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PUBLISHING FAKE NEWS FOR PROFIT SHOULD BE PROSECUTED AS WIRE FRAUD

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This Article argues that publishing fake news online for profit should be prosecuted as wire fraud under 18 U.S.C. § 1343. Fake news publishers compete in the two-sided market for online news. They deceive their readers to profit from advertisers. Neither the readers nor the advertisers are defrauded. The readers are not defrauded because they do not pay to read the stories. The advertisers are not defrauded because they are not subjected to the deception. But the fake news publisher still profits by means of the deception. To use the language of the law: the publisher obtains money by false pretenses. Publishing fake news is the pre-eminent example of a growing class of frauds that do not defraud. These are frauds where the dishonest acquisition of money or property is not accompanied by the dishonest deprivation of any particular person. The conjunctive interpretation of the mail fraud statute adopted by the Supreme Court in Cleveland v. United States precludes the prosecution of these kinds of frauds. This Article argues that Cleveland must be overruled to extend the reach of the wire fraud statute to frauds that do not defraud. It uses fake news as a vehicle to present a detailed account of why frauds that do not defraud are worthy of criminal prohibition. It explains why publishing fake news should constitute fraud and sets out how the prosecution of fake news as fraud would work. Its aim is to reframe the understanding of both fraud and fake news, and to expose publishing fake news as the scam, the swindle, the scheme, the cheat and the racket that it really is.

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* PhD Candidate and Casual Academic, University of Technology, Sydney. This Article is the product of a broader project examining the extent to which publishing fake news for profit may constitute fraud in several jurisdictions. I am grateful to Penny Crofts, Derek Wilding and Hallie Warnock for their valuable feedback on the earlier drafts. I am also grateful to the talented and hardworking editors of the Santa Clara Law Review. The review process made this Article much better than it otherwise would have been. And I am overcome with gratitude to Kasia Czarnota, not only for reading the earlier drafts, but also for her ever-incisive critique of my ideas and expression. This research was supported by an Australian Government Research Training Program Scholarship and by the University of Technology Sydney's Media Transition Doctoral Scholarship.

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I. INTRODUCTION

The free world is in the midst of a dishonesty crisis. Tyrannies, oligarchies and kleptocracies have no need for honesty. But democracies do. Democracies are built on the informed participation of their citizens. Modern democracies guarantee freedom of speech and freedom of the press to allow for transparency and the robust exchange of ideas. But there are some who abuse these freedoms. Some take these great gifts guaranteed by the social contract and use them to spread lies to further their own ends. Where these ends are political, not much can be done. The law trusts the truth to prevail. It trusts the people to favor honesty over mendacity. But where the ends are financial, it is a different story. The law extends no quarter to those who make money by telling lies. There is no freedom of false pretenses. There is no freedom to cheat or swindle. To make money by telling lies is fraud—a crime and a vitiator of statutes and contracts alike.

Perhaps the most significant manifestation of the modern dishonesty crisis is the proliferation and viral spread of fake news on the internet. The phrase "fake news" has been misappropriated almost out of meaning. Its modern use originally referred to false stories published on websites that look like legitimate news websites.[1] That is the sense in which it is used in this Article. The viral spread of false news stories on the internet is a recognized problem.[2] But the notion that the law may be the solution has been given short shrift. It has been eclipsed by an assumption that false speech must be tolerated to protect the right to express ideas and opinions.[3] That assumption has blotted out the whole sky.[4] It has obscured the true nature of the problem.

The problem is not just that people are publishing false information online. It is that people are *making money* by publishing *false statements of fact* online. Fake news stories typically contain false statements of

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1. *See, e.g.*, Jeremy W. Peters, *Wielding Claims of 'Fake News,' Conservatives Take Aim at Mainstream Media*, N.Y. TIMES, Dec. 26, 2016, at A11 ("purposely fabricated stories for clicks and revenue"); Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at the Truth*, N.Y. TIMES, Dec. 7, 2016, at A1 ("a made-up story with an intention to deceive, often geared toward getting clicks"); Jen Weedon, William Nuland & Alex Stamos, *Information Operations and Facebook*, FACEBOOK NEWSROOM 5 (Apr. 27, 2017), https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf ("[n]ews articles that purport to be factual, but which contain intentional misstatements of fact with the intention to arouse passions, attract viewership, or deceive"); Hunt Allcott and Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 213 (2017) ("news articles that are intentionally and verifiably false, and could mislead readers"); David M. Lazer et al., *The Science of Fake News*, 359 SCIENCE 1094, 1094 (2018) ("fabricated information that mimics news media content in form but not in organizational process or intent").

2. *See generally* United Nations Special Rapporteur on Freedom of Op. & Expression et al., *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda*, ORG. FOR SECURITY AND CO-OPERATION IN EUR. (Mar. 3, 2017), https://www.osce.org/fom/302796?download=true.

3. The assumption is in part grounded upon the notion that truth will prevail in the marketplace of ideas. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market"). The application of that notion to false information spread online has been persuasively attacked. *See* Ari Ezra Waldman, *The Marketplace of Fake News*, 20 J. CON. L. 845, 848 (2018) (arguing that fake news does not trade in the marketplace of ideas).

4. *See, e.g.*, Flemming Rose & Jacob Mchangama, *Shutting Down Fake News Could Move Us Closer to a Modern-Day '1984'*, WASH. POST, Feb. 10, 2017; Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L. J. 669, 679-80 (2017); Annie C. Hundley, *Fake News and the First Amendment: How False Political Speech Kills the Marketplace of Ideas*, 92 TULANE L. REV. 497, 504 (2017); Ashley Messenger, *The Epistemic and Moral Dimensions of Fake News and the First Amendment*, 16 FIRST. AMEND. L. REV. 328, 329-30 (2018); Jessica Stone-Erdman, *Just the (Alternative) Facts, Ma'am: The Status of Fake News Under the First Amendment*, 16 FIRST. AMEND. L. REV. 410, 415 (2018). *Contra* Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99 (2018) (arguing that restricting fake news is compatible with free speech).

fact, not ideas or opinions worthy of protection as free speech.[5] Most of them are published on websites supported by advertising revenue.[6] Several prominent fake news publishers have admitted to publishing fake news primarily to earn money.[7] Others have disclaimed the profit motive yet disclosed earnings of tens of thousands of dollars.[8] There is even evidence of publishers employing writers to create content.[9]

To obtain money by means of a false statement of fact ordinarily constitutes fraud. Yet almost no one has suggested that publishing fake news for profit may constitute fraud. Most legal analyses do not even mention fraud as a possibility.[10] This omission is baffling given that "fake news" is often referred to as "*fraudulent* news."[11] The whole

5. Waldman, *supra* note 3, at 848.

6. An examination of the *BuzzFeed* compilation of the fifty most-shared fake news stories of 2016 reveals that most of the stories were published on websites supported by advertising revenue. *See* Craig Silverman, *Here Are 50 of the Biggest Fake News Hits on Facebook from 2016*, BUZZFEED NEWS (Dec. 30, 2016), https://www.buzzfeednews.com/article/craigsilverman/top-fake-news-of-2016. *See also* Brittany Vojak, *Fake News: The Commoditization of Internet Speech*, 48 CAL. WEST. INT. L. J. 123, 140-43 (2017).

7. *See, e.g.*, Andrew Higgins, Mike McIntire & Gabriel Dance, *Inside a Fake News Sausage Factory: 'This Is All About Income'*, N.Y. TIMES, Nov. 26, 2016, at A1 (quoting fake news publisher as saying "For me, this is all about income, nothing more"); Scott Shane, *From Headline to Photograph, a Fake News Masterpiece*, N.Y. TIMES, Jan. 19, 2017, at A1 (reporting fake news publisher insisting that the money, not the politics, is the point); Craig Silverman, Jane Lytvynenko & Scott Pham, *These Are 50 Of The Biggest Fake News Hits On Facebook In 2017*, BUZZFEED NEWS (Dec. 28, 2017), https://www.buzzfeednews.com/article/craigsilverman/these-are-50-of-the-biggest-fake-news-hits-on-facebook-in (reporting fake news publisher describing taking advantage of online hoaxes as "a way to make money"). *See also* Vojak, *supra* note 6, at 140-43.

8. *See, e.g.*, Caitlin Dewey, *This Is Not an Interview with Banksy*, WASH. POST, Oct. 23, 2014 (reporting fake news publisher disclosing earnings of up to $10,000 per day from a false story describing the arrest of the anonymous artist known as Banksy); Laura Sydell, *We Tracked Down A Fake-News Creator In The Suburbs. Here's What We Learned*, NPR: ALL THINGS CONSIDERED (Nov. 23, 2016) (downloaded using NPR) (reporting fake news publisher making between $10,000 and $30,000 per month yet insisting that it is not about money); Eli Saslow, *'Nothing on This Page Is Real': How Lies Become Truth in Online America*, WASH. POST, Nov. 18, 2018 (describing fake news publisher earning as much as $15,000 in a "good month").

9. *See, e.g.*, Terrence McCoy, *Inside a Long Beach Web Operation That Makes up Stories about Trump and Clinton: What They Do for Clicks and Cash*, L.A. TIMES, Nov. 22, 2016; Silverman, *supra* note 6; Simon Oxenham, *'I was a Macedonian Fake News Writer'*, BBC FUTURE (May 28, 2019), https://www.bbc.com/future/article/20190528-i-was-a-macedonian-fake-news-writer.

10. *Cf.* David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 5, 9 (2017) (identifying fraud and unfair and deceptive trade practices as potential tools to fight fake news); John Allen Riggins, *Law Student Unleashes Bombshell Allegation You Won't Believe: "Fake News" as Commercial Speech*, 52 WAKE FOREST L. REV. 1313, 1327-29 (2017) (dismissing fraud as viable solution); Ari Melber, *Capitol Report: Regulating Fraud News*, N.J.L.J. (Jan. 30, 2017) (suggesting FTC could treat non-political fake news stories as fraudulent).

11. *See, e.g.*, PEN AMERICA, FAKING NEWS: FRAUDULENT NEWS AND THE FIGHT FOR TRUTH (2017) (defining fraudulent news "as demonstrably false information that is being

enterprise—the lying, the manipulation, and the profit motive—is reminiscent of a traditional scheme to defraud.

This Article argues that those who publish fake news online for profit should be prosecuted for wire fraud. Wire fraud is the go-to offense for the prosecution of online fraud in the United States. It is contained in 18 U.S.C. § 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.[12]

To publish information on the internet is to transmit or cause to be transmitted writings, signs, signals, or pictures by means of wire communications.[13] The communications are "interstate or foreign" because they are directed at the world at large.[14] They are "in . . . commerce" because they are published with the intention of making money via

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presented as a factual news report with the intention to deceive the public, and the related erosion of public faith in traditional journalism"); Riggins, *supra* note 10, at 1313 (referring to "the phenomenon of intentionally *fraudulent*, faux journalistic content" (emphasis added)).

12. 18 U.S.C. § 1343 (2008). The wire fraud statute is the younger sibling of the mail fraud statute contained in 18 U.S.C. § 1341. The two are identical insofar as they relate to fraud. The courts have interpreted them as being in *pari materia* such that principles developed in relation to one apply to the other. *See* United States v. Pollack, 534 F.2d 964, 971 (D.C. Cir. 1976); United States v. Donahue, 539 F.2d 1131, 1135 (8th Cir. 1976); United States v. Tarnopol, 561 F.2d 466, 475 (3rd Cir. 1977), *abrogated on other grounds by* Griffin v. United States, 502 U.S. 46, 57 n.2 (1991); United States v. Comput. Scis. Corp., 689 F.2d 1181, 1188 n.14 (4th Cir. 1982), *overruled on other grounds by* Busby v. Crown Supply, Inc., 896 F.2d 833, 841-42 (4th Cir. 1990); United States v. Feldman, 711 F.2d 758, 763 (7th Cir. 1983).

13. *See, e.g.*, United States v. Pirello, 255 F.3d 728, 729-30 (9th Cir. 2001) (publishing false advertisements online treated as wire communications); United States v. Lee, 296 F.3d 792, 793-94 (9th Cir. 2002) (publishing imitation website treated as wire communication); United States v. Roemmele, No. 04–60206–CR, 2011 WL 4625348, 6-7 (S.D. Fla. Oct. 3, 2011); United States v. Foster, No. 13-20063-CR-GRAHAM, 2014 WL 12687616 (S.D. Fla. Mar. 31, 2014), *aff'd*, 878 F.3d 1297, 1302 (11th Cir. 2018) (publishing false news articles online treated as wire communications); United States v. Arif, 897 F.3d 1, 4 (1st Cir. 2018) (publishing false research and fictitious testimonials online treated as wire communications).

14. Several circuits have held that an internet transmission in and of itself constitutes an interstate communication. *See* United States v. Carroll, 105 F.3d 740, 742 (1st Cir. 1997); United States v. Runyan, 290 F.3d 223, 239 (5th Cir. 2002); United States v. MacEwan, 445 F.3d 237, 244 (3rd Cir. 2006). The Tenth Circuit has recognized that it is possible for an internet transmission to be intrastate—for example, where the servers of both parties to the transmission are located within the same state. *See* United States v. Kieffer, 681 F.3d 1143, 1155 (10th Cir. 2012). No such possibility can arise in relation to communications directed at the world at large published on websites.

advertising.[15] Publishing fake news online therefore meets the *jurisdictional* elements of wire fraud. This means that it constitutes the offense if it is a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[16]

The Supreme Court has held that the words "to defraud" refer to "wronging one in his property rights by dishonest methods or schemes" and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching."[17] This definition is traditional, not radical. To defraud is to deprive by dishonest means.[18] The publication of fake news for profit does not constitute a scheme or artifice "to defraud" because the fake news publisher does not *defraud* anyone. The readers are not defrauded because they do not pay to read the stories. The advertisers are not defrauded because they are not subjected to the deception. They pay the publisher for exposure to the readers and the publisher delivers that exposure. There is a relationship between the number of readers and the payment due to the publisher.[19] But neither the readers nor the advertisers are deprived by dishonest means.

The fraud of a fake news publisher is not a traditional scheme to defraud. It is something else—a fraud that does not defraud. Although the publisher defrauds neither the readers nor the advertisers, the profit the publisher makes via the advertising is contingent upon the deception of the readers. Fortunately, the wire fraud statute prohibits devising or intending to devise any scheme or artifice "to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[20] If the statute were read literally, a fake news publisher could be prosecuted on the basis that publishing fake news for

15. The requirement that the communications must be made "in interstate or foreign commerce" exists because the validity of the wire fraud statute depends upon the commerce clause in Section 8 of Article 1 of the Constitution. *See* United States v. Bryant, 766 F.2d 370, 375 (8th Cir. 1985); United States v. Hook, 195 F.3d 299, 310 (7th Cir. 1999); United States v. Schaefer, 501 F.3d 1197, 1202 (10th Cir. 2007); United States v. Louper-Morris, 672 F.3d 539, 563 (8th Cir. 2012). The Supreme Court has treated "commerce" as being analogous with "economic enterprise" or "economic activity." *See* United States v. Lopez, 514 U.S. 549, 561 (1995). There should be no doubt that running a website to generate a profit via advertising is an economic enterprise and therefore is "in . . . commerce."

16. 18 U.S.C. § 1343.

17. Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) quoted in McNally v. United States, 483 U.S. 350, 358 (1987), *superseded by statute as stated in* Skilling v. United States, 561 U.S. 358 (2010).

18. *See* Re London and Globe Finance Corporation, Ltd [1903] 1 Ch.D. 728, 732 ("To defraud is to deprive by deceit").

19. *See infra* Section (II)(B).

20. 18 U.S.C. § 1343.

profit is a scheme or artifice "for obtaining money . . . by means of false or fraudulent pretenses [or] representations."[21]

Unfortunately, there is a problem with this argument—a crippling problem. The argument proceeds on the assumption that the wire fraud statute should be read *disjunctively*, and that read disjunctively, the statute does not require that the scheme or artifice be a scheme or artifice "to defraud." The problem is that the wire fraud statute has not been interpreted disjunctively. In *Cleveland v. United States*, the Supreme Court interpreted the first two phrases of the mail fraud statute *conjunctively*—as if a scheme or artifice "for obtaining money or property" must also be a scheme or artifice "to defraud."[22] This conjunctive interpretation stands in the way of the prosecution of fake news as wire fraud.

This Article argues that *Cleveland* should be overruled so that publishing fake news for profit may be prosecuted as wire fraud. It makes this argument in five parts. Part I introduces the notion that publishing fake news for profit is a fraudulent scheme and asserts that the wire fraud statute provides an appropriate solution to the problem. Part II explains the development of the conjunctive interpretation of the wire fraud statute. It traverses key events relevant to the interpretation of the mail fraud statute that led to the decision in *Cleveland*. Part III attacks the decision in *Cleveland*. It argues that the Supreme Court misinterpreted unclear evidence of legislative intent instead of adhering to the plain meaning of the statute. It also argues that inconsistency in the interpretation of the mail and wire fraud statutes and the bank fraud statute violates the consistent-usage canon of statutory construction.

Part IV sets out three reasons to favor a disjunctive interpretation of the wire fraud statute. This interpretation would extend the statute to schemes or artifices "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" that are not also schemes or artifices "to defraud"—frauds that do not defraud. The first reason is that one underlying purpose of the statute is to prohibit the making of dishonest gains. The second is that it is legitimate to use the criminal law to prevent and punish deceptive economic exploitation. The third is that the disjunctive interpretation would better capture modern frauds and do so in a manner more conventional than recourse to the intangible rights doctrine. Part IV concludes by addressing some anticipated objections to the disjunctive interpretation.

Part V describes the scope of "fake news wire fraud." It sets out the elements of the offense and applies the facts of fake news publication

21. 18 U.S.C. § 1343.

22. Cleveland v. United States, 531 U.S. 12, 25-26 (2000).

to those elements. It stresses that the publication of an opinion or not-for-profit content cannot constitute fraud. It examines the tricky issue of how to differentiate genuine satire from fake news. And it explains why the obvious falsity of a fake news story cannot provide a defense to its publisher.

The overall goal of this Article is to advance an argument in favor of prosecuting fake news publishers for wire fraud. One subsidiary goal is to critique the present inability of the wire fraud statute to capture frauds that do not defraud. Another is to change the way that people look at fake news—to expose it as the scam, the swindle, the scheme, the cheat and the racket that it really is.

II. FAKE NEWS AS FRAUD

The publication of fake news has a history of being viewed as a criminal act. As far back as 1275 the First Statute of Westminster provided "[t]hat from henceforth none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord or slander, may grow between the king and his people or the great men of the realm."[23] Many laws enacted in the name of curtailing false speech would today be considered inconsistent with ideals of free speech and freedom of the press. But the publication of false news *for profit* belongs to a different category. That category is fraud.

A. Hard Copy Fake News

Imagine a person who created a fake newspaper—a hard copy, buy it, fold it in half and carry it under your arm, newspaper. Now imagine that person standing in the street ringing a bell shouting: "*Extra! Extra! Pope Francis Shocks World and Endorses Donald Trump for President!*"[24] The sale of such a newspaper is fraud throughout the United States today. It has been fraud for as long as fraud has been a crime.

The original fraud offense at common law was known as "cheating." To cheat was to defraud a person in a way that affected the public.[25] The courts recognized two kinds of frauds as "cheats." The first

23. Statute of Westminster 1275, 3 Edw. 1 c. 34 (Eng.).

24. This false story was one of the most popular fake news stories of 2016. *See* Dan Evon, *Pope Francis Shocks World, Endorses Donald Trump for President*, SNOPES (July 10, 2016), https://www.snopes.com/fact-check/pope-francis-donald-trump-endorsement/; Craig Silverman & Jeremy Singer-Vine, *The True Story Behind The Biggest Fake News Hit Of The Election*, BUZZFEED NEWS (Dec. 16, 2016), https://www.buzzfeednews.com/article/craigsilverman/the-strangest-fake-news-empire; Silverman, *supra* note 6.

25. *See* 2 SIR EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN 817 (Philadelphia, P. Byrne 1806); 3 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 161 (London, Macmillan & Co, 1883).

were those that directly affected the public by causing prejudice to the administration of public services such as the courts or the revenue.[26] The second were those that a man of ordinary capacity could not detect.[27] The rationale behind this second category was that a cheat beyond the detection of a man of ordinary capacity was likely to be capable of affecting the public because it could be practiced upon many subjects without detection. The courts considered the use of false tokens, false weights and false measures, as well as conspiracies to defraud, to be examples of cheats that men of ordinary capacity could not detect.[28]

The word "token" was used in one sense to refer to copper or brass tokens issued by tradesmen as change in lieu of coins.[29] But the phrase "false tokens" was also used in a broader sense. It encompassed counterfeit trade tokens as well as false dice,[30] counterfeit letters,[31] counterfeit seals,[32] counterfeit passports,[33] counterfeit orders,[34] counterfeit promissory notes,[35] fake business cards,[36] and even other less obviously deceptive objects, like keys or rings.[37] A false token was a physical object or device used to support an act of deception—something that "betoken[ed] a general design to defraud."[38] A publication masquerading as a newspaper would have been considered to be a false token because it meets this description. Selling it would thus have constituted cheating at common law; and the publisher would have been whipped, pilloried or fined as punishment.

The publication of a fake newspaper may also have constituted cheating at common law pursuant to authority that spreading false news in and of itself constituted cheating. In *R v. Harris*, Chief Justice Scroggs said that "all the judges of England" had unanimously declared that writers of false news, "though not scandalous, seditious, nor

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26. *See* 2 EAST, *supra* note 25, at 816-18; 2 JW CECIL TURNER, RUSSELL ON CRIME 1322-27 (11th ed. 1958).

27. *See, e.g.*, R v. Jones (1703) 1 Salk. 379; 91 Eng. Rep. 330; 2 Ld. Raym. 1013; 92 Eng. Rep. 174; 6 Mod. 105; 87 Eng. Rep. 863. *See also* 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 187-88 (London, Eliz. Nutt 1716).

28. R v. Wheatly (1761) 2 Burr. 1124, 1127-28; 97 Eng. Rep. 746, 748 *sub nom* R v. Wheatley (1761) 1 Black. W. 273, 275; 96 Eng. Rep. 151, 162; 3 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 203 (Philadelphia, Edward Earle 1819).

29. Henry Mares, *Fraud and Dishonesty in King's Bench and Star Chamber*, 59 AM. J. LEGAL HIST. 210, 225 (2019).

30. Martin Leeser's Case (1619) Cro. Jac. 497; 79 Eng. Rep. 424.

31. R v. Tripp (1670) 2 Keble 527; 84 Eng. Rep. 330.

32. R v. Worrall (1683) Skin. 108; 90 Eng. Rep. 51.

33. R v. F.D.L., t16860707-28 (O.B. 1686).

34. R v. Smith, t16891211-24 (O.B. 1689).

35. 2 EAST, *supra* note 25, at 825.

36. Jones v. State, 50 Ind. 473, 476 (Ind. 1875).

37. 2 EAST, *supra* note 25, at 826-27; 3 CHITTY, *supra* note 28, at 424.

38. 2 EAST, *supra* note 25, at 820.

reflective upon the government of the state" were "indictable and punishable upon that account."[39] Several treatises on the criminal law picked up on this statement as justification for describing the publication of false news as a form of cheating.[40] Russell, for example, said in his chapter on cheats: "[P]robably at this day the fabrication of news, likely to produce any public detriment, would be considered as criminal."[41]

The requirement that a cheat had to affect the public allowed many dishonest schemes to go unpunished.[42] Coupled with changing public attitudes towards dishonesty brought about by events like the bursting of the South Sea Bubble,[43] its unpopularity prompted Parliament to enact the False Pretences Act of 1757.[44] This statute prohibited "knowingly and designedly, by false Pretence or Pretences [obtaining] from any Person or Persons, Money, Goods, Wares or Merchandizes, with Intent to cheat or defraud any Person or Persons of the same."[45] It did not require

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39. R v. Harris (1680) 7 St. Tr. 925, 929-30.

40. 1 SIR WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES & MISDEMEANORS 1367 (1st American ed., Boston, Wells & Lilly 1824); HUMPHRY W. WOOLRYCH, A PRACTICAL TREATISE ON MISDEMEANORS 23 (London, Shaw & Sons 1842); FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 445 (Philadelphia, Kay & Brother 1846). Some texts even referred to the spreading of false news as a standalone offense. *See, e.g.*, 1 JOSEPH GABBETT, A TREATISE ON THE CRIMINAL LAW 319 (Dublin, John Cumming 1835). Bishop criticized Russell's placement of spreading false news and other indictable misdemeanors under the title of cheats. "But while there is nothing gained by undertaking to be too nicely philosophical in our division of subjects in the criminal law, still it is a little loose to contemplate all these varying wrongs as cheats." *See* JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 162 (Boston, Little, Brown & Co, 6th ed. 1877). In truth the dictum of Scroggs CJ in *Harris* may be better regarded as representative of libel and not fraud because the mere spreading of false news involves no financial benefit or detriment. Russell at least was alive to this reality. He referred to *Harris* as an authority for libel as well as cheating. *See* 1 RUSSELL, *supra* at 319. *See also* THOMAS STARKIE, LAW OF SLANDER, LIBEL, SCANDALUM MAGNATUM AND FALSE RUMOURS 354 (New York, Collins & Hannay 1832). But Russell may still have been correct to include it as an authority for cheating seeing as he confined his statement to false news *likely to produce any public detriment*. This was reflective of the requirement that cheats had to affect the public. There would have needed to be some element of financial gain or loss involved. But there is no reason why a false pretense in the form of news could not have constituted cheating if it affected the public. An example of a decision along those lines (although it was prosecuted as a conspiracy) was R v. De Berenger (1814) 3 M. & S. 67; 105 Eng. Rep. 536. The defendants in that case spread rumours than Napoleon had been killed and that England was about to make peace with France in order to take advantage of the resultant surge in the price of government bonds.

41. 1 RUSSELL, *supra* note 40, at 1367.

42. The reports are full of failed indictments for cheating. *See, e.g.*, R v. Glanvill (1710) Holt K.B. 355; 90 Eng. Rep. 1096; R v. Wilders (1720) 11 Mod. 309; 88 Eng. Rep. 1057; R v. Bryan (1730) 2 Str. 866; 93 Eng. Rep. 902; 1 Barn. K.B. 299; 94 E.R. 203; R v. Nunos (1740) Sess. Cas. 233; 93 Eng. Rep. 234; R v. Combrune (1751) 1 Wils. K.B. 301; 95 Eng. Rep. 630.

43. *See* JEROME HALL, THEFT, LAW AND SOCIETY 29-30 (2nd ed. 1952).

44. 30 Geo. II c. 24.

45. 30 Geo. II c. 24.

the fraud to be beyond the detection of a man of ordinary capacity.[46] A bare-naked lie was enough, as long as it was a misrepresentation of a past or present fact, not an expression of opinion or a promise to do something in the future.[47] Moreover, although most false pretenses were written or verbal, the courts also recognized that conduct could amount to a false pretense.[48] In one decision, the utterance of a counterfeit note was held to be a false pretense that the note was genuine.[49] In another, the wearing of a commoner's cap and gown was held to be a false pretense that the wearer was a commoner of Magdalen College, Oxford.[50]

A person who stands in the street and holds out a fake newspaper for sale represents to the world that the newspaper is legitimate and that the stories it contains are legitimate news stories. This is a false pretense by conduct. The stories themselves may contain written false pretenses. Any money paid by passers-by in exchange for copies of the newspaper would be obtained by means of the false pretense. The publisher, by requesting money in exchange for the newspapers known to be false, demonstrates intent to cheat and defraud. The publication and sale of a fake newspaper would therefore have constituted obtaining money by false pretenses.

Provisions prohibiting obtaining money by false pretenses remain in force throughout the United States.[51] The publication and sale of a fake newspaper is criminal fraud throughout the country today because it contravenes those provisions. The notion that it is not fraudulent to publish fake news online thus seems anomalous. The online fake news publisher does more or less the same thing as the hard copy publisher. How can one be fraud but not the other?

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46. R v. Young (1788) 1 Leach 505; 168 Eng. Rep. 354, 355.

47. R v. Goodhall (1821) Russ. & Ry. 461; 168 Eng. Rep. 898, 899.

48. *See e.g.*, R v. Freeth (1807) Russ. & Ry. 127; 168 Eng. Rep. 718 (uttering counterfeit note held to be pretense that note was genuine); R v. Barnard (1837) 7 Car. & P. 784; 173 Eng. Rep. 342 (wearing university uniform held to be pretense that wearer was student of university); R v. Parker (1837) 7 Car. & P. 825; 173 Eng. Rep. 360; 2 Mood. 1; 169 ER 1 (paying with cheque held to be pretense that cheque was good and genuine order for payment); R v. Story (1805) Russ. & Ry. 81; 168 Eng. Rep. 695 (accepting money intended to be paid to another person held to be pretense that defendant was that other person). *See also* R v. Bull (1877) 13 Cox. C.C. 608; R v. Parker & Bulteel (1916) 25 Cox. C.C. 145.

49. R v. Freeth (1807) Russ. & Ry. 127; 168 Eng. Rep. 718.

50. R v. Barnard (1837) 7 Car. & P. 784, 173 Eng. Rep. 342.

51. *See, e.g.*, CAL. PEN. CODE §§ 484(a), 148.6(a)(1); N.Y. PEN. CODE § 155.05(2)(d), 190.60, 190.65; TEX. PEN. CODE § 31.02, 31.03; WASH. REV. CODE 9A.56.020(1)(b). *See also* MODEL PENAL CODE § 233.3 (AM. LAW INST., Proposed Official Draft 1962).

B. The Two-Sided Market for Online Fake News

The answer to this question relates to the online fake news business model. The hard copy fake news publisher relies on a traditional buyer and seller business model. The newspapers are sold to the readers. In contrast, the online fake news publisher makes use of a two-sided market model. The fake news is provided to the readers free of charge, but revenue is generated via advertising.

A two-sided market is one that contains two interrelated groups of consumers.[52] Google's search engine is a prominent example.[53] On one side are users who do not pay to use the search engine. On the other are advertisers who pay to advertise to the users.[54] If there were no users, there would be no one to whom the advertisers could advertise. If there were no advertisers, there would be no revenue to fund the search engine. Google must attract both users and advertisers to profit in the two-sided market for online search.[55]

The notion that a business may cater to more than one market at the same time is not new. It is an inherent feature of any business supported by advertising or involving an intermediary.[56] The difference today is the scale at which two-sided markets operate and the opportunities that exist to profit from one side without charging the other. Both of these changes were brought about by the internet. The internet has made it possible to reach millions of people with low investments in time and

52. Lapo Filistrucchi, Damien Geradin & Eric van Damme, *Identifying Two-Sided Markets*, 36 WORLD COMPETITION 33, 33-34 (2013) ("a market in which a firm sells two distinct products or services to two different groups of consumers . . . and knows that selling more to one group affects the demand from the other group and possibly vice versa"); *see also* David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325, 328 (2003) (explaining that "platform businesses" serve "multiple disparate communities" and "compete in 'multi-sided markets' ").

53. *See generally* Robert H. Bork & J. Gregory Sidak, *What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?*, 8 J. COMP. L. & ECON. 663 (2012); Giacomo Luchetta, *Is the Google Platform a Two-Sided Market?*, 10 J. COMP. L. & ECON. 185 (2013); James D. Ratliff & Daniel L. Rubinfeld, *Is There a Market for Organic Search Engine Results and Can Their Manipulation Give Rise to Antitrust Liability?*, 10 J. COMP. L. & ECON. 517 (2014).

54. *See* Bork & Sidak, *supra* note 53, at 667 ("Search users value the information freely available on the Internet; advertisers value access to search users. . . . Internet search can be considered an intermediary platform that brings together two parties—the search user and the advertiser—to an exchange that occurs over the Internet.").

55. *See id.* at 668 ("When Google increases demand for its search engine, advertising on Google search becomes more valuable. Google can therefore increase the demand for advertising on its search platform by improving the end-user experience.").

56. See Filistrucchi et al., *supra* note 52, at 34 (explaining that prominent examples of two-sided markets include media markets, payment card markets, and auction houses).

capital.[57] Online businesses can provide free-to-access products and services but profit from the sale of data and attention.[58]

The news media has not been immune from this transformation. Publications such as *Buzzfeed*, *The Guardian* and *Huffington Post* are free to read.[59] Like Google, these publications operate in a two-sided market—the two-sided market for online news. On one side are the readers who read the articles. On the other are the advertisers who advertise to the readers. The publications must attract both readers and advertisers; they cannot survive with one but not the other.[60]

Publications like *BuzzFeed*, *The Guardian* and *Huffington Post* compete in the market for online news against other legitimate news publishers. But they also compete against fake news publishers. Fake news publishers compete in the market for online news in the same way as legitimate news publishers. The difference is that the way in which fake news publishers compete is far from legitimate. Fake news publishers compete by inventing stories, not reporting them, and by taking deliberate steps to trigger the spread of their stories across social media and message boards.[61] A typical fake news scheme works in the following way:

1. The publisher purchases a domain that sounds like the domain of a legitimate news organization.
2. The publisher builds a website that looks like a legitimate news website.
3. The publisher publishes false news stories on the website.
4. The publisher engages an online advertising service to host advertisements alongside the stories.
5. The publisher posts links to the stories on platforms like Facebook and Twitter and forums like Reddit and 4chan.
6. Users read, re-post or share the stories in the false belief that they are real news stories.

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57. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849-53 (1997); United States v. Pirello, 255 F.3d 728, 729-30 (9th Cir. 2001).

58. John M. Newman, *Antitrust in Attention Markets: Objections and Responses*, 59 SANTA CLARA L. REV. 743, 746-50 (2020).

59. John Reynolds, *Huffington Post may Charge for Some Content, Says Chief Executive*, HUFFINGTON POST, Mar. 20, 2014; Fergal Gallagher, *How Does BuzzFeed Make Money*, TECH TIMES (Mar. 6, 2015), https://www.techtimes.com/articles/38013/20150306/buzzfeed-make-money.htm; Jim Waterson, *Guardian Breaks Even Helped by Success of Supporter Strategy*, THE GUARDIAN, May 1, 2019.

60. *See* Filistrucchi et al., *supra* note 52, at 34 ("In media markets, advertisers demand for ads on media outlet increases with the number of consumers of content (viewers, readers, listeners, etc.), while viewers, readers and listeners might also be, positively or negatively, affected by the quantity of advertising.").

61. *See* Vojak, *supra* note 6, at 140-43 (distinguishing intentional fake news for profit from other types of fake news).

7. The publisher is paid by the advertising service for exposing advertisements to readers.[62]

The successful execution of a scheme to profit by publishing fake news requires an understanding of website design and knowledge of the online information ecosystem. But the real art (if dishonesty is an art) is devising the right kind of story—one that people not only will want to read, but one they will want to share. Publishing stories that people want to share is the key to making money via fake news.[63] The more people who visit the website (the more *impressions*) and/or the more people who visit websites linked by advertisements (the more *clicks*), the more money the publisher will make.[64]

The two most popular false stories in the lead up to the 2016 Presidential Election were a report that Pope Francis had endorsed Donald Trump for President and a report that Hilary Clinton had sold weapons to I.S.I.S.[65] The publishers of those stories banked on devoted pro-Trump readers sharing them.[66] They anticipated the glee with which those readers would receive news that the Pope had endorsed Trump or that Clinton had been caught selling weapons to I.S.I.S. And they

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62. *See* Vojak, *supra* note 6, at 123-27 (describing how three individuals set up fake news sites to make money); Abby Ohlheiser, *This Is How Facebook's Fake-News Writers Make Money*, WASH. POST, Nov. 18, 2016; Justin Ray, *The Man Who Helps the Internet Make Fake News*, COLUMBIA JOURNALISM REV. (Jan. 24, 2019), https://www.cjr.org/innovations/breakyourownnews-com-jonathan-cresswell.php; *Where Does Fake News Come From?*, CTR. FOR INFO. TECH. & SOC'Y, https://www.cits.ucsb.edu/fake-news/where (last visited Feb. 20, 2020).

63. Fake news websites attract a much higher proportion of their traffic from social media (41.8%) compared to top news websites (10.1%). *See* Allcott & Gentzkow, *supra* note 1, at 222. *See also* Jacob L. Nelson & Harsh Taneja, *The Small, Disloyal Fake News Audience: The Role of Audience Availability in Fake News Consumption*, 20 NEW MEDIA & SOC'Y 3720, 3721 (2018) (finding that "visits to fake news sites originated from social network sites . . . at a much higher rate than visits to real news sites, confirming the primary role social media played [in 2016] in spreading fake news").

64. *See* Vojak, *supra* note 6, at 124; *see also* James Parsons, *The Difference Between Website Impressions and Clicks*, GROWTRAFFIC BLOG (Jan. 25, 2015), https://growtraffic.com/blog/2015/01/difference-website-impressions-clicks.

65. Craig Silverman, *This Analysis Shows How Viral Fake Election News Outperformed Real News on Facebook*, BUZZFEED NEWS (Nov. 16, 2016), https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook [hereinafter Silverman, BUZZFEED].

66. *See* Allcott & Gentzkow, *supra* note 1, at 223 (finding that "there are about three times more fake pro-Trump articles than pro-Clinton articles, and the average pro-Trump article was shared more on Facebook than the average pro-Clinton article"); Emily Shugerman, *Trump Supporters Share More Fake News Than Anyone Else, Study Shows*, INDEPENDENT (Feb. 7, 2018), https://www.independent.co.uk/news/world/americas/us-politics/trump-supporters-share-more-fake-news-junk-news-oxford-study-a8199056.html; Nir Grinberg et al., *Fake News on Twitter During the 2016 U.S. Presidential Election*, 363 SCIENCE 374 (2019) (finding that most fake news was consumed by persons who were conservative leaning, older and highly engaged with political news).

anticipated the outrage with which they would respond to other stories. "Police Find 19 White Female Bodies in Freezers with 'Black Lives Matter' Carved into Skin" and "Donald Trump Protester Speaks Out: 'I was paid $3,500 to Protest Trump's Rally' " were also top performers.[67]

Fake news is infamous today because of suggestions that it in some way influenced the outcome of the 2016 Presidential Election.[68] But the publication of fake news is not an inherently political enterprise.[69] Whilst politics is an easy target because some people care about it so much, anything about which people really care will do. Health and safety, life and liberty, are also targets. Beyond the narrow but important realm of politics, fake news publishers have produced false accounts of events during natural disasters,[70] promoted bogus health care advice,[71]

67. Kim Lacapria, *Did Police Find 19 Female Bodies in Freezers with 'Black Lives Matter' Carved Into Their Skin?*, SNOPES (Feb. 18, 2016); Louis Jacobson, *No, Someone Wasn't Paid $3,500 to Protest Donald Trump; It's Fake News*, POLITIFACT (Nov. 17, 2016), https://www.politifact.com/factchecks/2016/nov/17/blog-posting/no-someone-wasnt-paid-3500-protest-donald-trump-it/; Silverman, *supra* note 6.

68. *See, e.g.*, Silverman, BUZZFEED, *supra* note 65; Richard Gunther, Paul A. Beck & Erik C. Nisbet, *Fake News May Have Contributed to Trump's 2016 Victory* (Ohio State Univ., 2018) (finding a correlation between belief in fake news stories and voting for Donald Trump among individuals who voted for Barack Obama).

69. *But cf.* Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CAL. L. REV. 1223, 1226 (2018) (characterizing fake news as political advertising).

70. *See, e.g.*, Sy Mukherjee, *These Hurricane Irma Myths Have Gone Viral. Don't Fall for Them*, FORTUNE, Sep. 6, 2017; Jane Lytvynenko, *Here's a Running List of Hoaxes and Scams About Hurricane Florence*, BUZZFEED NEWS (Sep. 13, 2018), https://www.buzzfeednews.com/article/janelytvynenko/hurricane-florence-hoaxes-fake-news. *See also* DEPARTMENT OF HOMELAND SECURITY, COUNTERING FALSE INFORMATION ON SOCIAL MEDIA IN DISASTERS AND EMERGENCIES 8 (2018) (discussing opportunistic disinformation).

71. *See, e.g.*, Amanda Z. Naprawa, *Don't Give Your Kid That Shot!: The Public Health Threat Posed by Anti-Vaccine Speech and Why Such Speech is Not Guaranteed Full Protection Under the First Amendment*, 11 CARDOZO PUB. L. POLICY & ETHICS J. 473, 506-08 (2013) (addressing anti-vaccination information spread to influence sales of other products); Przemyslaw M. Waszak, Wioleta Kasprzycka-Waszakc & Alicja Kubanek, *The Spread of Medical Fake News in Social Media – The Pilot Quantitative Study*, 7 HEALTH POL. & TECH. 115, 116 (2018) (finding 40% of frequently shared health-related links in Polish language social media contain false information). In the past few months this form of misinformation has adopted a new form, as individuals have used YouTube videos to promote bogus advice related to the COVID-19 pandemic. *See* Kari Paul, *YouTube Profits From Videos Promoting Unproven Covid-19 Treatments*, THE GUARDIAN, Apr. 3, 2020. Although there is no research available on the topic, it appears to be safe to assume that at least some of those who post bogus advice on YouTube are financially motivated, as YouTube channels generate advertising revenue for their owners. *See How to Earn Money on YouTube*, YOUTUBE HELP, https://support.google.com/youtube/answer/72857 (last visited Apr. 6, 2020).

published false rumors about celebrities,[72] and simply sought to scare or shock their readers.[73]

The damage done by this kind of deception cannot be underrated. The sheer prevalence of false information online makes it hard for even astute readers to determine whether or not a particular story is real; and readers who believe false stories may be influenced to act in ways in which they would not have acted but for their belief in the false stories.[74] To use obvious examples, those who believe political fake news may vote in ways in which they would not otherwise have voted,[75] and those who believe false health care advice or crisis information may subject themselves to serious physical danger.[76] Prevalence of these kinds of beliefs may influence or taint the legitimacy of an election or waste precious public resources. In this way, the false beliefs of some have the potential to set back the interests of others and society as a whole.[77] The

72. *See, e.g.*, Dan Evon, *John Cena Death Hoax*, SNOPES (Jul. 10, 2016), https://www.snopes.com/fact-check/john-cena-death-hoax/; Dan Evon, *Did Mark Zuckerberg Announce His Resignation from Facebook?*, SNOPES (Mar. 14, 2017), https://www.snopes.com/fact-check/mark-zuckerberg-resignation/.

73. *See, e.g.*, Dan Evon, *Did Police Discover a Meth Lab in a Back Room of an Alabama Walmart?*, SNOPES (Dec. 27, 2017), https://www.snopes.com/fact-check/meth-lab-alabama-walmart/; Dan Evon, *Are Michigan Police Worried About a 'Vigilante' Serial Killer of Pedophiles?*, SNOPES (Oct. 15, 2018), https://www.snopes.com/fact-check/police-vigilante-pedophile-serial-killer/.

74. Even those who know better than to believe false stories may unwittingly alter their behavior in response due to what psychologists call the "illusory truth effect" – the phenomenon that people come to believe a statement the more times they are exposed to it, even if they originally knew it to be false. *See* Lisa Fazio, *Unbelievable News? Read It Again and You Might Think It's True*, THE CONVERSATION, Dec. 5, 2016.

75. Richard Gunther, et al., *Fake News May Have Contributed to Trump's 2016 Victory* 1 (Ohio State Univ., Mar. 8, 2018) ("Our analysis leads us to the conclusion that fake news most likely did have a substantial impact on the voting decisions of a strategically important set of voters"). *See generally* Allcott & Gentzkow, *supra* note 1, at 232-33. *See also* Krysten Crawford, *Stanford Study Examines Fake News and the 2016 Presidential Election*, STANFORD NEWS (Jan. 18, 2017), https://news.stanford.edu/2017/01/18/stanford-study-examines-fake-news-2016-presidential-election/ ("A reader of our study could very reasonably say, based on our set of facts that it is unlikely that fake news swayed the election…[b]ut that conclusion ultimately depends on what readers think is a reasonable benchmark for the persuasiveness of an individual fake news story.").

76. Research suggests that fake news has contributed to the anti-vaccination movement that is behind the resurgence of diseases like measles and diphtheria. *See, e.g.*, Vincenzo Carrieri, Leonardo Madio & Francesco Principe, *Vaccine Hesitancy and (Fake) News: Quasi-Experimental Evidence from Italy*, 28 HEALTH ECONOMICS 1377, 1381 (2019) (linking fake news to drop in childhood immunization).

77. Several commentators have argued that the prevalence of false political information has the potential to undermine faith in democracy. *See, e.g.*, PEN AMERICA, *supra* note 11, at 16 ("Pinned beneath the weight of so much uncertainty, people lose interest in government, civic life, and democratic participation because they are convinced that the whole enterprise is a veil for self-dealing, that any professed ideals are empty words."); Meital Balmas, *When Fake News Becomes Real: Combined Exposure to Multiple News Sources and Political Attitudes of Inefficacy, Alienation, and Cynicism*, 41 COMMUNICATION RESEARCH 430, 446

dishonesty of and disruption caused by the publication of fake news is a serious problem.

C. Wire Fraud as a Solution to the Problem

Nations, organizations and individuals around the world are in search of a solution to the fake news problem. The prevailing attitude favors fact checking, promoting news literacy, and censorship by platforms in lieu of laws prohibiting the publication of fake news. But there are significant problems with each of these purported solutions.

"Fact checking" with respect to fake news refers to the practice of responding to false stories by publishing articles that counteract false information or by labelling links to stories as false on social media.[78] Although the practice is noble, as a solution it is too slow and ineffective. By the time a fact checker has investigated and debunked a false story, thousands of people may have seen the story;[79] most of them will never see the response by the fact checker,[80] and those that do may not believe it.[81]

"Improving news literacy" refers to efforts to teach citizens how to spot false information.[82] This too is a worthy goal. But it is also too

(2014) (identifying "a political-communication process whereby fake-news viewing impacts on political attitudes, enhancing feelings of inefficiency, alienation, and cynicism towards politicians").

78. *See What Is Fact-Checking?*, BALLOTPEDIA, https://ballotpedia.org/What_is_fact-checking (last visited Feb. 20, 2020); Lili Levi, *Real "Fake News" and Fake "Fake News"*, 16 FIRST AMEND. L. REV. 232, 239 (Symposium 2017).

79. Levi, *supra* note 78, at 292 ("because of the speed with which 'fake news' can propagate on social media, it is very likely that fact checkers will find it difficult to provide real-time rebuttals").

80. *See* Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146, 1147 (2018) ("[F]alsehood diffuse[s] significantly farther, faster, deeper, and more broadly than the truth in all categories of information."); Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L. J. 55, 77-78 (2018) (explaining how filter bubbles inhibit dissemination of counterspeech).

81. Alice E. Marwick, *Why Do People Share Fake News? A Sociotechnical Model of Media Effects*, 2 GEO. L. TECH. REV. 474, 508 (2018) (suggesting that fact checking may make believers double down on false beliefs).

82. *See, e.g.*, *What Is News Literacy?*, CTR. FOR NEWS LITERACY, https://www.centerfornewsliteracy.org/what-is-news-literacy/ (last visited Feb. 20, 2020) (defining news literacy as development of "critical thinking skills in order to judge the reliability and credibility of information" and "a literacy that empowers news consumers to determine whether information is reliable and then act on it"); Pesach Benson, *News Literacy: The 7 Habits You Need to Develop*, HONESTREPORTING (Jan. 21, 2019), https://honestreporting.com/news-literacy-7-habits/ (describing strategies to improve news literacy); Lindsay Beyerstein, *Can News Literacy Grow Up? [Updated]: After a Decade, the Movement Tries to Prove Its Worth*, COLUMBIA JOURNALISM REV. (2014), https://archives.cjr.org/feature/can_news_literacy_grow_up.php (explaining that the mission of news literacy is "to help give people the critical-thinking skills necessary to discern what is trustworthy").

slow; and it is too optimistic.[83] It assumes that a person who is news literate will reject false stories.[84] This fails to account for those weighed down by heavy confirmation bias. It also fails to account for stories the falsity of which is difficult to detect. Modern "deepfake" technology increasingly allows for the creation of convincing false video and audio content.[85] The fake news of tomorrow will be difficult to detect for literate and illiterate alike.[86]

"Platform censorship," in relation to fake news, refers to platforms, such as Facebook, Google, and Twitter, removing, deprioritizing or identifying false information.[87] Research demonstrates that platform censorship works.[88] But it also places the platforms in a tricky position.[89] Failing to censor content risks criticism that the platform is being used to spread false information. Censoring too much content risks criticism that the platform is violating rights to freedom of speech and freedom of the press, or that it is biased.[90] More importantly, the notion that

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83. *See* Beyerstein, *supra* note 82 ("In theory, critical thinking skills are teachable, but in practice they are difficult to define and measure.").

84. *See* Nicole A. Cooke, *Posttruth, Truthiness, and Alternative Facts: Information Behavior and Critical Information Consumption for a New Age*, 87 LIBR. Q. 211, 217 (2017) ("the bulk of disinformation on the Internet could be combated with basic evaluation skills. If consumers of information would take time to make a few simple assessments, disinformation would not be so prevalent or insidious.").

85. *See* Holly Kathleen Hall, *Deepfake Videos: When Seeing Isn't Believing*, 27 CATH. U. J. L. & TECH. 51, 57 (2018) ("Deepfakes are created by inserting photographs into a machine-learning algorithm that puts one face on another."); Oscar Schwartz, *You Thought Fake News Was Bad? Deep Fakes are Where Truth Goes to Die*, THE GUARDIAN, Nov. 12, 2018 (explaining that a deepfake is "a computer-generated replication of a person . . . saying or doing things they have never said or done"); John Villasenor, *Artificial Intelligence, Deepfakes, and the Uncertain Future of Truth*, BROOKINGS (Feb. 14, 2019), https://www.brookings.edu/blog/techtank/2019/02/14/artificial-intelligence-deepfakes-and-the-uncertain-future-of-truth/ ("Deepfakes are videos that have been constructed to make a person appear to say or do something that they never said or did.").

86. *See* Hall, *supra* note 85, at 56-61 (describing the potential misuses of deepfakes); *see generally* Schwartz, *supra* note 85; Garfield Benjamin, *Deepfake Videos Could Destroy Trust in Society – Here's How to Restore It*, THE CONVERSATION, Feb. 7, 2019; Villasenor, *supra* note 85.

87. *See generally* Cindy Cohn, *Bad Facts Make Bad Law: How Platform Censorship Has Failed So Far and How to Ensure That the Response to Neo-Nazis Doesn't Make It Worse*, 2 GEO. L. TECH. REV. 432 (Spring 2018);

88. *See, e.g.*, Lesley Chiou & Catherine Tucker, *Fake News and Advertising on Social Media: A Study of the Anti-Vaccination Movement* 23 (Nat'l Bureau of Econ. Research, Working Paper No. 25223, 2018) (finding that a "ban on advertising [containing links to fake news sites] led to a dramatic decline of 75% in the number of shares on Facebook relative to Twitter").

89. *See generally* Kate Klonick, *The New Governors: The People, Rules and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (examining moderation of online speech by platforms).

90. *See, e.g.*, John Herrman & Mike Isaac, *Conservatives Accuse Facebook of Political Bias*, N.Y. TIMES, Mar. 10, 2016, at B1.

platforms should take responsibility for censoring fake news is hard to justify. On what ground can society demand that platforms take steps to prevent the spread of information, the publication of which is said to be legal?

Beyond these specific problems, the prevailing solutions share a more serious general problem. That problem concerns responsibility and the attribution of blame. The publishers are the ones who buy the domain name, build the website, dream up the false and inflammatory content, and post and share the content in the hopes of turning a profit.[91] Their enterprise is pre-meditated. It takes time, effort and ingenuity. Yet the prevailing solutions place responsibility for the problem on ordinary citizens and organizations engaged in legitimate business. They accept fake news as inevitable and place no blame upon those who are actually responsible for its publication.

From one perspective, this reaction is unusual. One would expect society to blame those responsible for conduct that is recognized as being disruptive and damaging to public interests. But from another perspective, the reaction is understandable. Fake news publishers have usurped many of the protections that modern democracies hold dear: they have usurped the protections extended to the press by mimicking the press; they have usurped the protections extended to speech by publishing political content; and they have usurped the protections extended to opinions and ideas by posing as satirists or commentators. In other words, fake news looks so much like protected speech that society has assumed that it is protected speech: the very nature of the deception has impaired its characterization of the problem.

The problem is not just that false stories are being spread online; it is that those who spread false stories online are *profiting* by publishing *false statements* of *fact*. To profit by intentionally publishing false statements of fact is to obtain money by means of false or fraudulent pretenses or representations. That is why prosecution for wire fraud is an appropriate solution. Publishing fake news is a new way to make money by telling lies—a new form of fraud made possible only by misuse of the online two-sided market business model. And, so far as frauds go, it is one of the most ingenious kinds. By utilizing the two-sided market to split up the dishonesty from the deprivation, the fake news publisher obtains money by deception without defrauding anyone, and lulls society into thinking that his behavior is beyond the reach of the criminal law.

To prosecute the publication of fake news for profit as wire fraud is an appropriate way to address the source of the problem and attribute

91. *See supra* Section (II)(B).

blame to those most responsible. It would not violate the rights to freedom of speech or freedom of the press because fraudulent speech is an exception to the First Amendment.[92] And it would avoid an inherent flaw in enacting new laws to prohibit the publication of fake news—the risk of criticism that the very existence of the law is politically motivated. The wire fraud statute contains an established offense with settled principles of application. Its focus upon the falsity of the statement and the profit made by the publisher would ensure that the political orientation of the fake news is not put on trial. The publisher would be tried for making money by telling lies, not for the content of the lies told.

III. THE CONJUNCTIVE INTERPRETATION OF THE WIRE FRAUD STATUTE

Today the publication of fake news for profit does not constitute wire fraud due to the limitations imposed by the conjunctive interpretation in *Cleveland v. United States*.[93] The conjunctive interpretation requires a scheme "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" to also be a scheme "to defraud."[94] This part of the Article explains the development of that interpretation. Its origin was entangled with the emergence of the intangible rights doctrine.

A. The Intangible Rights Doctrine and the Word "Or"

Under the "intangible rights doctrine," a scheme to defraud a person of a recognized intangible right, but not money or property, constituted mail or wire fraud.[95] The doctrine developed over a series of decisions in the 1970s and 1980s.[96] Prosecutors relied upon it to prosecute those who breached fiduciary duties or engaged in corrupt conduct. In one seminal case, an employee who arranged for his employer to purchase cabinets from a particular manufacturer in exchange for a kickback from the manufacturer was convicted of devising a scheme to defraud his

92. *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150 (1967) (naming mail fraud statute as an exception to right to communicate information of public interest); Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600, 621 (2003) ("the First Amendment and our case law emphatically do not require … a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations"); United States v. Alvarez, 567 U.S. 709, 723 (2012) ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.").

93. 531 U.S. 12 (2000).

94. *See id.* at 19, 25-26.

95. Skilling v. United States, 561 U.S. 358, 401 n.35 (2010).

96. *See infra* notes 144-45.

employer of its right to "his honest and faithful services."[97] In another, a governor who accepted bribes in return for fixing particular racing dates for a horse racing enterprise was convicted of devising a scheme to defraud the people of their right to his "honest and faithful services as governor."[98]

The intangible rights doctrine is relevant to the conjunctive interpretation of the wire fraud statute because several defendants charged with defrauding a person of an intangible right attempted to exonerate themselves by relying on a conjunctive interpretation of the mail fraud statute. Their basic argument was that a scheme "to defraud" also had to be a scheme "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" for it to constitute mail fraud. This argument was rejected each and every time it was made.

In *United States v. States* the defendants argued that their voter fraud scheme was not a scheme to defraud because it was not a scheme "for obtaining money or property."[99] The Eighth Circuit said that their interpretation placed a "very strained and limited meaning" upon the statute.[100] It held that the two phrases were "part of an uninterrupted listing of a series of obviously diverse schemes" and concluded that the "more natural construction" was "to view the two phrases independently."[101] In *United States v. Halbert* the defendant claimed that his scheme could not constitute a scheme to defraud because it did not involve a false or fraudulent pretense, representation or promise.[102] The Ninth Circuit rejected his argument.[103] It held that the statute "specifies several alternative ways in which the mail fraud offense may be committed."[104] And in *United States v. Scott* the defendant was charged with devising a scheme for obtaining money or property but not with devising a scheme to defraud.[105] The trial judge instructed the jury that they were to consider whether he had intent to "obtain[] money or property by means of false or fraudulent pretenses, representations, or promises."[106] The defendant argued on appeal that the trial judge should have instructed the jury that they had to find "intent to defraud."[107] The

97. United States v. George, 477 F.2d 508, 513 (7th Cir. 1973).
98. United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir. 1974).
99. 488 F.2d 761, 763 (8th Cir. 1973).
100. *Id.* at 764.
101. *Id.*
102. 640 F.2d 1000, 1007 (9th Cir. 1981).
103. *Id.*
104. *Id. See also* United States v. Frankel, 721 F.2d 917, 920 (3rd Cir. 1983); United States v. Clapps 732 F.2d 1148, 1152 (3rd Cir. 1984).
105. 701 F.2d 1340, 1343 (11th Cir. 1983).
106. *Id.*
107. *Id.* at 1344.

Eleventh Circuit rejected his argument.[108] "The phrasing of this statute in the disjunctive prohibits two separate acts, each constituting an independent ground for prosecution and conviction of mail fraud."[109]

By the mid-1980s the doctrine was on an exponential path of development. Courts were recognizing more and more classes of intangible rights and prosecutors were on a warpath against dishonesty.[110] But the Supreme Court stopped the development dead in its tracks when it abolished the doctrine in *McNally v. United States*.[111] The defendants in *McNally*, like many before them, attempted to rely on a conjunctive interpretation of the statute as a defense.[112]

B. McNally v. United States

The defendants in *McNally* were convicted of mail fraud for devising a scheme to defraud the citizens and government of Kentucky of their right to have the State's affairs conducted honestly.[113] Two of the defendants petitioned the Supreme Court.[114] They disputed the validity of the intangible rights doctrine by arguing that the mail fraud statute did not extend to schemes or artifices that did not have an object of depriving someone of money or property.[115] A majority of the Supreme Court accepted their argument.[116] In doing so, the majority addressed the possibility that the words "to defraud" were somehow limited by the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises":

> Because the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently and that the money-or-property requirement of the latter phrase does not limit schemes to defraud to those aimed at causing deprivation of money or property. This is the approach that has been taken by each of the Courts of Appeals that has addressed the issue: schemes to defraud include those designed to deprive individuals, the people, or the government of intangible rights, such as the right

108. *Id.*

109. *Id.* at 1343. *See also* Christopher Q. Cutler, *McNally Revisited: The "Misrepresentation Branch" of the Mail Fraud Statute a Decade Later*, 13 B.Y.U. J. PUB. L. 77, 83-85 (1998).

110. *See* United States v. Louderman, 576 F.2d 1383, 1387 (9th Cir. 1978) (recognizing a scheme to defraud telephone company of confidential information and customers of right to privacy).

111. 483 U.S. 350 (1987).

112. *See id.* at 354-55.

113. *See McNally*, 483 U.S. at 352.

114. *See id.*

115. *See id.* at 358-59.

116. *See id.* at 360.

> to have public officials perform their duties honestly. As the Court long ago stated, however, the words "to defraud" commonly refer "to wronging one in his property rights by dishonest methods or schemes," and "usually signify the deprivation of something of value by trick, deceit, chicane or overreaching." The codification of the holding in [*Durland v. United States*] in 1909 does not indicate that Congress was departing from this common understanding. As we see it, adding the second phrase simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property.[117]

The majority's reference to *Durland v. United States* and the 1909 amendment requires some explanation.[118] The original mail fraud statute prohibited only schemes or artifices "to defraud."[119] In *Durland*, the petitioner devised a phony investment scheme in which he sold bonds promising returns that he knew would never eventuate.[120] The common law and statutory offense of obtaining property by false pretenses required the making of a "[mis]representation as to [a] past or present" fact.[121] The petitioner argued that this was also a requirement under the mail fraud statute such that his scheme, which he claimed did not involve a misrepresentation of a past or present fact, could not constitute a scheme to defraud.[122] The Supreme Court rejected his argument:

> We cannot agree with counsel. The statute is broader than is claimed. Its letter shows this: "Any scheme or artifice to defraud." Some schemes may be promoted through mere representations and promises to the future, yet are none the less schemes and artifices to defraud.[123]

The Supreme Court held that the statute was broader than claimed by the petitioner on two grounds.[124] One was that a promise as to the future could constitute a false pretense where the promisor never intended to make good on the promise.[125] The other was that the purpose of the statute was to protect the public against "all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect."[126] Thirteen years later—in 1909—Congress added the

117. *Id.* at 359 (internal citations omitted).
118. Durland v. United States, 16 U.S. 306 (1896).
119. *See McNally*, 483 U.S. at 357-58.
120. *See Durland*, 16 U.S. at 312.
121. *See id.* at 313.
122. *See id.* at 312-13.
123. *Id.* at 313.
124. *See id.* at 314.
125. *See id.*
126. *Durland*, 16 U.S. at 314.

words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" to the statute.[127]

The majority in *McNally* did not hold that the words inserted in 1909 limited the meaning of the words "to defraud." The crux of their reasoning was that "to defraud" means "to defraud of money or property" because that is the common meaning of those words. However, by asserting that the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" were inserted to codify *Durland*, the majority suggested that those words were limited by the words "to defraud."

Soon after *McNally*, Congress enacted 18 U.S.C. § 1346: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." This was a partial revival of the intangible rights doctrine. It created a statutory intangible right to honest services. But it made no mention of other intangible rights, such as the right to fair elections or privacy. The law, therefore, became that a scheme or artifice to defraud had to deprive another person of money, property, or the intangible right of honest services for it to constitute mail or wire fraud.

C. Cleveland v. United States

The defendants in *Cleveland v. United States* applied for licenses to operate poker machines in the State of Louisiana.[128] They concealed their dire financial circumstances by using the names of their children in their applications.[129] They were charged with mail fraud.[130] They argued that the alleged scheme did not constitute mail fraud because they had not defrauded the State of property.[131] This argument was premised upon the proposition that an unissued license was not "property" in the hands of the State.[132] The District Court rejected their argument and held that the licenses did constitute property in the hands of the State.[133] The Fifth Circuit affirmed its decision on appeal.[134]

The defendants petitioned the Supreme Court for certiorari.[135] The Supreme Court unanimously held that the poker machine licenses were not "property" in the hands of the government such that the defendants

127. *See* Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130.
128. *Cleveland*, 531 U.S. at 15-16.
129. *Id.* at 16.
130. *Id.* at 16-17.
131. *Id.* at 17.
132. *See id.* at 18.
133. United States v. Cleveland, 951 F. Supp. 1249, 1261 (E.D. La. 1997).
134. United States v. Bankston, 182 F.3d 296, 319 (5th Cir. 1999).
135. *See Cleveland*, 531 U.S. at 18.

had not defrauded the government of any money or property.[136] But it also addressed an alternative argument put by the prosecution. This argument was that the defendants had devised a scheme "for obtaining" the licenses by "false pretenses" and, therefore, had breached the second phrase of the mail fraud statute:

> Finally, in an argument not raised below but urged as an alternate ground for affirmance, the Government contends that § 1341, as amended in 1909, defines two independent offenses: (1) "any scheme or artifice to defraud" and (2) "any scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Because a video poker license is property in the hands of the licensee, the Government says, [the defendant] "obtain[ed] . . . property" and thereby committed the second offense even if the license is not property in the hands of the State . . . Although we do not here question that video poker licensees may have property interests in their licenses, we nevertheless disagree with the Government's reading of § 1341. In *McNally*, we recognized that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is arguable that they are to be construed independently." But we rejected that construction of the statute, instead concluding that the second phrase simply modifies the first by "ma[king] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." . . . We reaffirm our reading of § 1341 in *McNally*.[137]

In other words, the Supreme Court held that a scheme "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" must also be a scheme "to defraud" for it to constitute mail fraud.[138] It affirmed the rejection of the disjunctive reading of the first two phrases by the majority in *McNally*.[139] It interpreted the statute as if it were written so as to prohibit the following: devising or intending to devise a scheme or artifice to defraud, ~~or~~ <u>including a scheme or artifice</u> for obtaining money or property by means of false or fraudulent pretenses, representations or promises.[140] Because of this interpretation, the *Cleveland* decision prevents the publication of fake news being prosecuted as wire fraud.

136. Cleveland v. United States, 531 U.S. 12, 20 (2000).
137. *Id.* at 25-26 (internal citations omitted).
138. *Id.* at 25.
139. *Id.* at 25-26.
140. *Id.*

IV. ILLEGITIMACY OF THE CONJUNCTIVE INTERPRETATION

Cleveland was a unanimous decision of the Supreme Court.[141] The relevant element of the decision—that the second phrase of the mail fraud statute is limited by the first—was a response to an argument made by the prosecution.[142] It was ratio, not dicta. It is therefore binding throughout the United States. This part of the Article identifies a number of problems with the decision. Although these problems do not permit a court other than the Supreme Court to depart from *Cleveland*, they should motivate prosecutors eager to overcome the limits it imposes to run the gauntlet to the Supreme Court.

A. The Purpose of the 1909 Amendment

The majority in *McNally* said that the purpose of the 1909 amendment was to codify the decision in *Durland*—to clarify that a scheme to defraud included a scheme involving false promises.[143] The unanimous court in *Cleveland* affirmed this aspect of the majority's reasoning.[144] But there are good reasons to view it with suspicion. If the purpose of the amendment was to codify *Durland*, why did the amendment speak of "obtaining money or property" and "false or fraudulent pretenses [and] representations"? Why did Congress not simply add something like "including by means of false promises" after the words "to defraud"? The words of the amendment were much broader than the purpose ascribed to them by the majority in *McNally*.

The majority in *McNally* explained that the 1909 amendment was a codification of *Durland* in the following way:

> Congress codified the holding of Durland in 1909, and in doing so gave further indication that the statute's purpose is protecting property rights. The amendment added the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after the original phrase "any scheme or artifice to defraud." . . . The new language is based on the statement in Durland that the statute reaches "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." . . . However, instead of the phrase "everything designed to defraud" Congress used the words "[any scheme or artifice] for obtaining money or property."[145]

141. *Id.* at 14.
142. *Cleveland*, 531 U.S. at 26.
143. *McNally*, 483 U.S. at 357-58.
144. *Cleveland*, 531 U.S. at 26.
145. *McNally*, 483 U.S. at 357-58 (internal citations omitted).

The majority supported the first sentence of the above extract with the following footnote:

> The new language was suggested in the Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States, which cited Durland in the margin of its Report . . . . The sponsor of the 1909 legislation did not address the significance of the new language, stating that it was self-explanatory.[146]

As is apparent from the combination of the footnote and the text, the majority based its assertion that the 1909 amendment was a codification of *Durland* purely upon the reference to *Durland* in the margin of the Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States. The fact that the sponsor of the legislation said that the language was "self-explanatory" is neither here nor there.[147] If anything, it suggests a literal interpretation, not an interpretation that construes the new language as having a purpose at odds with its literal meaning.

The report to which the majority referred was split into two parts.[148] The first part contained the report itself.[149] The second contained a proposed revised penal code.[150] The commissioners did not refer to the addition of the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" in the actual report.[151] The report, insofar as it addressed the proposed changes to the mail fraud statute, explained why two tracts of the statute had been removed, and why other words had been inserted.[152] The margin of the *report* contained no references.[153] The reference to *Durland* was in the margin of the proposed penal code.[154]

It appears that the commissioners used the margin of the proposed penal code to set out the decisions to which they had turned their minds during the drafting process. *Durland* was one of thirty-three decisions referred to in the margin alongside the proposed mail fraud provision.[155] Nothing about its placement or position suggests that the commissioners considered it to be more significant than any of the others; and none of

146. *Id.* at 357 n.7 (internal citations omitted).
147. *Id.*
148. *See generally id.*
149. *See* S. REP. NO. 57-68, pt. 2, at III-XXXIV.
150. *Id.* at 1.
151. *See generally id.* at III-XXXIV.
152. *See* S. REP. NO. 57-68, pt. 2, at XVI (1901).
153. *See generally id.*
154. *Id.* at 63.
155. *Id.* at 63.

the references were accompanied by explanatory text.[156] Therefore, on the majority's reasoning, it seems that the 1909 amendment was a codification of thirty-three decisions, not just a codification of *Durland*.[157]

This proposition flows not just from the presence of those decisions in the margin but also from the following statement by the commissioners in the introduction to their report:

> In compliance with the provision of the act of Congress that requires us to "indicate any proposed change in the substance of existing law," we submit the following, premising that we do not here note changes of phraseology only which are designed to secure uniformity or greater precision of expression.[158]

The commissioners recognized that they were obliged to indicate any changes to the substance of the existing law and clarified that they would not indicate changes of phraseology only. This suggests that the commissioners regarded the addition of the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" in substance to represent the existing law and that they introduced the words to "secure uniformity or greater precision of expression."[159] There is no evidence to suggest that they inserted the words to modify the meaning of the words "to defraud." Nor is there any evidence that they intended the word "or" to be interpreted conjunctively. The words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" were inserted to overcome the lack of precision of the words "to defraud." The two phrases represent what the commissioners considered to be two ways of saying the same thing.

The problem for the Supreme Court in *Cleveland* is that the commissioners were mistaken. The two phrases, taken literally, are not two ways of saying the same thing. There are slight differences between them. The arguments advanced by the prosecution in *Cleveland* and by this Article prove that there are schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" that are not schemes "to defraud." Therefore, the issue is not whether, as held in *Cleveland*, the second phrase was intended to modify the first. It is clear that it was not. Rather, the issue is whether the scope of the second phrase, read disjunctively, should be limited on the basis that it was not expected to broaden the scope of the statute, or whether

156. *See id.*

157. Analysis of the thirty-three decisions does not appear to provide any additional assistance as to the meaning of the 1909 amendment.

158. S. REP. NO. 57-68, pt. 2, at VII.

159. *Id.* at 63.

the second phrase should be interpreted according to its plain meaning, so that the statute is able to capture new forms of fraud.

B. Use of Legislative Intent

There is a canon of statutory construction that clear evidence of legislative intent may illuminate ambiguous text.[160] This canon exists to supplement the "plain meaning rule"—that if the language of a statute is unambiguous, it must be applied according to its terms.[161] The majority in *McNally* relied upon legislative intent in order to interpret the 1909 amendment as a codification of *Durland*.[162] The previous section contended that the majority misinterpreted the purpose of the 1909 amendment. There are also good reasons to question their very use of legislative intent as an aid to construction.

The canon requires *clear* evidence of legislative intent. But there was not *clear* evidence of the purpose of the 1909 amendment. The majority described the mail fraud statute as having a "sparse legislative history."[163] The only evidence relevant to the 1909 amendment was the report of the law reform commission and the records of Congress. The report ascribed no particular purpose to the amendment beyond the general purpose of better expressing the law as it existed at the time. The representative who sponsored the bill said that the amendment was "self-explanatory."[164]

Furthermore, the canon provides that the clear evidence may illuminate *ambiguous* text. But the majority never said that the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" was *ambiguous*. They never questioned the meaning of the words "or," "obtaining," "false," "fraudulent," "pretense," "representation," or "promise." They never asked what it meant for one thing to be "by means of" another. They relied upon their interpretation of the purpose of the amendment without considering the meaning of the words themselves. This was, respectfully, an inappropriate use of legislative intent.

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160. *See, e.g.*, Milner v. Dep't of the Navy, 562 U.S. 562, 572 (2011) ("Those of us who make use of legislative history believe that clear evidence of congressional intent may illuminate ambiguous text. We will not take the opposite tack of allowing ambiguous legislative history to muddy clear statutory language.").

161. *See, e.g.*, Consumer Prod. Safety Comm'n v. G.T.E. Sylvania, Inc., 447 U.S. 102, 108 (1980); Griffin v. Oceanic Contractors, 458 U.S. 564, 570 (1982); United States v. Ron Pair Enters., Inc., 489 U.S. 233, 242 (1989); Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000); Sebelius v. Cloer, 569 U.S. 369, 381 (2013).

162. *McNally*, 483 U.S. at 357.

163. *Id.* at 356. *See generally* Jed S. Rakoff, *The Federal Mail Fraud Statute*, 18 DUQ. L. REV. 771, 779-86 (1980) (discussing the origin of the mail fraud statute).

164. *See McNally*, 483 U.S. at 357 n.7.

C. Inconsistency with the Bank Fraud Statute

Another canon of statutory construction is the "presumption of consistent usage." According to this presumption, identical words in different parts of the same statute should generally be presumed to have the same meaning.[165] It is perhaps trivial to note that the word "or" is used forty times in the mail fraud statute but was interpreted conjunctively only once. But it is not trivial to compare the use of the word "or" in the mail fraud statute with its use in other provisions of the United States Penal Code. In particular, it is not trivial to compare it to the use of the word "or" in the bank fraud statute.[166]

The bank fraud statute shares the language but not the style of the mail fraud and wire fraud statutes:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the money, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.[167]

The meaning of the word "or" in the bank fraud statute arose for consideration in *Loughrin v. United States*.[168] The defendant purchased goods from Target using stolen checks and returned the goods in exchange for cash.[169] He was convicted of breaching subsection (2) of the statute.[170] Before the Supreme Court, he argued that he should not have been convicted because he had defrauded Target, not a financial institution.[171] One aspect of his argument was that subsection (2) of the bank fraud statute was limited by subsection (1) in the same way that the

165. The Supreme Court has recognized the existence of this presumption but emphasized that it readily yields to context. *See* Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932); Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007); Utility Air Regulatory Grp. v. E.P.A., 573 U.S. 302, 320 (2014); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 170-73 (2012) (explaining the presumption of consistent usage as a canon of statutory construction).

166. 18 U.S.C. § 1344.

167. *Id.*

168. 573 U.S. 351 (2014).

169. *Id.* at 353.

170. *Id.* at 355.

171. *Id.* at 356.

second phrase of the mail fraud statute was limited by the first in *McNally* and *Cleveland*.[172] The Supreme Court rejected his argument:

> The single question presented is whether the Government must prove yet another element: that the defendant intended to defraud a bank. As Loughrin describes it, that element would compel the Government to show not just that a defendant intended to obtain bank property (as the jury here found), but also that he specifically intended to deceive a bank. And that difference, Loughrin claims, would have mattered in this case, because his intent to deceive ran only to Target, and not to any of the banks on which his altered checks were drawn . . . . That is because the first clause of § 1344, as all agree, includes the requirement that a defendant intend to "defraud a financial institution"; indeed, that is § 1344(1)'s whole sum and substance. To read the next clause, following the word "or," as somehow repeating that requirement, even while using different words, is to disregard what "or" customarily means. As we have recognized, that term's "ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings." Yet Loughrin would have us construe the two entirely distinct statutory phrases that the word "or" joins as containing an identical element. And in doing so, his interpretation would make § 1344's second clause a mere subset of its first: If, that is, § 1344(2) implicitly required intent to defraud a bank, it would apply only to conduct already falling within § 1344(1). Loughrin's construction thus effectively reads "or" to mean "including"—a definition foreign to any dictionary we know of.[173]

The Supreme Court's assertion that to read "or" as "including" is foreign to any known dictionary undermines both *McNally* and *Cleveland* and defies the presumption of consistent usage. But the judges were alive to the disharmony they were creating. The defendant had relied upon *McNally* in support of his argument:

> Loughrin rightly explains that, despite the word "or," *McNally* understood [the mail fraud statute] as setting forth just one offense—using the mails to advance a scheme to defraud. The provision's back half, we said, merely codified a prior judicial decision applying the front half: In other words, the back clarified that the front included certain conduct, rather than doing independent work.[174]

The Supreme Court in *Loughrin* distinguished *McNally* on three grounds. The first ground related to the structural differences between the bank fraud and the mail fraud statutes:

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172. *Id.* at 359-62.
173. *Id.* at 356-57 (internal citations omitted).
174. *Loughrin*, 573 U.S. at 359.

> [T]he two statutes, as an initial matter, have notable textual differences. The mail fraud law contains two phrases strung together in a single, unbroken sentence. By contrast, § 1344's two clauses have separate numbers, line breaks before, between, and after them, and equivalent indentation—thus placing the clauses visually on an equal footing and indicating that they have separate meanings. The legislative structure thus reinforces the usual (even if not McNally's) understanding of the word "or" as meaning . . . well, "or"—rather than, as Loughrin would have it, "including."[175]

There is no doubt that by separating the two phrases into subsections and dividing them by line breaks, Congress indicated its intention that the two phrases in the bank fraud statute were to be read disjunctively. But it does not follow from the absence of subsections and line breaks in the mail fraud statute that Congress intended the mail fraud statute to be read conjunctively. The failure of Congress to draft the mail fraud statute in a more readable way is evidence of nothing more than its adherence to a now (thankfully) defunct style of drafting.

The second ground upon which the Supreme Court in *Loughrin* distinguished *McNally* concerned the existence of what it called a "serious chronological problem":

> Congress passed the bank fraud statute in 1984, three years before we decided that case. And at that time, every Court of Appeals to have addressed the issue had concluded that the two relevant phrases of the mail fraud law must be read "in the disjunctive" and "construed independently." McNally disagreed, eschewing the most natural reading of the text in favor of evidence it found in the drafting history of the statute's money-or-property clause. But the Congress that passed the bank fraud statute could hardly have predicted that McNally would overturn the lower courts' uniform reading. We thus see no reason to doubt that in enacting § 1344, Congress said what it meant and meant what it said . . . i.e., that it both said "or" and meant "or" in the usual sense.[176]

This ground proposes that Congress, when it enacted the bank fraud statute in 1984, mistakenly believed, due to its reliance upon decisions that were overruled in 1987, that the Congress that amended the mail fraud statute in 1909 intended the mail fraud statute to be interpreted disjunctively. The Supreme Court relied on this argument to support its disjunctive interpretation of the bank fraud statute. But this argument may also support a disjunctive interpretation of the mail and wire fraud statutes. The ground accepts that Congress was aware of and satisfied

175. *Id.* at 359.
176. *Id.* at 359-60 (internal citations omitted).

with the disjunctive interpretation of the mail and wire fraud statutes in 1984. Re-enactment of a statute is evidence of legislative ratification of the "settled construction" of the parts of the statute that are not altered.[177] And failure of Congress to amend a statute after it has been interpreted "is persuasive of legislative recognition that the judicial construction is the correct one."[178] The enactment of the bank fraud statute was not a re-enactment of the mail or wire fraud statutes. But its *replication* of the language used in those statutes signal legislative approval of the disjunctive interpretation known to Congress in 1984.

The third ground upon which the Supreme Court in *Loughrin* distinguished *McNally* was based upon the 1909 amendment:

> And a peek at history, of the kind *McNally* found decisive, only cuts against Loughrin's reading of the bank fraud statute. According to *McNally*, Congress added the mail fraud statute's second, money-or-property clause merely to affirm a decision of ours interpreting the ban on schemes "to defraud": The second clause, *McNally* reasoned, thus worked no substantive change in the law. By contrast, Congress passed the bank fraud statute to *disapprove* prior judicial rulings and thereby expand federal criminal law's scope—and indeed, partly to cover cases like Loughrin's . . . . We will not deprive that enactment of its full effect because *McNally* relied on different history to adopt a counter-textual reading of a similar provision.[179]

This is the real crux of the distinction drawn by the Supreme Court between the mail fraud statute and the bank fraud statute. Congress intended the mail fraud statute to be read in the conjunctive because its purpose was to affirm *Durland*. However, as explained earlier, Congress did not amend the statute merely to codify *Durland*. This means that the Supreme Court justified its interpretation of the word "or" as meaning "including"—an interpretation that it said was "foreign to any dictionary"—upon a false premise. In these circumstances, the disharmony between the mail and wire fraud statutes and the bank fraud statute cannot stand. The universal interpretation should be one where "or" means, in the Supreme Court's own words: "well, 'or.' "

177. *See, e.g.*, Lorillard v. Pons, 434 U.S. 575, 580 (1978); Monessen S.W. Ry. v. Morgan, 486 U.S. 330, 338-39 (1988); Pierce v. Underwood, 487 U.S. 552, 567 (1988); Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992); Jama v. Immigration and Customs Enf't, 543 U.S. 335, 349-52 (2005).

178. Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 601 (1983); *see, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 90-91 (2007) (considering Congress's failure to criticize, revise, or reconsider an adopted definition of a statute while determining its construction).

179. *Loughrin*, 573 U.S. at 360-61 (internal citations omitted).

V. REASONS TO FAVOR THE DISJUNCTIVE INTERPRETATION

The Supreme Court in *Loughrin* was right to describe the interpretation of "or" in *McNally* and *Cleveland* as "foreign to any dictionary."[180] Reading "or" as "including" was not interpretation. It was substitution of one word for another—something the judiciary is not supposed to do. To read "or" as "including" requires every litigant, lawyer and judge to ask whether "or" means "or" or whether it means something else every time it appears. This throws not only the interpretation of statutes, but also rules, regulations and contractual terms, into doubt, which increases the likelihood of discordance, and, therefore, litigation. The conjunctive interpretation could be overruled on the sole ground that it strays too far from the plain meaning of the statute. But there are other reasons to favor the adoption of a disjunctive interpretation. This part sets out those reasons. It is split into five sections. The first section describes the practical effect of adopting a disjunctive interpretation. The second, third and fourth sections set out three reasons to favor its adoption. The final section rebuts counterarguments that opponents of a disjunctive interpretation may seek to proffer.

A. Frauds that do not Defraud

The disjunctive interpretation would extend the reach of the wire fraud statute to schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" that are not also schemes "to defraud."[181] The introduction to this Article explained that to "defraud" is to deprive by dishonest means.[182] Most schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" are schemes to deprive by dishonest means. This means that in most cases the adoption of a disjunctive interpretation will not make a difference. However, not all fraudulent schemes are schemes to defraud. There are some "frauds that do not defraud." These kinds of frauds are not captured by the conjunctive interpretation but would be captured by a disjunctive interpretation. They may be broken into three categories.

The first category is where there is no person to deprive of the money or property: if there is no person to deprive, there is no person to defraud. This category includes situations in which the defendant obtains money or property that is not possessed or owned by anyone—property that has never had an owner or has been abandoned. It is hard

180. *Id.* at 357.
181. *See supra* Section (I).
182. *Id.*

to imagine a situation where a person could obtain un-owned or abandoned property by means of a false or fraudulent pretense, representation or promise. But if such a situation were ever to exist, it would be a fraud that does not defraud.

The second category is where the person from whom the property is obtained is not deprived of the property: if there is no deprivation, there cannot be a dishonest deprivation. This may occur where the acquired property only becomes property upon or after its acquisition. Licenses issued by a government authority are an example.[183] It may also occur where the property is capable of being used by more than one person at the same time. The bulk of this kind of property is intangible. Examples include information such as stock tips,[184] news stories,[185] or recipes,[186] and digital products such as computer programs and online subscription services.[187]

The third category is where the acquisition but not the deprivation is dishonest: if the deprivation is not dishonest, there cannot be a dishonest deprivation. This occurs where one person deceives a second person in order to obtain something from a third person pursuant to a bona fide transaction. This kind of fraud that does not defraud is possible within a two-sided market in which one side of the market is not charged. Publishing fake news is perhaps the first, but is unlikely to be the last, example of this kind. The acquisition is dishonest because the publisher deceives the readers in order to profit by selling exposure to advertisers. But the deprivation is not dishonest because: (1) the readers are not subjected to any deprivation—they do not pay to read the stories; and (2) the deprivation of the advertisers is honest—the publisher is entitled to be paid for providing exposure to the readers.[188]

Not all cases in which one person deceives another in order to obtain money or property from a third person fall into this category. The category only encompasses circumstances where: (1) the first person and the third person enter a legitimate agreement; (2) the first person fulfills her or his end of the bargain by being dishonest to the second person; and (3) the second person is not deprived of anything recognised by the

183. *See, e.g.*, Cleveland v. United States, 531 U.S. 12 (2000). *See also* Donna M. Maus, *License Procurement and the Federal Mail Fraud Statute*, 58 U. CHI. L. REV. 1125, 1142-49 (1991) (arguing that licenses are not property); Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. ILL. L. REV. 683, 708-13 (2000) (discussing theories pursuant to which courts have attempted to determine whether unissued licenses are property).

184. *See, e.g.*, Carpenter v. United States, 484 U.S. 19 (1987).

185. *See, e.g.*, Int'l News Serv. v. Associated Press, 248 U.S. 215, 263-67 (1918).

186. *See, e.g.*, Moohr, *supra* note 183, 692-93 (giving example of carrot cake recipe).

187. *Id.* at 728 (discussing online databases).

188. *See supra* Sections (II)(B) and (II)(C).

law—i.e. money, property or an intangible right. If not for the legitimate agreement between the first person and the third person, the scheme would be a scheme "to defraud,"[189] as there is no requirement that the person deceived be the person who is deprived of the money or property.[190] And if the second person was deprived of something recognised by the law, the scheme would be a conventional scheme "to defraud," as the second person would have been subjected to dishonest deprivation.

B. One Purpose of Wire Fraud is to Prohibit the Making of Dishonest Gains

The first reason to favor the disjunctive interpretation is that it would help the statute fulfill one of its underlying purposes: to prohibit the making of dishonest gains. This aspect of its purpose is not always obvious. Superficially, the purpose of the statute appears to be to

189. *See, e.g.*, United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990).

190. *See* United States v. Pepper, 51 F.3d 469, 473 (5th Cir. 1995) ("There is no statutory requirement that direct misrepresentations must be made to the victims of the scheme."); United States v. Blumeyer, 114 F.3d 758, 767 (8th Cir. 1997); United States v. Christopher 142 F.3d 46, 54 (1st Cir. 1998) ("Nothing in the mail and wire fraud statutes requires that the party deprived of money or property be the same party who is actually deceived."); United States v. Ratcliff, 488 F.3d 639, 645 (5th Cir. 2007) ("the misrepresentations in a mail fraud scheme need not be made directly to the scheme's victim"); United States v. Sorich, 523 F.3d 702, 713 (7th Cir. 2008); United States v. McMillan 600 F.3d 434, 449-50 (5th Cir. 2010) (holding that the prosecution "was not required to prove that misrepresentations were made directly to any of the victims"); United States v. Seidling, 737 F.3d 1155, 1161 (7th Cir. 2013) ("this Court does not interpret the mail fraud statute as requiring convergence between the misrepresentations and the defrauded victims"); United States v. Greenberg, 835 F.3d 295, 306 (2nd Cir. 2016). There are no persuasive authorities to the contrary. In United States v. Evans, 844 F.2d 36, 38-40 (2nd Cir. 1988) the Second Circuit said: "it *may* be the correct view of the statute . . . that the deceived party must lose some money or property." But in *Greenberg* it rejected the proposition: "wire fraud does not require convergence between the parties intended to be deceived and those whose property is sought in a fraudulent scheme." *See Greenberg*, 835 F.3d at 306. In United States v. Lew, 875 F.2d 219, 221 (9th Cir. 1989) the Ninth Circuit said that *McNally* "made it clear that the intent must be to obtain money or property from the one who is deceived." Other circuits rightly doubted that proposition. *See Evans*, 844 F.2d at 39 ("as we read *McNally*, the Supreme Court did not focus on whether the person deceived also had to lose money or property") and *Christopher*, 142 F.3d at 54 ("*McNally* itself says nothing about convergence"). In United States v. Walters, 997 F.2d 1219, 1227 (7th Cir. 1993) the Seventh Circuit held that "only a scheme to obtain money or other property from the victim by fraud violates § 1341." In *Sorich* the Seventh Circuit confined the meaning of this statement. *See Sorich*, 523 F.3d at 713. It explained that the statement "was not a requirement that the defendant receive the money or property [from the victim], but rather a way of illustrating a deeper problem with the case." *Id.* The defendant in *Walters* was an agent who signed college athletes as clients and thereby caused them to violate the terms of their scholarships. *Walters*, 997 F.2d at 1227. The "deeper problem" was that the scheme was not a scheme to defraud the colleges of the scholarships. *Id.* at 1224. The payment of scholarship money to the athletes was incidental to the scheme. *Id.* at 1225-26. *See also* United States v. Seidling, 737 F.3d 1155, 1160-61 (7th Cir. 2013); United States v. Wolf, No. 03 CR 532-2, slip op. at 4 (D.C. N.D. Ill. Aug. 31, 2005) ("the Seventh Circuit's holding focused upon Walters' *intent*").

prohibit the dishonest infliction of losses by means of telecommunications. But wire fraud is more than a criminal version of the tort of deceit. It also captures schemes to defraud that do not cause the victim(s) to suffer any loss.

To say that the statute does not require *loss* is not the same thing as saying that the statute does not require *deprivation*. There is a difference between loss and deprivation. If one person tricks another into purchasing property, the purchaser is *deprived* of the purchase price. But the purchaser only suffers a *loss* if the purchase price was greater than the value of the property. If the purchase price was less than or equal to the value of the property, the purchaser may on-sell the property to recover the purchase price and thereby mitigate the loss.

The authorities support the proposition that the wire fraud statute does not require loss for at least eight reasons. The first is that the statute prohibits "*devising*" or "*intending to devise*" a "*scheme or artifice.*" There is no need to prove loss because there is no need to prove that the scheme or artifice was successfully executed—an attempt, or even an *intent*, is enough. This reason flows from the clear words of the statute itself and is universally accepted.[191]

The second reason is that a person who dishonestly deprives another of only the *use* of property has defrauded that person of the property.[192] The implications of this reason depend on the kind of property involved. If the property may be used by only one person at a time, the defendant causes a loss to the victim whilst he or she is using it, and may risk losing it whilst using it. The scheme is not truly "lossless" because it risks loss and because elimination of the loss depends upon the defendant restoring the victim to her or his original position. However, if the property is capable of being used by more than one person at a time, the victim will only suffer a loss if the use by the defendant diminishes

191. *See, e.g.*, Neder v. United States, 527 U.S. 1, 25 (1999) ("By prohibiting the 'scheme to defraud,' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted."); Pasquantino v. United States, 544 U.S. 349, 371 (2005) ("[T]he wire fraud statute punishes the scheme, not its success." (quoting United States v. Pierce, 224 F.3d 158, 166 (2d Cir. 2000) (internal quotation marks omitted)).

192. *See, e.g.*, *Carpenter*, 484 U.S. at 26-27; Shaw v. United States, 137 S. Ct. 462, 467 (2016). In *Carpenter* the defendants profited by obtaining access to the contents of an influential investment column published by the Wall Street Journal. *Carpenter*, 484 U.S. at 26-27. The Supreme Court held: "Petitioners cannot successfully contend . . . that a scheme to defraud requires a monetary loss, such as giving the information to a competitor; it is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter." *Id.*

its value.[193] If the use does not diminish its value, the victim does not suffer a loss, and the scheme is lossless.

The third reason is that there is no need to prove loss of money or tangible property if the victim has suffered a loss of an intangible right.[194] This suggests that the purpose of the statute is to prevent loss but that it encompasses losses of intangible rights as well as losses of money or tangible property. It cannot be taken as evidence of the purpose of the whole statute because the intangible rights doctrine was abolished in *McNally*.[195] But it is evidence of its purpose with respect to a scheme to deprive others of the intangible right to honest services under 18 U.S.C. § 1346.

The fourth reason is that a fiduciary who makes a secret profit does not have to cause the principal to suffer a loss because the fraud is inherent in the breach of duty.[196] However, as the original decisions based upon this reasoning were enmeshed with the intangible rights doctrine (a breach of fiduciary duty being a deprivation of the right to honest services)[197] their authority did not survive the decision in *McNally*. The reasoning now rests upon 18 U.S.C. § 1346, which, pursuant to the

193. *See* Moohr, *supra* note 183, at 734 ("when intangible property is taken, the owner still possesses and may even use the property. Because owners lose only exclusive use, their harm is lost financial value").

194. *See, e.g.*, United States v. George, 477 F.2d 508, 512 (7th Cir. 1973); United States v. States, 488 F.2d 761, 766 (8th Cir. 1973); United States v. Isaacs, 493 F.2d 1124, 1149-50 (7th Cir. 1974); United States v. Keane, 522 F.2d 534, 546 (7th Cir. 1975); United States v. Bryza, 522 F.2d 414, 421-22 (7th Cir. 1975); United States v. Rauhoff, 525 F.2d 1170, 1175 (7th Cir. 1975); United States v. Bush, 522 F.2d 641, 646 (7th Cir. 1975); United States v. Brown, 540 F.2d 364, 374 (8th Cir. 1976); United States v. Mandel, 591 F.2d 1347, 1361-62 (4th Cir. 1979); United States v. Bohonus, 628 F.2d 1167, 1172 (9th Cir. 1980); United States v. Von Barta, 635 F.2d 999, 1005-07 (2nd Cir. 1980); United States v. Margiotta, 688 F.2d 108, 121 (2nd Cir. 1982); United States v. Barber, 668 F.2d 778, 784 n.4 (4th Cir. 1982); United States v. Boffa, 688 F.2d 919, 926 (3rd Cir. 1982); United States v. Clapps, 732 F.2d 1148, 1153 (3rd Cir. 1984); United States v. Price, 788 F.2d 234, 237 (4th Cir. 1986); United States v. Lovett, 811 F.2d 979, 984 (7th Cir. 1987); United States v. Silvano, 812 F.2d 754, 759 (1st Cir. 1987).

195. *McNally*, 483 U.S. at 356-60.

196. Most of the decisions that speak of secret profits involved schemes whereby the fiduciary caused the principal to suffer a loss. *See, e.g.*, United States v. Buckner, 108 F.2d 921, 926-27 (2nd Cir. 1940); United States v. Groves, 122 F.2d 87, 90 (2nd Cir. 1941); United States v. Hoffa, 205 F. Supp. 710 (S.D. Fla. 1962); United States v. Boffa, 688 F.2d 919, 930-31 (3rd Cir. 1982); United States v. Silvano, 812 F.2d 754, 759-60 (1st Cir. 1987). Others involved secret profits that the court said deprived the principal of a gain to which it was entitled. *See, e.g.*, United States v. Barrett, 505 F.2d 1091, 1104 (7th Cir. 1974); United States v. Bush, 522 F.2d 641, 647 (7th Cir. 1975). The only decision in which the gain was not linked to some form of loss appears to be United States v. Isaacs, 493 F.2d 1124, 1149 (7th Cir. 1974).

197. *See, e.g.*, United States v. Isaacs, 493 F.2d 1124, 1149-50 (7th Cir. 1974); United States v. Margiotta, 688 F.2d 108, 121 (2nd Cir. 1982) ("it is now a commonplace that a breach of fiduciary duty in violation of the mail fraud statute may be based on artifices which do not deprive any person of money or other forms of tangible property").

decision of the Supreme Court in *Skilling v. United States*, extends only to fiduciary frauds involving bribes or kickbacks.[198]

The fifth reason is that a lack of financial loss is not a defense to the offense of obtaining property by false pretenses,[199] and the mail and wire fraud statutes reflect the law relating to false pretenses in this way.[200] This reason is particularly important. It demonstrates that loss traditionally is not an element of criminal fraud.

The sixth reason is that the insertion of the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" was "evidently intended to enlarge the scope of the act."[201] This reason is questionable in view of the drafting history recounted earlier. The insertion of the new words did enlarge the scope of the statute. But they enlarged it to encompass frauds of a kind that Congress could not have anticipated at the time.

The seventh reason is that any other construction of the statute would "deprive it of all force" in dealing with fraudulent schemes

198. 561 U.S. 358, 408-09 (2010).

199. *See, e.g.*, People v. Bryant, 119 Cal. 595, 597 (Cal. 1898) ("If a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated"); Ex parte Rudebeck, 95 Wash. 433, 440 (Wash. 1917) ("[T]he cases frequently declare that the owner must have been actually defrauded. But this expression does not imply that he must have suffered actual pecuniary loss."); People v. Bartels, 77 Colo. 498, 500 (Colo. 1925) ("[I]t is not necessary that the prosecutor should sustain a pecuniary loss."); State v. Sargent, 2 Wash.2d 190, 193 (Wash. 1940) ("[W]hether or not the owner suffered a pecuniary loss is immaterial."); People v. Talbott, 65 Cal.App.2d 654, 659 (Cal. 1944) ("The victim is merely a witness whose ultimate financial gain or loss, in the circumstances, is immaterial."); Nelson v. United States, 227 F.2d 21, 25 (D.C. Cir. 1955) (holding fraud committed where defendant obtained two television sets but provided security worth five times their value); State v. Mills, 96 Ariz. 377, 381 (Ariz. 1964); State v. Hines, 36 N.C. App. 33, 41-42 (N.C. 1978) ("[A] showing of actual pecuniary loss by the victim/prosecuting witness is not necessary to sustain a conviction for obtaining property through false pretenses."); State v. Kennedy, 105 Wis.2d 625, 631-33 nn.1-2 (Wis. 1981); State v. Gruber, 132 N.H. 83, 91-92 (N.H. 1989); Hale v. State, 214 Ga. App. 899, 901 (Ga. 1994); State v. Bouchard, 881 A.2d 1130, 1134 (Me. 2005); Scott v. States, 277 Ga. App. 876, 878-79 (Ga. 2006); State v. Cagle, 182 N.C. App. 71, 77 (N.C. 2007). *See generally* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 240-46 (2nd ed. 1960); GEORGE P FLETCHER, RETHINKING CRIMINAL LAW § 1.3.4 (2000); WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 19.7(i)(3) (5th ed. 2010).

200. *See, e.g.*, Neder v. United States, 527 U.S. 1, 24-25 (1999) (holding that requirements of reliance and damages "plainly have no place in the federal fraud statutes"). But the Supreme Court has not interpreted the statutes as if they replicate *all* the elements of the false pretenses offense. *Compare Durland*, 16 U.S. at 313 (rejecting the argument that the mail fraud statute only reaches cases that would come within the definition of false pretenses) *with Neder*, 527 U.S. at 25 (holding that the requirement of materiality applies to the mail and wire fraud statutes).

201. Moore v. United States, 2 F.2d 839, 841 (7th Cir. 1924), *overruling* Miller v. United States, 174 F. 35 (7th Cir. 1909).

involving the purchase of property of uncertain value.[202] "[I]n how many cases could the government show that [the victims] failed to get their money's worth?"[203] On one view, this reason appears to suggest that the purpose of the statute is to punish loss, but that it does not require loss where loss is too difficult to prove. On another, it may be taken to suggest that the law should not allow difficulties in determining loss to prevent the prosecution of those who make dishonest gains.

The final reason is that the "loss of a chance to bargain with the facts" is enough. This reason originated in *United States v. Rowe*.[204] There Judge Learned Hand noted that the indictment did not allege that any of the victims had suffered a loss and said:

> Civilly of course the action would fail without proof of damage, but that has no application to criminal liability. A man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him. That is the evil against which the statute is directed.[205]

This reason appears to suggest that the scheme does require loss, but that the loss does not have to be measured in terms of money or property. In this way, it is similar to the third reason, which suggested that the loss could be of an intangible right. But to speak of a loss of a "chance to bargain with the facts" is really to speak of a loss of honesty. This makes the final reason far broader than the others: the mere presence of dishonesty in a transaction renders the dishonest party guilty of fraud.[206]

These reasons and their supporting authorities prove that the wire fraud statute does not require the victim to suffer a loss. The consequences of this proposition are substantial. Imagine a person who is tricked into purchasing something that turns out to be something other than what the seller represented it to be. As the statute does not require

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202. Wilson v. United States, 190 F. 427, 434 (2nd Cir. 1911).

203. *Id. See also* Cowl v. United States, 35 F.2d 794, 797 (8th Cir. 1929).

204. United States v. Rowe, 56 F.2d 747 (2nd Cir. 1932).

205. *Id.* at 749.

206. *See also* United States v. Bernard, 84 F. 634, 635 (S.D.N.Y. 1898) (obtaining of money by false pretenses constitutes scheme to defraud even where defendants intended to invest money for benefit of victims); United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990) (lying on application for school bus operator permit held to constitute scheme to defraud school district of salary despite proper performance of duties); United States v. Schwartz, 924 F.2d 410, 421 (2nd Cir. 1991) (lying to military equipment supplier about identity of customer held to constitute scheme to defraud supplier of night vision goggles despite making full payment).

proof of loss, the seller has committed wire fraud even if the value of the thing turns out to be the same as or greater than the purchase price.[207] In each case the buyer is *deprived* of the purchase price. However, because the buyer suffers no *loss*, the deprivation causes no tangible harm. This suggests that the purpose of the law extends beyond preventing the dishonest infliction of losses. It suggests that the law is also concerned with preventing the making of dishonest gains.

In these circumstances, it is hard to justify favoring the conjunctive interpretation over the disjunctive interpretation. The conjunctive interpretation captures lossless schemes to defraud but not frauds that do not defraud. This means that it prohibits the making of dishonest gains only in circumstances where there is some form of dishonest deprivation. But the utility of the deprivation requirement is questionable given the negligible character of the deprivation involved in a lossless scheme to defraud. Put simply, if the law operates in circumstances where the deprivation causes no loss, why require deprivation at all? In both the fraud that does not defraud and the lossless scheme to defraud, the defendant gets what he or she wants by being dishonest and without causing anyone else to suffer a loss. It does not make sense to prohibit one but not the other.

There are even reasons to consider frauds that do not defraud to be more worthy of prohibition than lossless schemes to defraud. Consider the following three scenarios:

(a) *A* deceives *B* into purchasing worthless property for $100,000.
(b) *A* deceives *B* into purchasing property worth $100,000 for $100,000.
(c) *A* deceives *B* in order to obtain $100,000 from *C* (without dishonestly depriving *C* of the $100,000).

Scenario (a) represents the typical scheme to defraud. *B*'s loss is *A*'s gain. There is a $200,000 difference between *A* and *B*'s final positions. *A* is $100,000 better off and *B* is $100,000 worse off. Scenario (b) represents the lossless scheme to defraud. *B* suffers no loss. There is no difference between *A* and *B*'s final positions. *A* purchases property worth $100,000 and pays $100,000 to *B*. Scenario (c) represents a fraud that does not defraud. *B* suffers no loss but *A* makes a gain. There is a $100,000 difference between *A* and *B*'s final positions. *B* stays the same but *A* gains $100,000. The lossless scheme to defraud results in no net change to the respective positions of *A* and *B*. But the fraud that does

207. For example, where the seller made a mistake about the nature or value of the item, or where the market changed soon after the transaction, or where the seller just wanted to make a sale, and was never interested in obtaining more than the property was actually worth.

not defraud places *A* ahead of *B* by $100,000. This arguably makes a fraud that does not defraud (i.e., scenario (c)) worse than a lossless scheme to defraud (i.e., scenario (b)) because a $100,000 change has been brought about by deception. Prohibiting lossless frauds, but not frauds that do not defraud, thus may prohibit the lesser of two evils. The disjunctive interpretation would capture the greater evil by prohibiting dishonest acquisition even where it is unaccompanied by dishonest deprivation.

This approach is likely to attract opposition. An opponent might argue that dishonest deprivation is an essential element of fraud—that is, without dishonest deprivation, there cannot be fraud.[208] This argument is unconvincing in light of the triviality of the deprivation in a lossless scheme to defraud. The more lethal argument available to the opponent of the disjunctive interpretation is that the appropriate solution is to *retract* rather than extend the wire fraud statute—to argue that wire fraud should not extend to lossless schemes to defraud. This argument would reject the notion that preventing and punishing the making of dishonest gains is a legitimate function of the criminal law. The whole argument advanced in this Article hinges upon the acceptance of that notion. It is therefore necessary to explore it in further detail.

C. It is Legitimate to Prohibit Deceptive Economic Exploitation

John Stuart Mill famously argued that the "*only* purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[209] Mill's *harm principle* has had a powerful influence on the criminal law. It has become routine to characterize offenses by reference to the harms they seek to redress.[210] It has also become routine to question the legitimacy of offenses that do not address cognizable harms.[211] The disjunctive interpretation of the wire fraud statute is hard to justify by recourse to the harm principle. That is because fraudulent schemes that are not schemes

208. Perhaps on the ground that without deprivation the exchange does not undermine "the regime of property." *See* A.P. Simester & G.R. Sullivan, *On the Nature and Rationale of Property Offences*, *in* R.A. DUFF & STUART GREEN, DEFINING CRIMES 168, 172 (2005). *Contra* Alex Steel, *The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft*, 31 U.N.S.W.L.J. 712, 720-21 (2008) (citing Arthur Ripstein, *Beyond the Harm Principle*, 34 PHIL. & PUB. AFF. 215, 226 (2006)).

209. JOHN STUART MILL, ON LIBERTY 22 (London, Parker & Son 1859) (emphasis added).

210. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 109-12 (1999).

211. *Id.* at 134-38.

to defraud appear to constitute "harmless wrongdoing."[212] The deception makes the scheme wrong; but the lack of loss, or an apparent victim, may indicate that it causes no harm.

Joel Feinberg critiqued the notion that the law may be used to prohibit harmless wrongdoing in the final volume of his four-volume work titled *The Moral Limits of the Criminal Law*.[213] The central thesis of his work was that the criminal law should prohibit only acts that cause either harm or offense to others.[214] Feinberg rejected the general proposition that instances of harmless wrongdoing should be crimes.[215] He argued that the prohibition of harmless wrongdoing amounted to little more than the enforcement of morality.[216]

But Feinberg was tentative about one particular kind of harmless wrongdoing—that involving exploitation. For the purposes of his analysis, Feinberg defined an *exploitation principle*: "that it is always a good reason in support of penal legislation that it will prevent wrongful (unjust) gain even when there is no corresponding wrongful loss (harm)."[217] He revealed his tentativeness about exploitation when he said that the exploitation principle "makes much stronger claims to our acceptance . . . than most other forms of legal moralism and must therefore be taken very seriously."[218]

The exploitation principle provides a rationale upon which to consider the prohibition of frauds that do not defraud. The essential point about the principle is that it purports to justify the criminalization of conduct that *does not cause harm*. Although there are definitions of "exploitation" that require the victim to suffer harm,[219] they are not relevant here. Here exploitation refers to one person (the exploiter) taking advantage of another (the exploitee) to make some kind of gain. The exploitation may lead to the exploitee suffering harm.[220] But it is the gain

212. *See generally* JOEL FEINBERG, HARMLESS WRONGDOING (1990) [hereinafter "HARMLESS WRONGDOING"].

213. *Id.*

214. *Id.* at x-xvi.

215. *Id.*

216. *Id.*

217. Joel Feinberg, *The Paradox of Blackmail*, 1 RATIO JURIS 83, 83 n.2 (1988); *see also* HARMLESS WRONGDOING, *supra* note 212, at 213.

218. HARMLESS WRONGDOING, *supra* note 212, at 176.

219. *See* ALAN WERTHEIMER, EXPLOITATION 10-13 (1996) (identifying writers who consider harm to be an element of exploitation but himself seeing "no reason to put such constraints on what counts as exploitation").

220. HARMLESS WRONGDOING, *supra* note 212, at 211 ("The harm principle alone could handle most cases of coercive and fraudulent exploitation."). Many offenses involve exploitation that causes harm. The law against embezzlement, for example, is readily justifiable on the ground that it causes harm. Yet the defendant also exploits the trust of her or his employer. The presence of exploitation is treated as insignificant because of the presence of harm.

to the exploiter and the taking of advantage of the exploitee, not the harm or possibility of harm to the exploitee, that the exploitation principle seeks to prohibit.[221]

The central difficulty with exploitation as a justification for criminal laws is differentiating between wrongful and non-wrongful exploitation. There are many kinds of exploitation that are not wrongful. The conductor who exploits the talents of an orchestra does not wrong the members of that orchestra, for example.[222] Feinberg described this kind of exploitation as "utilization."[223] He conceived the degree to which criminal sanction is justified as dependent upon the *unfairness* of the act of exploitation.[224] Utilization deserves no sanction because it is not unfair; but beyond obvious instances of legitimate exploitation the position becomes murky. Fairness is a difficult concept. What seems fair to one person, or from one perspective, may seem unfair to, or from, another.

Feinberg conceptualized the level of unfairness by reference to the means of exploitation, the traits and circumstances of the exploitee exploited by the exploiter, and the discrepancy between the effect of the exploitation as between the exploitee and exploiter.[225] He suggested: (1) coercion and deception are more unfair than other means of exploitation such as manipulation or the making of non-deceptive offers;[226] (2) exploiting traits and circumstances like trust and other virtues is more

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Wertheimer calls this "the problem of occlusion". WERTHEIMER, *supra* note 219, at 15-16. The exploitation is *occluded* by the harm. This is a problem when it comes to understanding the basis upon which conduct has traditionally been criminalized. The criminalization of exploitative conduct that causes harm may be justified on the ground that it prevents harm. But it is possible that such conduct was in fact criminalized on the ground that it prevents harm *and* exploitation—not one but not the other, and not one any more than the other.

221. HARMLESS WRONGDOING, *supra* note 212, at 203 ("[T]he distinctively offensive element is not that *B* has suffered a loss but that *A* has made a profit."). *See also* John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 680 (1994) ("[I]f the offeror does not intend to take advantage of a vulnerability, the offer is not exploitative."); WERTHEIMER, *supra* note 219, at 17 ("[I]t seems that A cannot take unfair advantage of B unless A gets some advantage from B.").

222. *See* HARMLESS WRONGDOING, *supra* note 212, at 177.

223. *Id.* at 199.

224. *See* WERTHEIMER, *supra* note 219, at 10 ("A exploits B when A takes unfair advantage of B.").

225. HARMLESS WRONGDOING, *supra* note 212, at 179. Wertheimer delineated exploitation along similar lines by considering the benefit to the exploiter, the effect on the exploitee and the process adopted by the exploiter. *See* WERTHEIMER, *supra* note 219, at 16-28. *See also* A. Bogg & J. Stanton-Ife, *Protecting the Vulnerable: Legality, Harm and Theft*, 23 L.S. 402, 416 (2003) (adopting Feinberg's conception of wrongfulness).

226. HARMLESS WRONGDOING, *supra* note 212, at 201 ("It would surely seem that the coercive uses have the greatest tendency to be unfair."). *Id.* at 202 ("[T]he clearest of all examples of unfairness are those in which *A* takes advantage of *B*'s trust by cheating or freeloading, and thus achieves a dishonest gain for himself.").

unfair than exploiting misfortunes and weaknesses;[227] and (3) the more the exploiter gains relative to the exploitee, the more unfair the exploitation.[228]

The need to consider something as nebulous as "unfairness" may seem like a weakness of the exploitation principle.[229] But that weakness is characteristic of any liberty-limiting principle, including the harm principle. The harm principle suggests that conduct should be prohibited where it causes "harm" to others. But it does not define "harm."[230] What constitutes "harm" is open to interpretation. Feinberg defined "harm" as a setback to interests. His version of the harm principle extended only to harms that were also "wrongs."[231] "*B* is *A*'s victim if and only if *A* . . . both sets back [*B*'s] interests and wrongs [*B*]."[232] This limitation is not radical. It excludes setbacks that are legitimate, such as pain endured by a boxer or losses sustained by an investor. Without it, the harm principle would be over-inclusive.

The harm principle and the exploitation principle both propose that certain kinds of wrongful conduct may be prohibited. The harm principle proposes that the law may be used to prevent one person setting back the interests of another where the setback is wrongful. The exploitation principle proposes that the law may be used to prevent a person advancing her or his own interests where the advance is wrongful. The principles are really two sides of the same coin. The person who harms gets ahead by putting others behind; the person who exploits puts her or himself ahead and leaves others behind.

Those left behind by exploitation often end up suffering some kind of setback. Consider the frauds that do not defraud that were set out in the first section of this part of the Article. The person who obtains abandoned property does not defraud any particular person at the time, but the next person who seeks to obtain the abandoned property suffers a loss. That person would have obtained the property had it not been obtained already. Similarly, the dishonest license applicant does not defraud the issuing authority. However, if there are only a limited number of licenses available, and the application of another applicant is rejected,

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227. *Id.* at 202 ("This puts the moral universe out of joint: untrustworthiness is rewarded and honesty is penalized (or at least unrewarded).").

228. *Id.* at 203-04.

229. *See* Jennifer Collins, *Exploitation of Persons and the Limits of the Criminal Law*, [2017] CRIM. L. REV. 167, 180 (2017) (critiquing "imprecision" of Feinberg's account of exploitation).

230. *See* Harcourt, *supra* note 210, at 120 (arguing that harm principle "provides no guidance to *compare* harm arguments").

231. *See* HARMLESS WRONGDOING, *supra* note 212, at xxvii-xxix.

232. *Id.* at xxix.

that applicant suffers a loss.[233] Finally, the person who deceives one person to obtain money pursuant to an agreement with another does not defraud either person. However, if there are others who would have obtained that money had it not been obtained already, those others suffer a loss.

The exploitation principle recognizes that for every winner there is always a loser—even if the loser is too distant and uncertain to invoke the operation of the harm principle. [234] In this sense the exploitation principle may not truly extend to harmless wrongdoing. Both it and the harm principle seek to prevent unfair adjustment of the position of one person vis-à-vis other members of society. The exploitation principle could be accepted as a legitimate liberty limiting principle either on its own merits or because it complements the harm principle in this way—subject to one modification.

The modification relates to the object of the exploitation. The "object" is the intended outcome of the exploitation—typically economic, sexual, social or political gain. The exploitation principle asserts that exploitation may be prohibited where it is wrongful (i.e., unfair). Feinberg conceptualized unfairness by reference to the kind of exploitation, the vulnerability of the exploitee and the discrepancy of the effect of the exploitation between the exploitee and exploiter.[235] The object of the exploitation should be added to this conception as a fourth category. Some objects are more unfair than others; and to return to the present topic, the case for prohibiting economic exploitation, in particular, is very strong.

In a capitalist society, where citizens are expected to compete against each other for limited resources, those who accumulate great wealth are able to enjoy a higher standard of living than those who do not.[236] The law sets all kinds of limits on resource allocation. The most basic limits concern what kinds of conduct may be engaged in to acquire money or property. But the law does not operate in a prescriptive way. It does not enumerate ways in which money or property may be acquired. Rather, it prohibits certain methods of acquiring money or property, and thereby permits methods that are not prohibited. This distinction is simple, but critical. By prohibiting certain methods of acquiring money or property, the law creates punitive incentives not to employ those

233. *See* Maus, *supra* note 183, at 1142 n.101.

234. Ripstein, *supra* note 208, at 223 ("[T]he harm principle gets its critical edge from its demand that *each* prohibition be justified in terms of the harm that *it* prevents.").

235. *See* HARMLESS WRONGDOING, *supra* note 212, at 179.

236. *See generally* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 257-68 (London, Henry G. Bohn, 1853).

methods. The corollary of this approach is that the law leaves in place economic incentives to employ methods that are not prohibited. In other words, everything that is not prohibited is encouraged, or, if not encouraged, at least condoned. For example, the law disincentivizes stealing and selling whale meat by prohibiting theft and the sale of whale meat; but it condones building and teaching by not prohibiting people working in the construction or education industries.

The law underpinning property and financial offenses is special in this way. Not only does it prevent and punish interferences with money and property, it also defines which methods of obtaining money or property are permissible—it sets the rules of the game. This aspect of its purpose has been underappreciated. In part that is because the criminal law tends to focus on the impact upon the victim (i.e., the deprivation). But it is predominantly because almost all wrongful acquisitions of property also involve wrongful deprivation. Theft, for example, involves wrongful deprivation by definition.[237]

The general rule is that wrongful acquisitions and wrongful deprivations go hand in hand. Frauds that do not defraud are exceptions to that general rule. But that does not mean they should be exceptions to the law. Part of the purpose of fraud—like all property and financial offenses—is to define which methods of obtaining money or property are legitimate. To exclude frauds that do not defraud from criminal fraud is to permit deceptive exploitation with an object of economic gain. This treats lying as a legitimate method for obtaining money or property. And if the fake news phenomenon has proven anything, it is that the law should not treat lying as a legitimate way to obtain money or property.

The law should not treat lies as products or being lied to as a service. Nor should it treat lying as an occupation. Lying is not like building, teaching, trading, writing, investing, or entertaining. Whilst the existence of economic incentives to engage in those and other activities tends to benefit society, the existence of an economic incentive to lie tends to do the opposite. As the Supreme Court said in *Gertz v. Robert Welch, Inc.*, false statements of fact "are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[238] The disruption and confusion

237. *See, e.g.*, MODEL PENAL CODE § 233.2 (AM. LAW INST., Proposed Official Draft 1962) ("A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to *deprive* him thereof.").

238. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974), quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas . . .."). Some suggest that there is value in false

brought about by the fake news phenomenon has proven this point. The most profitable lies have been those that exploit, not only trust, but also fears, dreams and prejudices, that prey upon social, political and cultural rifts, and that risk damage to both individuals and institutions. Put simply, the worst lies have been the bestsellers. By eliminating the existing incentive to engage in deceptive economic exploitation, the disjunctive interpretation of the wire fraud statute would remove them from the shelf.

D. The Disjunctive Interpretation is Necessary and Conventional

Modern social and economic conditions increasingly present opportunities to profit by means of frauds that do not defraud. The growth of regulation means that licenses are required for more and more kinds of conduct. The growth of the internet means that attention may be commoditized at small cost for great reward. All kinds of digital products are relied on in day-to-day work and leisure. These developments have exposed a gap in the law of criminal fraud that in simpler times would have been microscopic. The law must adapt to fill this gap. The legislature must introduce new laws or the judiciary must give new meaning to old laws. In the case of the wire fraud statute, this "new" meaning is the literal meaning—the meaning that really should be the old meaning.

The mail and wire fraud statutes have long been recognized as weapons with which to fight novel forms of fraud. Chief Justice Burger expressed this sentiment in *United States v. Maze*:

> Section 1341 of Title 18 U.S.C. has traditionally been used against fraudulent activity as a first line of defense. When a 'new' fraud develops—as constantly happens—the mail fraud statute becomes 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.[239]

The Chief Justice was speaking in dissent.[240] His suggestion that the mail and wire fraud statutes should be used as stopgap devices has attracted at best uneasy acceptance among judges and academics. The apparent consensus is that it is appropriate to use the statutes to capture novel forms of fraud—subject to at least two qualifications. One is that

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opinions. *See* MILL, *supra* note 209, at 36 (arguing that expression of a false opinion produces a "clearer perception and livelier impression of the truth, produced by its collision with error"). But this affords no value to false statements of fact.

239. United States v. Maze, 414 U.S. 395, 405-06 (1974). *See also* Rakoff, *supra* note 163, at 772 (likening mail fraud statute to a trusty hand gun – the federal prosecutor's "one true love").

240. *Maze*, 414 U.S. at 405.

the "fraud" must in fact be fraud and not something else. The other is that the statutes should not be used to interfere with matters that should be dealt with by the States. The next section explains why the disjunctive interpretation does not collide with either qualification.

The disjunctive interpretation would ensure that the wire fraud statute is able to operate as a stopgap for new forms of telecommunications fraud. The necessity for this should be apparent to anyone who has spent even a little time online. The internet is a wilderness of dishonesty, and frauds that do not defraud are the next frontier. The free on one side, not free on the other, market model is ubiquitous online. Search engines, streaming services, content providers and social media platforms provide free products and services but generate revenue via advertising. The prevailing interpretation of the wire fraud statute permits these kinds of businesses to profit by lying to their users because it precludes the prosecution of frauds that do not defraud.

The disjunctive interpretation is necessary to prevent online businesses that make use of two-sided markets from profiting by lying to their users. But beyond bare necessity, the disjunctive interpretation would in fact provide a more conventional means by which to capture novel frauds. There is nothing unprecedented about a fraud offense that extends to frauds that do not defraud. Such offenses already exist in other common law jurisdictions. For example, § 2(1) of the *Fraud Act 2006* (U.K.) provides:

> A person is in breach of this section if he—
>
> (a) dishonestly makes a false representation, and
>
> (b) intends, by making the representation—
>
> (i) to make a gain for himself or another, or
>
> (ii) to cause loss to another or to expose another to a risk of loss.[241]

Similarly, § 192E(1) of the *Crimes Act 1900* (N.S.W.) provides:

> A person who, by any deception, dishonestly—
>
> (a) obtains property belonging to another, or
>
> (b) obtains any financial advantage or causes any financial disadvantage, is guilty of the offence of fraud."[242]

The clear terms of both provisions prohibit acquiring money or property irrespective of whether or not the acquisition entails

241. Fraud Act 2006, c. 35, § 2(1) (UK). *See also id.* § 5(2), which provides that "gain" and "loss" extend only to "gain or loss in money or other property" and "include any such gain or loss whether temporary or permanent."

242. *Crimes Act 1900* (NSW) § 192E (Austl.).

deprivation. The limiting factor is whether the accused has acted dishonestly. This is a question of fact to be determined by the jury.[243] Accordingly, if a person perpetuated a fraud that does not defraud, and a jury thought that the person had intended to make a gain (or had obtained a financial advantage) "dishonestly,"[244] the person would be convicted. The law of the United Kingdom has taken this form since the enactment of the *Theft Act 1968* (U.K.).[245] Australian law has taken this form since its States and Territories created similar offenses in the 1970s and 1980s.[246] New Zealand law has taken this form since at least 2003.[247]

The United States lags years behind the rest of the common law world. One cause of this lag may be comparative ambivalence towards dishonesty.[248] But the major cause is the judicial anomaly known as the intangible rights doctrine. The intangible rights doctrine allowed courts to convict defendants who had not deprived their victims of money or property by means of the fiction that those victims had been defrauded of intangible rights.[249] The invention of the doctrine allowed the United

243. *Crimes Act 1900* (NSW) § 4B(2) (Austl.); *Criminal Code 2002* (ACT) § 302 (Austl.); *Criminal Law Consolidation Act 1935* (SA) § 131(2) (Austl.); Peters v. The Queen (1998) 192 CLR 493, [29] (Austl.); R v. Dillon; Ex parte Attorney-General (Qld) [2016] 1 Qd R 56; [2015] QCA 155 (Austl.); Tasmania v. Clark [2018] TASSC 64, [10]-[11] (Austl.); Ivey v. Genting Casinos (UK) Ltd [2018] AC 391; [2017] UKSC 67, [48].

244. In the United Kingdom, Queensland and Tasmania, to prove that the defendant acted "dishonestly," the prosecution must prove that the defendant was dishonest according to the standards of ordinary people. *See* R v. Fitzgerald [1980] Tas R 257, 262, 264 (Austl.); Peters v. The Queen (1998) 192 CLR 493, [18], [145] (Austl.); Macleod v. The Queen (2003) 214 CLR 230, [46] (Austl.); Jovanovich v. The Queen [2007] TASSC 56, [38]-[40] (Austl.); R v. Dillon; Ex parte Attorney-General (Qld) [2016] 1 Qd R 56; [2015] QCA 155, [48] (Austl.); Ivey v. Genting Casinos (UK) Ltd [2018] AC 391; [2017] UKSC 67, [74]; D.P.P. v. Patterson [2018] 1 Cr. App. R 28; [2017] EWHC 2820 (Admin), [16] (Gr. Brit.); R v. Pabon [2018] EWCA Crim. 420, [23] (Gr. Brit.); London Organising Committee of the Olympic and Paralympic Games (in liquidation) v. Sinfield [2018] EWHC 51 (Q.B.), [62]. In New South Wales, South Australia and the Australian Capital Territory, the prosecution must prove in addition that the defendant knew that he or she was dishonest according to those standards. See *Crimes Act 1900* (NSW) § 4B(1) (Austl.); *Criminal Law Consolidation Act 1935* (SA) § 131(1) (Austl.); *Criminal Code 2002* (ACT) § 300 (Austl.). In Victoria the prosecution must prove only that the defendant did not have a belief in a legal right to the financial advantage. *See* R v. Salvo [1980] VR 401, 422, 440 (Austl.); R v. Brow [1981] VR 783, 789 (Austl.); R v. Bonollo [1981] VR 633, 634-35, 644-45 (Austl.); R v. Todo (2004) 10 VR 244; [2004] VSCA 177, [26] (Austl.).

245. Theft Act 1968, c. 60 §§ 15 (obtaining property by deception), 15A (obtaining a money transfer by deception), 16(1) (obtaining pecuniary advantage by deception) (UK).

246. *Criminal Code 2002* (ACT) § 332 (Austl.); *Summary Offences Act 1970* (NSW) § 38 (Austl.) (repealed); *Crimes Act 1900* (NSW) § 178BA (Austl.) (repealed); *Criminal Code 1899* (Qld) § 408C (Austl.); *Criminal Law Consolidation Act 1935* (SA) § 139 (Austl.); *Criminal Code Act 1924* (Tas) sch. 1 §§ 252A, 253A (Austl.); *Crimes Act 1958* (Vic) § 82 (Austl.).

247. Crimes Act 1961, s 240(1) (N.Z.).

248. See generally TAMAR FRANKEL, TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD 3-6 (Oxford University Press, 2006).

249. *See supra* Section (III)(A).

States to duck the question "Can a dishonest *acquisition* of money or property *alone* constitute fraud?" at a time when other common law jurisdictions were answering "Yes" to that question.[250]

A striking feature of the decisions that promulgated the intangible rights doctrine is their complete lack of justification for its development. The early decisions purported to follow cases that did not in fact support the proposition that a scheme to defraud a person of an intangible right constituted mail fraud.[251] The later decisions continued that trend and followed the early decisions without questioning their merits.[252] At no

250. *See* Donald V. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 62-65 (1980) (explaining court focus on disloyalty rather than unjust enrichment of defendant).

251. The origin of the intangible rights doctrine appears to have been United States v. Faser, 303 F. Supp. 380 (E.D. La. 1969). There the court said: "[I]t is a violation of the statute in question if a person defrauds the States out of the 'loyal and faithful services of an employee.' " *Id.* at 384. In support it relied on Blachly v. United States, 380 F.2d 665 (5th Cir. 1967) and Foshay v. United States, 68 F.2d 205 (8th Cir. 1933). *Id.* at 384-85. Neither case involved intangible rights. The scheme in *Blachly* was a pyramid scheme. 380 F.2d at 668-71. *Foshay* involved the sale of stock by false pretenses. 68 F.2d at 206-07. None of the decisions predating *Faser* referred to in later decisions as authorities for the intangible rights doctrine involved an acknowledged deprivation of an intangible right. United States v. Rowe, 56 F.2d 747, 748 (1932) involved the fraudulent settlement of claims made by those who had lost money investing in stocks. United States v. Classic, 35 F. Supp. 457, 458 (E.D. La. 1940) was a voter fraud scheme in which the court rejected an argument that there could be no fraud because the defendants were acting in their capacity as primary election commissioners. There was no suggestion that the defendants defrauded the people of any intangible right. *Id.* They may have been charged with devising a scheme to defraud the government of the salaries of the candidates for whom they attempted to procure election. *Id. See also* United States v. Aczel, 219 F. 917, 938-39 (D.C. D. Ind. 1915). Shushan v. United States, 117 F.2d 110 (5th Cir. 1941), *overruled by* United States v. Cruz, 478 F.2d 408 (1973), was credited by the Supreme Court in Skilling v. United States, 561 U.S. 358, 400 (2010) with "first presenting the intangible-rights theory." But it involved a scheme to defraud a public body of money by means of corrupting its officials and false representations. *Id.* There was an element of breach of fiduciary duty that was later relied upon, but the decision said nothing about intangible rights. *See id.* at 420. United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D.C. Ma. 1942) followed *Shushan*, and itself has been referred to as supporting the intangible rights doctrine. The scheme was a fiduciary fraud scheme in which the defendants bribed employees of the Lever Brothers Company to provide confidential information and experimental soaps. *Procter & Gamble*, 47 F. Supp. at 678. Those employees were not honest and loyal, but the deprivation of their honesty and loyalty was not the scheme for which the defendants were indicted. *Id.* at 678-79.

252. United States v. George, 477 F.2d 508 (7th Cir. 1973) is considered to be an intangible rights case. *See, e.g.*, United States v. Bryza 522 F.2d 414, 422 (7th Cir. 1975); United States v. Brown 540 F2d 364, 374 (8th Cir. 1976). But the court in *George* held that the defendant fiduciary had defrauded his principal of money. See *George*, 477 F.2d at 512-13. It relied on *Faser*, United States v. Hoffa, 205 F. Supp. 710, 716 (S.D. Fla. 1962) and *Rowe*, 56 F.2d at 513. *Faser* and *Rowe* were explained in the previous footnote. *Hoffa* held that making secret profits constitutes an active fraud but did not refer to intangible rights. *See* 205 F. Supp. at 716-17. United States v. States 488 F.2d 761 (8th Cir. 1973) recognized a scheme to defraud the people of "certain intangible political and civil rights"—namely, the right to the fair conduct of elections. 488 F.2d at 765. In addition to several cases irrelevant to this Article, the

point did any judge explain why an intangible right to "honest services" or "free and fair elections" was as worthy of protection as money or property. The empty, pseudo-technical reasoning is perhaps the chief cause of the doctrine's downfall. Critics identified its weaknesses but there were no champions of its strengths. It was a castle built on sand with no defenses. The opposing forces simply washed it away and left its inhabitants wondering why.

Congress responded to *McNally* by reviving the intangible rights doctrine insofar as it protected the "intangible right to honest services."[253] But this revival caused problems of its own. The courts had to grapple with difficult questions. When does the right to honest services arise? What does it entail? Under what circumstances is a person defrauded of it? The Supreme Court later clarified that only schemes or artifices involving bribes or kickbacks prejudiced the intangible right to honest services.[254] But the remaining questions continue to present difficulties.

It would be much simpler to interpret the statutes as if they mean what they say—that schemes or artifices for *obtaining* money or property by false pretenses constitute mail and wire fraud. This would eliminate the need to rely on the fallacy that a person can be defrauded of an intangible right, at least where a false or fraudulent pretense, representation, or promise has been made. It would accord with fraud's traditional emphasis on money and property. It would allow the law of the United States to catch up with developments in other common law jurisdictions. And it would ensure that the law is ready for the new frontier of online fraud.

E. Counterarguments

The previous three sections set out three reasons to favor extension of the wire fraud statute to frauds that do not defraud. This extension would allow for the prosecution of those who publish fake news for profit. The next part of this Article discusses what that prosecution would look like. However, before moving to that topic, it is necessary to address some objections that opponents of extending the statute may

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court relied upon *Faser* and *George* as "persuasive authority for the proposition that in a prosecution for the use of the mails to further and execute a vote fraud scheme the indictment states an offense even though it does not contain allegations that anyone was defrauded of any money or property." United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974) followed *Faser* and *George* and several other decisions that did not involve intangible rights. 493 F.2d at 1150. This trend continued right up until the abolition of the doctrine in *McNally*. *See supra* note 194.

253. 18 U.S.C. § 1346.

254. Skilling v. United States, 561 U.S. 358, 368 (2010).

seek to proffer. Many commentators and judges have criticized the sprawling reach of the mail and wire fraud statutes. Their criticisms indicate potential grounds upon which a disjunctive interpretation of the wire statute may be opposed. They tend to be based upon one of five concerns.

The first concern relates to federalism. Critics argue that the statutes are used to prosecute conduct that should be prosecuted by the States.[255] This was an underlying theme in *Cleveland*.[256] Resolving the federal balance is beyond the scope of this Article. But one point may be made. The point concerns an important difference between the mail fraud statute and the wire fraud statute. The wire fraud statute, but not the mail fraud statute, applies only to communications that are "in interstate or foreign commerce." This limitation prevents the wire fraud statute being used to prosecute fraudulent schemes that make use of only intrastate wire communications.[257] Expansion of wire fraud, therefore, cannot readily be characterized as undermining the federal balance.[258]

The second concern relates to the interpretation of the jurisdictional elements of the mail and wire fraud statutes. Critics argue that the courts have taken an inconsistent and lax approach to defining the circumstances in which a mailing or wire communication is "for the purpose

255. *See, e.g.*, Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321, 336-38 (1983); Ralph E. Loomis, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U. L. REV. 63 (1978); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. LEG. 153, 170-87 (1994) [hereinafter "*Mail Fraud and the Intangible Rights Doctrine*"]; Geraldine Szott Moohr, *The Federal Interest in the Criminal Law*, 47 SYRACUSE L. REV. 1127 (1997).

256. *See Cleveland*, 531 U.S. at 25 (" ' [U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." (quoting Jones v. United States, 529 U.S. 848, 858 (2000)); *see also* Hadi S. Al-Shathir, *And Into the Maelstrom Steps the Supreme Court: Licenses Are Not Property for Purposes of the Mail Fraud Statute*, 68 MISS. L. REV. 179, 192 (2003).

257. *See, e.g.*, United States v. Garrido, 713 F.3d 985, 998 (9th Cir. 2013); United States v. Izydore, 167 F.3d 213, 219 (5th Cir. 1999); Smith v. Ayres, 845 F.2d 1360, 1366 (5th Cir. 1988); United States v. Giovengo, 637 F.2d 941, 943 (3rd Cir. 1980).

258. This important difference between the two statutes may even support an argument that the statutes should not be interpreted in *pari materia*. It may be appropriate to confine the scope of the mail fraud statute due to concerns of federal overreach (although this Article contends that it is illegitimate to do so by undermining the plain meaning of its words) but inappropriate to confine the scope of the wire fraud statute because the protection of interstate and foreign wire communications is squarely within the domain of the federal legislature. *See, e.g.*, Committee on Long Range Planning of the Judicial Conference of the United States, LONG RANGE PLAN FOR THE FEDERAL COURTS 24 (1995) (viewing federal criminal legislation as justified only where state prosecution is inappropriate or where federal interests are paramount); *see also Mail Fraud and the Intangible Rights Doctrine*, *supra* note 255, at 1143-44, 1169-70 (discussing the Long Range Plan).

of" executing a fraudulent scheme.[259] These criticisms are persuasive. But they have no relevance to the argument at hand. Extending the statute as proposed by this Article neither expands nor contracts the jurisdictional elements of either offense.

The third concern relates to the characterization of certain kinds of conduct as "fraud." Critics argue that the statutes have been used to prosecute as "fraud" conduct that in fact is not "fraud."[260] These criticisms are not relevant to the argument at hand either. This Article proposes that obtaining money or property by means of false or fraudulent pretenses, representations, or promises should constitute fraud in circumstances where no one has been defrauded. Although this may seem novel, it cannot be better characterized as something other than fraud.

The fourth concern is the "principle of lenity." This principle provides that "when there are two rational readings of a criminal statute, one harsher than the other, [the courts] are to choose the harsher only when Congress has spoken in clear and definite language."[261] It has been justified on the ground that "the citizen is entitled to fair notice of what sort of conduct may give rise to punishment."[262] Critics may argue that to adopt a disjunctive interpretation would violate the principle of lenity. But there are good reasons to doubt that argument.

The principle of lenity is premised upon the proposition that Congress would not prohibit (or should not be taken to have prohibited) behavior without using clear and definite language.[263] This proposition is most potent where legislation spells out a number of clear and definite offenses or elements of offenses and the challenged behavior does not fall within any of them. It is least potent where legislation is broad or indefinite in its entirety. The deliberate use of broad language signals open-ended intent. It indicates that Congress intended the courts to develop the scope of the offense.[264]

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259. 18 U.S.C. § 1341; *see, e.g.*, Morano, *supra* note 250, 82-83; *see generally*, C.J. Williams, *What is the Gist of the Mail Fraud Statute*, 66 OKLA. L. REV. 287 (2014).

260. *See, e.g.*, Richard A. Hibey, *Application of the Mail and Wire Fraud Statutes to International Bribery: Questionable Prosecutions of Questionable Payments*, 9 GA. J. INT'L & COMP. L. 59 (1979); W. Robert Gray, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562 (1980); John C. Coffee Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981).

261. *McNally*, 483 U.S. at 359-60.

262. *Id.* at 375 (Stevens, J., dissenting).

263. *See generally* Bell v. United States, 349 U.S. 81, 83-84 (1955); United States v. Bass, 404 U.S. 336, 348-49 (1971).

264. *McNally*, 483 U.S. at 373 (Stevens, J., dissenting) ("The wide open spaces in statutes such as these are most appropriately interpreted as implicit delegations of authority to the courts to fill in the gaps in the common-law tradition of case-by-case adjudication.").

The broad language of the mail and wire fraud statutes indicates that Congress has delegated the task of determining the scope of the offense to the courts. The fact that Congress has repeatedly amended the statutes to broaden their reach in response to decisions of the Supreme Court supports this argument.[265] In *United States v. Maze*, the Supreme Court held credit card fraud to be beyond the reach of the mail fraud statute.[266] Congress reacted by enacting the bank fraud statute.[267] In *McNally*, the Supreme Court held that the mail fraud statute did not extend to "intangible rights."[268] Congress reacted by enacting 18 U.S.C. § 1346. Congress has therefore twice sanctioned the application of the statutes to novel forms of fraud.

The conjunctive interpretation rebukes the conferral of discretion upon the courts by Congress. It also collides with the proposition that Congress would or should use clear and direct language to identify criminal conduct. It does so because, by reading the second phrase as a subset of the first, it gives no meaning to the clearest and most direct language used in the statutes. In a perverse sort of way, it employs the principle, which is reserved for cases of "grievous ambiguity or uncertainty,"[269] to undermine the least ambiguous words. The principle of lenity should not be applied to reduce the scope of the statutes as the clearest language supports the broader interpretation.

The final concern relates to overcriminalization. Critics may argue that extension of the statute will prohibit conduct that should not be criminal. Against this argument it is important to bear in mind that the words "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" are words of limitation as well as words of expansion. The words ensure that depriving someone of something cannot constitute wire fraud unless the deprivation is accompanied by the obtaining of money or property. They also ensure that concealing a fact or breaching a duty cannot constitute wire fraud unless the concealment is accompanied by the making of a false or fraudulent pretense, representation, or promise. Extension of the wire fraud statute will only capture those who profit from overt dishonesty.

It is also important to bear in mind the weakness of arguments based on overcriminalization more generally. During the hearing of

265. *Id.* at 374.

266. 414 U.S. 395, 396-97, 405 (1974).

267. 18 U.S.C. § 1344. *See* Loughrin v. United States, 573 U.S. 351, 360-61 (2014).

268. *McNally*, 483 U.S. at 356.

269. Muscarello v. United States, 524 U.S. 125, 138-39 (1998); Ocasio v. United States, 136 S.Ct 1423, 1434 n.8 (2016); Barber v. Thomas, 560 U.S. 474, 488 (2010). *Cf.* Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. 179, 190-91 (2018) (describing *Muscarello* as a "stingy approach" to the lenity principle).

Cleveland, Justice Breyer suggested that the prosecution was proposing that the winner of the television show *Survivor* could be charged with fraud for deceiving the other contestants in order to win the contest.[270] The transcript records laughter.[271] Counsel for the prosecution never recovers. Similarly, in *Sorich v. United States*, Justice Scalia expressed dismay at the possibility that the intangible rights doctrine could be used to charge an employee for skipping work to attend a ball game.[272] His goal was to make readers think: "But that is simply ridiculous! It would turn all kinds of otherwise respectable people into criminals!"

These are *reductio ad absurdum* arguments, and only a little thought reveals that they are unpersuasive. Breyer's argument is unpersuasive because the winner of *Survivor* was playing a game. His deception is no more a crime than the bluff of a professional poker player. Scalia's argument is unpersuasive because an employee who lies to skip work to attend a ball game *is actually a criminal*. The employee told his employer, "I am too sick to work today." But in fact he was not sick at all. This was a false pretense. The employee was only entitled to be paid for working or in circumstances where his contract of employment made provision for paid leave. The employee made use of the false pretense to obtain pay without working and outside of those paid leave circumstances. The employee thus obtained his pay by false pretenses. In passing it may be noted that this fraud involves no reliance upon the intangible rights doctrine.

The point here is not that federal prosecutors should open up a new branch to deal with truant employees. It is that there is nothing unsettling about the notion that something as innocuous as skipping work may constitute a crime. The same employee could be charged with theft for taking stationery home from work, defamation for making false statements about his boss, or assault for poking someone in the midst of a heated argument. All kinds of day-to-day mischief is criminal. The bulk of the population remains at liberty because the law has built in mechanisms that prevent and mitigate the prosecution and punishment of trivial crimes.[273] *De minimis non curat lex*.

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270. Oral Argument at 31-32, Cleveland v. United States, 531 U.S. 12 (2000) (No. 99-804).

271. *Id.*

272. Sorich v. United States, 555 U.S. 1204, 1309 (2009) (Scalia, J., dissenting).

273. *See generally* Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369-73 (2010) (extolling the merits of prosecutorial discretion).

VI. THE SCOPE OF "FAKE NEWS WIRE FRAUD"

This final part of the Article explains the way in which publishing fake news could be prosecuted as wire fraud. The first section addresses the elements of wire fraud and applies the facts of publishing fake news to those elements. The second section deals with the important issue of how *bona fide* satirists may be distinguished from fake news publishers. The final section dispels the notion that the obviousness of the falsity of a fake news story should have anything to do with whether or not its publication constitutes fraud.

A. The Elements of "Fake News Wire Fraud"

To prove that a person has committed wire fraud, it is necessary to prove first that the jurisdictional elements of the offense are satisfied. They are satisfied in relation to fake news because to publish information on the internet for profit is to transmit or cause to be transmitted writings, signs, signals or pictures by means of wire communications in interstate or foreign commerce.[274] It is then necessary to prove that the fraud-related elements of the offense are satisfied. According to the disjunctive interpretation advanced in this Article, the prosecution must prove beyond a reasonable doubt: (1) that the defendant "devised or intend[ed] to devise" a "scheme or artifice;" (2) that the scheme or artifice was "for obtaining money or property;" (3) that the money or property was to be obtained "by means of" certain conduct; (4) that the conduct involved the making of "false or fraudulent pretenses, representations, or promises;" and (5) that the defendant had the requisite intent.

The publication of content upon a website constitutes a scheme or artifice. The fake news publisher devises the scheme or artifice by creating the website and publishing the content.[275] The scheme or artifice is for obtaining money because it is supported by advertising. The publication of the website in the form of a news website constitutes a false or fraudulent pretense or representation that the website is a legitimate news website; the publication of a false story in the form of a news story constitutes a false or fraudulent pretense or representation that the story is a legitimate news story; and false statements made within a story constitute false or fraudulent pretenses or representations that the contents

274. *See supra* Section (I).

275. *See, e.g.*, United States v. Foster, No. 13-20063-CR-GRAHAM, 2014 WL 12687616 (S.D. Fla. Mar. 31, 2014), *aff'd*, 878 F.3d 1297, 1302 (11th Cir. 2018) (defendant convicted of wire fraud for publishing false news articles online); United States v. Arif, 897 F.3d 1, 4 (1st Cir. 2018) (defendant convicted of wire fraud for publishing false research and fictitious testimonials).

of the statements are true.[276] Money is obtained by means of the false or fraudulent pretenses or representations because the website and stories are used to lure readers to the advertisements—but for the website, stories, and statements, there would be no readers, and, by extension, no revenue.[277]

The foregoing demonstrates that the creation and operation of a fake news website satisfies the first four fraud-related elements of wire fraud. Before turning to the fifth element, it is necessary to make two important points. One is that the publication of an opinion cannot constitute wire fraud—no matter how vile or erroneous the opinion happens to be. That is because a false pretense or representation must be an assertion of fact,[278] and an expression of an opinion is not an assertion of fact.[279] The other point is that the publication of false information on a website that is not supported by advertising or some other means of raising revenue cannot constitute wire fraud—no matter how egregious the falsity of the information. That is because the scheme must be for "obtaining money or property." There is no such thing as a not-for-profit fraud that does not defraud. That is just a lie.

The fifth fraud-related element of wire fraud is intent—the *mens rea* of the offense. The *mens rea* of wire fraud is typically described as "intent to defraud." The meaning of that phrase has been expressed in various ways. The Second Circuit has referred to it as "intent to deceive and intent to cause actual harm."[280] The Seventh Circuit has put it slightly differently: "acting willfully and with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another."[281]

Both formulations include two requirements: (1) intent to deceive; and (2) intent to do something else—to cause harm or loss, or to gain. This Article has premised the criminality of publishing fake news upon prohibiting deceptive economic exploitation. It follows that the

276. *See supra* Section (II)(A).

277. *See supra* Section (II)(B).

278. *See Durland*, 161 U.S. at 312 (describing false pretense as a "misrepresentation as to some existing fact"). *See also* WHARTON, *supra* note 40, at 453.

279. However, in appropriate circumstances, a person who makes an assertion of opinion that he or she does not actually hold may be taken to have made an implied false assertion of fact—namely, that he or she holds the opinion. See WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW § 19.7(b)(5) (5th ed. 2010).

280. *See, e.g.*, United States v. Stavroulakis, 952 F.2d 686, 694 (2nd Cir. 1992); United States v. Chandler, 98 F.3d 711, 715 (2nd Cir. 1996).

281. United States v. Britton, 289 F.3d 976, 981 (7th Cir. 2002); Corley v. Rosewood Care Ctr., Inc. of Peoria, 388 F.3d 990, 1000 (7th Cir. 2004); United States v. Faruki, 803 F.3d 847, 853 (7th Cir. 2015). *See also* United States v. Moede, 48 F.3d 238, 241 (7th Cir. 1995); United States v. Paneras, 222 F.3d 406, 410 (7th Cir. 2000); United States v. Davuluri, 239 F.3d 902, 906 (7th Cir. 2001).

prosecution should be required to prove beyond a reasonable doubt that the defendant had intent to deceive and intent to make a gain. The publication of a fake news website, fake news stories, and false statements within those stories demonstrates *prima facie* intent to deceive;[282] and the engagement of an advertising service to raise revenue demonstrates *prima facie* intent to gain.

Against this *prima facie* case for intent, the fake news publisher could claim to have lacked intent to deceive on the ground that he did not intend for readers to believe the stories. But this defense would be difficult to establish. There is authority that a person who knowingly makes a false statement may disprove intent to deceive if he "knew that he could not deceive the recipient of his statements."[283] A person who makes a misrepresentation to a confined audience may be able to demonstrate that he or she knew that the members of the audience could not be deceived. But the fake news publisher would have to demonstrate that he knew that there was not a single person with access to the internet who would think the website and stories were legitimate. This would be close to impossible.

The fake news publisher could also claim to have lacked intent to deceive on the ground that he thought the stories were true. Belief in the truth of a false pretense or representation constitutes a complete defense to fraud.[284] But the defense is not as simple as saying, "Well, I thought it was true." The prosecution will no doubt demonstrate the lack of evidence for the truth. The publisher will then have to explain how he was able to form a genuine belief despite the lack of evidence. If the publisher is not able to explain how he had a genuine basis for his belief, the prosecution may argue that the publisher, whilst he may not have known

282. Note that the wire fraud statute does not require proof that any particular person believed or relied on the false or fraudulent pretenses or representations. *See* Neder v. United States, 527 U.S. 1, 24-25 (1999) (explaining that requirements of reliance and damages "plainly have no place in the federal fraud statutes").

283. United States v. Maxwell, 579 F.3d 1282, 1301 (11th Cir. 2009) (citing United States v. Pendergraft, 297 F.3d 1198, 1209 (11th Cir. 2002)). *See also* Norton v. United States, 92 F.2d 753, 755 (9th Cir. 1937). The Eleventh Circuit appeared to set the bar a little lower in Pelletier v. Zweifel, 921 F.2d 1465, 1499 (11th Cir. 1991). "A defendant cannot possibly intend to deceive someone if he does not believe that his intended 'victim' will act on his deception." *Id.* This test appears to focus more upon the subjective belief of the defendant. In practice the difference is unlikely to be material.

284. *See, e.g.*, Knickerbocker Merch. Co. v. United States, 13 F.2d 544, 546 (2nd Cir. 1926) ("[A] man might not be charged for his honest beliefs, however imbecile they might be."); Stone v. United States, 113 F.2d 70, 74-75 (6th Cir. 1940); United States v. Alkins, 925 F.2d 541, 550 (2nd Cir. 1991) ("An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statement may turn out to be.").

that the propositions were *false*, nevertheless had *reckless disregard* as to the truth, which amounts to intent to deceive.[285]

B. Satirical Fake News

Satirical fake news published in the hopes of entertaining readers or expressing opinions is as much "fake news" as the kind of behavior this Article has discussed so far. Stephen Colbert's portrayal of a right-wing pundit on *The Colbert Report* was fake news. So are articles by publications like *The Onion*. But there is a world of difference between a satirist and the kind of person this Article has referred to as a "fake news publisher." The fake news publisher is to the satirist what the forger is to the calligrapher. The two-share skill, not virtue.

Satire is speech protected by the First Amendment.[286] It has been relied on as a defense to suits for defamation and the intentional infliction of emotional distress.[287] Its cousin, parody, has been relied on as a defense to suits for copyright and trademark infringement.[288] The courts recognize that humor, such as satire, "is . . . to be protected as much, under appropriate circumstances, as political speech, journalistic exposés, or religious tracts."[289] Therefore, for prosecuting fake news as wire fraud to work, there must be a way to differentiate between fake news and genuine satire.[290]

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285. *See, e.g.*, United States v. Amrep Corp., 560 F.2d 539, 543 (2nd Cir. 1977); United States v. Frick, 588 F.2d 531, 536 (5th Cir. 1979); United States v. Themy, 624 F.2d 963, 965 (10th Cir. 1980); United States v. Boyer, 694 F.2d 58, 59 (3rd Cir. 1982); United States v. Schaflander, 719 F.2d 1024, 1027 (9th Cir. 1983); United States v. Dick, 744 F.2d 546, 551 (7th Cir. 1984); United States v. Gay, 967 F.2d 322, 326 (9th Cir. 1992).

286. *See generally* Roy S. Gutterman, *New York Times Co. v. Sullivan: No Joking Matter – 50 Years of Protecting Humor, Satire, and Jokers*, 12 FIRST. AMEND. L. REV. 497 (2014).

287. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 54-57 (1988) (barring claims for intentional infliction of emotional distress against public figures and officials absent showing actual malice); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

288. *See, e.g.*, Fisher v. Dees, 794 F.2d 432, 440 (9th Cir. 1986) (affirming summary judgment against copyright infringement because the parody was "deserving of fair-use protection as a matter of law"); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987) ("Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression."); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (holding that "[i]t was an error for the Court of Appeals to conclude that the commercial nature of [the parody] rendered it presumptively unfair.").

289. Freedlander v. Edens Broad. Inc., 734 F. Supp. 221, 228 (E.D. Va. 1990).

290. Fraudulent speech and protected speech have collided in the past. *See, e.g.*, In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 988 (3rd Cir. 1985) (rejecting contemnor's claim that "the first amendment forbids application of the mail fraud statute to an author"). *See also* Peter T. Barbur, *Mail Fraud and Free Speech*, 61 N.Y.U. L. REV. 942, 943 (1986) (arguing that the government interest in regulating protected speech "must be more compelling than the mere interest in preventing fraud").

This task presents difficulties. People sometimes mistake satirical news stories for actual news stories, and many fake news publishers present themselves as satirists. Fortunately, the courts have dealt with similar dilemmas in relation to defamation, which, like fraud, requires the making of a false statement of fact. The law is not as settled as might be expected.[291] But it is settled enough to provide useful guidance.

For a statement to be defamatory, it must be a false statement of fact that "harm[s] the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[292] Where the subject of the statement is a public official or public figure, the statement must be made with "actual malice."[293] In this context "actual malice" does not mean something akin to "malevolence." It means that the statement must be made "with knowledge that it was false or with reckless disregard of whether it was false or not."[294]

Where a statement is alleged to have been satirical, the actual malice rule presents a problem. *The satirist who makes a false statement knows that the statement is false*. The satirist thus appears to have actual malice as of course—"automatic actual malice."[295] The courts have avoided this outcome by holding that a statement must be able to be reasonably interpreted as stating facts about an individual for it to be defamatory.[296] The Tenth Circuit expressed the test in the following way: "The test of what a particular statement could reasonably be understood to have asserted is what a *reasonable reader* would understand the

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291. *See generally* Jeff Todd, *Satire in Defamation Law: Toward a Critical Understanding*, 35 REV. LITIG. 45 (2016).

292. RESTATEMENT (SECOND) OF TORTS § 559 (1977) (AM. LAW INST. 1975).

293. *N.Y. Times Co.*, 376 U.S. at 279; *Curtis Publ'g Co.*, 388 U.S. at 162-65 (Warren, J., concurring).

294. *N.Y. Times Co.*, 376 U.S. at 279-80. One commentator has suggested that relaxation of the actual malice rule may provide a solution to the fake news problem. *See* Randall D. Nice, *Reviving the Lost Tort of Defamation: A Proposal to Stem the Flow of Fake News*, 61 ARIZ. L. REV. 205, 230 (2019). The problem with this proposal is that fake news publishers know their content is false. This means that eliminating the actual malice requirement will not do anything. The reason publishers are not sued for defamation is not that the tort is too narrow. It is that fake news is not always defamatory and most people who are defamed are not interested in litigation. *See id.* at 223.

295. New Times, Inc. v. Isaacks, 146 S.W.3d 144, 162 (Tex. 2004).

296. *See, e.g.*, Greenbelt Coop. Publ'g Assn., Inc. v. Bresler, 398 U.S. 6, 14 (1970) ("[E]ven the most careless reader must have perceived that the word was no more than rhetorical hyperbole."); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (holding that ad parody "could not reasonably have been interpreted as stating actual facts about the public figure involved"); Letter Carriers v. Austin, 418 U.S. 264, 286 (1974); Milkovich v. Lorain Journal Co., 497 U.S. 1, 16-20 (1990).

author to be saying, considering the kind of language used and the context in which it is used."[297]

This test recognizes that false statements of fact may be employed to convey opinions or ideas. It excludes satire from defamation on the ground that a statement that cannot reasonably be taken as conveying a factual message should not be characterized as a false statement of fact.[298] It is similar to the way in which puffery is not considered to be a false pretense.[299] Consider a salesman who claims, "This is the greatest horse in the world." The statement could be construed as a false statement of fact, but cannot reasonably be taken as conveying a factual message because potential buyers would recognize it to be hyperbole.

Satirical false statements should be treated by fraud in the same way in which they are treated by defamation. Where a defendant claims to have published satire, the court should ask, "Would a reasonable reader interpret the article as stating facts?" Naturally, the answer will likely depend upon consideration of all the circumstances. But some guidance may be drawn from decisions in which satire or parody has been relied upon as a defense to defamation or copyright or patent infringement. Propositions supported by those decisions are considered in the next four paragraphs.

The medium in which a statement is made may indicate satire.[300] A statement made during a comedic performance would be readily interpreted as satire, for example.[301] But this does not assist the satirical fake news publisher. Satirical fake news is satire through parody. The parody is the adoption of the form of a news article. The satire is the content of the article. The adoption of the form of a news article is necessary for the satire to work. But it also suggests to the audience that the article is legitimate. This means that the satire must overcome the otherwise legitimate form in which it is presented to obtain protection.

The reputation of the defendant may indicate satire. For example, the pig named "Spa'am" in the film *Muppet Treasure Island* was held not to infringe the trademark of the food product "SPAM" in part because viewers would recognize *The Muppets* as satire.[302] Thus,

297. Mink v. Knox, 613 F.3d 995, 1007 (10th Cir. 2010).

298. *Id.*

299. *See* United States v. New South Farm & Home Co., 241 U.S. 64, 71 (1916); Harrison v. United States, 200 F. 662, 665, 669 (6th Cir. 1912).

300. *See, e.g.*, *Freedlander*, 734 F. Supp. at 228 (concerning song broadcast on morning comedy and music show); Cardtoons v. Major League Baseball Players, 95 F.3d 959, 967 (10th Cir. 1996) (concerning parody baseball cards carrying logo of manufacturer).

301. *See, e.g.*, Polygram Records, Inc. v. Superior Court, 170 Cal.App.3d 543, 552-53 (1985).

302. Hormel Foods Corp. v. Jim Henson Prod. Inc., 73 F.3d 497, 503 (2nd Cir. 1996).

publications like *The Onion* may be readily characterized as satire on account of their satirical fame.

The presence of a disclaimer may indicate satire.[303] Here there is a need for caution. Many fake news websites contain disclaimers stating that the content is not true or is intended to be satire. Sometimes these disclaimers appear below or alongside each article. Other times they appear elsewhere on the website—on the "About Us" page, for example. However, most readers access fake news by clicking links on social media or in search results.[304] These links may contain a title, short description and picture. But they will not contain the disclaimer. This means the reader may share or click the link without being exposed to the disclaimer, the result being that the scheme is fully executed before the disclaimer appears.

The content may indicate satire. Here there is a similar need for caution. If a statement describes events that are physically impossible,[305] or even illogical or nonsensical,[306] it may readily be characterized as satire. However, as research demonstrates that most social media users share and comment upon news articles without reading the stories themselves,[307] it may be inappropriate to place weight on the content of an article. The courts have emphasized that the reasonable person "does not represent the lowest common denominator, but reasonable intelligence and learning,"[308] and there is also authority that a person who forms an opinion "after reading a sentence or two" of a newspaper article

303. *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 48 (1988) (concerning small print stating "ad parody—not to be taken seriously" beneath fake advertisement and contents labelled "Fiction; Ad and Personality parody")); *L.L. Bean, Inc.*, 811 F.2d at 27 (concerning Back-To-School-Sex-Catalog labelled as "humor" and "parody" in contents); *Cardtoons*, 95 F.3d 962, 967 (concerning parody baseball cards carrying statement that they were not licensed by Major League Baseball Players Association). The courts have also rejected the notion that a disclaimer or identification is *necessary* to indicate satire. *See* Yankee Publ'g, Inc. v. News Am. Publ'g, Inc., 809 F. Supp 267, 281 (S.D.N.Y. 1992) ("There is no requirement that a parody identify itself by a label stating, 'a parody.' "); *Acuff-Rose Music, Inc.*, 510 U.S. at 583 n.17 ("Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived).").

304. *See* Allcott & Gentzkow, *supra* note 1, at 222.

305. *See, e.g.*, Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 441, 443 (10th Cir. 1983) (holding impossibility of fellatio causing recipient to levitate into air to be indicative of satire).

306. *See, e.g.*, *Freedlander*, 734 F. Supp. at 228.

307. Maksym Gabielkov et al., *Social Clicks: What and Who Gets Read on Twitter?*, ACM SIGMETRICS (Apr. 13, 2016), https://dl.acm.org/doi/pdf/10.1145/2896377.2901462 (finding 59% of links shared on Twitter are never clicked).

308. Patrick v. Superior Court, 22 Cal. App. 4th 814, 821 (1994) (unpublished opinion) ("[T]he hypothetical reasonable person . . . is no dullard."); *New Times, Inc.*, 146 S.W.3d at 157 ("The person of 'ordinary intelligence' . . . is a prototype of a person who exercises care and prudence, but not omniscience, when evaluating allegedly defamatory communications.").

"out of context" is not "an objectively reasonable reader."[309] But the same reasoning may not apply to articles, or at least not all articles, shared on social media. The better approach may be to judge the impression given by the post, not the article itself.

These propositions focus on the way in which reasonable people would interpret a false statement. They pay no regard to the intent of the publisher. If a statement can reasonably be interpreted as stating actual facts, it does not matter that the publisher never intended to state actual facts; the statement is defamatory.

Allegedly *fraudulent* statements *cannot* be treated in the same way. The wire fraud statute requires proof that the defendant possessed the requisite intent—defined earlier as intent to deceive and intent to gain.[310] This means that a further defense may be available to a true satirist wrongly accused of fraud. The satirist may be able to argue that *he himself* did not intend for the statement to be interpreted as a false statement of fact.

Many factors relevant to whether a statement may reasonably be interpreted as stating facts are also relevant to intent. A publisher who has a recognized satirical brand would have a better chance at disproving intent than a publisher who hops from domain to domain building no familiarity with readers.[311] A publisher who publishes outrageous or hilarious stories would have a better chance at disproving intent than a publisher who publishes believable stories where the joke is obscure. And a publisher who makes use of disclaimers would have a better chance at disproving intent than a publisher who takes no steps to identify the falsity of the content.

Another factor relevant to intent is the attitude of the publisher. Consider Paul Horner, for example. Horner was perhaps the most infamous fake news publisher during the lead up to the 2016 presidential election.[312] He was responsible for several of the most popular fake news stories and operated websites like www.abcnews.com.co and www.cnn.com.de.[313] In response to evidence that many people believed

309. *New Times, Inc.*, 146 S.W.3d at 159 (citing *Acuff-Rose Music, Inc.*, 510 U.S. at 583).

310. *See supra* Section (VI)(A).

311. *See* Craig Silverman, *Publishers Are Switching Domain Names To Try And Stay Ahead Of Facebook's Algorithm Changes*, BUZZFEED NEWS (Mar. 1, 2018), https://www.buzzfeednews.com/article/craigsilverman/publishers-are-switching-domain-names-to-try-and-stay-ahead (describing publishers registering new domain names over and over again to avoid being censored by platforms).

312. Abby Ohleiser, *Who do you Believe When a Famous Internet Hoaxer is said to be Dead?*, WASH. POST, Sep. 27, 2017.

313. Christina Caron, *Paul Horner, Fake News Writer Who Took Credit for Trump Victory, Dies at 38*, N.Y. TIMES, Sep. 27, 2017; Ohleiser, *supra* note 312; Maria L La Ganga,

his story about protesters being paid to attend Donald Trump rallies, Horner added the following disclaimer to the story:

> This story is not real. No one needs money to protest Donald Trump. I personally went to two Donald Trump rallies and I can say with 100% certainty that NONE of the protesters were getting paid. This story is mocking all of you sheep who think protesters are getting paid. Do your own thinking, retards.[314]

Horner continued to publish false stories despite clear evidence that many readers were not "getting" the joke. His statement that the story was mocking "sheep" and "retards" evinces a certain nastiness. In Horner's eyes, the content of the story was not the joke; the people who believed it were the joke. A true satirist would be unlikely to feel such disdain for his audience.

The final factor relevant to intent encompasses other activities undertaken by the publisher on the fake news website. Consider Alex Jones, for example. Jones is the creator and host of *Infowars*.[315] In addition to peddling fake news and conspiracy theories, Jones operates a side hustle selling *Infowars* branded supplements like "Brain Force PLUS":

> Top scientists and researchers agree: we are being hit by toxic weapons in the food and water supply that are making us fat, sick, and stupid . . . . It's time to fight back with Brain Force PLUS from Infowars and Infowars Life, the next generation of advanced neural activation and nootropics.[316]

Brain Force PLUS is one of many dubious supplements sold by Jones on the *Infowars Store*.[317] The products tend to be tied into false pretenses peddled on the show—in relation to Brain Force PLUS, that "top scientists and researchers agree that toxic weapons have been introduced to the food and water supply."[318] The relationship between Jones' false stories and the sale of products on the *Infowars Store* is further

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Paul Horner: How the Fake-News Kingpin's Life and Death Blurred Fact and Fiction, THE GUARDIAN, Sep. 30, 2017.

314. Ishmael N. Daro, *The Toronto Sun Fell For An Obvious Hoax About Paid Anti-Trump Protesters*, BUZZFEED NEWS (Feb. 28, 2017), https://www.buzzfeed.com/ishmaeldaro/toronto-sun-wyd.

315. *See generally* Josh Owens, *I Worked for Alex Jones. I Regret It*, THE N.Y. TIMES MAGAZINE, Dec. 5, 2019.

316. INFOWARS STORE, https://www.infowarsstore.com/brain-force.html (last visited Jun. 23, 2019).

317. Steven Salzberg, *Conspiracy Theories And Dubious Health Advice, Courtesy of Alex Jones*, FORBES, Aug. 17, 2018; Luis Ferre-Sadurni & Jesse McKinley, *Alex Jones Is Told to Stop Selling Sham Anti-Coronavirus Toothpaste*, N.Y. TIMES, Mar. 13, 2020; Andrew Marantz, *Alex Jones's Bogus Coronavirus Cures*, THE NEW YORKER, Mar. 30, 2020.

318. INFOWARS STORE, *supra* note 316.

evidence of intent to deceive. Jones' use of false stories to increase the likelihood of his supplement sales blends false pretenses with puffery in the style of a frontier snake oil salesman.

C. Obviously Fake Fake News

Many fake news articles are obviously fake. Some are so obviously fake that the publisher may feel entitled to argue that the readers should have known better than to believe them. The previous section explained that a satirist should be able to rely upon a "*The readers should have known it was a joke*" defense. Non-satirical fake news publishers may seek to rely upon a similar defense—"*The readers should have known the story was not true.*" This defense is not available. The obviousness of the falsity of a fake news article has no bearing upon the guilt or innocence of its publisher. To claim that the readers should have known the story was false is to blame the victim.

The law of criminal fraud has a long and convoluted history of victim blaming. Here there is space for only a summary. Prior to the development of cheating at common law, there appears to be no evidence that the courts considered whether or not the victim should have known better than to believe the defendant. For example, in the late sixteenth century, Lambarde wrote of the need for the law to "straine the line of Justice beyond the ordinarie length and wonted measure" to punish those who "lay Hookes, and make Traps as it were for the taking, intangling, and snaring of *silly and simple folks.*"[319]

That changed following the decision of the Queen's Bench in *R v. Jones*.[320] Jones pretended to have been sent to collect a debt from the prosecutor.[321] The prosecutor paid him the money.[322] Upon discovering that Jones had not been sent to collect the debt, the prosecutor indicted Jones for cheating.[323] The Queen's Bench quashed the indictment.[324] Chief Justice Holt asked, "Shall we indict one man for making a fool of another?"[325] His decision appears to have been the origin of the rule that a cheat had to be beyond detection of a man of ordinary capacity. According to Hawkins, there was no need to provide severe laws to prevent

319. WILLIAM LAMBARDE, ARCHEION: OR, A DISCOURSE UPON THE HIGH COURTS OF JUSTICE IN ENGLAND 85-86 (Charles H. McIlwain ed., Harv. Univ. Press 1957) (1635) (emphasis added).

320. (1703) 1 Salk. 379, 91 Eng. Rep. 330.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. R v. Jones (1703) 2 Ld. Raym. 1013; 92 Eng. Rep. 174.

cheats "against which common Prudence and Caution may be a sufficient Security."[326]

The unpopularity of the rule in *R v. Jones* prompted the enactment of the False Pretences Act of 1757.[327] Its enactment shifted the focus of the law from the credulity of the victim to the dishonesty of the defendant.[328] Justice Ashurst described its purpose in the following way, "The Legislature saw that all men were not equally prudent, and this statute was passed to protect the weaker part of mankind."[329] Thus, the obviousness of the fraud or the imprudence of the victim has not been a defense in England for more than two hundred and fifty years. In one case, for example, the defendant paid for a drink with a £1 note and tricked the cashier into paying him change for £5.[330] He was convicted of obtaining £4 by false pretenses.[331]

The courts of the United States stumbled in their reception of this aspect of English law.[332] Some held that the fraud had to be capable of deceiving a person of "ordinary caution."[333] Others held that the law would not protect those who had the means of detecting the fraud "in their own hands."[334] Others held that the law did not extend to pretenses

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326. HAWKINS, *supra* note 27, at 187-88.

327. 30 Geo. II c. 24.

328. *See, e.g.*, R v. Wickham (1839) 10 Ad. & E. 34, 36; 113 E.R. 14, 15 (Lord Denman C.J.) ("Why is it the prosecutor's folly more than the defendant's fraud? This point is sometimes put as if a lie were something laudable. There are indeed cases where the pretence is so very foolish that it is difficult to say that an imposition is practiced; but still, who is to give the measure?").

329. Young v. The King (1788) 1 Leach 505, 508; 168 Eng. Rep. 354, 356. *See also* R v. Woolley (1850) 1 Den. 559, 564; 169 Eng. Rep. 372, 374 ("It was once thought that the law was only for the protection of the strong and prudent. That notion has ceased to prevail.").

330. R v. Jessop (1858) Dears. & B. 442; 169 Eng. Rep. 1074, 1075.

331. *Id.*

332. The confusion was understandable. Some states received the English law as it existed in 1775. Others received the law as it existed in 1607. The former received the offense of obtaining property by false pretenses. But the latter received only cheating. The position was further complicated by the enactment of statutory false pretenses offenses in some states. *See generally* WAYNE LAFAVE, SUBSTANTIVE CRIMINAL LAW §§ 2.1(c)-(e), 19.7(a) n. 4 (5th ed. 2010).

333. People v. Johnson, 12 Johns. 292, 293 (N.Y. 1815); People v. Haynes, 11 Wend. 557, 566 (N.Y. Sup. Ct. 1834); People v. Haynes, 14 Wend. 546, 571-72 (N.Y. 1835); State v. Magee, 11 Ind. 154, 155 (Ind. 1858); Jones v. State, 50 Ind. 473, 477 (Ind. 1875); Clifford v. State, 56 Ind. 245, 249 (Ind. 1877); Bonnell v. State, 64 Ind. 498, 506 (Ind. 1878); Perkins v. State, 67 Ind. 270, 275-76 (Ind. 1879); Miller v. State, 73 Ind. 88, 91 (Ind. 1880); Wagoner v. State, 90 Ind. 504, 507-08 (Ind. 1883).

334. Commonwealth v. Drew, 36 Mass. 179, 184-185 (Mass. 1837); Commonwealth v. Hutchinson, 2 Pa. L.J. 241, 243 (Pa. 1843); Commonwealth v. Grady, 13 Bush. 285, 287 (Ky. 1877); Woodbury v. State, 69 Ala. 242, 245-46 (Ala. 1881); State v. Cameron, 117 Mo. 641, 643 (Mo. 1893); Walker v. State, 68 Fla. 278, 282 (1914). *See also* State v. Estes, 46 Me. 150, 151 (Me. 1858) ("Under these circumstances, if the pawner is chargeable with turpitude, the pawnee is equally so with stupidity. The Government cannot punish the one or protect the other.").

that were "absurd or irrational."[335] Over time, however, the view that the capacity of the victim and the quality of the fraud was irrelevant prevailed,[336] and the states of the United States fell into line with the English position—but not before their decisions infected the law relating to mail fraud.[337]

In *Oesting v. United States*,[338] the Ninth Circuit rejected an argument that a scheme to defraud under the mail fraud statute had to be calculated to deceive in the same manner as a false pretense.[339] "All that is necessary is that it be a scheme *reasonably calculated to deceive persons of ordinary comprehension and prudence* and that the mail service of the United States be used and intended to be used in execution of the same."[340] For nearly five decades, courts used the Ninth Circuit's statement as it did—to emphasize that the scheme did not have to involve a "false pretense."[341] But the statement later came to be expressed in different language. "The scheme is one to defraud if it is reasonably calculated to deceive persons of ordinary prudence and comprehension."[342] And it was also picked up as a statement as to the requisite intent. "The government proves specific intent if it proves that the scheme was 'reasonably calculated to deceive persons of ordinary prudence and comprehension.'"[343]

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335. Commonwealth v. Hutchinson, 2 Pa. L.J. 241, 243 (Pa. 1843); Buckalew v. State, 11 Tex. App. 352, 354-55 (Tex. Ct. App. 1882); State v. Cameron, 117 Mo. 641, 643 (Mo. 1893); Walker v. State, 68 Fla. 278, 282 (Fla. 1914).

336. State v. Mills, 17 Me. 211, 218 (Me. 1840); Commonwealth v. Burdick, 2 Pa. 163, 164-65 (Pa. 1845); Commonwealth v. Henry, 22 Pa. 253, 256 (Pa. 1853); Re Greenough, 31 Vt. 279, 290-91 (Vt. 1858); State v. Phifer, 65 N.C. 321, 326 (N.C. 1871); Lefler v. State, 153 Ind. 82, 86-88 (Ind. 1899); People v. Gilman, 121 Mich. 187, 189 (Mich. 1899); State v. Phelps, 41 Wash. 470, 473 (Wash. 1906).

337. *See, e.g.*, United States v. Fay, 83 F. 839 (E.D. Mo. 1897) *rejected by* United States v. Calwer, 292 F. 1007, 1008 (D. Mont. 1923).

338. Oesting v. United States, 234 F. 304 (9th Cir. 1916).

339. *Id.* at 307.

340. *Id.* (emphasis added).

341. *See, e.g.*, Silverman v. United States, 213 F.2d 405, 407 (5th Cir. 1954); Linden v. United States, 254 F.2d 560, 566 (4th Cir. 1958); United States v. Baren, 305 F.2d 527, 533 (2nd Cir. 1962); Irwin v. United States, 338 F.2d 770, 773 (9th Cir. 1964); United States v. Bruce, 488 F.2d 1224, 1229 (5th Cir. 1974); United States v. McNeive, 536 F.2d 1245, 1249 (8th Cir. 1976); United States v. Pearlstein, 576 F.2d 531, 535 (3rd Cir. 1978); Kehr Packages, Inc. v. Fidelcor Inc., 926 F.2d 1406, 1415, 1416 (3rd Cir. 1991); United States v. Goodman, 984 F.2d 235, 237-39 (8th Cir. 1993).

342. Gusow v. United States, 347 F.2d 755, 756 (10th Cir. 1965); *see also* United States v. Seasholtz, 435 F.2d 4, 8 (10th Cir. 1970); United States v. Ammons, 464 F.2d 414, 417 (8th Cir. 1972); United States v. Beitscher, 467 F.2d 269, 273 (10th Cir. 1972); United States v. Schall, 371 F. Supp. 912, 916-17 (D.C. W.D. Pa. 1974); United States v. Netterville, 553 F.2d 903, 909 (5th Cir. 1977).

343. United States v. Bohonus, 628 F.2d 1167, 1172 (9th Cir. 1980); *see also* United States v. Green, 745 F.2d 1205, 1207 (9th Cir. 1984).

Eventually, a defendant relied on this language in an attempt to evade conviction by blaming the victim. In *United States v. Brown*, the defendants were charged with concocting an elaborate scheme whereby they sold property in Florida at highly inflated prices.[344] They claimed that the scheme was not "reasonably calculated to deceive persons of ordinary comprehension and prudence."[345] In spite of authority from other circuits that the quality of the fraud and the prudence of the victim was irrelevant,[346] the Eleventh Circuit agreed and ordered their acquittal, holding that "federal criminal fraud requires proof that a person of ordinary prudence would rely on a representation or a deception."[347]

The decision in *Brown* was unpopular. It resurrected a form of victim blaming that had not been seen in the United States since the end of the nineteenth century. It left the people most in need of protection exposed to the schemes of those who would prey upon their imprudence.[348] It failed to recognize the shortcomings of the victims as vulnerabilities ripe for exploitation. It was criticized.[349] It was not followed in other circuits.[350] The Eleventh Circuit overruled it thirteen years later in *United States v. Svete*.[351] Its fall was the last stand for victim blaming in fraud in the United States.

The overruling of *Brown* means that neither the obviousness falsity of a fake news story nor the credulity of the readers has any bearing upon whether its publication constitutes wire fraud. This point may go against what some believe to be the spirit of the market—the ancient maxim *caveat emptor*. Some may think that the law should ask people to take responsibility for their own interests—that a person should not be held

344. 79 F.3d 1550, 1553-55 (11th Cir. 1996).

345. *Id.* at 1557 (citing *Pelletier*, 921 F.2d at 1498-99).

346. *See, e.g.*, Tucker v. United States, 224 F. 833, 837 (6th Cir. 1917); Whitehead v. United States, 245 F. 385, 388 (5th Cir. 1917); United States v. Brien, 617 F.2d 299, 311 (1st Cir. 1980).

347. United States v. Brown, 79 F.3d 1550, 1558 (11th Cir. 1996).

348. People v. Gilman, 121 Mich. 187, 189 (Mich. 1899) ("The law is more necessary to the protection of the unwary and simple-minded, who are not looking for duplicity and deceit, than shrewder persons. Designing persons do not ply their nefarious vocations among the latter class, but seek for victims among those whose credulity makes them more easily deceived.").

349. *See generally* Mark Zingale, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 COLUM. L. REV. 795 (1999). *Cf.* Jason T. Elder, *Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All*, 77 OR. L. REV. 707, 727 (1998).

350. *See, e.g.*, United States v. Cabe, 57 F. App'x 542, 545-46 (4th Cir. 2003); United States v. Thomas, 377 F.3d 232, 241-44 (2nd Cir. 2004); United States v. Davis, 226 F.3d 346, 359 (5th Cir. 2007); United States v. Amico, 486 F.3d 764, 780 (2nd Cir. 2007).

351. 556 F.3d 1157, 1166 (2009).

responsible for lies detectable by means of common prudence.[352] But experience demonstrates that this approach is misguided. Common prudence is not common. It was not common in the sixteenth century. It is not common today.

The fake news phenomenon has demonstrated just how uncommon "common prudence" really is. News anchors have promoted false information sourced in fake news stories.[353] The President of the United States has promoted false information sourced in fake news stories.[354] Edgar Welch drove from North Carolina to Washington to storm a pizza restaurant because he read online that the Democratic Party was operating a child-sex ring on the premises.[355] He was sentenced to four years imprisonment for assault with a dangerous weapon[356]—the perpetrator of one crime but victim of another.

It is hard to have sympathy for someone as imprudent as Edgar Welch. But it does not follow that the law should sympathize with someone like Sean Adl-Tabatabai. Adl-Tabatabai published an article spreading the "PizzaGate" hoax on his fake news website www.YourNewsWire.com.[357] His publication of the story as a news article gave it added authenticity. It also repackaged the story in a form able to be shared on social media. Adl-Tabatabai was not the creator of the hoax. But he was one of many fake news publishers who exploited those who believed it for financial gain.

The law precludes consideration of the obviousness of the fraud and the credulity of the victim for the same reason it extends to lossless schemes to defraud. Criminal fraud is concerned with the prevention

352. *See* STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE 129 (2012) (discussing reaction to fraud of Bernie Madoff and the suggestion by some that "the victim who is duped by a fraudster should have known better and therefore is partially to blame").

353. Dewey, *supra* note 8 (describing *Fox News* report of fake story that President Obama funded Muslim culture museum); Becky Bratu et al., *Tall Tale or Satire? Authors of So-Called 'Fake News' Feel Misjudged*, NBC NEWS (Dec. 15, 2016), https://www.nbcnews.com/news/us-news/tall-tale-or-satire-authors-so-called-fake-news-feel-n689421 (describing Sean Hannity reporting false story about settlement of 250,000 Syrians in United States).

354. *See* Sapna Maheshwari, *10 Times Trump Spread Fake News*, N.Y. TIMES, Jan. 18, 2017.

355. Marc Fisher, John Woodrow Cox & Peter Hermann, *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST, Dec. 6, 2016.

356. Matthew Haag & Waya Salam, *Gunman in 'Pizzagate' Shooting Is Sentenced to 4 Years in Prison*, N.Y. TIMES, Jun. 23, 2017, at A14.

357. Craig Silverman, *How the Bizarre Conspiracy Theory Behind "Pizzagate" Was Spread*, BUZZFEED NEWS (Dec. 6, 2016), https://www.buzzfeed.com/craigsilverman/fever-swamp-election; Daniel Funke, *Fact-Checkers Have Debunked This Fake News Site 80 Times. It's Still Publishing on Facebook*, POYTNER (Jul. 20, 2018), https://www.poynter.org/fact-checking/2018/fact-checkers-have-debunked-this-fake-news-site-80-times-its-still-publishing-on-facebook/.

and punishment of deceptive economic exploitation as well as harm. It does not matter if the victim does not suffer a loss because the defendant has obtained a dishonest gain. And it does not matter if the victim could have detected the deception because the failure of the victim is evidence of vulnerability exploited by the defendant. All frauds exploit trust. Many exploit financial vulnerabilities such as desperation, a lack of financial literacy, or a predisposition to believing things that are "too good to be true." Fake news publishers exploit a lack of online literacy as well as other vulnerabilities—rabid political partisanship, skepticism of institutions, stress, and anxiety in times of emergency and sickness. These vulnerabilities are worthy of protection.

VII. CONCLUSION

This Article has attempted to advance a forceful argument in favor of prosecuting those who publish fake news for profit for wire fraud under 18 U.S.C. § 1343. This solution alone cannot solve the problem. But it is capable of holding those responsible to account. And it is the solution that best captures the nature of publishing fake news—a rare example of a fraud that does not defraud made possible by the use of a two-sided market on the internet. But for the conjunctive interpretation in *Cleveland*, frauds that do not defraud would constitute wire fraud. *Cleveland* must be overruled. Its conjunctive interpretation strays too far from the plain meaning of the statute and is ill-equipped to fight the new frontier of online fraud. Without a disjunctive interpretation, the people who Paul Horner described as "sheep" and "retards"—those who Justice Ashurst more eloquently referred to as "the weaker part of mankind"—will remain ripe for exploitation. Their financial interests may not be harmed. But they and society along with them are rightly called victims—victims of an interpretation that preserves an economic incentive to be dishonest.