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## Exactly What They Asked For: Linking Harm and Intent in Wire Fraud Prosecutions

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# Exactly What They Asked For: Linking Harm and Intent in Wire Fraud Prosecutions

CHRISTINA M. FROHOCK & MARCOS DANIEL JIMÉNEZ\*

*Recent opinions have obscured the U.S. Court of Appeals for the Eleventh Circuit’s guidance on federal criminal fraud prosecutions. In 2016, the court decided United States v. Takhalov and found no crime of wire fraud where the alleged victims received the benefit of their bargain. Just three years later, the concurring opinion in United States v. Feldman criticized that prior reasoning as puzzling, inviting problematic interpretations that become untethered from the common law of fraud. This Article tracks the development of the court’s view and argues for an interpretation of Takhalov that links harm to the specific intent necessary for a federal criminal fraud charge.*

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## INTRODUCTION

Should federal criminal fraud convictions stand when the alleged victims received what they bargained for? The U.S. Court of Appeals for the Eleventh Circuit has struggled to answer that question. In 2016, the court ruled in *United States v. Takhalov* that there can be no federal wire fraud when the defendants “gave the victims exactly what they asked for and charged them exactly what they agreed to pay.”<sup>1</sup> The *Takhalov* opinion followed common-law tradition in linking fraud and harm, as the court analyzed the criminal fraud statute from the perspective of whether the purported victims received what they bargained for—even if they were deceived and would have avoided the bargain altogether without the deception.<sup>2</sup> Wire fraud requires a scheme to defraud, with intended harm rather than actual harm.<sup>3</sup> The principle of “no harm, no foul” may govern in basketball<sup>4</sup> and common-law fraud, but transforms into “no intent, no foul” in federal criminal fraud.<sup>5</sup>

Yet, only three years later, the concurring opinion in *United States v. Feldman* cast doubt on the *Takhalov* court’s reasoning.<sup>6</sup> Judge William Pryor expressed concern over the “puzzling opinion” that the benefit of the bargain negates wire fraud.<sup>7</sup> The court’s

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<sup>1</sup> *United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016), *modified*, 838 F.3d 1168 (11th Cir. 2016).

<sup>2</sup> *Id.* at 1310, 1313; *see id.* at 1311 (“In the defendants’ story, none of these allegedly swindled men were truly victims: they knowingly entered the clubs, bought bottles of liquor, and drank them with their female companions. Thus, in the defendants’ view, these men got what they paid for—nothing more, nothing less.”); *see also Harm*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “harm” as “[i]njury, loss, damage; material or tangible detriment”).

<sup>3</sup> *Takhalov*, 827 F.3d at 1310, 1313; *see also* JOHN WILLARD, A TREATISE ON EQUITY JURISPRUDENCE 147 (Platt Potter ed., 1875) (“Fraud has been defined to be, any kind of artifice by which another is deceived.”).

<sup>4</sup> *Cf.* CHARLES CLAY DOYLE ET AL., THE DICTIONARY OF MODERN PROVERBS 117 (2012) (tracing the origin of “no harm, no foul” to basketball refereeing, with the phrase first published in the *Hartford Courant* in 1956).

<sup>5</sup> *See United States v. Artuso*, 482 F. App’x 398, 402 (11th Cir. 2012) (noting that wire fraud defendant “seems to present a ‘no harm/no foul’ argument that the government failed to prove [the company] was defrauded of any money or property and, therefore, the evidence failed to support the convictions,” and that “[h]is argument misses the point of mail and wire fraud criminal charges”).

<sup>6</sup> *United States v. Feldman*, 931 F.3d 1245, 1265, 1267 (11th Cir. 2019) (W. Pryor, J., concurring).

<sup>7</sup> *Id.* at 1265.

opinion could be interpreted narrowly or broadly and could be based on harm or materiality.<sup>8</sup> According to Judge Pryor, all options are problematic: the narrow interpretations are too narrow, and the broad interpretations risk abandoning the statute's common-law heritage.<sup>9</sup>

The *Feldman* concurrence may signal a retreat from the Eleventh Circuit's view in *Takhalov*. Such a retreat would be unfortunate, as *Takhalov* advances our understanding of wire fraud prosecutions by tightening the link between harm and intent. This Article tracks the development of the court's view and argues for an interpretation of *Takhalov* that looks from specific harm to specific intent: there can be no crime of wire fraud when the victims received exactly what they asked for *consistent with the defendant's intent*.

## I. BENEFIT OF THE BARGAIN

The federal statutes criminalizing mail fraud and wire fraud are powerful and flexible tools for prosecutors, covering a wide range of cases from traditional fraud to political corruption.<sup>10</sup> In fiscal year 2018, U.S. Attorneys' Offices filed 4592 white-collar crime cases, the majority charging fraud.<sup>11</sup> In his former role as a prosecutor, Senior Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York described mail fraud as "our Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart—and our true love."<sup>12</sup> Spreading the love, courts apply the same analysis to both mail and wire fraud.<sup>13</sup>

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<sup>8</sup> *Id.* at 1267–68.

<sup>9</sup> *Id.* at 1270.

<sup>10</sup> See 18 U.S.C. §§ 1341, 1343 (2018) (criminalizing mail fraud and wire fraud, respectively); Joseph Lanuti, *Mail and Wire Fraud*, 56 AM. CRIM. L. REV. 1151, 1151–52 (2019); KELLY J. STRADER, UNDERSTANDING WHITE COLLAR CRIME 73 (4th ed. 2017).

<sup>11</sup> U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT FISCAL YEAR 2018, at 12 (2018), <https://www.justice.gov/usao/page/file/1199336/download>.

<sup>12</sup> Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980); see also Stuart Taylor, Jr., *Law's 'Stradivarius': Inside Trader Ruling Saves Mail Law as Key Tool for Federal Prosecutors*, N.Y. TIMES, Nov. 19, 1987, at A20.

<sup>13</sup> *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); see also, e.g., *United States v.*

Wire fraud is codified at 18 U.S.C. § 1343, which provides that

[w]hoever, 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.<sup>14</sup>

The Eleventh Circuit generally articulates two elements: “(1) intentional participation in a scheme to defraud, and, (2) the use of the interstate mails or wires in furtherance of that scheme.”<sup>15</sup> Other circuit courts (and even, on occasion, the Eleventh Circuit) add a third, isolating specific intent to defraud or “money or property as the

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Ross, 131 F.3d 970, 985 (11th Cir. 1997) (applying mail fraud analysis to defendants’ convictions under wire fraud statute); *United States v. Manarite*, 44 F.3d 1407, 1411 n.5 (9th Cir. 1995) (noting that “wire fraud statute is read in light of the case law on mail fraud”); CHARLES DOYLE, CONG. RESEARCH SERV. MAIL AND WIRE FRAUD: A BRIEF OVERVIEW OF FEDERAL CRIMINAL LAW 2 (2019) [hereinafter DOYLE, MAIL AND WIRE FRAUD], <https://fas.org/sgp/crs/misc/R41930.pdf> (“The mail and wire fraud statutes are essentially the same, except for the medium associated with the offense—the mail in the case of mail fraud and wire communication in the case of wire fraud.”).

<sup>14</sup> 18 U.S.C. § 1343 (emphasis added). The statute further provides that if the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency . . . or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

*Id.*; see also *id.* § 1341 (criminalizing use of the mails in “any scheme or artifice to defraud”); *id.* § 1344 (criminalizing “scheme or artifice to defraud” in bank fraud).

<sup>15</sup> *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009); accord *United States v. Sawyer*, 85 F.3d 713, 723 (1st Cir. 1996) (“To prove mail or wire fraud, the government must prove, beyond a reasonable doubt: (1) the defendant’s knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud, and (2) the use of the mails or interstate wire communications in furtherance of the scheme.”).

object of the scheme.”<sup>16</sup> However numerous the formulation, harm is not among the elements.

More than a century ago, the Supreme Court recognized that mail fraud is criminal even if the defendant’s letters are “absolutely ineffective.”<sup>17</sup> Congress similarly intended wire fraud to be an inchoate offense, punishing schemes whether successful or unsuccessful.<sup>18</sup>

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<sup>16</sup> See, e.g., *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004) (listing elements as “(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme”) (quoting *United States v. Dinome*, 86 F.3d 277, 283 (2d Cir.1996) (alteration omitted)); *United States v. McNeil*, 320 F.3d 1034, 1040 (9th Cir. 2003) (listing elements as “a scheme to defraud, use of the wires in furtherance of the scheme, and the specific intent to defraud”); *United States v. Merklinger*, 16 F.3d 670, 678 (6th Cir. 1994) (listing elements as “(1) the existence of a scheme to defraud, (2) use of wire communications in furtherance of the scheme, and (3) that the scheme was intended to deprive a victim of money and property”). Compare *United States v. Williams*, 527 F.3d 1235, 1240 (11th Cir. 2008) (“Under 18 U.S.C. § 1343, wire fraud requires proof beyond a reasonable doubt that (1) the defendant participated in a scheme or artifice to defraud; (2) with the intent to defraud; and (3) used, or caused the use of, interstate wire transmissions for the purpose of executing the scheme or artifice to defraud.”), and *United States v. Near*, 708 F. App’x 590, 597 (11th Cir. 2017) (“To convict the defendants of wire fraud in violation of 18 U.S.C. § 1343, the government must prove beyond a reasonable doubt that they (1) participated in a scheme or artifice to defraud; (2) with the intent to defraud; and (3) used, or caused the use of, interstate wire transmissions for the purpose of executing the scheme or artifice to defraud.”), with *Williams*, 527 F.3d at 1241 (“Wire fraud requires proof of a scheme or artifice to defraud and the use of interstate wire transmissions in furtherance of the scheme.”), and *United States v. Aldissi*, 758 F. App’x 694, 700 (11th Cir. 2018) (“To prove wire fraud under 18 U.S.C. § 1343, the United States must establish that a defendant intentionally participated in a scheme or artifice to defraud and used the interstate wires to carry out that scheme.”).

<sup>17</sup> *Durland v. United States*, 161 U.S. 306, 315 (1896) (“It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although, in the judgment of the jury, they may be absolutely ineffective therefor.”).

<sup>18</sup> *United States v. Ross*, 131 F.3d 970, 986 (11th Cir. 1997) (“Punishment under the wire fraud statute is not limited to successful schemes.”); *United States v. D’Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994) (“The scheme to defraud need not have been successful or complete. . . . Therefore, the victims of the scheme need not have been injured.”); *United States v. Dynalectric Co.*, 859 F.2d 1559, 1576 (11th Cir. 1988) (“[C]onviction under the federal mail fraud statute only requires the government to prove a scheme to defraud; the success or failure of the scheme is irrelevant.”); *United States v. Patterson*, 528 F.2d 1037, 1041 (5th Cir. 1976) (“There is no necessity for the government to prove actual financial loss.”).

The victim need not suffer any financial loss at all.<sup>19</sup> Since 2002, the statute has expressly criminalized “attempts” to commit the offense.<sup>20</sup> Even before that clarification, the Department of Justice treated attempted wire fraud as a crime: “this was not an impediment in practice, because proof of a scheme to defraud did not necessarily require proof that the scheme was successful.”<sup>21</sup> On its face, the statute lacks any mention of harm or injury or loss or damage from the scheme or artifice, as well as any definition of “scheme or artifice.”<sup>22</sup> The crime lies simply in the scheme to defraud.<sup>23</sup>

Unpacking that scheme is not so simple. Courts have filled the statutory vacuum by looking to and beyond the common law of fraud.<sup>24</sup> Fraud is ancient, a bedrock of our jurisprudence with the earliest recorded use of the noun dating to the fourteenth century.<sup>25</sup> A writ of deceit, which “lay against one who had swindled another by the misuse of a legal procedure,” dates even further back, to 1201.<sup>26</sup>

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<sup>19</sup> See *United States v. Artuso*, 482 F. App’x 398, 402–03 (11th Cir. 2012) (“The mail and wire fraud statutes do not focus on the victim’s actual loss but on the defendant’s intent to obtain money or property by means of fraud or deceit. . . . The formulation and implementation of a scheme to defraud support a prosecutable offense regardless of its ultimate success or actual impact on the victim.”); *Maxwell*, 579 F.3d at 1302 (“[F]inancial loss is not at the core of these mail and wire frauds. Instead, the penal statutes also seek to punish the intent to obtain money or property from a victim by means of fraud and deceit.”).

<sup>20</sup> 18 U.S.C. § 1349 (2018) (“Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”).

<sup>21</sup> Attach. to Attorney Gen. Memorandum on the Sarbanes-Oxley Act of 2002 (Aug. 1, 2002), <https://www.justice.gov/archives/ag/attachment-attorney-general-august-1-2002-memorandum-sarbanes-oxley-act-2002>.

<sup>22</sup> See 18 U.S.C. §§ 1341, 1343; *United States v. Bradley*, 644 F.3d 1213, 1239 (11th Cir. 2011).

<sup>23</sup> See *United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016), *modified*, 838 F.3d 1168 (11th Cir. 2016) (“For § 1343 forbids only schemes to defraud, not schemes to do other wicked things.”).

<sup>24</sup> See, e.g., *Bradley*, 644 F.3d at 1239–40 (providing “a judicial framework for conceptualizing a fraudulent scheme” and noting that “[p]ursuant to the judicial definition, a ‘scheme to defraud’ is broader than the common law conception of fraud”); *United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002) (“[T]he meaning of ‘scheme to defraud’ has been judicially defined.”).

<sup>25</sup> See *Fraud*, BLACK’S LAW DICTIONARY (11th ed. 2019).

<sup>26</sup> *Iconco v. Jensen Constr. Co.*, 622 F.2d 1291, 1295 (8th Cir. 1980) (“The foundation case for the modern law of fraud was *Pasley v. Freeman*, 3 Term Rep.

Statutory prohibitions against fraud have a younger pedigree; Congress first enacted a mail fraud statute in 1872 and codified wire fraud as a distinct crime in 1952.<sup>27</sup> These statutes incorporate the common-law notion of fraud, but criminalize more conduct.<sup>28</sup> Congress abandoned traditional elements in favor of capturing society's moral condemnation of dishonesty, deception, and unfair play.<sup>29</sup>

Fraud has always reflected moral concerns, as it was historically defined as "any kind of artifice by which another is deceived."<sup>30</sup> The

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51, 100 Eng. Rep. 450 (K.B. 1789), after which it was recognized as a species of tort action.").

<sup>27</sup> See Act to Further the Communications Act of 1934, ch. 879, 66 Stat. 722 § 18(a) (1952) (codified as amended at 18 U.S.C. § 1343); *Donaldson v. Read Magazine*, 333 U.S. 178, 189–90 (1948) ("In 1872 Congress first authorized the Postmaster General to forbid delivery of registered letters and payment of money orders to persons or companies found by the Postmaster General to be conducting an enterprise to obtain money by false pretenses through the use of the mails."); *Neder v. United States*, 527 U.S. 1, 22 (1999); see also DOYLE, MAIL AND WIRE FRAUD, *supra* note 13, at 1–2 ("The first of the two, the mail fraud statute, emerged in the late 19th century as a means of preventing 'city slickers' from using the mail to cheat guileless 'country folks.'").

<sup>28</sup> See *Neder*, 527 U.S. at 23, 25 (applying "the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses" and noting that statutes "prohibit[] the 'scheme to defraud,' rather than the completed fraud"); *Pendergraft*, 297 F.3d at 1208 ("Courts have defined the phrase broadly, allowing it to encompass deceptive schemes that do not fit the common-law definition of fraud.").

<sup>29</sup> See *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (noting that conspiracy to defraud the government "means primarily to cheat the government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest"); *Bradley*, 644 F.3d at 1240 (noting that "scheme to defraud . . . defies measure by a technical standard," but rather reflects "moral uprightness, . . . fundamental honesty, fair play and right dealing in the general and business life of members of society") (quoting *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958)); *United States v. Henningsen*, 387 F.3d 585, 589 (7th Cir. 2004) (in mail fraud context, finding scheme to defraud when conduct departs "from fundamental honesty, moral uprightness and candid dealings in the general life of the community").

<sup>30</sup> WILLARD, *supra* note 3, at 147; see also *Fraud*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.").



harm lay in the cheating of the victim.<sup>31</sup> Concentrating on the victim, a civil claim for fraud developed to require a showing of justifiable reliance and damage, among other elements.<sup>32</sup> By contrast, the federal crimes of mail and wire fraud require neither reliance nor damage.<sup>33</sup> The fraud statutes cast a wider net, criminalizing “frauds that would not have been ‘actionable’ at common law.”<sup>34</sup> But the net is not infinite. The government must, for example, prove materiality.<sup>35</sup> A scheme to defraud requires proof of either “a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property.”<sup>36</sup> Also, the statutory notion of defrauding does not “include threat and coercion through fear or force.”<sup>37</sup> Rather, defrauding “signifies ‘the deprivation of something of value by trick, deceit, chicanery, or overreaching.’”<sup>38</sup>

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<sup>31</sup> WILLARD, *supra* note 3, at 147 (“Hence, all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as fraud.”).

<sup>32</sup> *Neder*, 527 U.S. at 22; *see* *United States v. Feldman*, 931 F.3d 1245, 1266 (11th Cir. 2019) (listing elements of actionable fraud).

<sup>33</sup> *Neder*, 527 U.S. at 24–25 (“By prohibiting the ‘scheme to defraud,’ rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted.”).

<sup>34</sup> *Feldman*, 931 F.3d at 1266; *see, e.g.*, *Matthews v. Mass. Nat’l Bank*, 16 F. Cas. 1113, 1116 (C.C.D. Mass. 1874) (“Damage without fraud, or fraud without damage, will not sustain an action.”); *Stokes v. Victory Land Co.*, 128 So. 408, 409 (Fla. 1930) (“Deceit and fraud, if not acted upon, or if not accompanied by injury, are moral, not legal, wrongs . . . . It is of the very essence of an action of fraud or deceit that the same shall be accompanied by damage.”).

<sup>35</sup> *See Neder*, 527 U.S. at 20, 25 (“[M]ateriality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes”); *United States v. Artuso*, 482 F. App’x 398, 401 (11th Cir. 2012) (“To establish a scheme to defraud requires proof of a material misrepresentation or the omission or concealment of a material fact calculated to deceive another of money or property.”).

<sup>36</sup> *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009).

<sup>37</sup> *Fasulo v. United States*, 272 U.S. 620, 628 (1926); *see Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924) (“[T]he words ‘to defraud’ as used in some statutes . . . usually signify the deprivation of something of value by trick, deceit, chicanery, or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes.”).

<sup>38</sup> *United States v. Pendergraft*, 297 F.3d 1198, 1208–09 (11th Cir. 2002) (quoting *Hammerschmidt*, 265 U.S. at 188); *see Hammerschmidt*, 265 U.S. at 188 (noting that defrauding statutes refer “to wronging one in his property rights by

A scheme to defraud, then, must be a scheme intended to deprive the victim of something of value, some tangible or intangible property right.<sup>39</sup> With a valuable thing at stake, the potential for harm looms.<sup>40</sup> If the defendant's scheme is successful and the deprivation occurs, then the victim is harmed. If the scheme is not successful and the deprivation does not occur, then the victim is not harmed. Regardless, the scheme that envisions harm suffices for the crime.<sup>41</sup>

#### A. *United States v. Takhalov*

In 2016, the U.S. Court of Appeals for the Eleventh Circuit decided *United States v. Takhalov* and rested its analysis of § 1343 on the link between defrauding and value deprivation, echoing the common-law link between fraud and harm. With references to the *Bible*, Rick's *Café Américain* in *Casablanca*, Mr. Spock in *Star Trek*, Mark Twain, Hunter S. Thompson, and both Oliver Wendell *and* Sherlock

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dishonest methods or schemes"); *United States v. Barrington*, 648 F.3d 1178, 1191 (11th Cir. 2011) (noting that wire fraud and mail fraud statutes protect property rights and, like those statutes, the computer fraud statute protects "things of value").

<sup>39</sup> Compare *United States v. Carpenter*, 484 U.S. 19, 25 (1987) (recognizing Wall Street Journal's publication schedule and column contents as intangible property rights for purposes of mail and wire fraud), and *Barrington*, 648 F.3d at 1191–92 (recognizing university's "money or property" rights as "lost tuition resulting from the unearned hours credited to the students, rather than the actual grades"), with *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (holding that government's regulatory interest in issuing a state or municipal license is not a property right under § 1341); see also 18 U.S.C. § 1346 (2018) ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."); *Skilling v. United States*, 561 U.S. 358, 408–09 (2010) (limiting "honest services" in § 1346 to "only the bribe-and-kickback core of the pre-*McNally* case law") (referencing *McNally v. United States*, 483 U.S. 350 (1987)).

<sup>40</sup> See *United States v. Siegel*, 717 F.2d 9, 14 (2d Cir. 1983) (citation omitted) ("While the prosecution must show that some harm or injury was contemplated by the scheme, it need not show that direct, tangible economic loss resulted to the scheme's intended victim.").

<sup>41</sup> See *United States v. Williams*, 527 F.3d 1235, 1245 (11th Cir. 2008) (noting that government need not prove actual financial loss or benefit to defendant for wire fraud prosecution, but "merely needs to show that the accused intended to defraud his victim and that his or her communications were reasonably calculated to deceive persons of ordinary prudence and comprehension") (quoting *United States v. Ross*, 131 F.3d 970, 986 (11th Cir. 1997)).

Holmes, the court tapped an impressive range of resources to address an otherwise dry issue of statutory interpretation.<sup>42</sup>

The opinion opens with a Biblical bang, citing *Exodus* for the Ninth Commandment given to Moses on Mount Sinai: “Thou shalt not bear false witness against thy neighbor.”<sup>43</sup> Such an act would be sinful, on high authority to be sure, but not necessarily criminal under § 1343.<sup>44</sup> Bearing false witness, like other wicked “schemes to lie, trick, or otherwise deceive,” may not involve any risk of harm.<sup>45</sup> By contrast, wire fraud requires at least the looming potential of harm because the criminal fraud statutes protect “things of value.”<sup>46</sup>

The facts of *Takhalov* involved a “Bar Girls” or “B-girls” scheme that would likely violate several of the Ten Commandments, perhaps finding easy marks in Rick’s Café.<sup>47</sup> The defendants hired attractive, Eastern European women to pose as tourists and entice male customers into the defendants’ nightclubs and bars in South Beach, where they would spend exorbitant sums on alcohol.<sup>48</sup> The women tricked

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<sup>42</sup> See *United States v. Takhalov*, 827 F.3d 1307, 1310, 1311 n.2, 1313 n.6, 1319 n.9 (11th Cir. 2016), *modified*, 838 F.3d 1168 (11th Cir. 2016).

<sup>43</sup> *Id.* at 1310 n.1; *Exodus* 20:16.

<sup>44</sup> *Takhalov*, 827 F.3d at 1310.

<sup>45</sup> *Id.* (“The difference, of course, is that deceiving does not always involve harming another person; defrauding does.”).

<sup>46</sup> *United States v. Barrington*, 648 F.3d 1178, 1191 (11th Cir. 2011); see *Takhalov*, 827 F.3d at 1310; *United States v. Bradley*, 644 F.3d 1213, 1240 (11th Cir. 2011) (“To gauge a defendant’s intent to commit a fraudulent scheme, then, we must determine whether the defendant attempted to obtain, by deceptive means, something to which he was not entitled.”); see also 18 U.S.C. § 1343 (2018) (requiring the defendant “having devised or intending to devise” a scheme or artifice).

<sup>47</sup> The scheme would also violate Florida state law. Under the Florida Beverage Law statutes, it is a second-degree misdemeanor for any agent of an establishment licensed to sell alcohol “to beg or solicit any patron or customer . . . to purchase any beverage, alcoholic or otherwise,” for the agent. Fla. Stat. § 562.131 (2019). That is just what happened, but the defendants in *Takhalov* faced more serious federal felony charges rather than state misdemeanor charges.

<sup>48</sup> *Takhalov*, 827 F.3d at 1310; 18 U.S.C. § 1343 (2018) (requiring “wire, radio, or television communication in interstate or foreign commerce”); see *United States v. Feldman*, 931 F.3d 1245, 1250 (11th Cir. 2019) (describing “Miami Beach nightclubs that hired foreign women to pose as tourists, attract patrons, and persuade them to buy drinks without paying attention to the clubs’ exorbitant prices”); Press Release, Dep’t of Justice, Bar Club Operators Sentenced in South Beach “B-Girls” Private Clubs Scheme (May 17, 2013), <https://www.justice.gov/usao-sdfl/pr/bar-club-operators-sentenced-south-beach-b-girls-private-clubs-scheme> [hereinafter DOJ Press Release] (“The organization brought Eastern European

the men, targeted for their appearance as single, wealthy businessmen, by concealing that they worked for the clubs and bars and that they received a percentage of the money each customer spent in the establishment.<sup>49</sup> Motivations were purely financial. If the men ran out of money, the B-girls would “abandon them in the street.”<sup>50</sup> In one instance, two B-girls convinced a Philadelphia native, after several drinks of hard liquor, wine, and Champagne, to accompany them to “a Russian-style nightclub” where he proceeded to spend more than \$43,000 on Dom Pérignon Champagne, Beluga caviar, and a painting.<sup>51</sup> The women were paid through illegal shell companies, which the defendants had created “to conceal profits and salary payments from their criminal enterprise.”<sup>52</sup> According to one defendant’s plea agreement, the B-girls received 20% of a scam worth between \$400,000 and \$1,000,000 in the end.<sup>53</sup>

The lies supposedly continued after the men passed the velvet rope. Bar employees would hide menus, misrepresent drink prices, surreptitiously add vodka or drugs to the customers’ drinks, forge their signatures on credit card receipts, and serve the B-girls water in shot glasses.<sup>54</sup>

The defendants denied everything other than the B-girls’ initial deception.<sup>55</sup> If anything untoward or illicit happened inside the clubs, the defendants claimed ignorance and absence.<sup>56</sup> In their view,

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women into the United States illegally to work as ‘Bar Girls’ or ‘B-Girls,’ to lure out-of town businessmen and tourists from legitimate South Beach clubs to the defendants’ private clubs.”).

<sup>49</sup> *Takhalov*, 827 F.3d at 1311.

<sup>50</sup> *How Cruel Were the B-Girls?*, CNBC (May 12, 2016, 11:16 AM), <https://www.cnn.com/video/2016/05/12/how-cruel-where-the-b-girls.html>. (statement of retired Miami police detective Luis King).

<sup>51</sup> Jay Weaver, ‘B-girl’ Trial a Cautionary Tale for Drunk SoBe Tourists, MIAMI HERALD, Nov. 3, 2012, <https://www.miamiherald.com/latest-news/article1944248.html> [hereinafter Weaver, ‘B-girl’ Trial].

<sup>52</sup> DOJ Press Release, *supra* note 48.

<sup>53</sup> Weaver, ‘B-girl’ Trial, *supra* note 51.

<sup>54</sup> *Takhalov*, 827 F.3d at 1310; *see* *United States v. Feldman*, 931 F.3d 1245, 1250–51 (11th Cir. 2019); DOJ Press Release, *supra* note 48.

<sup>55</sup> *Takhalov*, 827 F.3d at 1310.

<sup>56</sup> *Id.* at 1310–11 (“As for the swindling going on inside the clubs—the lying about prices, the forging of signatures, and so on—the defendants said that they knew nothing about it. Instead, the defendants testified, they were merely investors

significantly, the customers were not victims because the B-girls' deception delivered the customers just what they wanted: entrance into trendy South Beach clubs, bottles of liquor, and attractive female company for the evening.<sup>57</sup> The customers might well have gone elsewhere had they known of the B-girls' financial arrangement, but so be it.<sup>58</sup> Were they not entertained?<sup>59</sup>

The U.S. District Court for the Southern District of Florida considered a precise issue: whether the fact of the B-girls' initial deception—standing alone, as conceded—would support a conviction for wire fraud.<sup>60</sup> The government argued that it would, and the jury could convict based solely on that deception.<sup>61</sup> The defense argued that it would not, and the jury could not convict based solely on the “failure to disclose the financial arrangement between the B-girls and the Bar.”<sup>62</sup> Indeed, worried that they might be convicted of wire fraud based on nothing more than the B-girls' concealment, the defendants requested a jury instruction that “[f]ailure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense.”<sup>63</sup> The court denied the request as an incorrect statement of the law.<sup>64</sup> Following the court's lead, the government argued at closing that “the B-girls' lies were material.”<sup>65</sup>

The trial lasted three months, with the government charging nineteen defendants in a wide-ranging fraud conspiracy.<sup>66</sup> Thirteen

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in the clubs—or in charge of the credit-card transactions—but were not involved in the day-to-day workings of the clubs.”).

<sup>57</sup> *Id.* at 1311.

<sup>58</sup> *Id.* (quoting prosecutor's statement that “even the defendant's own witness told you, had they known that these women worked for the clubs they likely wouldn't have even gone”); *see id.* at 1310 (“That a defendant merely induced the victim to enter into a transaction that he otherwise would have avoided is therefore insufficient to show wire fraud.”) (alteration and internal quotation marks omitted).

<sup>59</sup> *Cf.* *GLADIATOR* (DreamWorks, Universal Pictures, Scott Free Productions 2000) (Maximus Decimus Meridius asking crowd, “Are you not entertained?”).

<sup>60</sup> *Takhalov*, 827 F.3d at 1311.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 1314.

<sup>64</sup> *Id.* at 1311.

<sup>65</sup> *Id.*

<sup>66</sup> DOJ Press Release, *supra* note 48; Jay Weaver, *Appeals Court Throws Out Miami Beach 'Bar-Girl' Convictions*, MIAMI HERALD, July 11, 2016,

defendants pled guilty before trial, one pled guilty during trial, one was acquitted, and one was a fugitive.<sup>67</sup> Three defendants were left to face the jury. Not surprisingly, as the defense had already conceded the fact of the B-girls' lies and the government stressed their materiality, the jury convicted the remaining defendants on multiple counts of wire fraud and money laundering.<sup>68</sup> The named defendant, Albert Takhalov, received the longest sentence of twelve years in prison, as he had played a central role handling credit card transactions at five nightclubs.<sup>69</sup>

The defendants appealed to the Eleventh Circuit. At issue was whether the district court had abused its discretion in refusing to give the defendants' proposed jury instruction.<sup>70</sup> These "allegedly swindled men . . . got what they paid for—nothing more, nothing less."<sup>71</sup> So did the jury instruction state the law correctly?<sup>72</sup> Is there no wire fraud when the victims received exactly what they asked for? Short answers: Yes, it did. And no, there is not.<sup>73</sup>

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<https://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article88982837.html> [hereinafter Weaver, *Appeals Court*].

<sup>67</sup> DOJ Press Release, *supra* note 48.

<sup>68</sup> *Takhalov*, 827 F.3d at 1311.

<sup>69</sup> See DOJ Press Release, *supra* note 48 (praising the combined "investigative efforts of the FBI, the Miami Beach Police Department, and ICE's Homeland Security Investigations); Weaver, *Appeals Court*, *supra* note 66; Jay Weaver, *Convicted Club Operator in Miami Beach "Bar Girl" Ring Sentences to 6 1/2 Years in Prison*, MIAMI HERALD, June 1, 2016, <https://www.miamiherald.com/latest-news/article1952053.html>.

<sup>70</sup> *Takhalov*, 827 F.3d at 1310; see *United States v. Carrasco*, 381 F.3d 1237, 1242 (11th Cir. 2004) ("We review a district court's refusal to give a requested jury instruction for abuse of discretion. A district court's refusal to give a requested instruction is reversible error if (1) the requested instruction was a correct statement of the law, (2) its subject matter was not substantially covered by other instructions, and (3) its subject matter dealt with an issue in the trial court that was so important that failure to give it seriously impaired the defendant's ability to defend himself.") (citation and internal quotation marks omitted).

<sup>71</sup> *Takhalov*, 827 F.3d at 1311.

<sup>72</sup> See *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) ("We review the legal correctness of a jury instruction de novo, but defer on questions of phrasing absent an abuse of discretion.") (citation omitted).

<sup>73</sup> *Takhalov*, 827 F.3d at 1315–25 (finding that jury instruction was correct statement of law, critical to defendants' case theory, and not substantially covered by other jury instructions, and that failure to give instruction was not harmless error); see *id.* at 1314 (stating that "a wire-fraud case must end in an acquittal if

Examining the statutory phrase, “scheme or artifice to defraud,” the Eleventh Circuit adopted the plain meaning of “defraud.”<sup>74</sup> Perhaps reflecting the advanced age of the noun “fraud,” dictionaries of legal terms and dictionaries of plain English converge on the verb form.<sup>75</sup> *Black’s Law Dictionary* defines “defraud” as both “[t]o cause injury or loss to (a person or organization) by deceit” and “to trick (a person or organization) in order to get money.”<sup>76</sup> *Merriam-Webster Dictionary* defines “defraud” more concisely (and somewhat circularly) as “to deprive of something by deception or fraud.”<sup>77</sup> Both *Black’s* and *Merriam-Webster*, then, add an injury or deprivation component to the notion of deception when defining “defraud.” Granted, a trick to get money may not in the end yield any money. But *Black’s* includes such definition only in parity with the causation of injury or loss.<sup>78</sup> Defrauding includes a deception that is, critically, *en route* toward harm.<sup>79</sup> Just as the ancient notion of fraud is tied to harm, and a common-law claim for fraud includes the element of damage, so the notion of defrauding is tied to intended harm.<sup>80</sup> Absent an “intent to harm, there can only be a scheme *to deceive*, but

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the jury nevertheless believes that the alleged victims received exactly what they paid for”) (internal quotation marks omitted).

<sup>74</sup> *Id.* at 1312.

<sup>75</sup> See *Defraud*, MERRIAM-WEBSTER DICTIONARY (2020) (dating first known use of “defraud” modern meaning).

<sup>76</sup> *Defraud*, BLACK’S LAW DICTIONARY (11th ed. 2019); see *Takhalov*, 827 F.3d at 1312 (quoting only the first definition).

<sup>77</sup> *Defraud*, MERRIAM-WEBSTER DICTIONARY (2020), <https://www.merriam-webster.com>; see *Takhalov*, 827 F.3d at 1312 (quoting 2002 edition of *Webster’s Third New International Dictionary* for definition of “defraud” as “to take or withhold from (one) some possession, right, or interest by calculated misstatement or perversion of truth, trickery, or other deception”).

<sup>78</sup> See *Become a True Dictionary Buff*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/words-at-play/dictionary-facts-and-trivia/the-order-of-the-definitions-may-not-mean-what-you-think> (last visited June 9, 2020) (“All the senses of a word that are listed are equal.”).

<sup>79</sup> *Takhalov*, 827 F.3d at 1312 (“Thus, deceiving is a necessary condition of defrauding but not a sufficient one.”).

<sup>80</sup> *Id.* at 1313 (“[I]f a defendant does not intend to harm the victim . . . then he has not intended to defraud the victim.”); see, e.g., *Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985) (listing fraud elements as “(1) a false statement concerning a material fact; (2) the representor’s knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and, (4) consequent injury by the party acting in reliance on the representation.”).

not one *to defraud*.”<sup>81</sup> Deception may be always sinful, but is not always criminal.<sup>82</sup>

The Eleventh Circuit next addressed what such intent to harm might look like, offering as illustration two versions of the following hypothetical.<sup>83</sup> A man wants to exchange a dollar bill for four quarters.<sup>84</sup> So, using a cellphone signal that crosses state lines, he calls his neighbor and says that his child is terribly ill.<sup>85</sup> When the neighbor “runs over” out of concern, the man asks her to make change and “promises to give her a true dollar.”<sup>86</sup> In truth, the child is not ill; the man just needed quarters and was not inclined to visit a bank.<sup>87</sup> Ignoring questionable parenting choices, the court focused on the nature of the bargain. In the first version of the hypothetical, the man and his neighbor exchange money and go about their days.<sup>88</sup> In the second, the man passes a counterfeit bill to the neighbor.<sup>89</sup> Even though both versions involve deception about the child, only the second would be actionable as wire fraud.<sup>90</sup> The second version involves defrauding due to the additional deception about the “true dollar.”<sup>91</sup> Only with the counterfeit bill did the man intend to deprive his neighbor of something of value, and such deprivation of value ultimately inflicted harm.<sup>92</sup> The man’s intent to harm his neighbor found

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<sup>81</sup> *Takhalov*, 827 F.3d at 1313; *see id.* at 1312 (noting that “to *defraud*, one must intend to use deception to cause some injury; but one can *deceive* without intending to harm at all”).

<sup>82</sup> *Id.* at 1312 (“[O]ne who defrauds always deceives, but one can deceive without defrauding.”); *see also* *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (“Although the government is not required to prove actual injury, it must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims. Only a showing of intended harm will satisfy the element of fraudulent intent.”).

<sup>83</sup> *See Takhalov*, 827 F.3d at 1313.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1313 & n.4.

<sup>86</sup> *Id.* at 1313.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; *cf. Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996) (noting that “[d]epriving someone of an arguable (though not yet established) claim inflicts actual injury because it deprives him of something of value”).



expression in his “lie about the nature of the bargain.”<sup>93</sup> Significantly, the neighbor’s money was the sole thing of value in this hypothetical, as the law does not view neighborly trust and personal time as property rights under the protective umbrella of criminal fraud statutes.<sup>94</sup> Trust and time fall into the unprotected category of “intangible, non-property, non-monetary rights.”<sup>95</sup>

Analogously, on the facts of *Takhalov*, a beautiful young woman can target a businessman and lure him to drink at a bar while concealing her relationship with the bar owner, all without committing wire fraud.<sup>96</sup> Regardless of the bar owner’s “relationship with the woman, the businessman got exactly what he bargained for”: the target “received his drink, and he had the opportunity to buy a young woman a drink.”<sup>97</sup> By contrast, if the woman promises the businessman a glass of 1959 Dom Pérignon in exchange for his credit card payment, but intends to pour him a glass of Prosecco instead, then she does commit wire fraud “[b]ecause the misrepresentation goes to the value of the bargain.”<sup>98</sup> As in the sick child hypothetical, shattered trust and wasted time fall by the wayside. Only a lie about the financial exchange inside the bar expresses the defendant’s intent to deprive the victim of something of value and, so, to harm the

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<sup>93</sup> *Takhalov*, 827 F.3d at 1313–14.

<sup>94</sup> *See id.* at 1313. (“Although the transaction would not have occurred but for the lie in the first scenario—the woman would have remained home except for the phony sickness—the man nevertheless did not intend to deprive the woman of something of value by trick, deceit, and so on.”) (alteration and internal quotation marks omitted).

<sup>95</sup> *See United States v. Dynalectric Co.*, 859 F.2d 1559, 1570 (11th Cir. 1988) (interpreting mail fraud statute and noting that “the only fraudulent schemes exempt from the mail fraud statute are those involving intangible, non-property, non-monetary rights” and that the “statute applies to any fraudulent scheme involving a monetary or property interest, whether that interest is tangible or intangible”); *see also* *Sekhar v. United States*, 570 U.S. 729, 734 (2013) (holding that, for purposes of Hobbs Act, “[t]he property extorted must therefore be *transferable*—that is, capable of passing from one person to another”).

<sup>96</sup> *Takhalov*, 827 F.3d at 1314.

<sup>97</sup> *Id.* at 1313.

<sup>98</sup> *Id.*

victim.<sup>99</sup> Perhaps that bargain would not have occurred but for the opening lie, but the opening lie was not about the bargain.<sup>100</sup>

Accordingly, for purposes of wire fraud, a scheme to defraud involves a “lie about the nature of the bargain.”<sup>101</sup> Such lies primarily reflect either price—a bottle of 1959 Dom Pérignon valued at \$42,350—or quality—a bottle of sparkling wine corked in Italy rather than in France.<sup>102</sup> A lie about anything other than the bargain itself, no matter how wicked, selfish, or unneighborly, cannot support a wire fraud prosecution.<sup>103</sup>

At trial, the *Takhalov* defendants had asked the district court to instruct the jury that the B-girls’ lies outside the nightclubs were insufficient to convict.<sup>104</sup> The Eleventh Circuit interpreted that instruction as a statement “that the defendants had tricked the victims into entering a transaction but nevertheless gave the victims exactly what they asked for and charged them exactly what they agreed to pay.”<sup>105</sup> The B-girls’ lies were deceptive and intentional, but not lies about the bargain the purported victims were entering: an evening of “absurdly expensive drinks at the bar.”<sup>106</sup> That’s what the businessmen

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<sup>99</sup> See *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (“Misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution. Instead, the deceit must be coupled with a contemplated harm to the victim. Moreover, the harm contemplated must affect the very nature of the bargain itself.”); see also *Takhalov*, 827 F.3d at 1314 (adopting Second Circuit interpretation of wire fraud statute).

<sup>100</sup> *Takhalov*, 827 F.3d at 1310, 1313 (noting that “the woman would have remained home except for the phony sickness”).

<sup>101</sup> *Id.* at 1313–14.

<sup>102</sup> *Id.* at 1314, 1316; see Jenny Chang, *Top Ten Most Expensive Champagne Bottles in the World in 2020*, FINANCESONLINE (Jan. 14, 2020), <https://financeonline.com/top-10-most-expensive-champagne-bottles-in-the-world/>; *Roederer v. J. Garcia Carrión, S.A.*, 732 F. Supp. 2d 836, 841 (D. Minn. 2010) (“When used properly, the term ‘champagne’ denotes a sparkling wine made according to the traditional method from grapes grown in the Champagne region of France.”).

<sup>103</sup> *Takhalov*, 827 F.3d at 1314 (“[I]f a defendant lies about something else . . . then he has not lied about the nature of the bargain, has not ‘schemed to defraud,’ and cannot be convicted of wire fraud on the basis of that lie alone.”).

<sup>104</sup> *Id.* at 1310–11, 1315 (paraphrasing and quoting proposed jury instruction).

<sup>105</sup> *Id.* at 1310.

<sup>106</sup> *Id.* at 1316–18 (recognizing that defendants “did not argue that they lacked the specific intent to deceive the victims; indeed they admitted that they fervently hoped to do just that. The defendants instead argued that they had intended to deceive the victims in only one way—by tricking them into coming to the bars—

got. According to the Eleventh Circuit, then, “the proposed instruction was a correct statement of the law.”<sup>107</sup> The district court abused its discretion by refusing to give that jury instruction.<sup>108</sup> Because the error was not harmless, the Eleventh Circuit reversed.<sup>109</sup>

In its initial opinion in *Takhalov*, the Eleventh Circuit reversed all wire fraud convictions but one, based on an email one defendant had sent to American Express after it approved a questionable, allegedly fraudulent charge on the customer’s credit card account.<sup>110</sup> Upon rehearing, the panel revised its opinion and reversed that last conviction as well, wiping clean the defendants’ wire fraud convictions *en masse*.<sup>111</sup> Deception yes, wire fraud no.<sup>112</sup>

### B. *United States v. Feldman*

Three years after its rehearing in *Takhalov*, the Eleventh Circuit heard another appeal predicated on the B-girls’ lies. In *United States v. Feldman*, the court considered the same “basic hustle” underlying *Takhalov*, involving one of the same defendants from *Takhalov*.<sup>113</sup> Isaac Feldman, a real estate broker from Sunny Isles Beach who supposedly “liked hanging out with the women because they made him feel like Hugh Hefner,” had invested in two Miami Beach nightclubs that hired B-girls.<sup>114</sup> In the original trial, he received a sentence of eight years and four months in prison.<sup>115</sup> After the court reversed the convictions of Feldman and his co-defendants, the government

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and that such a deception was not wire fraud. Put another way, the defendants did not dispute that they lacked specific-enough intent; they argued that what they specifically intended to do was not a crime.”).

<sup>107</sup> *Id.* at 1316, 1319.

<sup>108</sup> *Id.* at 1319–20.

<sup>109</sup> *Id.* at 1323–24.

<sup>110</sup> *Id.* at 1325; *United States v. Takhalov*, 838 F.3d 1168, 1170 (11th Cir. 2016).

<sup>111</sup> *Takhalov*, 838 F.3d at 1170.

<sup>112</sup> See Raymond Lee, Note, *American Greed: The Eleventh Circuit Analyzes Whether Booze, Babes, and Business Can Tightrope the Line Between Fraud and Deceit*, 83 MO. L. REV. 753, 769 (2018) (“Somewhere between low moral standards and a penchant for profit lies a nexus in which objectionable business practices can thrive. The Defendants found precisely that sweet spot.”).

<sup>113</sup> *United States v. Feldman*, 931 F.3d 1245, 1250 (11th Cir. 2019).

<sup>114</sup> *Id.*; Weaver, ‘B-girl’ Trial, *supra* note 51; see Weaver, *Appeals Court, supra* note 66.

<sup>115</sup> DOJ Press Release, *supra* note 48.

redacted the indictment, Feldman again pleaded not guilty, and a new jury tried him individually.<sup>116</sup> The jury convicted him of conspiracy to commit wire fraud and conspiracy to commit money laundering, and the trial judge sentenced him to the same 100-month prison term.<sup>117</sup> He appealed, and a new Eleventh Circuit panel affirmed the convictions and sentence.<sup>118</sup> Judge William Pryor wrote the panel opinion—and took the occasion to write a concurrence solely to “express some concerns about our puzzling opinion” in *Takhalov*.<sup>119</sup>

The Eleventh Circuit’s holding in *Takhalov* was clear enough: the district court had committed reversible error when it rejected the defendants’ proposed jury instruction that the B-girls’ failure to disclose their financial arrangement with the bar, in and of itself, was not sufficient for a wire fraud conviction.<sup>120</sup> Judge Pryor described that instruction as “obviously correct.”<sup>121</sup> But the court’s holding was “all that is clear,” as “[t]he rationale for that decision remains an enigma.”<sup>122</sup> Specifically, Judge Pryor took issue with the opinion’s “mixed signals” and unduly “narrow construction of the phrase ‘scheme or artifice to defraud.’”<sup>123</sup> Weighing in the balance various interpretations of the opinion, Judge Pryor found all wanting.

First, on a narrow interpretation, the *Takhalov* court could have distinguished the B-girls’ mere nondisclosure from affirmative misrepresentation.<sup>124</sup> Their failure to disclose would “*never* ‘in and of itself’” prove a scheme to defraud.<sup>125</sup> Or, the court could have

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<sup>116</sup> *Feldman*, 931 F.3d at 1250, 1252.

<sup>117</sup> *Id.* at 1250 (noting a sentence of 100 months).

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 1254 (W. Pryor, J., concurring) (rejecting defendant’s arguments based on, among other things, double jeopardy, insufficient evidence, and due process by way of *Oliver Twist*); *id.* at 1265–74.

<sup>120</sup> *Id.* at 1265 (alteration and internal quotation marks omitted); *see id.* at 1267 (“To be sure, the bottom-line *holdings* of *Takhalov* are straightforward enough.”).

<sup>121</sup> *Id.* at 1267; *see id.* at 1273 (“I do not mean to imply doubt about the correctness of its result.”).

<sup>122</sup> *Id.* at 1273.

<sup>123</sup> *Id.* at 1265, 1267 (“Although the holdings of *Takhalov* may be easy to understand, its reasoning is less so.”).

<sup>124</sup> *Id.* at 1267.

<sup>125</sup> *Id.* (adding that concealment “tantamount to a misrepresentation . . . must also be material, made with scienter, and intended to induce detrimental reliance”). Judge Pryor noted that nondisclosure must be accompanied by “special circumstances” such as a confidential relationship between the parties. *Id.*

understood the jury “instruction to mean that the defendants would not have schemed to defraud if the *only* way they intended the concealment of the B-girls’ employment status to affect customers was by influencing them *merely to set foot* in the nightclubs.”<sup>126</sup> Tricking a customer into entering a nightclub would not constitute wire fraud because such a trick is not a transaction affecting the customer’s property rights.<sup>127</sup> According to Judge Pryor, the problem with these narrow readings is that both would transform the thrust of the *Takhalov* court’s opinion into dicta: a “scheme to defraud” refers only to a scheme “in which a defendant lies about the nature of the bargain itself,” and thus a jury must acquit if “the alleged victims received exactly what they paid for.”<sup>128</sup> The court would not need any of that discussion in order to reach the same outcome.<sup>129</sup>

Moving on, Judge Pryor next offered a broad interpretation: there was no scheme to defraud even if the defendants intended the B-girls’ lies to “affect customers *both* by inducing them to set foot in the clubs *and* by inducing them to buy drinks once they were there.”<sup>130</sup> The B-girls lied standing outside the nightclubs and tricked their unsuspecting targets into a bargain inside the nightclubs.<sup>131</sup> From a harm perspective, the targets suffered no cognizable injury because they understood the essential terms of that bargain and got the drinks they paid for.<sup>132</sup> Or, from a materiality perspective, the lies were immaterial because their subject matter was other than the “nature of the bargain.”<sup>133</sup>

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1268.

<sup>128</sup> *United States v. Takhalov*, 827 F.3d 1307, 1313–15 (11th Cir. 2016), *modified*, 838 F.3d 1168 (11th Cir. 2016) (internal quotation marks omitted); *see Feldman*, 931 F.3d at 1273.

<sup>129</sup> *See Feldman*, 931 F.3d at 1273.

<sup>130</sup> *Id.* at 1268.

<sup>131</sup> *Id.* at 1270 (describing “having been tricked into a transaction”).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (arguing that “[o]n the injury-based reading, the thesis of Part II.A.1 is that the harm of having been tricked into a transaction, while still understanding its essential terms, is not an injury that would make fraud actionable at common law” and “on the materiality-based reading, Part II.A.1 means that a lie about something other than ‘the nature of the bargain’ is necessarily immaterial”).

Judge Pryor rejected both perspectives as untethered from the common law.<sup>134</sup> The problem with the “injury-based reading” is that common law has long recognized fraud in the inducement based on a collateral and material misrepresentation.<sup>135</sup> To separate wire fraud from fraud in the inducement is to put the federal fraud statutes at odds with actionable fraud.<sup>136</sup> The problem with the “materiality-based reading” is that common law does not limit material statements to just those about price, quality, or nature of a bargain.<sup>137</sup> Wire fraud requires a material falsehood, to be sure.<sup>138</sup> But materiality is sensitive to circumstances, reflects the perspective of a reasonable person, and defies limitation as a matter of law.<sup>139</sup> A deception is material when “it has a natural tendency to influence, or is capable of influencing, the decision maker to whom it is addressed.”<sup>140</sup>

Perhaps bound by the norm of professional respect—and certainly by the norm of horizontal stare decisis<sup>141</sup>—Judge Pryor offered his concurrence not as a takedown of the court’s opinion but as a cautionary tale for judges and attorneys: “the bench and bar should

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<sup>134</sup> *Id.* at 1273 (“So, on examination, the two most plausible ways of translating the analysis of Part II.A.1 into the language of the common law turn out to be doctrinal dead ends.”).

<sup>135</sup> *Id.* at 1270–71.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1272–73.

<sup>138</sup> *Neder v. United States*, 527 U.S. 1, 25 (1999).

<sup>139</sup> *Feldman*, 931 F.3d at 1272; *see Neder*, 527 U.S. at 22 n.5; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 9 (AM. LAW INST., Tentative Draft No. 2, 2014) (“Liability for fraud attaches only to misrepresentations that are material. A misrepresentation is material if a reasonable person would give weight to it in deciding whether to enter into the relevant transaction, or if the defendant knew that the plaintiff would give it weight (whether reasonably or not). The question, in effect, is whether the defendant knew or should have known that the misrepresentation would matter to the plaintiff.”).

<sup>140</sup> *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009) (alteration and internal quotation marks omitted).

<sup>141</sup> *See, e.g., United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (“We acknowledge the strength of the prior panel precedent rule in this circuit. Under that rule, a prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.”).

exercise due care in interpreting our opinion in *Takhalov* and determining its precedential value.”<sup>142</sup>

*Takhalov* remains good law, but the *Feldman* concurrence may have blunted its force. Just six weeks after the Eleventh Circuit decided *Feldman*, it decided *United States v. Waters* and yet again heard the appeal of a wire fraud conviction and considered the denial of a proposed jury instruction.<sup>143</sup> There, the defendant had lied—“lock, stock, and barrel; stem to stern, top to bottom”—when he sent fake letters to lenders attesting to his creditworthiness in order to obtain a \$6 million loan.<sup>144</sup> Following *Takhalov* nearly word for word, the defendant had requested a jury instruction that “to defraud, one must intend to use deception to cause some injury; but one can deceive without intending to harm at all” and “if a Defendant does not intend to harm the victim—to obtain, by deceptive means, something to which the Defendant is not entitled—then he has not intended to defraud the victim.”<sup>145</sup> The district court refused to give that instruction, and the jury convicted the defendant on two counts of wire fraud.<sup>146</sup>

Chief Judge Carnes had served on the unanimous panel that decided *Takhalov* and now, writing for the unanimous panel in *Waters*, noted that a colleague on the bench “has questioned some of the statements in” *Takhalov*.<sup>147</sup> Recognizing the *Takhalov* issues in the present case, the court nonetheless found its precedent distinguishable: “[w]e need not get into that here.”<sup>148</sup> Reaching the opposite result from *Takhalov*, the court in *Waters* affirmed the district court’s refusal to give the proposed jury instruction as both incomplete and

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<sup>142</sup> *Feldman*, 931 F.3d at 1273 (“In the light of these concerns, I encourage the bench and bar to evaluate carefully the precedential value of *Takhalov* in future prosecutions under the fraud statutes.”).

<sup>143</sup> *United States v. Waters*, 937 F.3d 1344, 1346, 1349 (11th Cir. 2019).

<sup>144</sup> *Id.* at 1346.

<sup>145</sup> *Id.* at 1349–50.

<sup>146</sup> *Id.* at 1350.

<sup>147</sup> *Id.* at 1351; see *United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016), *modified*, 838 F.3d 1168 (11th Cir. 2016) (identifying panel of Chief Judge Carnes, Judge Martin, and U.S. District Judge Thapar sitting by designation from the Eastern District of Kentucky, with Judge Thapar as opinion author).

<sup>148</sup> *Waters*, 937 F.3d at 1351.

misleading.<sup>149</sup> In particular, the instruction would confuse the jury because it distinguished a scheme to defraud (where one necessarily intends harm) from a scheme to deceive (where one need not intend harm) without explaining that “harm” means depriving the victim of “what he paid for.”<sup>150</sup> Although the proposed instruction correctly explained the holding of *Takhalov*, without the additional explanation of harm, “the jury could hardly have been expected to apply our *Takhalov* decision correctly.”<sup>151</sup>

These recent opinions appear to confine *Takhalov* to its sensational, tabloid-ready facts. But *Takhalov* is worth a closer look, as it offers an analytical tool for wire fraud prosecutions going forward.

## II. SPECIFIC HARM AND SPECIFIC INTENT

The Eleventh Circuit’s opinion in *Takhalov* walks a fine line. The phrase “benefit of the bargain” never appears. Yet the court emphasized that the victims received “exactly what they wanted” and paid “exactly what they agreed to pay,” and at one point described a fictional businessman who “got exactly what he bargained for.”<sup>152</sup> Those same facts would be relevant to determine compensation in civil fraud: under the benefit-of-the-bargain rule, a defrauded buyer may recover “as damages the difference between the value of the property as represented and the actual value received.”<sup>153</sup> So *Takhalov* grafts a harm measure from a civil fraud case—benefit of the bargain—onto a criminal wire fraud case that does not require actual harm. Adding to the puzzle, Judge Pryor is correct that any

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<sup>149</sup> *Id.* at 1353 (finding that the district court did not abuse its discretion in refusing to give the proposed jury instruction even “[t]hough composed of quotations from our opinion in *Takhalov*”).

<sup>150</sup> *Id.* at 1353–54.

<sup>151</sup> *Id.* at 1353.

<sup>152</sup> *Takhalov*, 827 F.3d at 1310, 1314.

<sup>153</sup> *Benefit-of-the-Bargain Rule*, BLACK’S LAW DICTIONARY (11th ed. 2019); *see, e.g.*, *Gregg v. U.S. Indus., Inc.*, 887 F.2d 1462, 1466 (11th Cir. 1989) (“Our review of the relevant case law indicates that Florida follows the ‘flexibility theory’ in fraud actions, which permits a trial court to instruct the jury under either the out-of-pocket rule or the benefit of the bargain rule, whichever will more fully compensate the defrauded party.”).



interpretation of the wire fraud statute that untethers “scheme to defraud” from common-law fraud is a nonstarter.<sup>154</sup>

There may be a way to interpret *Takhalov* without losing its gist to dicta and without severing its ties to the common law. The central question—*Is there no wire fraud when the victims received exactly what they asked for?*—admits a longer answer. Specifically, there is no crime of wire fraud when the victims received the benefit of their bargain *consistent with the defendant’s intent*. This interpretation respects both the court’s opinion and the type of intent required to establish federal criminal fraud.

Consider again the Eleventh Circuit’s hypothetical of the caller, the neighbor, and the supposedly sick child.<sup>155</sup> That story involves two lies: one about the welfare of the caller’s child, and one about the authenticity of the caller’s dollar bill. The first bargain is, “Please come over and check on my child, and you’ll receive my gratitude.” The second bargain is, “Please give me four quarters, and you’ll receive my dollar.” We must distinguish these bargains and examine each under the light of the Eleventh Circuit’s reasoning. If only the first bargain includes deception, then there is no wire fraud because that bargain does not involve a thing of value in the eyes of the law: only trust and time. With no risk of harm, there is no intent to harm. By contrast, if the second bargain includes deception, then there is wire fraud because that bargain involves a thing of value: money. Now there is intent to harm. The two bargains may be sequential, with the first providing a necessary condition for the second. After all, the second bargain would not have occurred but for the first.<sup>156</sup> Nonetheless, they remain distinct for purposes of wire fraud

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<sup>154</sup> See *United States v. Feldman*, 931 F.3d 1245, 1265 (11th Cir. 2019) (W. Pryor, J., concurring) (“The Supreme Court has made clear that the statutory phrase ‘scheme or artifice to defraud’—a staple of the federal criminal-fraud statutes . . .—incorporates the traditional common-law meaning of fraud.”); see also *Neder v. United States*, 527 U.S. 1, 22 (1999) (“[B]oth at the time of the mail fraud statute’s original enactment in 1872, and later when Congress enacted the wire fraud and bank fraud statutes, actionable ‘fraud’ had a well-settled meaning at common law.”).

<sup>155</sup> *Takhalov*, 827 F.3d at 1313.

<sup>156</sup> See *id.* (“And this is so even if the transaction would not have occurred but for the trick.”).

culpability, and only the lie that risks a cognizable harm can support a conviction.<sup>157</sup>

Now consider a third version of the same hypothetical, which is a logical next step but left unstated in the court's discussion. As in the second version, which supports wire fraud, the caller tells a lie about his sick child and a lie about his money. Again, there is something of value at stake, and the caller intends to harm his neighbor by passing a counterfeit bill. But assume that in the end he does not do so. Perhaps he mistakenly picked up a true dollar, or his healthy child ran into the room and thwarted the money exchange. Whatever caused the defendant's scheme to fail, that failure should be irrelevant for purposes of prosecution. Wire fraud punishes both successful and unsuccessful schemes.<sup>158</sup> In this third version, the neighbor seems to have received the benefit of her bargain: she never took a counterfeit bill. Following the "exactly what they asked for" language from *Takhalov*, is there no offense here? Does incompleteness negate wire fraud?

That cannot be right, and it is best to avoid any interpretation that crashes into a *reductio ad absurdum*. Of course, the government may not bother prosecuting a clumsy, failed scheme to defraud.<sup>159</sup> Sentencing guidelines recommend less prison time in the absence of loss to a victim, which may further diminish the government's motivation to prosecute.<sup>160</sup> Nonetheless, that *de facto* outcome does not alter the conceptual point: an analysis of wire fraud must reach both successful and unsuccessful schemes.<sup>161</sup> We cannot read into the crime of

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<sup>157</sup> See *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (recognizing *The Wall Street Journal's* publication schedule and column contents as intangible property rights for purposes of mail and wire fraud).

<sup>158</sup> See, e.g., *United States v. Ross*, 131 F.3d 970, 986 (11th Cir. 1997).

<sup>159</sup> See *United States v. Bunday*, 804 F.3d 558, 570 & n.10 (2d Cir. 2015) (shifting from "requirement of *contemplated harm*" for wire fraud to "*requisite harm*," and rejecting "application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain," while upholding "convictions for mail and wire fraud where the deceit affected the victim's economic calculus or the benefits and burdens of the agreement") (emphasis added).

<sup>160</sup> See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (U.S. SENTENCING COMM'N 2018) (describing base offense level for fraud conviction).

<sup>161</sup> See *United States v. Williams*, 728 F.2d 1402, 1405 (11th Cir. 1984) (stating that the government "is not required to prove that the scheme succeeded to sustain a conviction under the mail fraud statute," and rejecting jury instruction

wire fraud an element that is notably absent; Congress sought to punish unsuccessful schemes by excluding the element of harm.<sup>162</sup> But it did include the element of *intent*: the defendant “must intend to use deception to cause some injury.”<sup>163</sup> A stronger interpretation of *Takhalov* looks not just at whether the victims received exactly what they asked for, but whether that receipt was consistent with the defendant’s intent. The Eleventh Circuit crystallizes the type of harm that must be looming in any wire fraud case: the bargain concerns something of value, and the potential victim would lose the benefit of that bargain. The opinion then suggests a deeper look: if the victim’s benefit of the bargain matches the defendant’s intent, then wire fraud does not lie.

Indeed, the court tracks backward from the outcome of the B-girls’ lies—the targets received exactly what they asked for—to the defendants’ intent: “had the requested instruction been given, a rational jury could find that the defendants lacked the intent to defraud on almost all of the wire-fraud counts.”<sup>164</sup> This consistency analysis

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“on the benefit or lack of benefit Williams received from the theft [as] . . . confusing and misleading”); *see also* *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1973) (“Since the gravamen of the [mail fraud] offense is a ‘scheme to defraud,’ it is unnecessary that the Government allege or prove that the victim of the scheme was actually defrauded or suffered a loss.”).

<sup>162</sup> *But see* *Neder v. United States*, 527 U.S. 1, 23 (1999) (Supreme Court reading materiality requirement into fraud statutes and noting that “we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes”).

<sup>163</sup> *United States v. Takhalov*, 827 F.3d 1307, 1312–13 (11th Cir. 2016), *modified*, 838 F.3d 1168 (11th Cir. 2016); *see* *United States v. Waters*, 937 F.3d 1344, 1353 (11th Cir. 2019) (noting that proposed jury instruction “emphasized the requirement that a defendant have the intent to harm”); *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (“Although the government is not required to prove actual injury, it must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims. Only a showing of intended harm will satisfy the element of fraudulent intent.”); *United States v. Masino*, No. 3:16cr17-MCR, 2019 WL 1045179, at \*1 n.2 (N.D. Fla. Mar. 5, 2019) (finding “no evidence of an intent to *harm* the charities by depriving them of property or money, as necessary to sustain the wire fraud conspiracy charge”); *see also* *Lanuti*, *supra* note 10, at 1155 (“There is a split in the circuits on whether an ‘intent to defraud’ requires proof of an intent to harm or injure in cases in which the object of the fraud is money or property.”).

<sup>164</sup> *Takhalov*, 827 F.3d at 1322; *see id.* at 1310–11 (describing jury instruction interchangeably as “they must acquit if they found that the defendants had tricked

finds support in the court's repeated references throughout *Takhalov* to both giving "the victims exactly what they asked for" and "not intending to harm the victim."<sup>165</sup> In the above hypothetical, then, the caller would still be guilty of wire fraud because his neighbor did not receive the benefit of her bargain consistent with his intent. Rather, the caller intended to harm his neighbor by depriving her of the benefit of her bargain for the dollar exchange.

Given the sordid facts of the B-girls' hustle and the nearly twenty indicted defendants, it is easy to entangle the admitted lies outside the nightclubs with the alleged lies inside the nightclubs.<sup>166</sup> But the issue before the Eleventh Circuit in *Takhalov* was focused to a pinpoint and forces us to isolate illicit activity. We must assume that the only lies in the case came from the B-girls standing outside the nightclubs and luring businessmen into the nightclubs: "Please join me in this bar, and you'll receive my company and buy me drinks."

Those lies are precisely and narrowly the focus of the defendants' proposed jury instruction: "[f]ailure to disclose the financial arrangement between the B-girls and the Bar, *in and of itself*, is not sufficient to convict a defendant of any offense."<sup>167</sup> And both sides agreed that the B-girls' lies could be viewed in isolation. The defendants conceded this sole, initial deception, testifying "that they believed this scheme was a perfectly legitimate business model."<sup>168</sup>

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the victims into entering a transaction but nevertheless gave the victims exactly what they asked for and charged them exactly what they agreed to pay" and "[f]ailure to disclose the financial arrangement between the B-girls and the Bar, in and of itself, is not sufficient to convict a defendant of any offense").

<sup>165</sup> See, e.g., *id.* at 1313 (noting that "one can *deceive* without intending to harm at all"); *id.* at 1313–14 (finding no intent to defraud where defendant "does not intend to harm the victim" and asking, "Did the man get what he bargained for? Yes."); *id.* at 1314 ("exactly what they paid for"); *id.* at 1316 ("exactly what they ordered"); *id.* at 1319 ("exactly what he paid for"); accord *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970) ("[W]e conclude that the defendants intended to deceive their customers but they did not intend to defraud them, because the falsity of their representations was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception.").

<sup>166</sup> See *supra* at Section I.A.

<sup>167</sup> *Takhalov*, 827 F.3d at 1311, 1314 (emphasis added).

<sup>168</sup> *Id.* at 1311; see also *United States v. Waters*, 937 F.3d 1344, 1355 (11th Cir. 2019) (noting that the *Takhalov* "defendants argued that their concealment of

While the government alleged many more misdeeds, it was content to have the jury convict on that one deception, arguing at closing that “the first lie was by the girls to get them to come to the clubs by not telling them that they work for the clubs and got a percentage and this was material.”<sup>169</sup> Accordingly, to faithfully interpret *Takhalov*, we must assume that the defendants were not responsible for lies about anything else—no hiding menus, no misrepresenting drink prices, no adding vodka or drugs to customers’ drinks, no forging credit card signatures, and no pouring water in shot glasses.<sup>170</sup> Erase all those details. We are left with beautiful women misrepresenting themselves as financially disinterested tourists to entice wealthy businessmen to spend the evening in a bar.<sup>171</sup> Nothing more. In essence, the B-girls told a lie analogous to the sick child, but not a lie analogous to the counterfeit dollar.<sup>172</sup>

Thus, the B-girls’ initial deception cannot support wire fraud because the victims received what they asked for and a rational jury could find the defendants’ intent consistent with that outcome. A corollary from *Takhalov* is that when the defendants’ intent is *inconsistent* with the victims’ receipt of what they asked for, wire fraud still lies.<sup>173</sup> Wire fraud requires the specific intent to defraud,

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their relationship with the B-Girls did not constitute wire fraud, regardless of whether that concealment was material to the businessmen’s decisions to enter the clubs”).

<sup>169</sup> *Takhalov*, 827 F.3d at 1311, 1319 (noting that government “repeatedly argued below that the B-Girls’ lies about their employment status was enough to convict the defendants of wire fraud”); *see id.* at 1316 n.8 (“The government of course argued that, in addition to tricking the victims into entering the bar, the defendants also charged them exorbitant drink-prices that the menus nowhere advertised. But all that shows is that the defendants’ case theory required the jury to find that the defendants did not monkey with the prices.”).

<sup>170</sup> *Id.* at 1310–11 (noting that defendants did not view the “allegedly swindled men” as “truly victims”).

<sup>171</sup> *See United States v. Feldman*, 931 F.3d 1245, 1260 (11th Cir. 2019) (identifying “the fraud theory that we rejected in *Takhalov*” as simply “that the B-girls’ concealment of their relationship with the clubs was an act of fraud”).

<sup>172</sup> *See Takhalov*, 827 F.3d at 1310–11, 1313.

<sup>173</sup> *See United States v. Near*, 708 F. App’x 590, 593, 602 (11th Cir. 2017) (affirming wire fraud convictions involving Small Business Innovation Research Program even though “district court determined that there was no loss to the government in this case because NSF and NASA got what they bargained for”); *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) (noting that “the deceit must

defrauding requires the intent to harm, and harm occurs when the victim does not receive what he requests.<sup>174</sup> It makes sense, then, that the Eleventh Circuit connects the outcome—“the alleged victims received exactly what they paid for”—with the deception—“a defendant lies about the nature of the bargain itself.”<sup>175</sup> The deception—about the bargain—must reflect the harm—about the benefit of that bargain.<sup>176</sup> The Eleventh Circuit offers price and characteristics of a good as “primary forms” of such a deception, not an exhaustive list.<sup>177</sup> A lie about the nature of the bargain just is an expression of intent to deprive a victim of the benefit of his bargain, through price, characteristics, or otherwise.<sup>178</sup> What counts as a lie about the nature

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be coupled with a contemplated harm to the victim [and] *the harm contemplated must affect the very nature of the bargain itself*)” (emphasis added).

<sup>174</sup> See *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009) (noting that “the specific intent required under the mail and wire fraud statutes is the intent to defraud, not the intent to violate a particular statute or regulation”).

<sup>175</sup> *Takhalov*, 827 F.3d at 1314–15; see *id.* at 1316 (describing defense theory as “we gave the victims exactly what they ordered . . . and thus any lies about the B-girls’ employment status did not misrepresent the value of the bargain”).

<sup>176</sup> See *id.* at 1317 (finding district court’s good-faith jury instruction insufficient because it “concerned only what it meant for the defendants to have a specific intent to deceive” but “said nothing about what kind of deception could constitute wire fraud”); see also *United States v. Fullwood*, No. 3:16-cr-48-J-34JBT, 2016 WL 5106940, at \*7 (M.D. Fla. Sept. 20, 2016) (denying motion to dismiss because, after identifying bargain as “the donated money would be used for a particular purpose,” the court could not “say as a matter of law that a misrepresentation regarding how donated funds are to be used does not concern the ‘nature of the bargain’ within the meaning of the wire fraud statute”).

<sup>177</sup> *Takhalov*, 827 F.3d at 1313; see *Primary*, MERRIAM-WEBSTER DICTIONARY (2020), (offering definitions of “first in order or time or development,” “of first rank, importance, or value,” and “direct, firsthand”); cf. *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1273 (11th Cir. 2010) (describing “two primary factors” for judicial estoppel and noting that “these factors are not exhaustive” and “courts must always give due consideration to the circumstances of the particular case”). But see *United States v. Waters*, 937 F.3d 1344, 1354 (11th Cir. 2019) (describing misrepresentation about nature of bargain as either “about the value of the thing” or “about the thing itself”); *Takhalov*, 827 F.3d at 1315–16 (approving jury instruction limited to “lie about the quality or price”).

<sup>178</sup> See *United States v. Johnson*, 945 F.3d 606, 612 (2d Cir. 2019) (“In right-to-control cases we determine if sufficient proof of fraudulent intent exists by considering *whether the defendant’s deception affected the very nature of the bargain* between the defendant and the victim.”) (alteration and internal quotation marks omitted) (emphasis added); *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970) (“[W]e have found no case in which an intent to

of the bargain, and what counts as a lie about something else, will depend on the facts of the bargain at issue.<sup>179</sup>

Looking back at the Eleventh Circuit's opinion in *Waters*, the court found the defendant's proposed jury instruction incomplete partly because, although it "emphasized the requirement that a defendant have the intent to harm, . . . it never defined what harm meant."<sup>180</sup> *Takhalov* instructs that harm means "the victim didn't get what he paid for."<sup>181</sup> A wire fraud defendant must intend *that* harm.

In the end, *Takhalov* stands as a modest clarification to the law of wire fraud, assigning an initial analytical role to harm. We should look for a specific type of harm, namely, whether the victim received the benefit of his bargain, and then ask whether that outcome is consistent with the defendant's intent. The ancient link between fraud and harm endures, even while harm remains outside the elements of a federal criminal fraud offense.

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deceive has been equated with an 'intent to defraud' where the deceit did not go to the nature of the bargain itself."); *see also Takhalov*, 827 F.3d at 1314 (complimenting Second Circuit's interpretation as "follow[ing] as a matter of logic from Congress's decision to use the phrase 'scheme to defraud' rather than 'scheme' or 'scheme to deceive'"); *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007) (finding "a fine line between schemes that do no more than cause their victims to enter into transactions they would otherwise avoid—which do not violate the mail or wire fraud statutes—and schemes that depend for their completion on a misrepresentation of an essential element of the bargain—which do violate the mail and wire fraud statutes").

<sup>179</sup> *See Takhalov*, 827 F.3d at 1314 (noting that "if a defendant lies about something else—*e.g.*, if he says that he is the long-lost cousin of a prospective buyer—then he has not lied about the nature of the bargain"); *Fullwood*, 2016 WL 5106940, at \*7 (describing "a contributor's expectation about how his donation will be used" as "go[ing] to the essence of the bargain itself"). A fact-specific analysis may help assuage Judge Pryor's concern in *Feldman* that the court's exclusion of "lies about something else" from wire fraud cases effectively excludes all fraud-in-the-inducement cases. *See United States v. Feldman*, 931 F.3d 1245, 1271–72 (11th Cir. 2019); *see also* *Petition for a Writ of Certiorari at 2, 8–9, Al-dissi v. United States*, No. 19-5805 (S. Ct. Aug. 29, 2019) (claiming in wire fraud case that "the evidence and the verdict can be understood only in the context of a fraudulent inducement theory").

<sup>180</sup> *Waters*, 937 F.3d at 1353.

<sup>181</sup> *Id.* at 1354.

### III. BENEFIT OF WHICH BARGAIN?

With harm front and center after *Takhalov*, future wire fraud cases may focus as a starting point on the potential harm from the alleged scheme: which bargain carries something of value for a fraud scheme and, thus, counts under the benefit-of-the-bargain analysis? Two recent federal cases involving the “right to control” theory of wire fraud support this prediction.

In the Eleventh Circuit case of *Aldissi v. United States*, two scientists were charged with wire fraud for submitting fraudulent research proposals to acquire federal funding, totaling approximately \$10.5 million in competitive contracts and grants designed to assist small businesses in research and innovation.<sup>182</sup> The government alleged that the defendants had lied about their laboratory space, equipment, physical address, subcontractors, employees, and eligibility, used Photoshop and copy-and-paste commands to forge letters of support, and falsified business records.<sup>183</sup> After an eighteen-day trial, a jury convicted both defendants, sentenced one to 180 months’ imprisonment and the other to 156 months, and ordered them to pay back millions in restitution.<sup>184</sup> On appeal, the defendants admitted that they had lied and forged documents and were not eligible for the funding, but claimed that there was insufficient evidence for wire fraud convictions.<sup>185</sup>

Following its opinion in *Takhalov*, the Eleventh Circuit identified the “fundamental dispute” to be “whether the Scientists’ admittedly material lies changed the nature of the bargain with the governmental agencies from whom they sought grants.”<sup>186</sup> Absent the scientists’ lies, the agencies would not have funded their research proposals.<sup>187</sup> Yet, despite their deception, the defendants argued that there was no scheme to defraud because they always intended to perform the research projects, they did fully perform, and “the government received exactly what it paid for: license-free access to technical data.”<sup>188</sup> The court rejected this argument as without merit, finding

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<sup>182</sup> *Aldissi v. United States*, 758 F. App’x 694, 698–99 (11th Cir. 2018).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 698; see Petition for a Writ of Certiorari, *supra* note 179, at 4, 10.

<sup>185</sup> *Aldissi*, 758 F. App’x at 699, 701.

<sup>186</sup> *Id.* at 701.

<sup>187</sup> Petition for a Writ of Certiorari, *supra* note 179, at 7.

<sup>188</sup> *Aldissi*, 758 F. App’x at 701.



that the defendants' deception did go to the nature of the bargain: "[b]y submitting applications which were replete with falsities, the Scientists defeated the entire purpose of the programs."<sup>189</sup> The defendants also argued that the trial court had erred in instructing the jury that it could find "specific intent to harm if the Scientists acted for personal gain *or* to harm the United States."<sup>190</sup> Again the Eleventh Circuit disagreed "because 'financial loss is not at the core of mail and wire fraud.'"<sup>191</sup>

After losing on appeal, the scientists turned to the Supreme Court with a petition for writ of certiorari, asking the high court to resolve a circuit split regarding what counts as cognizable harm for purposes of wire fraud.<sup>192</sup> Specifically, the circuits are split seven to four on "whether the deprivation of a victim's 'right to control' how to spend its money or to make informed economic decisions" is alone a sufficient property interest under the protection of the criminal fraud statutes.<sup>193</sup> The defendants argued against their wire fraud convictions because "the agencies received the financial benefit of their bargains (*i.e.*, scientific research in exchange for money) while losing nothing more than their 'right to control' which scientists to fund."<sup>194</sup> In their view, an exchange of research for money is a bargain that wire fraud protects, while an exchange of research for the "right to control" is not.<sup>195</sup> Tracking backward, the agencies received the benefit of the bargain that counts, consistent with the defendants' intent.<sup>196</sup>

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<sup>189</sup> *Id.* at 702. The *Aldissi* court noted that "[b]ecause the Scientists' lies, forgeries, and fabricated price quotes related to key ingredients for commercialization, those deceptions 'dishonestly circumvented the worthy purpose of the programs.'" *Id.* (alteration omitted) (quoting *United States v. Maxwell*, 579 F.3d 1282, 1303 (11th Cir. 2009)).

<sup>190</sup> *Id.* at 703.

<sup>191</sup> *Id.* (quoting *Maxwell*, 579 F.3d at 1302).

<sup>192</sup> Petition for a Writ of Certiorari, *supra* note 179, at 14–19.

<sup>193</sup> *Id.* at 14; *see id.* at 33 (asking Supreme Court to decide "right to control" theory "once and for all").

<sup>194</sup> *Id.* at 27.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 28 (arguing that because "agencies received the full financial benefit of their bargains; that is, they lost nothing more than their 'right to control' . . . the Government failed to prove specific intent to harm or harm itself"); *see id.* at 29 (stating "they had no specific intent to financially harm and visited no financial harm upon the United States").

Similarly, in the Second Circuit case of *United States v. Johnson*, the defendant was convicted of wire fraud and conspiracy to commit wire fraud based on his misrepresentations in a foreign currency exchange.<sup>197</sup> At trial and on appeal, the defendant argued that the sophisticated party on the other side of the exchange had received the benefit of its bargain.<sup>198</sup> The jury convicted, and the Second Circuit affirmed based on the “right to control” theory of harm.<sup>199</sup> The court looked directly from the harm to the deception as an expression of intent: “[i]n right-to-control cases we determine if sufficient proof of fraudulent intent exists by considering whether the defendant’s deception affected the very nature of the bargain between the defendant and the victim.”<sup>200</sup>

The defendant in *Johnson* filed an emergency motion to stay the appellate court’s order pending the filing and disposition of his petition for writ of certiorari to the Supreme Court.<sup>201</sup> Like the petitioners in *Aldissi*, his forthcoming certiorari petition will ask the Court to determine whether the loss of one’s “right to control” property is a type of bargain that supports wire fraud.<sup>202</sup>

In February 2020, the Supreme Court denied certiorari in *Aldissi* and the Second Circuit granted the stay in *Johnson*.<sup>203</sup>

#### CONCLUSION

The question raised in *Aldissi* and *Johnson* is essential after *Takhlov*. Federal sentencing for wire fraud varies based on harm. The analysis may, as well. As harm continues to play a key role in federal criminal fraud, reflecting its starring role in common-law fraud, courts will have to clarify what aspects of a bargain are valuable and, thus, worthy of protection. Otherwise, we will not know whether the victim received the benefit of one.

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<sup>197</sup> *United States v. Johnson*, 945 F.3d 606, 611–12 (2d Cir. 2019).

<sup>198</sup> *Id.* at 608.

<sup>199</sup> *Id.* at 611–14.

<sup>200</sup> *Id.* at 612 (internal alteration and internal quotation marks omitted).

<sup>201</sup> Emergency Motion of Defendant-Appellant for Stay of Mandate at 1–2, *United States v. Johnson*, No. 18-1503 (2d Cir. Jan. 23, 2020).

<sup>202</sup> *Id.* at 5–10.

<sup>203</sup> *Aldissi v. United States*, 758 F. App’x 694 (11th Cir. 2018), *cert. denied*, 2020 WL 872297 (S. Ct. Feb. 24, 2020) (No. 19-58-5); Order at 1, *United States v. Johnson*, No. 18-1503 (2d Cir. Feb. 21, 2020).