UNIVERSALIZING FRAUD

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Instead of joining the Mount Rushmore of Gates, Jobs, and Zuckerberg, [Elizabeth] Holmes will take her place among Bernie Madoff, Jeffrey Skilling (Enron), [and] Bernie Ebbers (WorldCom).

—*Robert Zafft, Forbes Leadership-Strategy Contributor*[1]

The difficulty of giving an adequate definition of fraud has been felt at all times.

—*Sir James Fitzjames Stephen, English judge*[2]

INTRODUCTION

The criminal trial of Elizabeth Holmes has reanimated public interest in fraud.[3] Holmes, once a Silicon Valley prodigy, was charged with two counts of conspiracy to commit wire fraud and eleven counts of wire fraud.[4] After deliberating for seven days, the jury reached a verdict,[5] finding Holmes guilty on four counts and potentially subjecting her to 80 years in prison.[6]

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1. Robert Zafft, *Theranos: Elizabeth Holmes's Witting and Unwitting Accomplices*, FORBES (Sept. 1, 2021), https://www.forbes.com/sites/robertzafft/2021/09/01/theranos-elizabeth-holmess-witting-and-unitting-accomplices/?sh=181768e569c3 [https://perma.cc/3WC3-SEKY].

2. JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 28 (1883).

3. For a comprehensive account of the Holmes story, see JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP (2018).

4. United States v. Holmes, 2021 WL 2044470, at *1 (N.D. Cal. July 20, 2020) https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/usa-v-holmes-et-al/USA-v.-Holmes-18-CR-00258-Dkt-469-Third-Sup-Indictment.pdf.

5. Sara Randazzo & Heather Somerville, *Elizabeth Holmes Found Guilty on Four Counts*, WALL ST. J. (JAN. 3, 2022), https://www.wsj.com/livecoverage/elizabeth-holmes-trial-theranos?mod=article_inline.

6. If convicted of all counts, Holmes faced a fine of $250,000, plus restitution, for each count of wire fraud and for each conspiracy count, totaling $2.75 million, excluding restitution. Holmes was convicted of four counts. Erin Griffith & Erin Woo, *Elizabeth Holmes Is Found Guilty of Four Counts of Fraud*, N.Y. TIMES (Jan. 3, 2022), https://www.nytimes.com/2022/01/03/technology/elizabeth-holmes-guilty.html. Holmes faces up

Holmes' guilty verdict, however, seems different than those of her predecessors.[7] Unlike famous fraudsters like Bernie Madoff, Jeffrey Skilling, and Bernard Ebbers, Holmes was a technology executive, giving her asylum within the confines of Silicon Valley's 'fake it till you make it' culture.[8] Her conviction puts a ceiling on the realm of acceptable 'fake it till you make it' conduct. "Fraud" is a moving target, "a legal concept designed to adapt alongside [] evolving behaviors. . . ."[9] Sir Edwin Coke observed as much as early as 1601: "If you ask why are there so many laws, the answer is that fraud ever increases on this earth."[10]

To complicate matters further, fraud is central to a legal concept that is similarly unstable—white-collar crime.[11] Criminal jurisprudence has struggled to construct a satisfactory definition of "white-collar crime" since sociologist Edwin H. Sutherland first coined the term in 1939.[12] White-collar crime, which is dominated by fraud, has a significant moral dimension.[13]

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to 20 years for each of the four counts on which she was convicted. Erin Griffin, *Elizabeth Holmes is set to be sentenced on Sept. 26***,** N.Y. TIMES (Jan. 12, 2022), https://www.nytimes.com/2022/01/12/technology/elizabeth-holmes-theranos-sentencing.html.

7. *See* Erin Griffith & Erin Woo, *Elizabeth Holmes is found guilty of four counts of fraud*, N.Y. TIMES (Jan. 3, 2022), https://www.nytimes.com/2022/01/03/technology/elizabeth-holmes-guilty.html. ("The verdict stands out for its rarity. Few technology executives are charged with fraud and even fewer are convicted.").

8. *See Elizabeth Holmes is found guilty on four counts of fraud*, N.Y. TIMES (Jan. 4, 2022), https://www.nytimes.com/2022/01/04/business/elizabeth-holmes-is-found-guilty-on-four-counts-of-fraud.html. (noting the verdict stands out for its rarity on two fronts: Holmes is both a technology executive and a female); *see also* Parmy Olson, *'Fake It Till You Make It' Will Live On After Theranos*, WASH. POST (Jan. 4, 2022), https://www.washingtonpost.com/business/fake-it-till-you-make-it-will-live-on-after-theranos/2022/01/04/555ad7ea-6d91-11ec-b1e2-0539da8f4451_story.html; Dileep Rao*, Fake It Till You Make It: Is This One More Lie From Silicon Valley. . . Like Theranos?*, FORBES (Sept. 15, 2021), https://www.forbes.com/sites/dileeprao/2021/09/15/fake-it-till-you-make-it-is-this-one-more-lie-from-silicon-valley-like-theranos/?sh=2e44c1c5134e.

9. Samuel W. Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511, 520 (2011).

10. Twyne's Case (1601), 3 Co. Rep. 80b, 82a, 76 Eng. Rep. 809, 815–16 (K.B.). Sir Edwin Coke has been dubbed "the most famous and influential legal thinker of the Elizabethan age." SAMUEL W. BUELL, CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE 41 (2016).

11. This Note uses "white-collar crime" to refer to crimes including bribery, fraud, perjury, obstruction of justice, false statements, and insider trading.

12. *See* EDWIN HARDIN SUTHERLAND, WHITE COLLAR CRIME 7 (1949) ("[V]iolations of law by persons in the upper socioeconomic class are, for convenience, called 'white collar crimes.'").

13. *See* Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501 (2014). ("Much of white collar crime involves conduct that is hard to define, hard to identify, and hard to prove; yet it is also some of the most harmful conduct our society faces.").

Morality's role in the law is nothing new.[14] But morality—our understanding of what is wrong and right—is not a concept that "intertwines comfortably" with white-collar crime.[15] Recently, morality has come to the fore in white-collar offenses;[16] "In the white collar context, conventional mental state tools often do not provide enough traction to handle the hard cases."[17] Definitionally, fraud "refer[s] to schemes not just to obtain money or property, but also to achieve any unjust advantage or to injure the rights or interests of another."[18] Moral content is central to the broader definition of fraud.[19] And beneath the statutory language lies a simple notion of morality: it is wrong to deceive another out of their property.[20]

Because of this moral dimension, the adjudication of white-collar crimes would benefit from the application of Immanuel Kant's universalizability principle.[21] To succinctly make this argument, this Note limits its analysis to the mail and wire fraud statutes.

The purpose of this Note is to show that the traditional degrees of culpability, either at common law or according to the Model Penal Code, are insufficient and should be supplanted with a standard based on Kant's philosophy. Both the common law and the Model Penal Code recognize levels of mens rea. At common law, there are five degrees of mental culpability: intentionally, knowingly, willfully, negligence, and

14. That is not to say that considering an actor's mental state in the adjudication of white-collar crimes is a novel concept. In fact, this debate has been taking place for a long time. *See generally* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

15. Jayme Herschkopf, *Morality and Securities Fraud*, 101 MARQ. L. REV. 453, 454 (2017).

16. Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001); Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 LAW & CONTEMP. PROBS. 133 (2012).

17. Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 LAW & CONTEMP. PROBS. 133, 138 (2012).

18. STUART P. GREEN, *Fraud*, *in* LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME 150 (2007) (internal citations and quotations omitted).

19. *See id.* at 150–51.

20. *See* John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1011 (2006) ("[T]he core of the legal wrong that has historically been labeled 'fraud' or 'deceit' is the wrong of interfering with a particular interest of the victim, namely her interest in making certain kinds of choices in certain settings free from certain forms of misinformation.").

21. Robert Johnson & Adam Cureton, *"Kant's Moral Philosophy"*, *in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 5 (Edward N. Zalta ed., Spring ed. 2022) https://plato.stanford.edu/entries/kant-moral/.

recklessness.[22] According to the Model Penal Code, the levels of mental culpability are purposely, knowingly, recklessly, and negligently. Although those mental states are adequate for the adjudication of most crimes, the same cannot be said of white-collar crimes. For the purposes of this paper, "white-collar crime" refers to the family of offenses that are *malum in se*. White-collar crimes are *malum in se*, as opposed to *malum prohibitum*, because of the insistence on requiring proof of a mental state. In the landmark case *Morissette v. United States*, Justice Robert H. Jackson wrote for a unanimous court, holding that acts which are bad in themselves (i.e., *malum in se*) require mens rea.[23] Therefore, contemplating white-collar crimes as acts which are bad in themselves necessitates mens rea as an element of the offense.

Resolving white-collar cases has proven to be a difficult task. Courts have shifted to using morality to adjudicate white-collar crimes.[24] This shift has occurred because of "a kind of moral complexity and uncertainty" unifying white-collar crimes.[25] Mixing of morality and black-letter law has convoluted the adjudication of fraud. Jurors, for instance, are often required to speculate not only about a defendant's mental state in the traditional legal sense but also to only convict if they find the defendant was aware that what she was doing was wrong—a principle called "consciousness of wrongdoing."[26] A simplified solution—one that aligns with the flexibility required of fraud statutes and coheres with the congressional intent behind those statutes—involves universalizing fraud by relying on Kantian principles.

Part I surveys two aspects of fraud's legal landscape: the statutory language and courts' interpretations of it, proving that consciousness of

22. The Model Penal Code uses similar degrees of culpability: purposely, knowingly, recklessly, and negligently. MODEL PENAL CODE § 2.02 (1980).

23. 342 U.S. 246 (1952). Criminal offenses are either *malum in se* ("evil in itself") or *malum prohibitum* ("prohibited evil"). *Malum in Se*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Malum Prohibitum*, BLACK'S LAW DICTIONARY (11th ed. 2019). *Malum in se* refers to the class of offenses that are innately immoral, irrespective of any law proscribing it. *Malum prohibitum* refers to the class of offenses that are prohibited by statute, while the act itself is not necessarily immoral. In the legal context, white-collar crimes, as I have defined them, and violent crimes are both *mala in se*. For a more philosophical discussion of the principle of *mala in se, see* Morten Dige, *Explaining the Principle of Mala in Se*, 11 J. OF MIL. ETHICS 318–332 (2012).

24. *See, e.g.*, United States v. Gypsum, 438 U.S. 422, 440-41 (1978) ("[T]he behavior . . . is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."); United States v. Sawyer, 85 F.3d 713, 741-42 (1st Cir. 1996) (discussing how, in a fraud case, "the line between merely unattractive and actually criminal conduct is blurred").

25. Green, *supra* note 11, at 504.

26. *See generally* Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 LAW & CONTEMP. PROBS. 133, 138 (2012).

wrongdoing as the requisite mens rea is a judicial misstep. Then Part II will explain Kant's philosophy, in particular his discussion of the Categorical Imperative. Part III will apply Kant's philosophy and design a new framework in an attempt to remedy some shortcomings of fraud jurisprudence.

I. THE STATUTORY FRAMEWORK AND EVOLUTION OF MAIL AND WIRE FRAUD STATUTES

Consciousness of wrongdoing—the current legal standard in many jurisdictions—is the misshapen product of statutory ambiguities. The requisite mens rea for a federal fraud conviction is willfulness.[27] "In each fraud case, the prosecution must prove that the defendant knew what he was doing was illegal."[28] And that culpable intent is often proven through the defendant's consciousness of wrongdoing.[29] For example, in *Arthur Andersen LLP v. United States*, the Supreme Court expressly imported consciousness of wrongdoing into the obstruction of justice statute.[30] Yet, without clear guidance as to what consciousness of wrongdoing entails, the definitional problem of an alleged defrauder's mental state persists.[31] Thus, demonstrating the difficulty of interpreting statutes that are so intertwined with morality.

The federal mail fraud statute has outgrown its humble origins. Enacted in 1872, the statute was initially aimed at protecting the integrity of the United States Postal Service.[32] More specifically, it

27. LEONARD SAND, JOHN S. SIFFERT, WALTER P. LOUGHLIN, STEVEN A. REISS & NANCY BATTERMAN, 2 MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 44.01 (2021) ("'Willfully' means to act knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.").

28. Tai H. Park, *The "Right To Control" Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 CARDOZO LAW REV. 135, 194 (2021).

29. *Id.*

30. 544 U.S. 696 (2005).

31. *See, e.g.*, United States v. Bertram, 900 F.3d 743, 749 (6th Cir. 2018) ("More specifically, the omission of a material fact with the intent to get the victim to take an action he wouldn't otherwise have taken establishes intent to defraud under the wire statute."); United States v. Faruki, 803 F.3d 847, 853 (7th Cir. 2015) ("Intent to defraud requires a willful act by the defendant 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.").

32. 18 U.S.C. § 1341 (2018). Jed. S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 779 (1980) ("The original federal mail fraud statute was enacted . . . to revise and recodify the various laws relating to the post office."); *See* Parr v. United States, 363 U.S. 370, 389 (1960) (noting the mail fraud statute's "purpose was 'to prevent the post office from being used to carry [fraudulent schemes] into effect'" (quoting Durland v. United States, 161 U.S. 306, 314 (1896)); NORMAN ABRAMS, SARA S. BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 335 (2020); C.J. Williams, *What Is the Gist of the Mail Fraud Statute?*, 66

aimed to punish the sale of counterfeit currency though the United States Mail.[33] The statute's significance "was to be based not so much on the degree of the fraud as on the degree of misuse of the mails."[34] The perceived need for an "enlarged and dynamic federal power" in light of the rapidly growing national economy that followed the Civil War catalyzed the creation of the federal mail fraud statute.[35] Titled "Frauds and swindles," the statute punishes individuals involved in "any scheme or artifice to defraud" who, in the course of executing or attempting this fraud, use interstate mail.

The mail fraud statute parallels its modern-day cognate—the wire fraud statute—in all respects but one, the jurisdictional element.[36] Where the mail fraud statute requires the use of the mails, the wire fraud statute requires the use of an interstate telephone call or electronic communication.

The federal fraud statutes have garnered wide appeal. In an oft-quoted passage, federal judge and former prosecutor, Jed S. Rakoff, described the statute as follows:

> To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law "darling," but we always come home to the virtues of 18 U.S.C. §1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand

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OKLA. L. REV. 287, 291 (2013); *see also* McNally v. United States, 483 U.S. 350, 356 (1987) ("The sponsor of the recodification stated, in apparent reference to the antifraud provision, that measures were needed 'to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country.'" (quoting CONG. GLOBE , 41ST CONG., 3D SESS., 35 (1870) (remarks of Rep. Farnsworth)).

33. C.J. Williams, *What Is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287, 291 (2013).

34. Jed. S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 784 (1980).

35. *Id.* at 780.

36. 18 U.S.C. § 1343 (2018). Titled "Fraud by wire, radio, or television," the wire fraud statute punishes:

> 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 . . . .

it.[37]

Critics of the sweeping nature of both statutes raise federalism concerns, arguing that frauds that are "the exclusive concern of the States" should not be prosecuted using the federal mail and wire fraud statutes.[38] To that end, critics maintain that federal prosecutors have invoked mail and wire fraud statutes "to impose criminal penalties upon a staggeringly broad swath of behavior, creating uncertainty in business negotiations and challenges to due process and federalism."[39]

Federal prosecutors are simply discouraged from undertaking regional cases—providing cold comfort to the critics.[40] In truth, federal prosecutors frequently bring mail and wire fraud cases limited to "isolated transactions," demonstrating the immense discretion bestowed on federal prosecutors.[41] Prosecutors have routinely used the mail and wire fraud statutes to prosecute a broad range of crimes, even when there is barely enough interstate activity to give federal courts jurisdiction.[42] The ever-growing reach of the mail and wire fraud statutes has added urgency to the call for a consistent and pragmatic interpretation.

A. The Statutory Elements

Described as "the oldest federal criminal statute[s] still being used extensively to prosecute crimes that are also within the province of state and local law enforcement," the mail and wire fraud statutes

37. Rakoff, *supra* note 27, at 771.

38. Parr v. United States, 363 U.S. 370, 397 (1960) (Frankfurter, J., dissenting).

39. United States v. Weimert, 819 F.3d 351, 356 (7th Cir. 2016) (quoting Justice Scalia's dissent from the denial of certiorari in Sorich v. United States, 555 U.S. 1204, 1205 (2009)).

40. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-43.100 (2018), provides:

> Prosecutions of fraud ordinarily should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts. Serious consideration, however, should be given to the prosecution of any scheme which in its nature is directed to defrauding a class of persons, or the general public, with a substantial pattern of conduct.

41. *See* John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 587 (2005) ("These broad provisions authorize the punishment of almost any kind of dishonest or deceptive behavior, even when no other party has suffered any harm. Thus, mail fraud charges have been brought against a developer for attempting to sell homes by falsely claiming that they were good investments and against a physician for referring patients to a hospital without disclosing to the patients that the hospital paid him a fee for the referrals.").

42. *See* Peter R. Ezersky, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427, 1442 (1985). ("[F]ederal prosecutors threaten to work an 'end-run' of a beneficial system of state corporate law by means of mail/wire fraud.")

extend far beyond other federal statutes.[43] The elements of the two statutory offenses are "(1) devising or participating in a scheme to defraud, (2) commission of the act with intent to defraud, and (3) use of the mails or wires in furtherance of the fraudulent scheme."[44] Their expansive reach has won favor with federal prosecutors, who see the mail and wire fraud statutes as the "first line of defense" against new areas of fraud for which Congress has not yet prohibited.[45] A characteristic of the federal fraud statutes lending to its expansive reach is their applicability to inchoate crimes.

Both mail and wire fraud are inchoate crimes. That is, the government need not prove that the fraudulent scheme reached fruition for the defendant to be held accountable. Furthermore, the jurisdictional elements of the fraud statutes have become a formality rather than requisites of the offense.[46] For application of the mail fraud statute, any use of the federal mails, either intrastate or interstate, affords federal jurisdiction.[47] And for its modern cognate, the interstate use of wires provides federal jurisdiction.[48]

The statutes' plain meaning and legislative history are ambiguous.[49]

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43. NORMAN ABRAMS, SARA S. BEALE & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 333 (2020).

44. Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 944 (2003).

45. United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting). *See* United States v. Handakas, 286 F.3d 93, 108 (2d Cir. 2002) (describing mail fraud as an "all-purpose prosecutorial expedient"); John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 126 (1981) (quoting the prosecutor's maxim, "when in doubt, charge mail fraud"); John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the 'Evolution' of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 3 (1983) (arguing that the mail fraud statute "seems destined to provide the federal prosecutor with what Archimedes long sought—a simple fulcrum from which one can move the world"); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980) (noting prosecutors' reference to the statute as "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart").

46. *See* Schmuck v. United States, 489 U.S. 705, 710–11 (1989) ("To be a part of the execution of the fraud . . . the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be 'incident to an essential part of the scheme.'") (quoting Badders v. United States, 240 U.S. 391, 394 (1916)); *see generally* Peter J. Henning, *Maybe It Should Just be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995).

47. 18 U.S.C. § 1341 (2018). The jurisdictional element relies on U.S. CONST. art. I, § 8 (providing that Congress shall have the power "[t]o establish Post Offices and post Roads" and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

48. 18 U.S.C. § 1343 (2018). The jurisdictional element for wire fraud relies on U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

49. *See* United States v. Bradley, 644 F.3d 1213, 1239 (11th Cir. 2011) ("In the absence of a

Neither the text of the mail fraud statute nor its newer counterpart defines what constitutes a scheme to defraud. Likewise, the relevant legislative history is scant. Violent crimes are usually defined by legislatures, whereas defining white-collar crime has largely been left up to prosecutors and courts.[50] Another commentator has observed that "the federal law of white collar crime now seems to be judge-made to an unprecedented degree, with courts deciding on a case-by-case, retrospective basis whether conduct falls within often vaguely defined legislative prohibitions."[51] Still, the courts have not been completely left to their own devices. Writing for the majority of the Supreme Court, Justice Byron White explained: "[T]he 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.'"[52]

B. The Evolving Interpretations of the Federal Fraud Statutes

Twenty-four years after its passage in 1896, the mail fraud statute came before the Supreme Court. Tasked with interpreting "any scheme or artifice to defraud,"[53] the Court rejected the argument that the

statutory definition, the courts have provided a judicial framework for conceptualizing a fraudulent scheme."); United States v. Pendergraft, 297 F.3d 1198, 1208 (11th Cir. 2002) ("[N]either statute defines what a 'scheme to defraud' is. Instead, the meaning of 'scheme to defraud' has been judicially defined." (quoting United States v. Lemire, 720 F.2d 1327, 1335 (D.C. Cir. 1983))); *see also* United States v. Pierce, 409 F.3d 228, 239 (4th Cir. 2005) (Gregory, J., dissenting) (noting "confusion in the jurisprudence surrounding the mail fraud statute leaves the very real possibility that courts and federal prosecutors will enforce the statute in arbitrary and unforeseeable ways"); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 480 (1996) (arguing that courts' current treatment of statutes such as the mail fraud statute "effectively transfers delegated lawmaking authority to individual prosecutors."); Donald V. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 47 n.3 (1980) (likening the mail fraud statute to the horrific practice of Procrustes, who in mythology forced his guests to lie on an iron bed and then either stretched out or lopped off their legs to make their bodies conform to the length of the bed); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 269 (1992) ("The mail fraud statute's uncertainty has exceeded the bounds of mere judicial activism and entered the arena of absurdity.").

50. J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1254 (1999) ("[I]t may be that the constraints the courts have placed on law enforcement in the criminal procedure context have led Congress to expand the scope of white collar criminal statutes . . . [i]n this light, the task of defining white collar crime is largely left to prosecutors and the courts.").

51. John C. Coffee Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. REV. 193, 198 (1991).

52. McNally v. United States, 483 U.S. 350, 358 (1987) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924).

53. Durland v. United States, 161 U.S. 306 (1896).

statute was limited to the common law crime of false pretenses.[54] This sweeping construction freed the mail fraud statute from its common law moorings.[55] The Court looked "beyond the letter of the statute," stressing that "the evil sought to be remedied . . . is always significant in determining the meaning [of the statute]."[56] In doing so, the Court read "any scheme or artifice to defraud" to include "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."[57] The Court added that the "significant fact is the intent and purpose [of the statute]."[58] Congress codified the holding of *Durland v. United States* in 1909.[59]

To prove intent, the prosecution enjoys "a liberal policy . . . allow[ing] the government to introduce evidence that even peripherally bears on the question of intent."[60] The government can often prove intent through consciousness of wrongdoing.[61] In practice, intent determines criminality. And thus, the most utilized defense strategies revolve around disproving the intent element. Good faith is available as an affirmative defense to federal fraud. Beyond that, a defendant can evade liability for mail and wire fraud charges by rebutting materiality by arguing puffery, negating mens rea by arguing innocent intent, or refuting deception by arguing that there was no "fiduciary duty." The question of whether the defendant knew she was engaged in unacceptable behavior dominates fraud cases.

Treating consciousness of wrongdoing as the requisite intent required to adjudicate fraud has its shortcomings.[62] It is simultaneously too broad, in potentially exposing morally innocent defendants to conviction, and too narrow, in that it shields guilty defendants.

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54. *Id.* at 312–13. 'False pretenses' is "[t]he crime of knowingly obtaining title to another's personal property by misrepresenting a fact with the intent to defraud." *False Pretenses*, BLACK'S LAW DICTIONARY (11th ed. 2019).

55. *Id.*

56. *Id.* at 313.

57. *Id.*

58. *Id.*

59. McNally v. United States, 483 U.S. 350, 357 n.6 (1987).

60. United States v. Kellogg, 510 F.3d 188, 197 (3d Cir. 2007) (quoting United States v. Copple, 24 F.3d 535, 545 (3d Cir. 1994)).

61. *See, e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (importing consciousness of wrongdoing into the term "corruptly" in the obstruction of justice statute); Newman v. United States, 28 F.2d 681, 683 (9th Cir. 1928) (noting that an alias may evidence "consciousness of wrongdoing"); United States v. Stevens, 771 F. Supp. 2d 556 (D. Md. 2011) (holding that good faith reliance on counsel negates the necessary showing of consciousness of wrongdoing in a charge under 18 U.S.C. § 1519).

62. For a thorough explanation of the following shortcomings, *see* Samuel W. Buell & Lisa Kern Griffin, supra note 16 at 150–65.

Consciousness of wrongdoing requires the jury to construct a complicated inferential chain.[63] The jurors must look at a defendant's actions and first infer that she committed the wrong she is charged with. Second, the jurors must infer that she not only transgressed, but that she also knew that what she was doing was wrong. In contrast, the inferential chain for a violent crime is straightforward. The physical act of killing another will, generally, constitute the necessary intent. At the same time, consciousness of wrongdoing is constricted because "the [prosecution's] narrative overrides a more logical approach to the evidence."[64] The desire for a sensible narrative—a story—takes precedence. As a result, jurors are more likely to interpret a defendant's actions as showing consciousness of wrongdoing than they are to think of those actions as isolated and unrelated.

Neither federal fraud statute explicitly requires proof of materiality. Yet the Supreme Court read such a requirement in *Neder v. United States*.[65] It did so because at the time of the statutes' enactment, the word "defraud" was understood to "require[] a misrepresentation or concealment of [a] material fact."[66] Thus, other than in an honest services context, a "scheme to defraud" for mail or wire fraud purposes must involve a material misrepresentation of some kind.[67] "A misrepresentation is material if it is capable of influencing the intended victim."[68]

63. *Id.* at 157.

64. *Id.* at 161. For an in-depth explanation and examination of the psychological forces that cause the associative system to override the logical one, *see* Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 PSYCHOL. BULL. 3, 15 (1996).

65. 527 U.S. 1 (1999).

66. United States v. Baroni, 909 F.3d 550, 564-65 (3d Cir. 2018) (citing among others United States v. Evans, 844 F.3d 36, 41 (2d Cir. 1988)); *see also* Neder, 527 U.S. at 22-3. ("[T]he well-settled meaning of 'fraud' required a misrepresentation or concealment of material fact.").

67. *See* Neder, 527 U.S. at 25 ("Accordingly, we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."); United States v. Evans, 892 F.3d 692, 711–12 (5th Cir. 2018) (internal citations omitted) ("'Scheme to defraud' is tricky to define, 'but it includes any false or fraudulent pretenses or representations intended to deceive others in order to obtain something of value, such as money, from the entity to be deceived.' Such falsity must be material."); Williams v. Affinion Group, LLC, 889 F.3d 116, 124 (2d Cir. 2018) (internal citations omitted) ("A 'scheme to defraud' is a plan to deprive a person of something of value by trick, deceit, chicane or overreaching. To make out such a scheme a plaintiff must provide proof of a material misrepresentation."); *see also* United States v. Roberts, 881 F.3d 1049, 1052 (8th Cir. 2018); United States v. Foster, 878 F.3d 1297, 1304 (11th Cir. 2018).

68. Roberts, 881 F.3d at 1052; *see also* Evans, 892 F.3d at 712 (internal citations omitted) (to be material "[the fraud] must have 'a natural tendency to influence, or [be] capable of influencing, the decision. . . .'"; Foster, 878 F.3d at 1304; United States v. Burns, 843 F.3d 679, 684 (7th Cir. 2016).

II. KANT'S PHILOSOPHY

An alternative to using the consciousness of wrongdoing standard in white-collar cases to prove the defrauder's mental state is to universalize her conduct and judge it against her rationale. Renowned for forming the Categorical Imperative, Kant may hold the key to untangling the current state of fraud adjudication.[69] Before a solution is proposed, Kant's philosophies will be considered, as they form the bases for his derivation of the Categorical Imperative. Then, the proposed universalization test will follow. The proposed test consists of two elements: fiduciary duty and the principle of universalization. The fiduciary element contemplates the extent of trust based on the industry-specific relationship between the defendant and the victim. Then the principle of universalizability universalizes that relationship and the defendant's conduct to expose the defendant's culpability.

A. Kant's Retributivism

Eighteenth-century German philosopher Immanuel Kant is one of the fathers of retributivism.[70] Kant's retributive rationale dictates that punishment "must in all cases be imposed only because the individual on whom it is inflicted has committed a Crime."[71] Retributivism justifies punishment by virtue of its "symbolic significance."[72] "[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or those 'in whose name' the punishment is inflicted."[73]

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69. Nicholas Bunnin & Jiyuan Yu, *Categorical Imperative*, THE BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 102 (2004) ("[T]he fundamental absolute formal demand (or set of demands) on our choice of maxims or principles on which to act. He proposed a number of formulations of the [C]ategorical [I]mperative that on the surface differ radically from one another, although Kant himself believed that the different formulations are equivalent.").

70. Jane Johnson, *Revisiting Kantian Retributivism to Construct a Justification of Punishment*, 2 CRIM. L. & PHIL. 291, 292 (2008) (noting that "[t]he standard view of Kant is as *the* paradigmatic retributivist") (emphasis in original); *see* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000); Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263 (2013); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1 (2006); Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321 (2002).

71. Clemens Schwaiger, *The Theory of Obligation in Wolff, Baumgarten, and the Early Kant*, *in* KANT'S MORAL AND LEGAL PHILOSOPHY (Karl Ameriks, Otfried Höffe, & Nicolas Walker eds., 2009).

72. JOEL FEINBERG , DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 100 (1970).

73. *Id.*

There are two justifications for criminal punishment:[74] utilitarianism and retributivism. Punishment, according to utilitarianism, is but a means to an end—less crime.[75] In contrast, the retributive viewpoint sees punishment as an end in itself.[76] That is, while punishment may have the incidental effect of decreasing crime, such effect is not the ultimate purpose of punishment. Rather, the ultimate purpose is to punish crimes because they are morally reprehensible.

There are generally three expressions of utilitarianism[77]—rehabilitation, incapacitation, and deterrence—with deterrence being the most prominent.[78] In 1881, Oliver Wendell Holmes, Jr. declared, "Prevention would . . . seem to be the chief and only universal purpose of punishment."[79] American criminal jurisprudence has taken shape, primarily, through utilitarianism.[80] The Supreme Court has acknowledged as much.[81] That is, until the last quarter of the twentieth century.[82] Criminologist John Braithwaite attributes the shift towards retributive justifications to "the realization that utilitarian … criminology had failed to deliver on its promises."[83] This failure was only compounded by "growing documentation of the injustices perpetrated in the name of criminal justice."[84] Another shortcoming of utilitarianism is that it sanctions punishing innocent people if the effects produced are socially desirable.[85]

Even if utilitarianism could avoid punishing the innocent—those

74. John Rawls, *Two Concepts of Rules*, 64 THE PHILOSOPHICAL REVIEW 3, 5 (1955).

75. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 19 (2012).

76. Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 20–22 (2003).

77. Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Defendants?*, 61 WAYNE L. REV. 27, 40 (2015).

78. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (2012).

79. OLIVER WENDELL HOLMES JR., THE COMMON LAW 46 (1951).

80. *See* JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 2 (1990).

81. BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY 248 (2004).

82. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the past Century and Some Thoughts about the Next*, 70 THE UNIVERSITY OF CHICAGO LAW REVIEW 1, 6 (2003); JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE 2 (1990).

83. BRAITHWAITE & PETTIT, supra note 75, at 4.

84. *Id.*; *see* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME AND JUSTICE 143–95 (2003).

85. *See* Igor Primorac, *Utilitarianism and Self-Sacrifice of the Innocent*, 38 ANALYSIS 194–99 (1978); Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 27–29 (2003); *but see* Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115 (2000).

who have not done wrong—by incorporating aspects of other justifications, it still could not avoid excessive punishment of the guilty.[86] Thus, a justification of punishment cannot rest *alone* on utilitarianism. Professor Louis Michael Seidman has gone so far as to remark, "[I]t is impossible under a utilitarian analysis to achieve the low level of crime that society currently desires."[87] A retributive analysis must either accompany or supplant entirely a utilitarian one.

Retributivism should not be confused with an enthusiastic endorsement of punishment for the sake of punishment.[88] Rather, retributivism signals to a society exactly what does and does not constitute acceptable behavior.[89] Thus, allowing members of a society to harmonize their behavior with that which is expected of them, either by the government or the society itself.[90] Kant's retributivism does not stop at theoretical justifications for criminal punishment.[91] This Note will demonstrate that Kant's moral philosophies imbue countless aspects of American criminal jurisprudence.[92]

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86. Alan H. Goldman, *The Paradox of Punishment*, 9 PHILOSOPHY & PUBLIC AFFAIRS 42, 48 (1979).

87. Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 THE YALE LAW JOURNAL 315, 319 (1984).

88. *See* Jane Johnson, *Revisiting Kantian Retributivism to Construct a Justification of Punishment*, 2 CRIM. L. & PHIL. 291, 294 (2008)

89. Brian M. Murray, *Restorative Retributivism*, 75 U. MIAMI L. REV. 855, 903–04 (2021).

90. *Id.*

91. *See generally* FARHAD MALEKIAN , THE MIRAGE OF INTERNATIONAL CRIMINAL LAW: KANT'S METAPHYSICS OF MENS REA (2018).

92. *See* TD Bank N.A. v. Hill, 928 F.3d 259, 271 (3d Cir. 2019) (copyright); Am. Hosp. Ass'n v. Price, 867 F.3d 160, 161 (D.C. Cir. 2017) (attributing ought implies can to Kant, opinion also starts with ought implies can); United States v. Krul, 774 F.3d 371, 378 (6th Cir. 2014) (Griffin, J., concurring); United States v. Hammer, 239 F.3d 302, 305 (3d Cir. 2001); Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (capital punishment); Save Our Valley v. Sound Transit, 335 F.3d 932, 947 (9th Cir. 2003) (Berzon, J., concurring in part and dissenting in part) (civil rights); Morgan v. Illinois, 504 U.S. 719, 752 , 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992) (Scalia, J., dissenting); People v. Schmeck, 37 Cal. 4th 240, 300–01, 118 P.3d 451, 491 (2005), as modified (Oct. 12, 2005), and abrogated by People v. McKinnon, 52 Cal. 4th 610, 259 P.3d 1186 (2011) (sentencing); Ball v. Rodgers, 492 F.3d 1094, 1105 n.17 (9th Cir. 2007); State v. Santiago, 318 Conn. 1, 101–02, 122 A.3d 1, 63–64 (2015) (sentencing and punishment and capital punishment); Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599, 2610–19 (1997) (international law); *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 290 (1970) (copyright); Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 17–21 (2006) (criminal law and punishment); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003) (federal sentencing guidelines); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997) (tort law); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009) (property law); Scott Brewer, *Scientific Expert Testimony*

Kant's belief in retributive punishment coalesces with his beliefs about the inherent moral force of law. Kant believed that the moral law is derived non-empirically from the very structure of practical reason itself (its form); and because all rational agents share the same practical reason, the moral law binds and obligates everyone equally.[93]

This moral law that universally obligates all rational agents is determined by the Categorical Imperative.[94] According to Kant, the Categorical Imperative stood for the general principle that demands that one respect the humanity in oneself and in others, that one not make an exception for oneself when deliberating about how to act.[95] In general, the Categorical Imperative means that one should only act in accordance with rules that everyone could and should obey.[96]

B. Kant's Universalizability Principle

1. Hypothetical and Categorical Imperatives

The Categorical Imperative can be best understood in contrast with hypothetical imperatives.[97] In their most basic form, imperatives are

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and Intellectual Due Process, 107 YALE L.J. 1535, 1635 n.350 (1998) (expert testimony); H. Tristram Engelhardt, Jr., *Giving, Selling, and Having Taken: Conflicting Views of Organ Transfer*, 1 IND. HEALTH L. REV. 29 (2004) (organ transfer); R. G. Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271 (2002); Jason R. Steffen, *Criminalization: A Kantian View*, 12 WASH. U. JURISPRUDENCE REV. 27 (2019).

93. *See generally* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor & Jens Timmermann trans., 2012) (emphasis added).

94. Nicholas Bunnin & Jiyuan Yu, *Categorical Imperative*, THE BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 102 (2004) ("[T]he fundamental absolute formal demand (or set of demands) on our choice of maxims or principles on which to act. He proposed a number of formulations of the Categorical Imperative that on the surface differ radically from one another, although Kant himself believed that the different formulations are equivalent.").

95. For a detailed discussion, see Robert Johnson & Adam Cureton, *"Kant's Moral Philosophy"*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 5 (Edward N. Zalta ed., Spring ed. 2022) https://plato.stanford.edu/entries/kant-moral/.

96. *But see* William M. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, *in* ETHICAL THEORY AND BUSINESS 75 (Tom L. Beauchamp & Norman E. Bowie eds., 4th ed., 1993) (parenthetical – insert parenthetical); John Hasnas, *The Normative Theories of Business Ethics: A Guide for the Perplexed*, 8 BUS. ETHICS Q. 19, 25–28 (1998); John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579 (2005); John Braithwaite, *Challenging Just Deserts: Punishing White-Collar Criminals*, 73 J. CRIM. L. & CRIMINOLOGY 723 (1982).

97. Nicholas Bunnin & Jiyuan Yu, *Hypothetical Imperative*, THE BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 317 (2004) (explaining a form of command issued by the will, in contrast to another form of command, the Categorical Imperative. In his account of morality, the fundamental role is assigned to Categorical Imperatives rather than to hypothetical imperatives. While the Categorical Imperative commands an action as an objective necessity in itself, without regard to any inclination or end, a hypothetical imperative commands an action as the means for satisfying some inclination or purpose).

"moral commands for determining an action in accordance with a certain principle of the will."[98] Hypothetical imperatives come in the form of if-then statements, with an antecedent and a consequent.[99] In other words, hypothetical imperatives are conditional. The following is an example: "If you want to pass the bar, you ought to study criminal law." If Person A does not want to pass the bar, then the imperative (or the command) that he study criminal law does not apply to him.

In contrast to hypothetical imperatives, a Categorical Imperative is applied to everyone and is not conditional. The following is an example: "You ought not to make false promises."[100] The imperative (or the command) of not making false promises applies to Person A whether he wants it to or not. The supreme principle of categorical imperatives is called *the* Categorical Imperative.[101] Kant thought that there ought to only be one such principle to avoid conflicting duties. Kant formulated four variations[102] of *the* Categorical Imperative.[103] They are *The Formula of Universal Law*, *The Formula of Humanity*, *The Formula of Autonomy*, and *The Formula of the Kingdom of Ends*.[104] Of

98. Nicholas Bunnin & Jiyuan Yu, *Imperative*, THE BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 333 (2004).

99. Consider the following example of a *modus ponens* argument pattern: Major premise: P –Q (i.e., if P then Q); Minor premise: P; Conclusion: Q. In the major premise, what is left of the arrow is called the *antecedent* and what is right of the arrow is called the *consequent*.

100. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 33–34 (Mary Gregor & Jens Timmermann trans., 2012).

101. A. T. Nuyen, *Counting the Formulas of the Categorical Imperative: One Plus Three Makes Four*, 10 HISTORY OF PHILOSOPHY QUARTERLY 37–48 (1993)(noting how "the situation seems to be this: either the different formulas, three or five as the case may be, are irreconcilable and thus an embarrassment to Kant, or they are fundamentally the same and thus an embarrassment to us who cannot reconcile them").

102. Some scholars count three, some four, and some count five formulations in the Groundwork. The reason some scholars count these five versions differently is that they combine the various formulations in differing arrangements.

103. Note that Kant's four formulations are still consistent with the notion that there is only one Categorical Imperative. There is only one Categorical Imperative. Kant merely articulated four formulations of it. *See* Paton, H. J. , 1947, *The Categorical Imperative: A Study in Kant's Moral Philosophy*, London: Hutchinson's University Library; David Misselbrook, *Duty, Kant, and Deontology*, 63 BR J GEN PRACT 211 (2013); Sven Nyholm, *Kant's Universal Law Formula Revisited*, 46 METAPHILOSOPHY 280–99 (2015); Richard Mccarty, *Kant's Derivation of the Formula of Universal Law*, 49 DIALOGUE 113–33 (2010).

104. Kant's first formulation of the Categorical Imperative is the Formula of Universal Law, which states, "Act as if the maxim of your action were to become through your will a universal law of nature." IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 33–34 (Mary Gregor & Jens Timmermann trans., 2012). Kant's second formulation is the Formula of Humanity, which states "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end." *Id.* at 44–45 (Mary Gregor & Jens Timmermann trans., 2012). Kant's third formulation is the Autonomy Formula, which states, "So act that your will can regard itself at the same time as

principal importance for white-collar crime is the formula of universal law.

2. Formula of Universal Law

The formula of universal law is Kant's first formulation of the Categorical Imperative, commanding people to "act only in accordance with that maxim through which you can *at the same time* will that it become a universal law."[105] Maxims have the form "I will do A if that will make me happy." Thus, a maxim is akin to a principle upon which one acts. For Kant, there are maxims of action and maxims of ends.[106] In short, *maxim* can mean both *principle* and *motive*. The principle is in one sense formal: that is, it commands nothing specific. At the same time, it is synthetic because it is acquired after *a priori* deliberation. One's *maxim* is her reason for acting. Simply put, the formula of universal law says that one should only act for those reasons which have the following characteristic: you can act according to a self-imposed rule that you can at the same time will that everyone obey.

The formula of universal law can be best understood by looking at Kant's discussion of an action that violates the formula of universal law. Consider the following: Person A is suffering financial difficulties and considers "borrowing" money, knowing that he can never repay. Person A's maxim then would be something to the extent of "make false promises." Universalizing (i.e., applying the formula of universal law to the maxim) renders promises impossible.[107] That is, Kant concludes, if acting in accordance with the maxim of making false promises became widespread, then there would be no such thing as *promises* anymore.[108] The contradiction lies here. Person A needs promises to exist because otherwise, how could he falsely promise to borrow money? If we were to universalize Person A's maxim—to will the universal breaking of

making universal law through its maxims." ID. AT [PAGE #] Finally, Kant's fourth formulation is the Formula of the Kingdom of Ends, which states, "So act as if you were through your maxims a law-making member of a kingdom of ends." Kingdom of Ends" The formulation states that we must "act in accordance with the maxims of a member giving universal laws for a merely possible kingdom of ends." ID. AT 50–51.

105. *Id.* at 33–34.

106. *See* infra III.B.1. Maxim of action parallels a Categorical Imperative and maxim of end parallels a hypothetical imperative.

107. *See* KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS, supra note 97, at 34-35 ("[T]he universality of a law which says that anyone who believes himself to be in need could promise what he please with the intention of not fulfilling it would make the promise itself and the end to be accomplished by it impossible; no one would believe what was promised to him but would only laugh at any such assertion as vain pretense.")

108. *Id.* at 34–38.

promises—we would *simultaneously* be willing the abandonment of promising.

III. UNIVERSALIZABILITY OF FRAUD: THE FORMULA OF UNIVERSAL LAW APPLIED TO FRAUD

A. The Elements

The universalization of fraud would involve two steps: determining the "fiduciary duty" (the antecedent) and universalizing the defendant's conduct (universalizing). In the ordinary course of a fraud trial, however, the prosecutor already must meet the first step. Thus, this new method therefore only involves one additional step.

First, the prosecutor must define the scope of the "fiduciary duty," as they already do.[109] The concepts of a fiduciary duty and a fiduciary relationship (and all of their nuances) encompass "corporate law's most mandatory inner core."[110] Admittedly, using the term "fiduciary duty" to encapsulate all those nuances betrays what it is supposed to capture, thereby trivializing the "most mandatory inner core."[111] As applied in the corporate crime context, the idea of a fiduciary duty in white-collar crime is better captured as a fiduciary *relationship*.[112]

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109. For an extensive discussion, *see generally* Samuel W. Buell, *The Court's Fraud Dud*, 6 DUKE J. CONST. L. & PUB. POL'Y 31 (2010).

110. John C. Coffee, *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1621 (1989).

111. The term "fiduciary duty" suggests an all-encompassing corporate obligation befitting any and all fiduciary-trustee relationships. *Duty*, BLACK'S LAW DICTIONARY (11th ed. 2019). A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust); a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another). For example, directors have a duty not to engage in self-dealing to further their own personal interests rather than the interests of the corporation. That could not be farther from the reality of mail and wire fraud adjudications. *See, e.g.*, Gomez-Jimenez v. New York L. Sch., 103 A.D.3d 13, 956 N.Y.S.2d 54 (2012); United States v. Dial, 757 F.2d 163 (7th Cir. 1985); United States v. Finnerty, 533 F.3d 143 (2d Cir. 2008); Ivey v. Genting Casinos UK Ltd. t/a Crockfords Club [2014] EWHC 3394 (QB); United States v. Regent Off. Supply Co., 421 F.2d 1174 (2d Cir. 1970); United States v. Weimert, 819 F.3d 351 (7th Cir. 2016); United States v. Litvak, 808 F.3d 160 (2d Cir. 2015); United States v. Litvak, 889 F.3d 56 (2d Cir. 2018); United States v. Gramins, 939 F.3d 429 (2d Cir. 2019); *see also* Samuel W. Buell, The Court's Fraud Dud, 6 DUKE J. CONST. L. & PUB. POL'Y 31, 38 (2010) (noting that "[f]iduciary duty . . . is simply a label used to designate relationships in which one party's expectations about disclosure make nondisclosure more likely to produce a deception that the law of fraud might want to sanction as wrongful.").

112. The relationship is understood as

> A relationship in which one person is under a duty to act for the benefit of

Whereas jurors looking at the relationship between a corporate officer and an investor must take on a fact-specific analysis in answering the question, jurors looking at a corporate officer's fiduciary duty can decide the issue absent a similar factual inquiry. This is so because "when the law has not confronted a particular question of relationship or duty, prior recognitions of relationships and duties . . . serve as a starting point for analysis."[113] Tort law has recognized many fiduciary duties.[114] And there is a danger of carrying the term "fiduciary duty" and its ensuing definitions into criminal law.[115]

To determine the scope of the fiduciary relationship, the prosecutor must answer several questions. First, what is the market in which the defendant is operating? Second, what is the nature of the relationship between the victim and the alleged defrauder? Third, with what kinds of expectations and assumptions is the victim coming into the transaction with the alleged defrauder? Answering these questions gives the jury a deeper and more meaningful insight into the defendant's mind. This kind of insight is crucial to the white-collar inquiry, given that the question of criminality hinges almost entirely on the defendant's mental state.[116]

To universalize the defendant's conduct would be to show that the defendant herself would object to everyone acting similarly. If she would not accept this, she possesses the predicate mental state. Once the prosecutor has demonstrated a fiduciary relationship, she must apply Kant's principles—essentially universalizing the defendant's

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> another on matters within the scope of the relationship. Fiduciary relationships — such as trustee-beneficiary, guardian-ward, principal-agent, and attorney-client — require an unusually high degree of care. Fiduciary relationships usu. arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

Fiduciary Relationship, BLACK'S LAW DICTIONARY (11th ed. 2019).

113. Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1986 (2006).

114. For a thorough analysis of 'fiduciary duty' as used in tort law *see* Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925 (2006).

115. Fiduciary duty as applied in tort law is judged against the "preponderance of evidence" standard, which is substantially lower than the "beyond a reasonable doubt" standard that a similar concept would be judged against in the white-collar crime jurisprudence.

116. *See* supra I.B.1.

conduct. To be clear, this analysis does not displace the mens rea element. The prosecutor must still prove that the defendant acted with "specific intent" to defraud.[117] What the universalization analysis does, however, is simplify the job of the prosecutor, the court, and most importantly, the jury.

To take a simple example, say a corporate CEO exaggerates the financial well-being of her company in quarterly reports to make the company's performance look better. She certainly would not tolerate this behavior in others: If all companies lied on their filings, then stock prices would be inherently untrustworthy, and the stock market would likely collapse. The CEO's behavior, therefore, fails Kant's universalizability test. According to this test, she would have the requisite mens rea for a mail or wire fraud violation. The functionality of the universalizability principle is not limited to simple thought experiments. Applying it to the Holmes case illustrates its practicality.

B. The Application: Elizabeth Holmes

Founded in 2003, Theranos was set to disrupt traditional healthcare.[118] Nineteen-year-old Elizabeth Holmes, starting her fledgling company, found support in her advisor and Dean of the School of Engineering at Stanford University, Channing Robertson.[119] Robertson introduced her to venture capitalists.[120] In March 2004,

117. *See* John C. Coffee, Jr. & Charles K. Whitebread, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, *in* WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 9.02 (Otto Obermaier et al., eds. 2016) (need explanatory parenthetical) Although the prosecutor must establish that the defendant acted with "specific intent," indirect and circumstantial evidence is admissible and may support an inference that the defendants intended to work an injury. Sometimes, however, this liberality permits the jury to infer a specific intent to defraud from the fact that the injury did in fact result and was foreseeable. Once the fact of injury can be used to prove an intent to injure, the independent significance of the mens rea element begins to fade rapidly.

118. Roger Parloff, *This CEO Is Out for Blood*, FORTUNE (June 12, 2014, 7:37 AM), https://fortune.com/2014/06/12/theranos-blood-holmes; Caitlin Roper, *This Woman Invented a Way To Run 30 Lab Tests on Only One Drop of Blood*, WIRED (Feb. 18, 2014, 1:30 PM), https://www.wired.com/2014/02/elizabeth-holmes-theranos/?cid=18964974; Laura Arrillaga-Andreessen, *Five Visionary Tech Entrepreneurs Who Are Changing the World*, N.Y. TIMES (Oct. 12, 2015), https://www.nytimes.com/interactive/2015/10/12/t-magazine/elizabeth-holmes-tech-visionaries-brian-chesky.html?_r=1; Sheelah Kolhatkar & Caroline Chen, *Can Elizabeth Holmes Save Her Unicorn?*, BLOOMBERG (Dec. 10, 2015, 5:00 AM), https://www.bloomberg.com/news/articles/2015–12–10/can-theranos-ceo-elizabeth-holmes-fend-off-her-critics-.

119. Nick Bolton, *Exclusive: How Elizabeth Holmes's House of Cards Came Tumbling Down*, VANITY FAIR (Sept. 6, 2016), https://www.vanityfair.com/news/2016/09/elizabeth-holmes-theranos-exclusive.

120. Ken Auletta, *Blood, Simpler*, THE NEW YORKER (Dec. 8, 2014),

Holmes dropped out of Stanford to dedicate all of her time and energy to her company.[121] That year, Holmes raised almost $7 million in early funding, which garnered a $30 million valuation for Theranos.[122] Theranos grew quickly, and in 2013, the company went public. Until then, little was known about Theranos, let alone about its founder. But in September 2013, the company announced its partnership with Walgreens and, in doing so, it received much public attention—attention, and scrutiny, that would ultimately lead to its downfall.[123]

In the government's indictment against Holmes, prosecutors alleged two theories of fraud: one to defraud investors and another to defraud doctors and patients.[124] The first theory is discussed here. The government asserted that Holmes made misstatements about Theranos's technology. For example, Theranos represented to its shareholders and potential investors that its proprietary analyzer was "presently capable of accomplishing certain tasks, such as performing the full range of clinical tests using small blood samples drawn from a finger stick and producing results that were more accurate and reliable than those yielded by conventional methods—all at a faster speed than previously possible."[125] The reality was that its proprietary analyzer has

https://www.newyorker.com/magazine/2014/12/15/blood-simpler; Avery Hartmans & Sarah Jackson, *The Rise and Fall of Elizabeth Holmes, the Former Theranos CEO Found Guilty of Wire Fraud and Conspiracy Who Is the Subject of the New Hulu Series 'The Dropout'*, BUSINESS INSIDER (Mar. 3, 2022, 1:10 PM), https://www.businessinsider.com/theranos-founder-ceo-elizabeth-holmes-life-story-bio-2018–4#as-a-sophomore-holmes-went-to-one-of-her-professors-channing-robertson-and-said-lets-start-a-company-with-his-blessing-she-founded-real-time-cures-later-changing-the-companys-name-to-theranos-thanks-to-a-typo-early-employees-paychecks-actually-said-real-time-curses-10.

121. Sara Ashley O'Brien, *The Rise and Fall of Elizabeth Holmes: A Timeline*, CNN (Jan. 4, 2022, 11:00 AM), https://www.cnn.com/2022/01/04/tech/elizabeth-holmes-rise-and-fall/index.html.

122. Ken Auletta, *Blood, Simpler*, THE NEW YORKER (Dec. 8, 2014), https://www.newyorker.com/magazine/2014/12/15/blood-simpler.

123. *See, e.g.*, Roger Parloff, *This CEO Is Out for Blood*, FORTUNE (June 12, 2014, 7:37 AM), https://fortune.com/2014/06/12/theranos-blood-holmes; Profile: Elizabeth Holmes, FORBES https://www.forbes.com/profile/elizabeth-holmes/?sh=1db023e547a7; Kimberly Weisul, *How Playing the Long Game Made Elizabeth Holmes a Billionaire*, INC. (Feb. 3, 2022), https://www.inc.com/magazine/201510/kimberly-weisul/the-longest-game.html; Laura Arrillaga-Andreessen, *Five Visionary Tech Entrepreneurs Who Are Changing the World*, N.Y. TIMES (Oct. 12, 2015), https://www.nytimes.com/interactive/2015/10/12/t-magazine/elizabeth-holmes-tech-visionaries-brian-chesky.html?_r=1; John Carreyrou, *Hot Startup Theranos Has Struggled With Its Blood-Test Technology*, WALL ST. J. (Oct. 16, 2015), https://www.wsj.com/articles/theranos-has-struggled-with-blood-tests-1444881901.

124. Indictment, United States v. Holmes, 2021 WL 2044470 (N.D. Cal. May 22, 2021), available at https://cand.uscourts.gov/wp-content/uploads/cases-of-interest/usa-v-holmes-et-al/USA-v.-Holmes-18-CR-00258-Dkt-469-Third-Sup-Indictment.pdf.

125. *Id.* at *4.

accuracy and reliability issues, performed only a fraction of the tests, and was slower than competing devices.[126] Likewise, Holmes misled investors as to Theranos's well-being, the securing of a Walgreens partnership, and the company's relationship with the Department of Defense.[127]

This case exemplifies the labyrinthine analysis that the consciousness of wrongdoing standard requires from prosecutors, courts, jurors, and defendants. The universalizability principle affords clarity not only to the courts and prosecutors but also, and more importantly, to defendants. A court applying this principle could avoid the pitfalls associated with deciding a defendant's mental state and in its stead rely solely on the defendant's actions and her beliefs.[128] Jurors would have to look at Holmes' conduct and conduct a subjective inquiry, asking if her actions reflect a consciousness of wrongdoing. The subjective nature of this inquiry needs a deeper understanding of Holmes as a person. For jurors to decide that her actions reflect an understanding of her wrongdoing, they must have a baseline to judge against. The need for a baseline is where consciousness of wrongdoing as a standard fails.

Additional information about the defendant is a double-edged sword. One possibility is that the ancillary biographical information sways jurors in favor of Holmes by justifying her conduct. The current jurisprudence risks jurors concluding that she *really* was trying to change the way patients had their blood drawn, that she *really* believed in the technology's potential, or that she *really* was trying her best. At the other end, further biographical facts can strengthen the prosecution's story, playing into the juror's desire for a cohesive narrative.

Yet the Kantian standard avoids all of the above. Universalizing the fraud at issue in the Holmes case is a more practical alternative to the above. The prosecutor would first have to prove that Holmes' representations were, in fact, false. By simply eliciting testimony that, for example, Theranos's proprietary analyzer was capable of running only twelve out of the more than 1,000 of tests Holmes claimed it could, the prosecutor would satisfy this step or that she had been using

126. *Id.*

127. United States v. Holmes, 2021 WL 2044470 at *1-2 (N.D. Cal. May 22, 2021).

128. *See* Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 LAW & CONTEMP. PROBS. 133 (2012).

Siemens machines to run her tests.[129] Then, the prosecutor must show that Holmes assumed a degree of regulatory compliance from companies and organizations with which she collaborated. The prosecutor would universalize Holmes' conduct. To do this, the prosecutor could elicit testimony from representatives of those entities about the representations they make regarding their business and the consequences of noncompliance with those regulations. For example, the prosecutor could call a representative of Siemens to testify on the topic of regulatory compliance and the consequences of noncompliance akin to Theranos's misconduct with respect to the Siemens analyzer. Finally, the prosecutor would show, through the cross of the defendant, through testimony from those close to her, or through closing arguments how Holmes' assumptions and expectations contradict her conduct. If Holmes would disapprove of other CEOs in the industry lying to investors then Holmes has violated Kant's Categorical Imperative.

C. The Value

Try to imagine the defendant's life as a massive puzzle. Each piece is an act of the defendant. The jury's job is not to assemble every piece of the defendant's life. Rather, the jury need only assemble the pieces relevant to the proceeding at hand. The consciousness of wrongdoing standard asks jurors to do two analyses. First, they must look at the scattered mess of individual puzzle pieces and, without showing them the whole picture, pick out the pieces they think will fit. Then, they must make conjectures as to how those pieces fit—using guesswork with a hodgepodge of information—while trying to connect the pieces.

Universalizing fraud takes much of the guesswork out of the calculus. Applying the formula of universal law to fraud, the prosecutor and the defendant not only give the pertinent puzzle pieces to the jurors, they also describe what those pieces will or will not show.

Companies usually want to act in conformity with the law, and they have good reason to.[130] Their success is predicated on their compliance with the law. The universalizability principle makes that easier to achieve. The interest in knowing the nuances of the fraud statutes is

129. Tim De Chant, *Holmes Claimed Theranos Could Do "More Than 1,000 Tests"—It Did 12*, ARS TECHNICA (Nov. 19, 2021), https://arstechnica.com/tech-policy/2021/11/holmes-claimed-theranos-could-do-more-than-1000-tests-it-did-12/.

130. David Kwok, *Is Vagueness Choking the White-Collar Statute?*, 53 GA. L. REV. 495, 498 (2019) (emphasis added).

shared because "companies *want* to know precisely what activity might subject them to liability."[131] In other words, if companies survey the law, it is not necessarily because they have devious purposes. What is more, if criminal jurisprudence were to proceed with that kind of assumption, it would be at a standstill—for every rule it could formulate, it would produce double loopholes. Courts have always been aware of the dual justifications of criminal punishment.[132] For example, Judge Denny Chin, citing symbolism, denied reducing Bernie Madoff's sentencing because his life expectancy was low.[133] Judge Chin underscores the retributive justification for punishment—that punishment should be proportional to the actor's moral culpability.[134] A final benefit is to the rest of society. Individuals "want to know precisely what activity might subject them to liability."[135] Such a principle would make the fraud statutes more salient to the general public.

CONCLUSION

Fraud is an ever-growing concept, and the statutory language is meant to reflect that. It is meant to leave enough breathing room to accommodate future fraudulent schemes that are currently out of reach. Yet, without understanding the moral underpinnings of fraud, the mail and wire fraud statutes can be broadened and narrowed on a

131. *Id.*

132. United States v. Gramins, 939 F.3d 429, 455 (2d Cir. 2019) ("The fact that the JPMAC trade postdated the Litvak indictment provided strong evidence for Gramins's consciousness of wrongdoing."); United States v. Panarella, 277 F.3d 678, 698 (3d Cir. 2002) (concluding that defendant's efforts to enlist another to conceal prior misrepresentations undermined any claim of inadequate notice in prosecution under flexible mail-fraud statute); Transcript of Sentencing Hearing at 46–47, United States v. Madoff, No. 09-CR-213 (S.D.N.Y. June 29, 2009), https://www.justice.gov/sites/default/files/usao-sdny/legacy/2012/04/16/062909sentencing.pdf.

133. Transcript of Sentencing Hearing at 47, United States v. Madoff, No. 09-CR-213 (S.D.N.Y. June 29, 2009)

134. Judge Chin said:

> One of the traditional notions of punishment is that an offender should be punished in proportion to his blameworthiness. Here, the message must be sent that Mr. Madoff's crimes were *extraordinarily evil*, and that this kind of irresponsible manipulation of the system is not merely a bloodless financial crime that takes place just on paper, but that it is instead, as we have heard, one that takes a staggering human toll. The symbolism is important because the message must be sent that in a society governed by the rule of law, Mr. Madoff will get what he deserves, and that he will be punished according to his moral culpability.

Transcript of Sentencing Hearing at 47, United States v. Madoff, No. 09-CR-213 (S.D.N.Y. June 29, 2009).

135. David Kwok, *Is Vagueness Choking the White-Collar Statute?*, 53 GA. L. REV. 495, 498 (2019).

whim. The formula of universal law as applied to fraud simplifies things and reaches just results. It incorporates principles rooted in the foundation of the fraud statutes and provides a rule of law that can be uniformly applied by courts and easily understood by juries, defendants, and prosecutors.