Mail Fraud, Morals, and U.S. Attorneys

by Michael E. Tigar

I will not preach the virtues of halcyon days, now faded into distant memory, when Calvin Coolidge was President and federal prosecutors knew their place. There are no such things as the good old days. But I am disturbed by reports from lawyers – good lawyers – about the difficulties they face more frequently of late.

- When does proposed corporate conduct change from being not a good idea into a crime?
- Once you have organized your business under the law of a particular state, can the regime you have chosen be set aside by the unilateral act of an Assistant United States Attorney?
- When you are busy trying to comply with the rules of an administrative agency, or even with its requests for information, are criminal charges for your alleged failure to comply just around the corner?

Lawyers in civil practice advise clients every day just how far they can go in their business dealings. When they give advice, lawyers pay attention to the duties imposed by statutes and regulations, and to the potential penalties for violation. They calculate how much risk there is that a proposed course of conduct will violate some regulation, and what will be the cost of violation. Now the Assistant United States Attorney intrudes in this process more than ever before. He can tell you that the statutes and regulations do not include all the duties you must obey, or all the penalties that might apply.

The most serious and extensive penetration of federal criminal law in recent years has been the intrusion of the federal mail and wire fraud statutes into corporate governance, state law, and even political expresssion. The proper limits of these statutes have become the center of serious consideration by judges, lawyers, and scholars.

Let us begin with an analogy from English law. In 1961, the English House of Lords decided *Shaw v. Director of Public Prosecutions,* [1961] All E.R. 446. Shaw had published a book entitled *The Ladies' Directory,* which gave the names and addresses of prostitutes, including information about their specialties. He was prosecuted for a conspiracy to corrupt public morals, a common law crime that had originated in the Star Chamber. The House of Lords upheld Shaw's conviction for this offense – a crime not found in any statute passed by Parliament and so vague as to give prosecutors considerable discretion in choosing the conduct to which it would be applied.

The decision in *Shaw,* and the debate over governmental power to regulate sexual conduct and erotic literature, fueled controversy on both sides of the Atlantic. That debate has dimmed now. English judges have limited some of the more expansive language of the opinions in *Shaw,* and Parliament narrowed the reach of the conspiracy laws in the Criminal Law Act of 1977. And I do not want, in this essay, to revisit the controversy about sexual freedom and erotic expression. I begin with *Shaw* because some of the Law Lords relied on an intriguing statement made by Lord Mansfield in 1774. They invoked it to support the notion that the common law conspiracy to corrupt was alive and well. Mansfield said:

> Whatever is *contra bonos mores et decorum,* the principles of our laws prohibit and the King's Court as the general censor and guardian of the public morals is bound to restrain and punish.

If one tried to transplant this idea to the United States and invite federal prosecutors to think up indictments for whatever seemed to them to be a violation of mores and decorum, some serious questions would be raised. Since the Crimes Act of 1790, American lawyers and judges have generally assumed that common law crimes are unknown to the federal system. A federal offense, we have thought, must be defined by the Congress – not by prosecutors and judges.

It is important, in the zeal to see a particular decision, that we not forget who is to make that decision. Mansfield's dictum would confer upon the federal courts a power that – if it lives anywhere – is generally thought to belong to the states. And a standard so vague would offend basic notions of due process of law. *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966) is instructive on the point. Giaccio was charged under a Pennsylvania statute that prohibited discharging or pointing a

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firearm at another person. His defense was he had used a starter pistol, capable only of firing blanks, and he was acquitted.

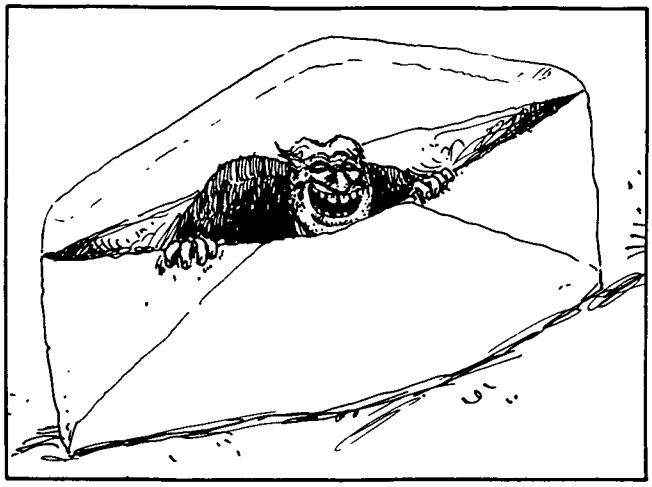
But under a nineteenth century Pennsylvania law, Giaccio's jury imposed upon him the costs of his prosecution. The Pennsylvania law had been interpreted as permitting this imposition upon a defendant who, although acquitted, had engaged in conduct that was "reprehensible," "improper," or outrageous to "morality and justice." The United States Supreme Court reversed, holding the Pennsylvania statute, as applied, void for vagueness. The statute failed to provide any ascertainable standard for what conduct it covered.

Understand that a broad, vague grant of power to courts to define and punish is in fact a grant of that power to the prosecutors. If the rules defining criminal conduct are vague, a court may have little alternative but to uphold the prosecutor's theory. Judges do not initiate federal criminal prosecutions, United States Attorneys and Justice Department lawyers do. To be sure, an indictment requires the concurrence of a grand jury. But anybody who thinks that provides much protection has not dwelt long in the federal courts. As a senior federal prosecutor put it, "Don't tell me about the grand jury. I can get them to indict a ham sandwich."

So my theme is the excessive power of prosecutors, and my target is the failure of judicial analysis that has put that power in the prosecutors' hands. This power is being used in ever more imaginative ways to devise and impose rules of conduct upon the business community, upon political dissidents, and upon state and local government. In this essay, I am concerned with recent uses of the mail and wire fraud statutes – particularly the statutory language, "scheme or artifice to defraud." Shorn of common law limits, gutted of any requirement that the victim has suffered a loss, and expanded by the careless and uncritical use of meager precedent, these statutes have replaced.... Well, let me paraphrase the enthusiastic musings of a federal prosecutor: The mail fraud statute is the Louisville slugger of his bat rack, the Colt .38 of his armory, the Cuisinart of his kitchen. It is the new darling of the prosecutor's nursery.

Do I exaggerate? Not much. Consider this language from the United States Court of Appeals for the Fourth Circuit, rejecting an attack on the mail fraud charge in *United States v. Mandel,* 591 F.2d 1347 (4th Cir.), *aff'd on rehearing,* 602 F.2d 683 (1979), *cert. denied,* 445 U.S. 961 (1980):

> [T]he mail fraud statute generally has been available to prosecute a scheme involving deception that...is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play, and right dealing.



The partisans of an expansive view of mail fraud include Chief Justice Burger and Justice White, who joined in dissent in *United States v. Maze,* 414 U.S. 395 (1974). They argued that the mail fraud statute must be flexible so prosecutors will have a weapon against new frauds until Congress can get around to legislating against them.

At least this argument puts the matter plainly. It is the very attitude against which Jeremy Bentham spoke:

> It is the judges...that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then beat him for it. This is the way you make laws for your dog, and this is the way the judges make laws for you and me.

How could a statute do that? 18 U.S.C. §1341 makes it a federal felony to use the mails for the purpose of executing any scheme or artifice to defraud. The wire fraud statute is to the same effect, except that the use of wire, radio, or television communication provides the federal jurisdictional element. The statute was originally passed in 1872, but was generally confined to garden variety frauds involving the mails until the twentieth century. And since today almost any transaction of any complexity can be argued to involve use of the mails, wires, or radio signals in some way, the application of these sections is limited only by the words "scheme or artifice to defraud." As Justice Holmes made clear in an early case, once the mails are used, any scheme can be swept within the statute's reach, even if Congress would not otherwise have power to regulate or forbid it.

In recent cases, the scheme need not have succeeded in obtaining money or property by fraud or yet involved a design to obtain a tangible benefit. This interpretation of "scheme or artifice" even has a name. It is called the "intangible rights doctrine."

The best way to describe what it means is with some recent cases. And the best way to introduce those cases is with a recent proposal for how to attack the problem.

Professor John Coffee of Columbia Law School, the Reporter for Part VII of the ALI Corporate Governance Restatement, has argued for restrictions on mail fraud prosecutions involving schemes to defraud of intangible rights or to violate a fiduciary duty owed the alleged victim. I share his concern that these statutes be limited, but I reject his analysis. He suggests that the principal reform should be the requirement that the prosecutor prove the defendant's conduct was the *promixate cause* of an actual or threatened loss to the victim.

The rules of causation certainly belong in the criminal law. But the language of proximate cause comes to us with too much baggage from the non-criminal sphere. As Coffee concedes, proximate cause is an inexact concept, a concession that will not surprise anyone who ever struggled through the Torts course in the first year of law school. Its vagueness is acceptable in civil cases. That vagueness is bound up with the very notion of the jury's rule in negligence cases.

But to suggest that proximate cause solves the issues in contemporary mail and wire fraud prosecutions is (it seems to

me) to fasten on the wrong end of the problem. The root problem is to define what intentional breach of duty will subject the defendant to liability. Does the breach of duty the prosecutor says was committed bear some logical relationship to the words "scheme or artifice to defraud?" Is that breach a proper subject for punishment by a federal court?

Whether a breach of duty may be prosecuted as a mail fraud is a serious question. Mail fraud is a felony. The typical mail fraud indictment contains multiple counts, each with its corresponding chance for fine and prison. Further, mail and wire fraud are predicate offenses under the Racketeer Influenced and Corrupt Organizations Act. A defendant who commits two or more mail or wire frauds within a ten year period is thereby guilty (if he does so as part of a pattern of the conduct of affairs of an enterprise) of an additional twenty year felony. And he is subject to forfeit his interest in the enterprise. On top of all that, RICO provides a treble damage civil remedy, which means that plaintiffs' counsel are as free as prosecutors to ring changes on the words "scheme or artifice to defraud."

In discussing intelligible limits on the mail fraud statute (and therefore upon prosecutorial discretion), I refer to four touchstones, which I will call *power, precision, prudence,* and *preemption.* Precedent is not on the list. One criticism I have of opinions in this area is the uncritical use of result-oriented prose that defers unduly to prosecutorial discretion.

Let me first talk about the power of a federal court to make a common law rule that defines a breach of duty. This issue requires consideration both of federalism and of separation of powers. Take the recent case of *United States v. Siegel,* 717 F.2d 9 (2d Cir. 1983). Siegel and Abrams were officers of Mego. Mego makes toys and games for children, a hotly competitive business; its sales during the indictment period ranged from $30 million to $109 million a year. Siegel and Abrams engineered off-the-books transactions by selling merchandise for cash. With that money, they created a cash fund that amounted to no more than $11,000 a year. They used this money to induce store buyers to stock Mego merchandise and to pay labor union officials, presumably to maintain labor peace. Paying store buyers may be commercial bribery under New York law, and paying union officials is probably a misdemeanor under the Taft-Hartley Act. But that was not the theory on which Siegel and Abrams were tried, convicted, and sentenced.

Under RICO, plaintiffs' lawyers are as free as prosecutors to define "scheme or artifice."

Rather it was alleged that they had devised a "scheme or artifice" to defraud Mego and its shareholders.

Of what?

Of their right to have Siegel and Abrams obey their fiduciary duty and keep proper corporate records. That was the prosecutor's theory, which the Court of Appeals for the Second Circuit upheld over Judge Winter's dissent. It was not an element of the offense that the shareholders of Mego suffered a loss. Indeed, given the nature of the toy business, the corporation probably benefitted by these transactions. True, Siegel and Abrams had engaged in improper record keeping. Also, it is commonly accepted that corporate officers have a fiduciary duty to the corporation and under some circumstances to its shareholders.

A great debate now rages over the extent of that corporate duty, enlivened by shareholder actions on the one hand and management efforts on the other. Some have said that management has too much influence in some state legislatures, and that states looking for corporate business are engaged in a "race to the bottom" by defining fiduciary duty as pallidly as possible. The American Law Institute is working on a Restatement on Corporate Governance and Structure. Reading Tentative Draft No. 1 and the comments in response to it make it obvious that management's duties will be debated for some time.

Think about the implications of the *Siegel* theory. A corporate officer owes a duty to the corporation. Absent fraud or self dealing, that duty is to perform his or her functions in good faith, in a manner she or he reasonably believes to be in the best interest of the corporation. The officer who obeys these rules is entitled to deference. The ALI Tentative Draft sets out standards that insulate a director or officer from civil liability under a version of the business judgment rule, provided that he or she has acted in accord with the recognized standards of impartiality, self-information, and good faith.

The most recent ALI draft rests principally upon the Reporters' analysis of treatises and state law. Their formulation of the duty is, in my view, flawed. Large parts of it are not supported by the decided cases. Further, those concerned with the race to the bottom in the state legislatures have testified in Congressional hearings, seeking to interdict the race through a federal business corporations act regulating what has traditionally been the province of state courts and legislatures. Distinguished academic commentators have added their voices to the debate. The Congress has declined to pass any such legislation.

With all this controversy still raging, an Assistant United States Attorney for the Southern District of New York steps in to resolve it. There is – because the indictment spells it out and the court upholds it – a federal law of corporate fiduciary duty. A breach of that duty can be a prosecutable scheme or artifice to defraud even without evidence that the corporation or its shareholders were harmed.

When I say that *Siegel* raises questions of power I want to make it clear what I mean. Congress undoubtedly has the *power* under the Commerce Clause to make rules for the governance of most of the corporations in the United States, but it has declined to do so. Whether it should is a difficult question. The question of power is whether the mail and wire fraud statutes contain a warrant for *prosecutors* to define, as a matter of federal law, the fiduciary duty of corporate officers, subject only to meager judicial control.

Officers of public companies must be held to high standards, but allowing prosecutors to explore the vague boundaries of the mail fraud statutes gives them a dangerous dual discretion.

First, they have the power to pick and choose their targets, using mail and wire fraud as a weapon for anyone who has aroused their ire.

Second, since judges can only decide the cases that are

presented to them, letting prosecutors embark on this course leads almost inevitably to a partial and ill-considered patchwork of rules. It intrudes upon the delicate line-drawing functions that are the jobs of legislatures and regulatory bodies.

True, civil cases develop these rules, but the civil law may be allowed some leeway. The stakes are not so high as in criminal cases. The mechanics of line-drawing in a criminal case, through argument and jury instructions, are ill-suited to framing the rules that are essential to intelligent application of the officers' duty and the defense of their business judgment.

The second question is *precision.* A number of political leaders have recently been the targets of mail and wire fraud prosecutions. Some courts have questioned whether the extension of these statutes to any form of "political cupidity" is wise. So let us examine the duty allegedly breached by these politicians. In what consisted their scheme or artifice to defraud, their violation of notions of public morality, uprightness and decorum?

Start with the case of Governor Marvin Mandel of Maryland. Mandel was on good terms with a group of businessmen who owned racetracks in Maryland. Some of them were his political supporters. These men shielded their ownership interest in racetracks behind nominees, which was lawful at the time in Maryland. When the Maryland legislature passed a bill limiting race dates at one of the tracks, Mandel vetoed it. But he let it be known (so the prosecutor said) that he would not mind if the legislature overrode his veto, which it did. Mandel also took positions favorable to the racetrack owners on other legislation.

The government claimed that even without any allegation or proof that Mandel received any personal financial benefit from the racetrack owners in exchange for his efforts, he had entered into a scheme to defraud the citizens and legislators of Maryland.

Of what?

Of the right to have all material facts relating to public issues disclosed to them. He could be guilty for lying about a matter being considered by the legislature, or even for concealing and not disclosing material information.

Mandel was a Democrat. Joseph Margiotta, on the other hand, was a Republican, and not even a public official. *See United States v. Margiotta,* 688 F.2d 108 (2d Cir. 1982), *cert. denied,* 103 S.Ct. 1891 (1983). Margiotta was chairman of the Republican Committee for Nassau County, Long Island, and for the town of Hempstead, New York. He was instrumental in selecting an insurance broker to sell insurance to the county and town. Margiotta failed to disclose to the citizenry that they might have been able to find a broker who would quote a lower premium and who would not take so large a commission.

In both *Mandel* and *Margiotta*, the evidence might have suggested the defendants received some personal benefit. But in each case, the court of appeals held that receipt of such a benefit was not a necessary element of the government's allegation and proof. The potential reach of a rule permitting the prosecution of politicians for not telling all that they should is staggering, particularly when the decision as to which politicians will be chosen this week is left up to the uncabined discretion of federal prosecutors. Merle Haggard sings a song of the good old days, "before Nixon lied to us all on T.V." *Mandel* and *Margiotta* teach us that it is not just a politician lying. The fact that it is on television makes it wire fraud.

Raise the question of power in *Mandel* and *Margiotta*. What authority does the mail fraud statute give federal prosecutors to define the fiduciary duty owed by state officials and political party officers to the citizenry? The more significant issue, however, is of *precision.* By precision I mean both vagueness and overbreadth in a First Amendment sense. In our government, public officials and party officers are not expected to act from disinterested motives. They are compelled by the logic of their positions to curry favor with potential support groups, and to look to those groups for campaign funds. The most cursory attention to the campaign finance debates of the past decade will tell us just how difficult these issues are and how they are overlain with First Amendment considerations.

Governor Mandel was on good terms with the racetrack owners—he vetoed the bill.

What are the bounds of this duty of both public officials and party officers to disclose the interests they seek to advance? In *Mandel* the proof was that some legislators testified that they wished they had known that the governor was friendly with the racetrack owners. They would have found this information relevant in considering legislation. Attaching criminal penalties to falsehood by public officials (let alone failure to disclose) raises the same issues we might have thought were put to rest when the Supreme Court declared there could be no libel on government. Precision has been the Court-commanded touchstone of the campaign finance legislation. Reams of legislative history accompanied the detailed recasting of the federal bribery and conflict of interest laws, to draw clear lines between lawful campaign contributions and unlawful gratuities.

Take that a little further. A federal elected official can receive a campaign contribution from someone who supports her past legislative activity or who hopes and expects that she will deliver on a campaign promise. That is not only lawful but, the Supreme Court has said, is protected conduct. The official may not accept nor the donor give a payment for or because of an official act by the official, past or present.

Is this a difficult line to understand, let alone to police?

Of course it is, as courts have recognized in construing the gratuity sections of subsections 201(f) and (g) of Title 18, U.S.C. These two-year felony sections do not require, as do the bribery sections, 201(b) and (c), a corrupt intent to influence or be influenced. With respect to gratuities, the line between what is lawful and what is criminal is arguably the same line that is between what is constitutionally protected and what is not.

The same problems of line drawing have plagued the legislative and judicial consideration of campaign finance and disclosure laws. Judges and prosecutors know from *Brown*

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v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982), and *Gibson v. Florida Legislative Investigating Committee*, 372 U.S. 539 (1963), that there are some circumstances under which the First Amendment forbids imposing an obligation to disclose the names of your supporters and the sources of your support. *Mandel* and *Margiotta* and cases like them cut through these concerns with prosecutorial weapons that are ill-suited to the task of making precise and narrow rules.

Of course, no one will believe that every politicians' lie or nondisclosure will bring a mail fraud prosecution. United States Attorneys and Justice Department employees – and ultimately the Attorney General of the United States – will make such decisions. They will choose the targets and select the cases to try. The proof may consist, as it has in the past, of the testimony of the defendant's political opponents that *they* believe she should have disclosed this motive or that supporter.

The answer lies in the definition of duty. The problem of precision suggests that the ill-defined terrain of mail fraud is the wrong place to indulge the line-drawing efforts of prosecutors in defining political offenses. Rather, a reviewing court should say that the mail fraud statute is so barren of standards as to be an inappropriate means to define the duty of politicians to speak truthfully to their constituents about motives and support.

There is another marker to steer by. The Supreme Court has said that when fundamental rights are at stake, Congress will not be presumed to have authorized application of a statute in a way that threatens those rights. *See Kent v. Dulles*, 357 U.S. 116 (1958), and *Gutknecht v. United States*, 396 U.S. 295 (1970). In both cases the court refused to decide the constitutional issue because it found no evidence that Congress had drafted a statute that presented it. This is perhaps one meaning of Judge Winter's warning from his dis-

sent in *Margiotta*, that the majority opinion there "lodges unbridled power in federal prosecutors to prosecute political activists."

The third and fourth criteria I have called *prudence* and *preemption*. By preemption, I do not mean the federal occupation of a field to the exclusion of the states, but rather Congressional and administrative prescription of a detailed set of rules in a system of regulation. Such a system exists, for example, in the area of labor management relations.

In *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982), *cert. denied*, 103 S.Ct. 1272, (1983), the defendants were charged with mail fraud. Boffa and his associates ran companies that provided drivers to other entities. For profit, they engineered a labor switch that resulted in Teamster member drivers being replaced by members of another union that was a party to a collective bargaining agreement that provided for lower wages. Boffa and the other defendants were charged with scheming to defraud the Teamsters drivers of the rights of self-organization and collective bargaining guaranteed by section 7 of the Taft-Hartley Act. The court of appeals found that the indictment did indeed allege the deprivation of this intangible right as defined in Taft-Hartley, and did not rest upon any alleged taking of tangible property or money.

The Third Circuit said these mail fraud counts could not stand. Taft-Hartley and the related labor legislation constitute an integrated system that contains administrative, self-help, and criminal provisions to protect the rights of the parties. Boffa and the others had engaged in an unfair labor practice under Taft-Hartley, and the court found that Congress had not intended that criminal sanctions attach to unfair labor practices.

United States v. Porter, 591 F.2d 1048 (5th Cir. 1979), is similar to *Boffa*. In *Porter*, doctors who relied on Medicare payments for their income engaged in what might charitably be called creative accounting practices relating to laboratory tests. But the Fifth Circuit, reversing the convictions, examined the underlying Medicare statutes and regulations and found no federal duty defined there that had been violated.

Both *Boffa* and *Porter* reflect a sensible approach to defining the duty that is said to constitute the scheme or artifice to defraud. If Congress has regulated an area, there is little sense in letting Assistant United States Attorneys in each judicial district think up their own versions of the rules that everybody should obey and how they should be punished for violating those rules.

While some judicial decisions have seen the wisdom of curbing the legislative impulses of prosecutors, others – perhaps most others – have not. The Fifth Circuit has been on both sides of the issue, and therefore has the solace of not having been wrong more than half the time.

In *United States v. Uni Oil, Inc.*, 710 F.2d 1078 (5th Cir. 1983), the court reversed Judge Ross Sterling's dismissal of a mail fraud and RICO indictment involving the alleged miscertification of crude oil. The Emergency Petroleum Allocation Act (and later the Emergency Petroleum Conservation Act) reflected an intensive Congressional effort to control the supply and price of crude oil. Volumes of the Code of Federal Regulations were filled with rules to carry out the mandate of these acts. Indeed, the EPAA had its own criminal sanctions, with what looked like plenty of room for administrators to fill up the gaps by prescribing the breach of duties which could lead to a misdemeanor prosecution.

The defendants in *Uni* were charged in a total of some 125 counts (of which four were RICO), including dozens of mail and wire fraud charges. Basically, the indictment alleged that the defendants had miscertified crude oil. They were charged with saying that crude oil produced from wells in production before a certain date had actually come from wells with initial production at a later time. The effect of miscertification was to increase the price at which the crude oil could be sold.

The prosecution charged that the miscertification defrauded the Department of Energy of their right to have their program administered free from craft, trickery, and deceit. It was not an essential element of these mail frauds that anybody had to pay more for a barrel of oil. Rather, the defendants had allegedly violated the government's intangible right.

There is no question the federal government has the power to regulate crude oil. But there was already a detailed system of regulations in place – including a special court, the Temporary Emergency Court of Appeals. There was, in short, ample basis to conclude that the field was full, to the exclusion of mail fraud prosecutions.

As for the question of prudence, the act and regulations had an integrated system of civil and misdemeanor sanctions. Sound prudential reasons would have counseled against enhancing the potential penalties and tying up disputes about the regulation of crude oil in multi-count felony cases.

Similar considerations moved Judge Weinfeld in New York, some years ago, to say that the prosecutor could not escalate a tax fraud case for a single year by the expedient of charging each use of the mails in connection with a fraudulent item of deduction or concealed income as a separate mail fraud offense. Other courts have disagreed, and even in the Southern District of New York, where Judge Weinfeld's opinion was written, the United States Attorney is testing the issue again. In a recently filed case, a taxpayer has been charged both for tax fraud and for multiple counts of wire fraud, each one relating to a single wire transfer of an unreported payment.

The issue is preemption and prudence: Does the system under the Internal Revenue Code occupy the field?

Preemption and prudence are not always going to point away from a mail fraud prosecution in an area subject to entensive regulation. In securities fraud, for example, there is a substantial body of statutory and regulatory material dealing with registration and sale of securities. But the courts have fashioned private rights of action and have used the existing structure as a matrix for developing judge-made rules. Congress and the SEC have acquiesced in that process. Moreover, Congress has specifically provided that any offense involving fraud in the sale of securities may be a predicate for a RICO prosecution.

But there is a warning even here. The addition of essentially redundant mail fraud counts to a securities fraud indictment has been soundly criticized by Judge Friendly in *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976).

The basic issue in every novel mail and wire fraud case is – or ought to be – whether the duty alleged by the indictment is properly characterized as a scheme or artifice to defraud. An exacting scrutiny pays respect to lenity; respects the separation of powers; contains the discretion of prosecutors;

makes the punishment proportionate to the transgression; and enforces the rights to notice, precision, and narrow controls. This is what Article III judging is all about. It is not about the uncritical use of precedents that point in every conceivable direction.

If these words about judges sound harsh, I apologize. They are not intended to be. A wise federal judge in Los Angeles, about to take a fresh look at an old problem, called to mind Chesterton's words about the English judges. "They are not cruel," he said, "they just get used to things." Getting used to things means putting power in the hands of federal prosecutors that experience has shown us they ought not to have. What was it that Lord Coke said?

> God send me never to live under the law of Conveniency or Discretion. Should the Soldier and Justice sit on one bench, the Trumpet will not let the Cryer speak in Westminster Hall.

Prosecutor's Pet

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of the following points: First, even where the crime is ill-defined, the prosecutor should not be allowed to shift his theory of the case mid-trial and attempt to convict on a point against which no defense has been prepared. Second, where multiple, allegedly illegal acts are contained in the indictment, the jury should be warned not to convict for one allegedly illegal aspect for which the grand jury would never have returned an indictment. Third, the jurors may not convict if each finds that one illegal act was performed, but there is no unanimity as to guilt for any one crime or conspiracy, no matter how defined. *See United States v. Miller,* 715 F.2d 1360 (9th Cir. 1983) and *United States v. Masteloto,* 717 F.2d 1238 (9th Cir. 1983).

If a single definition of the crime has not been obtained by the time jury instructions are given, and if the jury convicts, another problem will almost cer-