent. Against this backdrop, this Article has suggested that in making this determination courts should give particular weight to the effect of the introduction of the criminal sanction upon the type of activity thereby regulated.

now led to a serious encroachment upon constitutionally protected activities.[43]

A second possible consequence is that judicial expansion may not anticipate and expedite eventual legislative reform. Rather, it may alter and distort the direction of that change, producing a body of law that is significantly different from that which the legislature would be most likely to adopt. For example, the unplanned evolution of mail fraud law has produced a body of law that is markedly at odds with the major modern effort at penal recodification—the Model Penal Code.[44]

Finally, the evolution of the statute is as much a prosecutorial decision as a judicial one. Thus, an infrequently examined issue arises regarding the consequence of broad, amorphous statutes on the behavior of prosecutors and on the allocation of prosecutorial resources. Such comprehensive statutes invite a diffusion of prosecutorial energies over a wide spectrum of behavior and thus interfere with the effective implemention of any rational system of national priorities.[45] The remainder of this article will examine these contentions using the mail fraud statute as a case study of penal evolution.

II. MAIL FRAUD AS AN INCHOATE CRIME

Few principles in Anglo-American law are as firmly established as the proposition that the criminal law may not punish an evil intent standing alone.[46] Criminal liability requires criminal behavior—the *actus reus*—and cannot be predicated simply on bad thoughts or schemes. Thus, the common law permitted a defendant to be punished for the crime of attempt only if his act spoke for itself or was sufficiently penultimate as to be "unequivocally referable to the commission of the specific crime."[47] Regardless of how criminal attempt was phrased, there had to be, in Justice Holmes' words, a "dangerous proximity to success."[48] Although the Model Penal Code has relaxed this requirement, it still specifies a minimum conduct requirement for the crime of attempt under which the actor's conduct must constitute a "substantial step in a course of conduct planned to culminate in his commission of the crime."[49] The Code further provides that the conduct must be "strongly corroborative of the actor's criminal purpose" in order to constitute the requisite "substantial step" toward any preparatory action.[50]

Elementary as this explanation of the law of attempt is, it helps to explain why the crime of mail fraud stands out as a distinct anomaly in the basic pattern of the law of

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43. *See* Coffee, *supra* note 2, at 144 (discussing constitutional values implicated by expansion of statute to reach political association). *See also* Hurson, *supra* note 21, at 441-44 (discussing first amendment implications of *Margiotta*).

44. *See infra* notes 49-50 and accompanying text.

45. *See infra* text accompanying notes 83-84.

46. For classic statements of this rule, *see* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART I (2d ed. 1961); and H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 73-75 (1968). *See also* Jeffries and Stephan, *Defenses, Presumptions and Burden of Proof in Criminal Law*, 88 YALE L.J. 1325, 1371 n.130 (1979) (significance of the act requirement should not be understated).

47. Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230, 237-38 (1968) (*quoted in* People v. Bowen, 10 Mich. App. 1, 11, 158 N.W.2d. 794, 799 (1968).

48. *See infra* note 113 and accompanying text.

49. MODEL PENAL CODE, § 5.01 (1)(c) (Official Draft 1962).

50. *Id.* at § 5.01(2).

inchoate crimes. Since the Supreme Court trivialized the use-of-the-mails requirement early in this century,[51] the crime of mail fraud required only a scheme to defraud and any remotely foreseeable use of the mails by the defendant or his victim that was in furtherance of the scheme.[52] Although this dilution of the jurisdictional requirement is understandable, it leaves the substantive crime of mail fraud consisting of little more than an evil scheme.

In an earlier article, this author suggested that the courts should adopt a judicial gloss on the term "scheme to defraud" in the mail fraud and wire fraud statutes which would require the prosecutor to prove a sufficient proximity between the breach and the actual or threatened loss.[53] In rebuttal, Mr. Hurson answered that such a construction "would represent a marked departure from prior judical construction of the statute."[54] Of course, he is correct in the narrow sense, but he ignores the backdrop against which the law of inchoate crimes has been developed. From a broader perspective, the crime of mail fraud is itself the marked departure from the usual rule that criminal liability not be imposed in the absence of conduct that comes within a reasonable proximity of causing the contemplated injury.

This observation about the anomalous character of the mail fraud statute is not simply an academic point. Rather, the ability of the mail fraud statute to reach a conflict of interest without more is directly dependent on the current absence of any requirement of proximity between the breach and the threatened loss. Accordingly, by eliminating this inconsistency through a requirement of closer connection between the defendant's conduct and the threatened injury, we substantially curb the overreach of the mail fraud statute into the domain of conflicts of interest. At present, the existence of a conflict of interest arguably creates an obligation on the part of the fiduciary to make full disclosure of his interest, lest he be found to have violated his duty to provide "honest and faithful" services. This obligation exists even if the defendant was relatively passive and engaged in little conduct that actually furthered the possibility of economic injury to those entitled to his faithful services. *United States v. Bronston*[55] illustrates this point.

In *Bronston*, the defendant attorney knowingly placed himself in a position in which he was subject to a serious conflict of interest, but he participated only

51. The decisions in United States v. Young, 232 U.S. 155, (1914), and Badders v.United States, 240 U.S. 391 (1916), clearly established that the only elements of the crime of mail fraud were (1) devising a scheme to defraud, and (2) using or causing the use of the mails in the furtherance thereof. *See also* United States v. Pereira, 347 U.S. 1, 8-9 (1953) (use of the mails need not be a necessary part of the scheme to defraud nor even have been intended by the defendants, but it must have been "reasonably forseeable"). Lower courts have relaxed even this requirement. *See, e.g.*, United States v. Bright, 588 F.2d 504 (5th Cir.) (publication by probate court of legal notice and mailing of newspapers containing such notice was a reasonably foreseeable aspect of a scheme to forge a will), *cert. denied,* 440 U.S. 972 (1979). One modern decision has reemphasized the use of the mails, requiring that it be in "furtherance" of the crime and not merely an after-the-fact occurrence. *See* United States v. Maze, 414 U.S. 395 (1974) (mailing of credit card statement by defrauded motel operators held "not sufficiently closely related" to defendant's scheme to defraud through unlawfully obtaining another's credit card).

52. *See* United States v. Pereira, 347 U. S. at 8-9. Wire fraud (18 U.S.C. § 1343) requires that there be an interstate or foreign communication.

53. Coffee, *supra* note 2, at 134, 163.

54. Hurson, *supra* note 21, at 426.

55. 658 F.2d 920 (2d Cir 1981).

minimally in furthering the alleged "scheme to defraud."[56] As proved at trial, his conduct appears to have consisted only of sending a letter to the Mayor's Office recommending that the franchise held by the victims not be renewed.[57] Given the traditional premise that an attempted fraud must be reasonably close to fruition before it is punishable at common law, it is disturbing that this issue of proximity has simply disappeared from the equation under the prevailing judicial gloss on the mail statutes. Indeed, even those few cases (such as *United States v. Dixon*[58]) that have required the fiduciary breach to "further" the scheme to defraud have not adequately focused on this issue of proximity. Undoubtedly, it is important to say that a conflict of interest, standing alone, is insufficient to constitute a violation, because the breach must "further" the scheme to defraud;[59] however, it is still necessary to frame a test which addresses how close this furtherance must bring the scheme to its fruition. Such focus is fundamental to the normative coherence of the criminal law for at least two reasons. First, the law has been traditionally and wisely reluctant to infer that mere preparation implies that an individual will actually carry out his scheme. Second, the law has also prudently doubted the ability of people to judge mental attitudes when they are divorced from objective and corroborating conduct.[60]

What should be done? This author would not advocate adoption of the common

56. In United States v. Bronston, the defendant, a lawyer and a politician, had previously represented a corporation that was seeking the New York City franchise for bus stop shelters. His law firm had represented the investors of another contender for the franchise and thus it determined that there was a conflict of interest. Nonetheless, the defendant continued to represent his client on a personal basis. Although he clearly breached his fiduciary duty, the question remains whether he used his fiduciary position to further that breach (such as by conveying confidential information obtained through his firm or by sabotaging the efforts of his firm to represent its client). In an earlier article, this commentator argued that the failure to emphasize a use of the fiduciary positon in a manner adverse to the interests of the beneficiary could elevate any undisclosed conflict of interest by a fiduciary into a criminal offense. Although it is entirely possible that defendant Bronston did use his fiduciary position to advance his client's personal interest, as the dissenting opinion points out, this possibility was "completely without support in the record." 658 F.2d at 931 (Van Graafeiland, J., dissenting).

57. *Id.* at 928. This act, however, did not involve a *use* of his fiduciary position, because presumably anyone can petition public officials to deny an existing franchisee the renewal of its franchise. Although this act does show that the defendant did more than passively tolerate a known conflict of interest (but rather actively sought to pursue interests contrary to those of his firm's client), it again does not show that the fiduciary position "enabled the defendant to commit the wrongful acts." *Id.* at 931 (Van Graafeiland, J., dissenting).

58. 536 F.2d 1388 (2d Cir. 1976). In *Dixon,* the failure to disclose in a proxy statement noninterest bearing loans made by the corporation to its president was found to be a violation of the securities laws, but not the mail fraud statute. Judge Friendly implied that on the facts of the case "the nondisclosure did not cause the harm." *Id.* at 1400.

59. *Id.* at 1399. Judge Friendly emphasized that only "a scheme to *use* a private fiduciary position to obtain direct pecuniary gain is within the mail fraud statute" (emphasis added). *See also* United States v. Buckner, 108 F.2d 921, 926 (2d Cir. 1940) (similarly stressing the use of the fiduciary position to gain secret profits).

60. For representative cases expressing reluctance to infer that a clearly established resolution to commit a crime would be converted into action, see People v. Bowen, 10 Mich. App. 1, 158 N.W. 2d 794 (1968) (requirement that the jury find an overt act proceeds on the assumption that the devil may lose the contest, albeit late in the hour), and People v. Youngs, 122 Mich. 292, 81 N.W. 114 (1899) (armed suspect arrested at the scene of planned breaking and entering won reversal of conviction since the overt act requirement was not yet fulfilled). *See also* Jeffries and Stephan, *supra* note 46, at 1371 n.130 (significance of act requirement should not be understated).

law rule of attempt under which typically the very precipice of the crime must be reached. Instead, if a revised statute were drafted, it should contain a standard that corresponds to that of the Model Penal Code, under which liability arises only if the conduct is "strongly corroborative of the actor's purpose."[61] In cases like *Bronston*, the Model Code requirement properly frames the issue; the jury would not be asked whether Bronston had deprived his firm's clients of his "honest and faithful services," but whether his conduct "strongly corroborated" his alleged intent to defraud them by covertly assisting a competitor to capture their franchise. Such requirement could be easily built into a statute, such as the one Mr. Hurson has drafted, with only a minimal revision.[62]

However, Mr. Hurson's proposed redraft of the mail fraud statute would make that statute even more ambiguous than it currently reads. His proposal provides that a breach of fiduciary duty does not give rise to criminal liability when it is "premised solely upon a conflict of interest or violation of a recognized standard or code of conduct."[63] This proposed standard would only confuse matters. The use of the adverb "solely" would permit a prosecutor to believe that he could always frame the indictment to avoid this limitation; if so, the protection afforded would be largely illusory. On the other hand, the existence of this exclusion might tempt fiduciaries to believe that conflicts of interest and professional codes were irrelevant. Thus the exclusion erodes the deterrent value of the statute, at the same time as it affords only limited protection.

In summary, however rare the *Bronston* facts may seem, conflicts of interest are as inevitable as death and taxes. Current law appears to be approaching the point of criminalizing a conflict of interest whenever the fiduciary knowingly fails to disclose its existence and thereby deprives his beneficiary of his "honest and faithful services." Conversely, any legislative attempt to exempt conflicts of interest from the reach of the mail fraud statute might introduce an unfortunate class bias into the criminal law, under which lower echelon officials who embezzled would be penalized, but not upper echelon personnel who engaged in conduct that harmed their shareholders. The better compromise between these extremes is to limit the reach of criminal law, but not to stay its hand altogether. The first step toward this end is to reintroduce into the law of fraud a clearer requirement that the defendant's conduct be sufficiently proximate to the threatened harm to establish unequivocally both his intent to defraud and the likelihood of a loss.[64]

III. MAIL FRAUD AS A DISCLOSURE STATUTE

The *Margiotta* decision indicates that a mail fraud conviction will be upheld when

61. MODEL PENAL CODE, § 5.01(2). *See supra* text accompanying notes 49–50.

62. One merely has to replace subsection (a)(2) of Mr. Hurson's draft statute with Model Penal Code phraseology. *See* Hurson, *supra* note 21, at 457. As so revised it might read: "(2) engages in any substantial step in a course of conduct planned to culminate in the realization of such scheme . . . ." "Substantial step" might then be defined as in the MODEL PENAL CODE. *See* MODEL PENAL CODE, § 5.01(2) ("substantial" step is one "strongly corroborative of the actor's purpose").

63. Hurson, *supra* note 21, at 458 (draft section (c)(1)(B)(b)(4)).

64. This is, however, only the first step toward this goal; other problems also remain. For example, can the proximity requirement (if added to the statute) be circumvented by indicting defendants for conspiracy to commit mail fraud?

a politically active person, as well as a government official, is found by a jury to have assumed a duty to disclose material facts to the public and deliberately fails to do so. Thus, *Margiotta* and other recent cases border on making criminal any act of disingenuousness by a public fiduciary.[65] However, *Margiotta* is only the last step in this expansion of the criminal law into public life, and the reversal of its specific holding without more would achieve relatively little. Significant reform requires that we focus less on the class of persons reached by the statute and more on the actual behavior prohibited by it. Thus, Mr. Hurson's proposal, which would exclude political officials who are not also public employees,[66] addresses only the class of persons covered and accomplishes too little.

A. Implications of a Disclosure Requirement

The fundamental irony surrounding the current significance that disclosure has acquired in the law of fraud is that originally the element of a material misrepresentation was added by courts as a way of limiting the statute's coverage to prevent its overextension. In a series of cases, various courts of appeals recognized that "not every breach of every fiduciary duty works a criminal fraud."[67] Rather, the breach of duty must have been linked with a material misrepresentation before the crime was complete. This result was not only understandable, since the very term "fraud" implies some element of deception, but also attractively parsimonious in the use of the criminal sanction, because it meant that a simple conflict of interest, without more, was not criminal.

Despite this original requirement of material misrepresentation as an additional element of the crime of mail fraud, the introduction of a disclosure standard has had a hypnotic effect on recent courts, inducing them to focus more on the character of the disclosure standard than on the evidence of personal gain. The critical step in this transition was probably the *Mandel* decision, in which Governor Mandel was held criminally liable for deceiving official action, despite the lack of proof that the

65. Judge Winter in dissent described the majority's interpretation as one that reduced the mail fraud statute to "a catchall prohibition of political disingenuousness." 688 F.2d at 139 (Winter, J., dissenting).

66. Mr. Hurson limits the reach of the "intangible rights" doctrine (which he codifies in § (a)(1)(c)) in § (c)(1)(B)(b)(3) to a person "indicted as a principal" who is "an elected or appointed public official, or public employee." Hurson, *supra* note 21, at 458. Thus, his statute would not directly reach Mr. Margiotta, but would apparently reach the janitor in the county office building. Moreover, Margiotta could still be reached as an aider and abettor. In most instances this will be only a modest hurdle for the prosecutor to surmount; he will simply allege that the political leader who is not a public employee aided and abetted the elected official to effect a patronage scheme (for example, the appointment of a clearly unqualified person to office) and that such scheme was not fully disclosed. As a protection against overcriminalization, this approach affords only an illusory, easily circumvented line of defense. In other respects, however, Mr. Hurson's statute is ably drafted and would serve as a useful starting point for statutory reform.

67. *See, e.g.*, United States v. Bush, 522 F.2d 641, 648 (7th Cir. 1975) (must be material misrepresentation as well as deprivation of honest and faithful services to constitute a crime under the mail fraud statute), *cert. denied*, 424 U.S. 977 (1976); Epstein v. United States, 174 F.2d 754 (6th Cir. 1949) (where actions of corporate director were of benefit to the corporation and made in good faith, director's failure to disclose his interest in the corporation did not constitute an active intentional fraud). Quite properly, these decisions originally indicated that a mere "constructive fraud" (i.e., a conflict of interest without predatory conduct) was noncriminal. With *Bush*, the import of this phrase changed significantly to mean that only an *undisclosed* fiduciary breach could constitute mail fraud.

beneficiaries of this action bribed him for his services.[68] This absence of personal benefit expanded the definition of mail fraud to include not only simple bribery, but also cronyism. In turn, *Margiotta* expanded the scope of the covered behavior to include not only excessive zeal in helping one's friends and business associates but also one's political party or presumably any other interest group one serves. The importance of this last step is considerable, not merely because it expands the class of covered persons but also because it expands the scope of prohibited conflicts. The greater significance of *Margiotta* is that it can be read to include *ideological* conflicts of interest as opposed to simply economic ones. This quantum leap in scope far overshadows the marginal extension of the class of covered persons to include political bosses and others who satisfy the "reliance" or "de facto" control tests.[69]

In fact, the use of the "reliance" and "de facto" control tests would bring only the traditional political boss into the class of fiduciaries covered by the statute. However, under the Second Circuit's tacit acceptance of the proposition that a gain to the Republican Party was equivalent to a gain to the defendant, the following cases would remain within the scope of the *Margiotta* rationale, even if the statute were redrafted as suggested by Mr. Hurson to limit the "intangible rights" theory to public officials and employees:

1. An assistant to the President directs the EPA to "go slow" in prosecuting toxic waste cases because of substantial corporate contributions to the Republican Party.

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68. United States v. Mandel, 591 F.2d 1347 (4th Cir.), *aff'd in relevant part on reh'g en banc*, 602 F.2d 653 (4th Cir. 1978), *cert. denied*, 445 U.S. 961 (1980). As the Court noted, *Mandel* could have been submitted to the jury on either of two theories: (1) that Governor Mandel had been bribed as part of a scheme to defraud, or (2) that "false information was presented to, or true information concealed from, the Maryland General Assembly...in order to induce . . . favorable action toward those interested in [the racetracks involved in the scheme]." *Id.* at 1364. No proof was advanced that the Governor "had a direct interest in the racetrack business." *Id.*

This means that one alternative theory of liability was that Governor Mandel presented false information to, or concealed material information from, the relevant authorities to advance the interest of his cronies, thereby depriving the citizens of Maryland of his honest and faithful services. Thus, *Mandel* moved the law beyond the crime of bribery to include "the sin of cronyism." Coffee, *supra* note 2, at 143. Mr. Hurson, who prosecuted the Governor, takes issue with this, stating that the case "represented no new departures." Hurson, *supra* note 21, at 431 n.69. Although Mr. Hurson believes that the Governor did in fact receive bribes, the clear import of the above excerpt from the Fourth Circuit's decision is that proof of bribery was unnecessary if Governor Mandel concealed material information out of bias. This conclusion is underscored in the dissenting opinion to the Fourth Circuit's en banc opinion. 602 F.2d at 655 (Widener, J., dissenting) (noting that at second trial government argued "that bribery was not an element of the mail fraud charges" and that government "made a complete flip-flop").

Mandel is thus the transitional case between earlier simple bribery cases and *Margiotta*, where the personal gain was trivial. In *Mandel*, no matter how pervasive the suggestions of bribery, the Fourth Circuit found it sufficient that defendant had secretly aided his cronies, whereas in *Margiotta*, the Second Circuit found it sufficient that defendant had concealed secret patronage to his party.

69. 688 F.2d at 122. As discussed at note 21 *supra*, these persons could easily be indicted as aiders and abettors in most cases. The distinguishing feature in *Margiotta* was that a political feud between Margiotta, the Republican Party Chairman, and Ralph Caso, the Republican County Executive, made it impossible to argue that the two had formed a conspiracy or that one was aiding the other. More typically, the party chairman will act through elected political leaders, and, thus, even without the reliance or de facto control tests of *Margiotta*, the prosecutor can indict the political leader as an aider and abettor of the public official's violation. Curiously, Mr. Hurson accepts and codifies this result in his draft statute by limiting his restriction of the "intangible rights" doctrine to those who are indicted as principals. *See* Hurson, *supra* note 21, at 457-58.

Both the White House and the EPA publicly deny that politics has played any part in the handling of cases. At this point, the prosecutor, relying on *Margiotta*, might allege a conspiracy to violate the mail fraud statute and indict officials within both the White House and the EPA, even though the underlying behavior does not amount to bribery.[70]

2. The Department of Defense awarded a major aircraft procurement contract to one defense industry firm instead of to the firm which the responsible procurement officials had chosen. The Department of Defense did so upon the insistence of a Senate Committee Chairman who had received substantial PAC funds from the winning bidder. Again, all concerned publicly denied that political pressure had been applied.

3. Federal grants earmarked for one state are redirected to another state in retaliation for the first state's senior senator having opposed some Presidential initiative; the evidence is clear that the motive is retaliatory. However, once again, any political bias is publicly denied.

In these cases there is neither an explicit bribe nor any other prearranged *quid pro quo*. However, in each case the public is denied the "honest and faithful" services of elected officials and favoritism is disguised by material misrepresentations. The holdings in *Margiotta* and *Mandel* arguably control these cases. Although *Margiotta* and *Mandel* can be narrowly construed as involving implicit bribes, a prosecutor could conclude that he was entitled to indict in each of the foregoing hypotheticals on the strength of such precedents.[71]

As a result, the potential chilling effect on the actions of public fiduciaries is significant, selective enforcement becomes possible, and even a politicized war of indictments and counter-indictments between prosecutors of different political persuasions is conceivable. Therefore, one should not be reassured by a statutory proposal that would immunize only the political leader who is not an elected or appointed official.[72] Such persons may well be the least deserving of special concern

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70. Because there is no agreement to exchange a payment for the desired political response, this case would not come within the traditional definition of bribery. However, in addition to the *Margiotta* precedent, the alternative test in *Mandel* might be read to uphold a mail fraud violation on these facts. *See supra* note 68.

Some, of course, will see such an extension as desirable, but the potential for selective enforcement and retaliatory prosecutions upon changes of administrations is unacceptable.

71. *Margiotta* and *Mandel* can be construed to involve implicit bribes which either redound to the benefit of the defendant or pass through his control in such a manner as to be constructively received. Courts have, of course, considerable capacity to distinguish cases on their facts, and, however broad the dicta are in *Mandel* and *Margiotta*, no one can deny that an aura of venality that may not be present where a public fiduciary conceals an ideological conflict of interest surrounded both cases. Even in *Margiotta*, it is clear that the control the defendant possessed over the distribution of the insurance commissions was so complete and pervasive as to be distinguishable from the once common patronage arrangement by which an appointee agreed to contribute a specified percentage of his salary to his party's coffers.

72. To the extent we are concerned about the chilling effect of the *Margiotta* decision on first amendment values, the nonoffice holder, who is not expected to communicate with the public, is far less important to protect than the public official whose statements are potentially subject to criminal prosecution if a conflict of interest or other illicit motive is concealed. Such a person is virtually placed in the position of testifying under oath at all times (about matters as to which he is personally interested), because any false statement, even though unsworn, could in theory amount to a fiduciary breach. Although courts probably will never push *Margiotta* this far, its impact upon public officials may still be considerable, even if

because the triggering element of "de facto" control over elected officials is hardly a pattern one would want to foster through the creation of a special immunity, and because from a first amendment perspective it is the speech of the elected official that seems the most deserving of constitutional protection.

Ultimately, it is the political official—whether elected or appointed—who is in the most vulnerable position. Having authorized Political Action Committees ("PACs"), Congress must know that political candidates will obtain campaign financing from them and will be induced to make political commitments which are not easily disclosed with full candor to the public at large. Yet, the *Margiotta* decision now hovers over this scene like Banquo's ghost.

Prior decisions applying the "intangible rights" theory did not go nearly this far. The leading precedent, *United States v. Issacs*,[73] signified only that economic loss to the state need not be shown; thus, a bribe could result in conviction even though no loss resulted to the state.[74] Confined to cases involving direct pecuniary gain by public officials, the "intangible rights" doctrine did little harm and some good, given the absence of a general federal antibribery statute applicable to all governmental officials.

B. FOCUSING THE DISCLOSURE REQUIREMENT

If politics (as we know it today) is incompatible with an obligation to make a fully candid disclosure of one's motivations and interests, what reforms are appropriate? The options are essentially three-fold: First, "intangible rights" doctrine as it applies to the political fiduciary could be legislatively repealed and replaced with a simple federal antibribery statute. Actually, the Hobbs Act already represents such a statute if the defendant requests payment under "color of official right."[75] However, a revision of a simple antibribery statute would exempt Governor Mandel (to the extent that the prosecutor's case rested primarily on proof of misleading statements concerning the reasons for political actions undertaken at the request of those who had made substantial payments to the defendant and not on proof of bribery) and defendant Margiotta (who in any event was convicted under the Hobbs Act for the receipt of funds under "color of official right").[76] Such an exemption seems overbroad.

A second option is Mr. Hurson's proposal: Accept the *Margiotta* rationale with

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the principle is rarely enforced.

73. 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

74. Governor Kerner of Illinois was convicted for seeking additional racing dates for a racetrack in return for a bribe, even though such additional dates would increase pari-mutuel revenue to the state and cause no economic loss.

75. Judicial expansion of the Hobbs Act, 18 U.S.C. § 1951 (1976), has extended the act to a point where any improper receipt of money or property by a public official acting "under color of official right" is now a criminal offense (if the requisite impact on interstate commerce can be shown). *See* Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977) (noting a five dollar gratuity to a police officer to overlook a minor violation can be indicted as a federal offense).

76. 688 F.2d at 131. It is also noteworthy that the dissenting judge (Judge Winter) did not dissent on this issue.

respect to public officials, but reject it with respect to party officials.[77] This approach, however, would leave vulnerable the defendants in the three foregoing hypotheticals who have neither paid, received, nor arranged any bribes.

A third choice would be to require that the defendant have sought a personal gain or benefit. This option would exempt the defendants in the earlier hypotheticals. The drafting problem in this approach lies in defining "personal gain." Clearly a gain that accrues to one's family or affiliates should be sufficient, but some room must be left for judicial interpretation. A first step in this direction would be to distinguish bribes from political contributions. A revised statute should provide that a political contribution is not a bribe if it does not directly benefit the defendant. This safe harbor for political contributions could then be according to the degree of protection thought appropriate. At a minimum, a definition should encompass national, state, and other generalized campaign funds, but exclude contributions made to the campaign of individual political officials or candidates.[78] An important point in favor of this compromise is that the "intangible rights" doctrine need not be repealed[79] but could remain as a residual safety net to catch cases like those of Governor Kerner, involving a bribe but no tangible loss to the state.[80]

The cost of this approach is obvious: some forms of political corruption would escape the criminal sanction—specifically, implicit arrangements in which political decisions are made or changed in return for contributions. To some degree, this is the result of a modern democracy which relies on costly, large scale political campaigns. The line is simply too fine between the political leader who permissibly tailors his position to attract donations and the candidate who actually promises to support the position requested by the donor. Even if the jury could distinguish between these two situations, both the problem of overbreadth and the potential for selective enforcement would remain.[81]

Nor is it clear what distinguishes a political contribution in return for specific legislative support from a reciprocal vote trade between two legislators. Both involve a specific *quid pro quo* exchange. However, most people will accept the fact that reciprocal vote trades are part of the normal political process. Therefore, the better distinction should be the presence or absence of a personal gain. If so, this distinction should be made explicit by statutory amendment before it disappears under the steady encroachment of the "intangible rights" doctrine.

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77. *See supra* note 66 (discussing Mr. Hurson's suggestion that the reach of the "intangible rights" doctrine be limited to a person "indicted as a principal" who is "an elected or appointed public official or public employee")

78. Personal gain can be said to exist in contributions made to the campaign funds of individual political officials or candidates.

79. This author believes, however, that the enactment of a simpler antibribery statute applicable to state officials would largely eliminate the need for the doctrine.

80. *See supra* note 73 (discussing Governor Kerner's conviction even though additional race track dates would increase pari-mutuel revenue to state).

81. Even the specific facts of the *Margiotta* case are not unique. A number of New York State politicians have been active in the insurance business, particularly in handling insurance for public bodies. For instance, the Mayor of Albany was reported to handle "a major part of Albany County's insurance business." *See The Margiotta Case and Splitting of Insurance Fees*, N.Y. Times, Dec. 26, 1981, at 26. Although such practices seem undesirable, their prevalence should remind us that judicial expansion of a penal statute in this area may expose a substantial number of officials to prosecution for practices not previously recognized as unlawful and invite politically sensitive selection of cases by prosecutors.

To the extent that a more discriminating approach to the problem of political corruption is thought necessary, Congress could still undertake the difficult task of fashioning a specific political bribery statute. The first amendment cannot tolerate the continued uncertain evolution of a criminal statute in this sensitive area.[82]

III. THE FEDERAL ACCOUNTABILITY IN THE ALLOCATION OF PROSECUTORIAL RESOURCES: THE FEDERAL PROSECUTOR AS KNIGHT ERRANT OR RATIONAL BUREAUCRAT?

Politicians, businessmen, and federal prosecutors should all be held accountable. Accountability, in turn, requires that priorities be established and enforced, and that the decision of what conduct or activity to prosecute not be entrusted solely to the discretion of the individual prosecutor. The mail fraud statute is one of several federal statutes whose recent expansion[83] permits the prosecutor to exercise virtually unfettered discretion in defining the kind of misbehavior on which he intends to focus. This section will consider what measures are appropriate in the absence of statutory reform to achieve a more efficient allocation of prosecutorial resources.

A. PRACTICAL ANALYSIS OF PROSECUTORIAL RESOURCE ALLOCATION

Desirable as it may be to punish the wicked, one cannot ignore that the supply of such persons vastly exceeds available prosecutorial resources. Therefore, as this writer urged in his earlier article, in prosecutions involving fiduciary breaches, the prosecutor should first consider the adequacy of internal remedies such as restitution, damages, disqualification from office, civil injunctions, or even a state criminal prosecution. When appropriate, he or she should seek to utilize such remedies instead of commencing a federal prosecution. This use of internal remedies would create, in turn, a multiplier effect: increased use of alternative sanctions means that more prosecutions can be undertaken. In addition, in fiduciary breach cases, considerations of fairness, as well as efficiency, justify increased self-restraint on the part of federal prosecutors. Unlike the conduct involved in other criminal cases, the conduct involved in fiduciary breach cases is frequently of a lower order of culpability and thus, does not require a federal prosecution.

Mr. Hurson, in commenting on the foregoing proposal, has raised a variety of objections, claiming that such a requirement would be cumbersome,[84] would raise

82. Whatever the willingness of appellate courts to tolerate judicial expansion of a statute in some contexts, they have historically insisted upon strict construction of penal statutes where first amendment values were involved. *See* Bouie v. City of Columbia, 378 U.S. 347 (1964); N.A.A.C.P. v. Button, 371 U.S. 415 (1963) (standards of permissible statutory vagueness are strict in the area of free expression).

83. The Organized Crime Control Act of 1970 (RICO) and the Hobbs Act also do not compel the prosecutor to define the type of misbehavior on which he intends to focus. With respect to the Hobbs Act, see Ruff, *supra* note 6; with respect to RICO, (18 U.S.C. §§ 1961-68 (1976)), see Tarlow, *RICO: The New Darling of the Prosecutor's Nursery,* 49 FORDHAM L. REV. 165 (1980).

84. Hurson, *supra* note 21, at 454-55. Of course, this is true to a degree, but the issue is whether such reform will require the federal prosecutor to concentrate on more significant cases. Moreover, the overall efficiency of the process cannot be judged intelligently based only on a micro-perspective focused on whether the processing of individual cases is simplified or made more cumbersome.

The basic proposal of this Article, that greater use be made of intermediate sanctions short of criminal

due process objections[85] and, most revealingly, would make the job of the federal prosecutor less enjoyable.[86] Yet, the federal prosecutor already defers to civil proceedings or accepts restitution as an adequate justification for discontinuing his own prosecution within the context of other white-collar prosecutions.[87] The issue, then, is whether official guidelines should be promulgated to standardize and, to an ex-

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conviction and that a more substantial interface be developed with state prosecutors, may be here briefly summarized:

At present, although substantial screening occurs at the initial stage when federal prosecutors decide whether to undertake a criminal investigation (the so-called "immediate declination" decision), this pattern is reversed once the investigation is undertaken. After a prosecutor is assigned to the case, relatively little monitoring occurs, and the percentage of cases that are thereafter dropped on discretionary grounds ("later declinations") is surprisingly low. Within the special context of white-collar crimes where investigations typically drag on for a considerable period (generally over a year), this means that substantial resources are allocated to what may prove to be a fairly inconsequential case. Indeed, courts sometimes complain about the trivial character of the mail fraud prosecutions that are brought before them. *See, e.g.,* United States v. McNeive, 536 F.2d 1245, 1252 n.13 (8th Cir. 1976) (government's resources "would be far better served if petty cases such as these were left to province of state legal, or even political processes"). In effect Mr. Hurson acknowledged this, noting that once an investigation is begun, the prosecutor tends to pursue his quarry single-mindedly, even though the "process is a crazy quilt of leads and forays" with "little coherence to these investigations in terms of initial direction or specification." Hurson, *supra* note 21, at 432-33. In particular, he noted that potential mail fraud cases "are rarely aborted prior to indictment" unless the prosecutor doubts he can win or the case is truly insignificant. *Id.* at 448 n.206.

Admirable as this tenacity may be, it is more a testimony to the prosecutor's commitment to the adversarial values of the contest than positive evidence of the overall efficiency with which limited prosecutorial resources are employed. Put simply, the prosecutor's desire to win may interfere with efficient allocation of prosecutorial resources by encouraging the pursuit of marginal cases rather than concentration on national priorities.

85. *Id.* at 454. This argument is untenable. SEC attorneys regularly negotiate the resignation of culpable personnel, seek revisions in board structure and require restitution of gains as conditions of settlement of their civil injunctive actions. In fact, prosecutors appear today to obtain restitution and use it as a ground for declination. *See infra* note 87. No serious constitutional objection exists, because the Supreme Court has held that the due process clause of the fourteenth amendment permits a prosecutor to threaten more severe charges if the defendant does not accept the plea bargain. Bordenkircher v. Hayes, 434 U.S. 357, 360-65 (1978). Here, one only need ask the following question: is it desirable that the prosecutor be forced to indict and convict in a marginal case in order to then demand restitution and disqualification from office as a condition of probation (as he clearly can seek to do)? Or, may he offer a compromise that does not involve criminal prosecution? Clearly, it is not in the defendant's interest that the prosecutor be denied the ability to use intermediate options and instead force him to indict. For an overview of the constitutional status of threats in plea bargaining negotiations, see Coffee, *Twisting Slowly in the Wind: A Search for Constitutional Limits on Coercion of the Criminal Defendant*, 1980 SUP. CT. REV. 211.

86. Hurson, *supra* note 21, at 453. This is probably true, but at what price is prosecutorial contentment being purchased? In any event, this is not an "all or nothing" question, and there exists a continuum of various intermediate options between total laissez-faire and rigid bureaucratic control of the prosecutor.

87. According to the UNITED STATES ATTORNEYS STATISTICAL REPORT, JUSTICE MANAGEMENT DIVISION, EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' OFFICE STATISTICAL REPORT, FISCAL YEAR 1981 [hereinafter cited as STATISTICAL REPORT], restitution by the defendant was given as the reason for "immediate declination" by the prosecutor in 492 criminal fraud investigations during fiscal 1981 and also as the reason for 67 "later declinations" in fraud cases. *Id.* at Tables 33 and 34. This category of "fraud" is the same as the white-collar category discussed in the text. This disparity between 492 "immediate declinations" and only 67 "later declinations" underscores the pattern discussed earlier, *supra* note 84, of substantial screening at the initial stage and relatively few later declinations.

tent, equalize the exercise of prosecutorial discretion.[88]

Interestingly, Mr. Hurson supplied strong evidence supporting the need for greater accountability and supervision in the prosecution of white-collar crime. As he indicated, mail fraud is the federal government's "primary vehicle for prosecuting violations of private commercial fraud and public corruption."[89] Yet, as he also acknowledged, investigations proceed unpredictably, often changing directions, targets, and priorities in mid-stream.[90] From these premises he reached a conclusion that is more symptomatic than self-evident: "Since the ultimate object of any investigation is indictment and either plea or trial, federal prosecutors frequently will bring a case relatively unrelated to whatever they originally were pursuing, simply because it is an indictable, triable case."[91] The momentum to indict someone for something can often be irresistible.

As Mr. Hurson noted, this happens because the pressure to indict is not easily resisted; the investigating agents "press the prosecutor for indictment of whatever offenses appear to be indictable, even if those offenses have little relation to the initial investigation or involve lesser targets or less serious conduct than originally anticipated."[92] Though Mr. Hurson's description may be empirically correct, it is disappointing from both a normative and policy planning perspective. From the standpoint of criminal justice priorities, his conclusion is nothing less than irresponsible. Mr. Hurson has, in effect, defined the problem rather than raised objections to a proposed solution. Considering the scarcity of federal prosecutors, it is both a gross misallocation of resources and an abdication of responsibility when only minimal efforts are made to turn less serious offenses over to state authorities or to encourage, in appropriate cases, noncriminal disposition based on restitution or other civil sanctions.

This inefficiency in the use of prosecutorial resources persists for a number of reasons. First, federal prosecutors are an elite fraternity, and, like all fraternities, they resist outside supervision. Something akin to an "old boy" network exists between prosecutors and defense counsel, in part because the latter are typically alumni of United States Attorney's Offices. The overall efficiency of the process does not interest any of the immediate participants.

Second, careerist motives may encourage the individual prosecutor to stalk the "big kill"—typically, a highly visible business or political figure—even if the evidence ultimately obtained shows misconduct that is relatively modest in proportion to other violations by less notable persons. Successful prosecution of a highly visible defendant can significantly advance a prosecutor's career. To say this is not to accuse prosecutors of any impropriety; it is inevitable in any organization that

88. The House bill to recodify the federal criminal law has already moved in the direction this author has proposed. *See* H.R. 1647, 97th Cong., lst Sess. § 1751 (1981) (Bribery). This provision would preclude federal prosecution of state officials for bribery unless the Attorney General of that state charges that officials either "acquiesced in the Federal prosecution" or were "not about to undertake such a prosecution." No insurmountable barrier is imposed by such provision, and it might place pressure on state officials to prosecute cases that are currently being prosecuted by federal prosecutors although the states have concurrent jurisdiction.

89. Hurson, *supra* note 21, at 432.

90. *Id.* at 433.

91. *Id.*

92. *Id.*

some incongruence will arise between the aims and self-interest of the individual and those of the organization generally.

In most organizations, however, this incongruence is recognized, and a control system is implemented to monitor departures from the pursuit of the best interest and goals of the organization. In contrast, the value structure surrounding the federal prosecutor maximizes these opportunities to pursue individual self-interest. In a phrase, the self image of the federal prosecutor resembles that of the knight errant. As the knight of the round table went on a quest, so also the Assistant United States Attorney is given an investigation and permitted to pursue it with great independence and relatively modest supervision. It may be admirable that he pursues his quest diligently and relentlessly, but it is not necessarily efficient. Unlike the situation among state prosecutors where the constant pressure of the caseload automatically restrains free-lancing, few logistical constraints or other barriers inhibit the natural enthusiasm of the young federal prosecutor to pursue his quarry and gain important trial experience.[93] Concededy, superiors sometimes order the discontinuation of unproductive investigations, but little suggests that they frequently insist upon the use of alternative remedies or require an offered plea bargain to be accepted.

What is the alternative? One could sketch a model of the prosecutor as a rational bureaucrat, who considers whether the product of each additional increment of time and effort will exceed its marginal cost. Such model would, of course, be overly idealized, because such perfect efficiency is never obtainable. Put plainly, the realistic policy choices involve whether bureau chiefs should encourage their assistants to utilize alternative remedies, and whether they should ever accept a plea bargain offered by the defense attorney which the investigating prosecutor wishes to reject.

As Mr. Hurson has already noted, any attempt to rationalize the allocation of prosecutorial energies threatens to rob the federal prosecutor's job of its excitement and glamor. This is not a trivial concern, and thus, the issue posed is how inefficient the allocation of resources is today. Although there have been few serious studies, some empirical data is available, and it points to several important conclusions. First, the investigation and prosecution of white-collar cases is today the principal activity of federal prosecutors, surpassing by a wide margin any other category of

93. To be sure, the Department of Justice has promulgated guidelines and priorities. *See* U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION 5-7 (1980) (which recognizes that "prosecution should be declined because...(b) the person is subject to effective prosecution in another jurisdiction; or (c) there exists an adequate noncriminal alternative to prosecution"). *See also* U.S. DEP'T OF JUSTICE, NATIONAL PRIORITIES FOR THE INVESTIGATION AND PROSECUTION OF WHITE-COLLAR CRIME: REPORT OF THE ATTORNEY GENERAL (1980) (discussing the availability and effectiveness of state and local enforcement mechanisms as a factor to consider in determining the need for federal law involvement). Although the desirability of state referral and the use of civil sanctions, to which Mr. Hurson objects, are stressed in these policy statements, Mr. Hurson is probably correct in his belief that these principles are honored more in the breach than the observance. Probative of this point is the disparity between "immediate declinations" and "later declinations" (the latter occurring only after the federal prosecutor has begun his investigation). In fiscal 1981, there was a total of 39,779 "immediate declinations" as opposed to 12,828 "later declinations"—a ratio of over 3 to 1. This supports (but, of course, does not prove) an inference that the federal prosecutor is reluctant to abandon a strong case once undertaken, even though it may not be worth his time on a relative basis. *See* STATISTICAL REPORT at Tables 33 and 34.

federal criminal violations.[94] Second, white-collar cases are prosecuted at a rate that is disproportionate compared to the percentage that white-collar investigations bear to the total number of criminal investigations.[95] Third, only a very low rate of such investigations is turned over to other authorities or settled on the basis of restitution or similar sanctions.[96] Fourth, white-collar investigations appear to take longer and probably, therefore, consume more resources than any other class of investigations undertaken by U.S. Attorneys.[97] To the extent these conclusions are accurate, they suggest the desirablility of proposals that allocate prosecutorial resources more efficiently, by encouraging greater use of state and civil remedies in cases not clearly warranting the use of criminal sanctions.

B. A STATISTICAL ANALYSIS OF PROSECUTORIAL RESOURCE ALLOCATION

The foregoing characterization of the process of federal "white-collar" investigations rests upon evidence that is only partially available in published sources, but which is available to the researcher who has been granted access to the Department of Justice computerized records.[98] Since 1974, the Justice Department has maintained a computerized system of record-keeping, known as the U.S. Attorneys' Docket and Reporting System, which records the progress of each "matter" and "case" handled by U.S. Attorneys nationwide.[99] For present purposes, the most important information in this data-base is the generic "program code" classification given to each case and matter so recorded.[100] These program codes constitute a typology of crime categories under which the prosecuting attorney characterizes the underlying offense in terms of functional descriptions that explain how he sees the case, for example, as "Organized Crime," "Drug Dealing," "Official Corruption," or "Civil Rights" prosecution. This data-base permits a more precise examination of the treatment of a particular class of cases than would reliance on the statutory offense. For example, instead of examining simply "mail fraud" cases, an obviously heterogeneous category which includes prosecutions of governors and con men alike, one can examine a category entitled "White-Collar Crime" which is defined to

94. *See infra* text accompanying note 103.

95. *See infra* text accompanying note 104.

96. *See infra* notes 105-08 and accompanying text.

97. *See infra* notes 109-10 and accompanying text.

98. Table 31 of the STATISTICAL REPORT, *see supra* note 87, annually presents the "Criminal Program Category Report". Useful as they are, they do not permit the computation of declination rates for various crime categories nor do they reveal inter-district disparities. Moreover, the Department has considerably more detailed and subdivided categories which are not set forth in this report. For example, the white-collar crime category has various subdivisions (e.g., securities fraud, bank embezzlement, antitrust fraud, etc.).

99. For a full explanation of the system, see MANAGEMENT SUPPORT AND INFORMATION SYSTEMS, EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T. OF JUSTICE, ORDER NO. USA 2840, U.S. ATTORNEYS' DOCKET AND REPORTING SYSTEM MANUAL (Sept. 1, 1980) (updated by Change 1 (Feb. 1, 1981); Change 2 (Oct., 1981)) [hereinafter cited as MANUAL]. *See infra* note 102 (distinguishing between "matters" and "cases").

100. For a list of "Criminal Program Category Codes" see MANUAL, *supra* note 99, app. 1 at 15-22. There are 18 such categories. Several categories, including "White-Collar Crime/Fraud," "Government Regulatory Offenses," "Official Corruption," and "Labor/Management Offenses" are further divided into specific subcategories and a residual catchall category.

include all prosecutions of "non-violent crimes involving deceit, concealment, subterfuge, and other fraudulent activity."[101] Equally important, because the system contains data about "matters" (investigations that have not yet resulted in indictment or other disposition) as well as "cases,"[102] it is possible to observe the rates at which different categories of alleged criminal behavior are prosecuted.

1. White-Collar Matters and Cases

Analysis of the data-base for 1981, the most recent available fiscal year, reveals the following pertinent results: during fiscal 1981, 13,770 criminal matters (approximately 21.45% of all criminal matters handled during this period) were classified by U.S. Attorneys within the White-Collar Crime category and several related subcategories. This was the single largest category of criminal matters.[103] In addition, 6.15% of all matters were classified as Government Regulatory Offenses, and 0.82% of all matters were classified as Official Corruption matters. Because these categories are closely related and the distinctions between them are somewhat arbitrary, it is best to focus on their grand total—roughly 28.4%. To gain a perspective on the relative significance of this proportion, it is worth noting that the combined program categories of Drug Dealing and Drug Possession represented only slightly above 6% of all criminal matters.

This picture changes markedly as our focus shifts from criminal "matters" to criminal "cases." The White-Collar Crime program category declined from 21.45% of all matters to 17.32% of all cases. In contrast, the Drug Dealing category nearly tripled its proportionate share, climbing from approximately 5.5% of all matters to nearly 16% of all cases. The Drug Possession category doubled its share, rising from under 1% of matters to nearly 2% of cases. Thus, although the white-collar program category was the largest grouping of both matters and cases, white-collar cases were significantly underrepresented on a proportionate basis, while the drug cases were overrepresented. This underrepresentation does not necessarily imply that prosecutors are deemphasizing white-collar cases. It can be attributed to a variety of factors, including the relative difficulty of prosecuting white-collar cases, the greater legal uncertainties about what constitutes a crime, and the special problems of obtaining adequate evidence.[104] The better inference is that the capacity of federal prosecutors to handle complex prosecutions is limited. Thus, intermediate

101. *Id.* app. 1 at 17. This is the definition for criminal program category "030", which is the computer coding designation for the residual catchall subcategory for the "White Collar Crime/Fraud" discussed in note 100, *supra*. The 14 subcategories under the generic heading "White-Collar Crime/Fraud" are more specifically described therein. *See* MANUAL, *supra* note 99, app. 1 at 17-19.

102. *Id.* at 10. "A matter is a civil claim or Criminal Complaint on which an attorney spends one hour or more of his time, and has not been filed in Court." *Id.* "A case originates when the first paper is filed in court. A Criminal Case starts with the filing of an Indictment or Information (not with the filing of a complaint—it is still a matter until an Indictment or Information is filed.") *Id.*

103. This figure is the sum of program code "030" (the residual catchall category) and the 14 other subcategories of white-collar crime which are given program category numbers between "030" and "040". Thus, the number is larger than the figures set forth in the third column of Table 31 of the STATISTICAL REPORT, *supra* note 98, which appear to include simply those matters and cases which fall into the residual subcategory.

104. To state the obvious, a "bank robbery" case begins typically with the arrest of the offender, while, in the "white-collar" context, there may be substantial doubt that a crime has in fact occurred.

resources are probably the most practical means of dealing with this overload within existing budgetary limits.

2. *White-Collar Declinations*

The data-base also provides a general description of the reasons for declination whenever a decision is made to terminate a pending matter. Published data shows that, in the "white collar" program category, during fiscal year 1981 only 5.9% of "later declinations" (that is, declinations after an initial investigation) were the result of the suspects being prosecuted by other authorities.[105] This low rate of referral to state authorities is not limited to the white-collar context. But the rate of such referrals for white-collar cases is below the overall average.[106]

There were even fewer decisions to terminate an investigation because the defendant agreed to pay restitution. During fiscal 1981, of 3,135 decisions to terminate ongoing white-collar fraud investigations, only 67 decisions (2.1%) were so described.[107] This number is further decreased by the 8,432 "white-collar" crime "matters" that were handled during the period.[108]

3. *White-Collar Case Duration*

The white-collar crime category contains a higher proportion of older cases than any other category. At the end of fiscal year 1981, the majority of matters in the white-collar crime category were still pending indictments, declinations, or other terminations. In contrast, the majority of drug and other violent crime matters were

105. STATISTICAL REPORT, *supra* note 87, app. 1 at Table 34. ("Criminal Matters Declined—Later Declinations by Reason During FY 1981"). This table shows that there were 3,135 declinations in fraud cases in fiscal 1981. This category appears to be an abbreviation for White-Collar Crime/Fraud under the criminal program category classification system. Only 184 (5.9%) of these declinations were because the suspect was to be prosecuted by other authorities. It should be noted that Table 34 is incomprehensible without the MANUAL because the reasons for declination are illegibly abbreviated in the STATISTICAL REPORT's Tables. *See* MANUAL, *supra* note 99, app. 1 at 25-26.

106. *See* STATISTICAL REPORT, *supra* note 87, at Table 34. Overall, there were in fiscal 1981 12,828 "later declinations," of which 1,018 (7.9%) were due to the prosecution of the suspect by other authorities. This was the third largest category of such declinations. In contrast, the overall average for fraud offenses was 5.9%.

107. *Id.*

108. *Id.* at Table 31. In other words, less than 1% of the white-collar criminal matters pending during 1981 (i.e., 67 out of 8,432) were terminated based on restitution. Yet, this is the unique context where restitution is possible due to the financial resources of many defendants. Indeed, during the same period, 492 white-collar fraud cases were "immediately declined" before they became criminal matters based on the defendant's making or agreeing to make restitution. *Id.* at Table 33. This constituted nearly 5.7% of the "immediate declinations" for this program category in fiscal 1981. Based on this data, two conclusions appear justified. First, prosecutors appear to screen cases at the outset, but little monitoring thereafter occurs in order to encourage expeditious resolution of less serious cases. Certainly, more than 1% of all pending "white-collar" criminal matters should have been settled on a basis short of indictment, particularly when only a modest percentage of such cases ever results in indictments. Second, the Justice Department's guidelines in PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 93, at 13, which recommend declination where "there exists an adequate non-criminal alternative to prosecution," appear to have had little impact in this area.

disposed of within that fiscal period.[109] Evidence, other than that which shows the amount of time expended on a white-collar case, suggests that the typical "white-collar" investigation drags on for years.[110] Given the expense of such investigations, the need is obvious for careful case selection and periodic review.

4. Evaluation

None of this evidence is counterintuitive. The basic picture of prosecutorial discretion that emerges in "white-collar" cases is of an investigative process that considers a large number of complaints, produces a disproportionately lower number of indictments, seldom yields a case to state or other authorities, and probably invests greater effort per investigation (given their longer duration) than in other crime categories that involve more explicit and easily defined forms of misbehavior.[111]

Such description leads to the conclusion that both the interest of fairness to the defendant and the interest of efficient allocation of prosecutorial resources would be better served if sanctions short of actual indictment figured more prominently in the Department of Justice's policies. Additionally, the transfer of cases to state or civil authorities should be encouraged more frequently.

Considerations of fairness support this kind of policy. Today, within the "white-collar" context, the federal prosecutor confronts an "all or nothing" decision—whether to prosecute or decline—against a backdrop of a volume of pending investigations which is substantially higher than the federal criminal justice system can hope to prosecute. In all likelihood, a number of cases is on both sides of the indictment threshold. These would be more justly handled by the use of alternative sanctions.

The countervailing consideration is that the federal prosecutor, having stalked his prey, would like to make the kill.[112] Understandable as this may be, it is not a goal of the criminal justice system to maximize the psychological gratification of federal prosecutors. Nor is it a credible answer to reply that state authorities would ineffectively handle the case. To be sure, this is a valid consideration in a number of cases, particularly in the local corruption category. However, in the absence of any demonstrated willingness on the part of federal authorities to transfer control, one cannot reasonably fault state authorities for their lack of preparedness.

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109. Of all white-collar criminal matters handled during fiscal 1981, some 19.8% were declined, another 2.35% were dismissed, and 27.5% resulted in filed cases. However, 50.2% remained pending at the end of the period. In contrast, only 32.8% of Drug Dealing matters and 24.8% of Drug Possession matters remained pending at the end of the fiscal year. This conclusion cannot be verified based on the published data, but rather comes from this author's analysis of the 1981 computer tape. (This computer tape was obtained through a Freedom of Information Act lawsuit brought by Mr. Richard Grunner, a former student). This author has summarized some of the data from this study in a paper given at the 1983 Law and Society Annual Convention. *See* Coffee, Federal Prosecutorial Resources and White-Collar Crime: A Statistical Approach to Measuring the Allocation of Prosecutorial Resources (1983) (copy on file with THE AMERICAN CRIMINAL LAW REVIEW).

110. This was a conclusion reached in a detailed study of SEC investigations. *See* S. Shapiro, The Disposition of White-Collar Illegalities: Prosecutorial Alternatives in the Enforcement of the Securities Laws (Paper presented at 1978 Annual Meeting of American Sociological Association).

111. *See supra* text accompanying notes 103-110.

112. *See generally* Hurson, *supra* note 21, at 453 n.249.

IV. CONCLUSION

The practical strength of the mail fraud statute is also its conceptual weakness. To the prosecutor, its utility lies in its historic ability to "evolve" over time so as to cover any new form of misbehavior without need for congressional action. To the civil libertarian, this concept of "evolution" is fundamentally at odds with the principle of fair notice and with the maxim of strict construction of penal statutes. No other term in the federal criminal lexicon seems as all embracing as "scheme to defraud," or comes as close to a general prohibition of evil intent.

This Article has made three suggestions which, if implemented, should reduce this tension without rejecting the statute's evolutionary gloss. First, although mail fraud is now an inchoate crime which is complete whenever a "scheme to defraud" is advanced through use of the mails, criminal law cannot seek, and has never sought, to punish every scheme or evil plan, but only those that have a "dangerous proximity to success."[113] Thus, the first principle is that mail fraud should not stand apart from the modern law on inchoate crimes, but should be coherently and consistently integrated with that body of law and limited by standards equivalent to those governing the law of attempt.

Second, the obligation to disclose any conflict of interest, which the "intangible rights" doctrine now seems to impose on both public and private fiduciaries is an overly broad standard unless limited to some objective event such as the issuance of securities, the solicitation of proxies, or the filing of a formal document. A broad disclosure obligation, amounting in effect to a confessional duty to declare every secret commitment or promise, is particularly incompatible with the hurly-burly of political fundraising. If the modern political process is to function in any way like it does today, some immunity must be given from the overbroad theory that lurks in *Margiotta*, under which political contributions to a party are virtually equated with a kickback to an individual. The most feasible way to achieve this objective might be to legislate a safe harbor for certain "legitimate" varieties of fundraising where the interests of the fiduciary are less immediate or are not in apparent conflict. Although a test of this kind might not produce a different result in a case like *Margiotta*, it would provide more guidance to public officials, party officials, and private individuals who desire to participate fully in the political process and to avoid entanglement with the criminal law. More generally, disclosure should be obligatory only where the defendant has sought personal gain or benefit.

Finally, federal prosecutorial resources are too precious a commodity to be allocated as randomly as they frequently appear to be today. Thus, this article would suggest the first step should be internal reform within the Justice Department, under

113. This was Justice Holmes' phrasing of the proximity test which he used to distinguish mere preparation from a criminal attempt. *See* Hyde v. United States, 225 U.S. 347, 388 (Holmes, J., dissenting) (1912) ("combination, intention, and overt act may be present without amounting to a criminal attempt . . . there must be dangerous proximity to success. But when that exists, the overt act is the essence of the offense."). *See also* Commonwealth v. Peaslee, 177 Mass. 267, 59 N.E. 55 (1901) (defendant's attempt to induce servant to burn building constituted overt act sufficiently proximate to warrant conviction). Other formulae—such as physical proximity or last proximate act—were prevalent in other jurisdictions. For an extreme example, see People v. Rizzo, 246 N.Y. 334, 158 N.E. 888 (1927) (defendants who intended to rob payroll man but failed because they were arrested before they found him held not guilty of "attempt" to rob).

which policy guidelines should seek to utilize intermediate sanctions and activate state resources.

Absent reforms of this nature, we can anticipate that this Article will represent only an intermediate chapter in the continuing story of the mail fraud statute and its growth.