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## American Greed: The Eleventh Circuit Analyzes Whether Booze, Babes, and Business Can Tightrope the Line Between Fraud and Deceit

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## NOTE

# American Greed: The Eleventh Circuit Analyzes Whether Booze, Babes, and Business Can Tightrope the Line Between Fraud and Deceit

*United States v. Takhalov*, 827 F.3d 1307 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016)

*Raymond Lee*\*

### I. INTRODUCTION

South Beach, Miami, is renowned for its beautiful beaches, bikini-clad women, and incredible wealth.<sup>1</sup> Such an environment is ripe for opportunistic businessmen who are anxious to make an easy buck. Enter Albert Takhalov, Isaac Feldman, and Stanislav Pavlenko (the “Defendants”), three Russian immigrants who built a business model aimed precisely at taking advantage of the unique opportunities that South Beach has to offer.<sup>2</sup> By combining seductive women with tourism and alcohol, their profits quickly began to soar.<sup>3</sup> There was only one problem. The crux of their plan involved misleading their patrons. While schemes to profit from unsuspecting customers are hardly a modern concept, at what point does merely deceiving a customer become “taking advantage” of him? And at what point can a legitimate business model morph into a fraudulent criminal enterprise? The gray area in the middle is where the law tends to get murky.

Fraud itself is not defined anywhere in the federal criminal code.<sup>4</sup> As courts across the country – both state and federal – have helpfully observed,

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1. See Michelle S. Viegas, *Community Development and the South Beach Success Story*, 12 GEO. J. POVERTY L. & POL’Y 389, 392–93 (2005) (“Miami has earned its renown . . . from its . . . celebrity-frequented hotels and beaches . . . . This area’s mobile and diverse population of . . . independently wealthy entrepreneurs, models and tourists contributes to an eclectic atmosphere unlike any other in the United States.”).

2. See Brief for the United States at 6–7, *United States v. Takhalov*, 827 F.3d 1307 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016), (No. 13–12385–CC), 2014 WL 6844552, \*7–12.

3. See *id.* at 13–15.

4. See Fraud and False Statements, 18 U.S.C. ch. 47 (2012); see also Lawrence Bader, *Trying to Define ‘Fraud’ Under Federal Criminal Law*, FORBES (Oct. 19, 2011, 9:56 AM), <https://www.forbes.com/sites/insider/2011/10/19/trying-to-define-fraud->

“The law does not define fraud; it needs no definition. It is as old as falsehood and as versatile as human ingenuity.”<sup>5</sup> But this lack of definition means that the distinction between being defrauded and merely being deceived still presents itself in cases today. In the summer of 2016, the U.S. Court of Appeals for the Eleventh Circuit addressed the shortcomings of fraud in *United States v. Takhalov*.<sup>6</sup>

*Takhalov* is a case about booze, babes, and business practices that could easily be called deceptive.<sup>7</sup> Wealthy Miami tourists were effectively tricked into spending exorbitant sums of money on drinks and caviar in an effort to entertain attractive women whom they believed to be friendly fellow tourists, but were, in reality, employees of bars.<sup>8</sup> The case raises the question of whether all deceit is fraud or whether there is a level at which insidious entrepreneurs can mislead customers without violating federal statutes that prohibit fraudulent practices.<sup>9</sup>

This Note analyzes the facts and holdings of *Takhalov* and then delves into the history of statutes that prohibit employees from drinking and/or mingling with patrons, as well as the history of wire fraud. Next, it discusses the importance of not abusing the wire fraud statute so as to maintain a fine line between fraud and deceit. Lastly, this Note contends that the prosecution overstepped its bounds by bringing charges pursuant to the wrong criminal statute and that the correct statute, under which the prosecution should have brought charges, needs to carry tougher penalties.

## II. FACTS AND HOLDING

The Defendants collectively owned and operated a group of bars and nightclubs in South Beach, the most prominent of which was known as Caviar Bar.<sup>10</sup> Early in 2010, the Defendants constructed a plan to capitalize on Miami tourism.<sup>11</sup> They hired a number of young, attractive women, many of whom

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under-federal-criminal-law/#4608a7001527 (“Interestingly, the word fraud is not defined under [the federal criminal] statutes.”).

5. *State v. Shaw*, 847 S.W.2d 768, 775 (Mo. 1993) (en banc) (quoting *United States v. Bishop*, 825 F.2d 1278, 1280 (8th Cir. 1987)).

6. 827 F.3d 1307 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh’g*, 838 F.3d 1168 (11th Cir. 2016).

7. *Id.*

8. *Id.*; Brief for the United States, *supra* note 2, at 20.

9. *Id.*

10. Brief for the United States, *supra* note 2, at 6–12.

11. *Id.* at 8–9.

were foreign, known as “B-girls”<sup>12</sup> to help attract business.<sup>13</sup> The B-girls would work in pairs, scouring local hotels in search of available men.<sup>14</sup> In particular, they would look for “tell-tale signs of wealth, such as expensive watches or shoes.”<sup>15</sup> Once they found their marks, they would approach the men and pose as wholesome tourists in search of company.<sup>16</sup> The women would then proceed to get the men as drunk as possible with the ultimate goal of enticing them to go to Caviar Bar (or one of the Defendants’ other clubs) in mind.<sup>17</sup> The men, spurred along by hard drinking and casual conversation and totally unaware of the arrangement between the women and the bar, were often happy to oblige.<sup>18</sup>

At the Defendants’ club, the plan would come full circle. At the encouragement of the B-girls, targets invariably bought bottles of expensive champagne, rounds of excessively priced drinks, and heaps of fine Beluga caviar.<sup>19</sup> As the night continued, the number of drinks the men consumed would accumulate, which would cause their recollection of the evening to blur as their bar tabs began to soar.<sup>20</sup> In total, an estimated ninety men were enticed out of more

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12. A “B-girl” is “a woman employed by a bar, nightclub or the like, to act as a companion to male customers and to induce them to buy drinks, and usually paid a percentage of what the customers spend.” Amanda H. Littauer, *The B-Girl Evil: Bureaucracy, Sexuality, and the Menace of Barroom Vice in Postwar California*, 12 J. HIST. SEXUALITY 171, 174 (2003). The concept of “B-girls” and bars employing women to encourage men to purchase drinks goes back generations. See, e.g., *United States v. Amadio*, 215 F.2d 605, 609–10 (7th Cir.), *rev’d*, 348 U.S. 892 (1954) (“Almost all of the taverns and night clubs had ‘B girls’ . . . engaged in soliciting drinks from men customers.”); *People v. Burnette*, 102 P.2d 799, 805 (Cal. Dist. Ct. App. 1940).

13. *Takhalov*, 827 F.3d at 1310.

14. Jay Weaver, *Federal Trial of Miami Beach Club Operators Linked to Russian Mob Gets Underway*, MIAMI HERALD (Oct. 10, 2012, 8:37 AM), <http://www.miami-herald.com/latest-news/article1943427.html>.

15. *Id.*

16. See *Takhalov*, 827 F.3d at 1310.

17. Brief for the United States, *supra* note 2, at 13–14.

18. *Id.* at 14, 40.

19. See *id.* at 14–15; see also Nina Golgowski, *The Miami Honeytrap*, DAILYMAIL.COM (Nov. 5, 2012), <http://www.dailymail.co.uk/news/article-2227974/Alec-Simchuk-Russian-mobster-Miami-bar-girls-trial-reveals-1M-scam-Eastern-European-women.html>. According to the government, club employees would stop at nothing to keep the tab accruing, including providing shots of liquor that were kept behind the counter to “impair” the men further, ordering bottles for the victims, and possibly drugging the men. Brief for the United States, *supra* note 2, at 15. “[E]mployees would pour vodka in the men’s beer to get them drunker, misrepresent the prices of drinks, hide menus, cover up prices, and even forge the men’s signatures on credit-card receipts.” *Takhalov*, 827 F.3d at 1310.

20. See Brief for the United States, *supra* note 2, at 14.

than \$1,300,000 at the encouragement of the B-girls.<sup>21</sup> The most prominent victim, a former on-air meteorologist from Philadelphia, was influenced out of \$43,000 over a two-night period.<sup>22</sup>

The government viewed the Defendants' business enterprise as criminal, claiming the whole operation was nothing more than an unlawful scheme built on a series of lies.<sup>23</sup> In its view, the lies began the moment the girls first introduced themselves to the men<sup>24</sup> and ended with unsuspecting tourists blackout drunk, several thousand dollars poorer, or, in many cases, both.<sup>25</sup> Thus, in an effort to bring the scheme to a halt, a grand jury indicted the Defendants on a combined total of ninety-eight separate charges, including eighty-five counts of wire fraud,<sup>26</sup> four counts of conspiracy to commit wire fraud,<sup>27</sup> four counts of conspiracy to commit money laundering,<sup>28</sup> four counts of visa fraud,<sup>29</sup> and one count of bribery.<sup>30</sup>

The government argued that the jury could have convicted the Defendants of fraud based simply on the lies the women told the men to lure them into the bar in the first place, regardless of what happened after the men got there.<sup>31</sup> Had the men known the women were actually club employees rather than friendly strangers, they would not have entered the club.<sup>32</sup> In the government's

21. *See id.* at 79 (finding Pavlenko was responsible for \$273,897 in loss; Feldman was responsible for \$334,040 in loss; and Takhalov was responsible for \$719,219 in loss); Weaver, *supra* note 14.

22. Brief for the United States, *supra* note 2, at 26–27; *see also* Weaver, *supra* note 14.

23. *See Takhalov*, 827 F.3d at 1310.

24. The women had incentive to initiate contact, as the typical arrangement was that each B-girl received a twenty percent commission for bringing in customers. Weaver, *supra* note 14.

25. Brief for the United States, *supra* note 2, at 26–29.

26. 18 U.S.C. § 1343 (2012). The wire fraud statute allows for a charge to be brought for each individual occurrence of fraud and does not require that each occurrence be grouped together in one charge. *See United States v. Castillo*, 829 F.2d 1194, 1199 (1st Cir. 1987).

27. 18 U.S.C. § 1349 (2012).

28. *Id.* § 1956(h) (2012).

29. *Id.* § 1546 (2012).

30. *Id.* § 201; Brief for the United States, *supra* note 2, at 2–3. Pavlenko and Feldman were each charged with one count of conspiracy to commit wire fraud, twenty-six counts of substantive wire fraud, one count of conspiracy to defraud the U.S. Department of Homeland Security (visa fraud), and one count of conspiracy to commit money laundering. *Id.* at 2. Takhalov was charged with two counts of conspiracy to commit wire fraud, thirty-three counts of substantive wire fraud, two counts of conspiracy to defraud the U.S. Department of Homeland Security (visa fraud), two counts of conspiracy to commit money laundering, and one count of bribery. *Id.* at 2–3.

31. *United States v. Takhalov*, 827 F.3d 1307, 1311 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016).

32. *Id.*

view, any business conducted in the bar took place under false pretenses and amounted to fraud.<sup>33</sup>

The Defendants' story differed. During the trial, the Defendants freely admitted that they had tricked men into entering their clubs, but they did not believe that what they were doing was illegal.<sup>34</sup> Instead, the Defendants contended that they believed the scheme was "a perfectly legitimate business model."<sup>35</sup> They argued that if all the government could prove was that the men were tricked into entering the bar, then the men were merely deceived but not defrauded.<sup>36</sup> Although the women might have concealed their relationship with the club, once inside the club, the men ordered bottles of alcohol, drank them with their female companions, and were charged a price that they agreed to pay.<sup>37</sup> Thus, in the Defendants' view, none of the men were truly "victims."<sup>38</sup> Instead, they simply "got what they paid for – nothing more, nothing less."<sup>39</sup>

With that strategy in mind, and fearful that the jury might convict them of wire fraud based solely on their deceptive arrangement with the B-girls, the Defendants asked the trial court to instruct the jurors "that they must acquit if they found 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>40</sup> The trial court, believing that to be a misstatement of the law, did not allow the instruction.<sup>41</sup>

Ultimately, a jury from the U.S. District Court for the Southern District of Florida convicted the Defendants on only twenty of the ninety-eight combined counts.<sup>42</sup> However, those twenty counts were enough to result in the Defendants being sentenced to a sum total of more than thirty years imprisonment and being ordered to pay over \$90,000 in restitution.<sup>43</sup>

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33. *See id.*

34. *Id.* at 1310–11.

35. *Id.* at 1310.

36. *Id.* at 1311.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1310.

41. *Id.* at 1311.

42. Brief for the United States, *supra* note 2, at 3–4. Pavlenko was convicted of ten counts total, including one count of conspiracy to commit wire fraud, eight counts of substantive wire fraud, and one count of conspiracy to commit money laundering. *Id.* at 3. Feldman was convicted of one count of conspiracy to commit wire fraud and one count of conspiracy to commit money laundering. *Id.* at 3–4. Takhalov was convicted of eight total counts, consisting of two counts of conspiracy to commit wire fraud, three counts of substantive wire fraud, two counts of conspiracy to commit money laundering, and one count of visa fraud. *Id.* at 4.

43. *Id.* at 3–6. Pavlenko received a seventy-eight-month (six-and-a-half-year) sentence with three years of supervised release and was ordered to pay \$6,491.60 in restitution. *Id.* at 5. Feldman received a 100-month (eight-and-a-third-year) sentence with three years of supervised release and was ordered to pay \$15,498 in restitution.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit reversed and remanded all but a single visa fraud conviction, holding that the trial court abused its judicial discretion in refusing to give an instruction that could have possibly led the jury to reach a different verdict.<sup>44</sup>

### III. LEGAL BACKGROUND

#### A. B-Girl Statutes

Hiring girls to encourage men to spend money is a concept that has been around for ages. In America, the earliest evidence of this opportunistic behavior can be traced back at least as far as the 1850s.<sup>45</sup> During that period, women followed men out West, as both were anxious to capitalize on the gold rush.<sup>46</sup> Although ploys such as the “B-girl racket” were forced into a temporary hiatus during prohibition, they bounced back quickly, and taverns regularly employed saloon waitresses “whose constant pleas of ‘just one more little drink’ cost many a customer his shirt.”<sup>47</sup> These schemes flourished by the middle of the twentieth century “when hundreds of bars and night clubs [across the country] maintained salaried staffs of B-girls, who kept customers company at the bar and matched them drink-for-drink – in colored water, tea or soda pop, but at whiskey prices.”<sup>48</sup>

Legislators began to take note of the sheer amount of money being taken in by this “less than wholesome” industry, and, in an effort to eliminate these types of enticements, states began passing laws to prohibit them.<sup>49</sup> The reasons ascribed to these kinds of regulations were many. Among them were to avoid

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*Id.* Takhalov received a 204-month (seventeen year) sentence with three years of supervised release and was ordered to pay \$68,757.57 in restitution. *Id.* at 5–6.

44. *Takhalov*, 827 F.3d at 1324–25.

45. See Littauer, *supra* note 12, at 174.

46. *Id.*

47. *Id.* at 174–75 (“B-girls reappeared after Prohibition and became standard features of popular . . . bars during the Depression, wartime, and postwar years.”); see *B-Girls Fading Attraction in Bars Throughout U.S.*, SCHENECTADY GAZETTE (Dec. 27, 1954), <http://fultonhistory.com/newspaper%208/Schenectady%20NY%20Gazette/Schenectady%20NY%20Gazette%201954%20Grayscale/Schenectady%20NY%20Gazette%201954%20Grayscale%20-%209570.pdf>.

48. SCHENECTADY GAZETTE, *supra* note 47. B-girls have also appeared in popular culture. For example, Marilyn Monroe famously portrayed a B-girl in *Bus Stop* (1956). See Littauer, *supra* note 12, at 195. In the film, Monroe’s character, Sherrie, consumes four tea-and-sodas before her companion catches on and confronts her. *Id.* at 195–96 n.81. Monroe was nominated for a Golden Globe for her portrayal. *Winners & Nominees: Marilyn Monroe*, GOLDEN GLOBES, <https://www.goldenglobes.com/person/marilyn-monroe> (last visited Aug. 26, 2018).

49. See J. E. Leonarz, Annotation, *Regulations Forbidding Employees or Entertainers from Drinking or Mingling with Patrons, or Soliciting Drinks from Them*, 99 A.L.R.2d 1216, § 1[a] (1965) (updated weekly).

a deliberate commercial exploitation of the customer;<sup>50</sup> to curtail personal contact between female employees and nightclub patrons;<sup>51</sup> to avoid the danger to the public that bars might be converted from their proper use as places of sociable and relaxed drinking into places for solicitation of customers;<sup>52</sup> to prevent the evils resulting from encouraging customers to spend more money and drink more alcohol than they otherwise would;<sup>53</sup> and to eliminate the occupation of B-girls entirely – “a practice said to have done more to bring criticism upon the liquor industry than anything else.”<sup>54</sup>

While most states do not have a statute designed to prohibit arrangements in which bars hire women for the sole purpose of boosting business, Florida is one of the few states that does.<sup>55</sup> Enacted in 1961, Florida Statutes section 562.131 makes it unlawful for any employee<sup>56</sup> or agent of an establishment that possesses a liquor license to “beg or solicit any patron or customer” of that establishment to buy them a drink.<sup>57</sup> Further, it is unlawful for any establishment possessing a liquor license to knowingly permit any person in or around the premises “for the purpose of begging or soliciting any patron or customer” to buy drinks.<sup>58</sup> Florida has made violation of section 562.131 a second-degree misdemeanor<sup>59</sup> punishable by a maximum term of sixty days imprisonment and not more than \$500 in fines.<sup>60</sup>

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50. *Greenblatt v. Martin*, 2 Cal. Rptr. 508, 511 (Cal. Ct. App. 1960).

51. *City of New Orleans v. Kiefer*, 164 So. 2d 336, 339 (La. 1964).

52. *Greenblatt*, 2 Cal. Rptr. at 511.

53. *City of Miami v. Kayfetz*, 92 So. 2d 798, 803 (Fla. 1957).

54. *Leonarz*, *supra* note 49, § 2 (citing *United States v. R & J Enters.*, 178 F. Supp. 1, 4 (D. Alaska 1959)).

55. FLA. STAT. ANN. § 562.131 (West 2018); *see also, e.g.*, ALASKA STAT. ANN. § 04.16.020 (West 2018); CAL. PENAL CODE § 303 (West 2018); KY. REV. STAT. ANN. § 244.030 (West 2018); LA. STAT. ANN. § 26:286 (2018); TEX. CODE ANN. § 104.01 (West 2018); WIS. STAT. ANN. § 944.36 (West 2018).

56. The I.R.S. considers B-girls to be employees for income tax purposes. Rev. Rul. 62-157, 1962-2 C.B. 216 (“Where individuals mingle with and encourage customers to buy drinks in night clubs or similar-type establishments for remuneration determined on a commission basis or otherwise (the so-called B-Girls), they are employees of the operators of the establishments with respect to such services for purposes of the Federal employment taxes.”).

57. FLA. STAT. ANN. § 562.131(1).

58. *Id.* § 562.131(2).

59. *Id.* § 562.131(3).

60. *Id.* § 775.082(4)(b) (West 2018) (referencing the sixty days imprisonment); *Id.* § 775.083(1)(e) (West 2018) (noting the maximum \$500 fine).



Perhaps even more pertinent to the case at hand, the City of Miami likewise has its own ordinance restricting B-girl activity, which predates the Florida statute.<sup>61</sup> The Miami ordinance goes a step further than the Florida statute and makes it illegal for employees to “mingle or fraternize with customers.”<sup>62</sup>

### B. Wire Fraud

Enacted in 1952, the federal wire fraud statute<sup>63</sup> serves as “a jurisdictional hook” to facilitate federal prosecutorial involvement where it is not otherwise explicitly authorized.<sup>64</sup> Wire fraud generally consists of (1) a scheme to defraud by means of a material deception; (2) where the perpetrator intended to defraud; (3) while using interstate wires to carry out the scheme; (4) which resulted in, or would have resulted in, the loss of money or property.<sup>65</sup> The United States Supreme Court has observed on multiple occasions that the statute encompasses “everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.”<sup>66</sup> Thus, the statute is regularly used as a tool to prosecute general wrongdoing because transactions involving credit cards are transmitted across state lines, thereby constituting a “wire, radio, or television communication in interstate or foreign commerce.”<sup>67</sup>

Although the wire fraud statute makes criminal “any scheme or artifice to defraud,” the statute itself does not explain what constitutes such a scheme or

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61. Compare *B-Girls Fading Attraction in Bars Throughout U.S.*, *supra* note 47 (noting that in 1954, Miami enacted an ordinance to restrict B-girl activity), with FLA. STAT. ANN. § 562.131 (originally enacted as the Professional Service Corporation Act, ch. 621–234 (1961)).

62. MIAMI, FLA., CODE § 4-4 (2018), [https://library.municode.com/fl/miami/codes/code\\_of\\_ordinances?nodeId=PTIITHCO\\_CH4ALBE\\_ARTIINGE\\_S4-4EMNOMICU](https://library.municode.com/fl/miami/codes/code_of_ordinances?nodeId=PTIITHCO_CH4ALBE_ARTIINGE_S4-4EMNOMICU) (“It shall be unlawful for employees or entertainers in places dispensing alcoholic beverages for consumption on the premises to mingle or fraternize with the customers or patrons of such establishment.”).

63. 18 U.S.C. § 1343 (2012). The wire fraud statute is modeled after the mail fraud statute, which has been in existence since the 1872. C.J. Williams, *What Is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287 (2014). The mail fraud statute was originally enacted “to address the sale of counterfeit currency through the United States Mail.” *Id.* at 291.

64. *Id.* at 307.

65. Devika Singh et al., *Mail and Wire Fraud*, 54 AM. CRIM. L. REV. 1555, 1557 (2017).

66. *Pasquantino v. United States*, 544 U.S. 349, 377 (2005) (Ginsburg J., dissenting) (quoting *Durland v. United States*, 161 U.S. 306, 313 (1896)).

67. 18 U.S.C. § 1343; Peter R. Ezersky, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427, 1428 (1985).

artifice,<sup>68</sup> leaving the phrase “scheme to defraud” to be “judicially defined.”<sup>69</sup> Modern courts have defined the phrase broadly, allowing it to encompass deceptive schemes that do not fit the common law definition of fraud.<sup>70</sup> In many courts, including the Eleventh Circuit, a scheme to defraud is measured by a “reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.”<sup>71</sup> Generally, a scheme to defraud involves depriving a person of “something of value by trick, deceit, chicanery, or overreaching.”<sup>72</sup>

Simply put, the flexibility of this language sets the bar for charging wire fraud extremely low, making the statute a preferred weapon of the government.<sup>73</sup> For this reason, the statute has been described as both a “blessing and [a] curse.”<sup>74</sup> On one hand, the wire fraud statute serves “as a first line of defense” or “stopgap device” to address previously unseen forms of criminal conduct that fail to fall within more specific legislation.<sup>75</sup> On the other hand, the statute can be used as a vehicle for prosecuting certain behaviors that, “albeit offensive to the morals or aesthetics of federal prosecutors, cannot reasonably be expected by the instigators to form the basis of a federal felony.”<sup>76</sup> And while the Justice Department claims to defer federal prosecution for petty local fraud, no legal mechanism prevents abuse of this discretion.<sup>77</sup>

However, despite its breadth, there are limits to the judicially created interpretation of a “scheme to defraud.”<sup>78</sup> The statute itself makes the most important limit obvious: The scheme must be one to defraud and cannot be something that, while possibly misleading or even unethical, falls short of outright fraud.<sup>79</sup> Many courts, such as the U.S. Court of Appeals for the Second Circuit,

68. 18 U.S.C. § 1343. Black’s Law Dictionary defines “artifice” as “a clever plan or idea, esp. one intended to deceive.” *Artifice*, BLACK’S LAW DICTIONARY (10th ed. 2014).

69. *United States v. Bradley*, 644 F.3d 1213, 1239 (11th Cir. 2011) (quoting *United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002)).

70. *Id.* at 1240.

71. *Id.* (quoting *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958)).

72. *Id.* (quoting *Pendergraft*, 297 F.3d at 1208–09).

73. Charles Clark, “Schemes to Defraud” *Under the Federal Mail and Wire Fraud Statutes: Development of a Working Definition*, 4 CHARLESTON L. REV. 679, 684 (2010).

74. *United States v. Czubinski*, 106 F.3d 1069, 1079 (1st Cir. 1997).

75. *Id.* (quoting *United States v. Maze*, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting)).

76. *Id.*

77. Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 145–46, 152 (1990) (“U.S. Attorneys or their assistants decide largely on their own what improper practices warrant federal prosecution” and that “the inquiry is evaluative rather than mechanistic.”).

78. *United States v. Takhlov*, 827 F.3d 1307, 1312 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh’g*, 838 F.3d 1168 (11th Cir. 2016) (quoting *United States v. Bradley*, 644 F.3d 1213, 1240 (11th Cir. 2011)).

79. *Id.*

distinguish between schemes that merely induce their victims to engage in transactions that they otherwise would have avoided – which are not violations of the federal wire fraud statute – and schemes that depend upon a misrepresentation of a fundamental element of the bargain for their completion – which are violations of the federal wire fraud statute.<sup>80</sup> The Second Circuit has also held that misrepresentations that only amount to deceit are not enough to maintain a federal wire fraud prosecution.<sup>81</sup> Instead, the deceit must be paired with an anticipated harm to the victim that affects “the very nature of the bargain itself.”<sup>82</sup>

Thus, to constitute a “scheme to defraud,” as used in the wire fraud statute, a defendant must intend to harm the victim by lying about the nature of the bargain itself.<sup>83</sup> That lie can fit two primary frameworks: “the defendant might lie about the price (e.g., if he promises that a good costs \$10 when it in fact costs \$20)” or the defendant “might lie about the characteristics of the good (e.g., if he promises that a gemstone is a diamond when it is in fact a cubic zirconium).”<sup>84</sup> In either instance, the defendant has lied about the nature of the bargain, hence, in both instances the defendant has committed criminal wire fraud.<sup>85</sup> But if the defendant lies about something other than price or quality, for example, “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, has not ‘schemed to defraud,’ and cannot be convicted of wire fraud on the basis of that lie alone.”<sup>86</sup>

Federal wire fraud charges carry a much stiffer penalty than state statutes prohibiting B-girls.<sup>87</sup> A person convicted of federal wire fraud can be “fined [up to] \$1,000,000 or imprisoned [up to thirty] years, or both.”<sup>88</sup> The most severe sentences are generally reserved for cases in which the fraud involves a financial institution coupled with other aggravating circumstances.<sup>89</sup> How-

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80. *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007); *see also* *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987).

81. *Shellef*, 507 F.3d at 108 (quoting *Starr*, 816 F.2d at 98–99).

82. *Starr*, 816 F.2d at 98; *see also* *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 . . .”).

83. *Takhalov*, 827 F.3d at 1313.

84. *Id.* at 1313–14 (italics omitted).

85. *Id.* at 1314.

86. *Id.*

87. *Compare* FLA. STAT. ANN. § 562.131(3) (West 2018) (listing statutes imposing a second-degree misdemeanor with a maximum penalty of sixty days imprisonment and not more than \$500), *with* 18 U.S.C. § 1343 (2012) (carrying a maximum term of thirty years imprisonment and not more than \$1,000,000 in fines for a federal wire fraud conviction under certain circumstances).

88. 18 U.S.C. § 1343.

89. *Id.*

ever, due to a large array of enhancements available under the Federal Sentencing Guidelines, the average conviction carries with it a sentence in excess of two years in a federal penitentiary.<sup>90</sup> And because each wire transmission constitutes a separate act of wire fraud,<sup>91</sup> the penalties can add up quickly, especially when combined with similar charges, such as conspiracy to commit wire fraud or money laundering, as in the case at hand.<sup>92</sup>

### C. Abuse of Judicial Discretion

As is the case with any conviction, the hurdle for overturning a jury verdict based on abuse of judicial discretion is a difficult one to clear.<sup>93</sup> To show an abuse of discretion for refusal to give a proposed jury instruction in the Eleventh Circuit, “a defendant must first show that the requested instruction was a correct statement of the law.”<sup>94</sup> Further, he or she must also show “that the instruction dealt with a sufficiently important point raised during trial” that was important enough that failure to give the proposed instruction might have critically interfered with the defendant’s ability to conduct his or her defense.<sup>95</sup> Finally, even if a proposed instruction was a correct statement of law, which dealt with a sufficiently important point that was raised during trial, a conviction must stand unless the defendant can “show that the proposed instruction ‘was not substantially covered by a charge actually given.’”<sup>96</sup>

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90. See U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2017 11 (June 2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf) (stating the average sentence imposed in all fraud cases in fiscal year 2017 at twenty-six months imprisonment); U.S. SENTENCING; U.S. DEP’T JUST., BUREAU OF JUST. STAT. SPECIAL REPORT, FEDERAL OFFENSES AND OFFENDERS: WHITE COLLAR CRIME 7 (Sept. 1987), [https://www.bjs.gov/content/pub/pdf/whc\\_1985.pdf](https://www.bjs.gov/content/pub/pdf/whc_1985.pdf) (reporting the average sentence length specific to wire fraud convictions in 1985 to be thirty-three months imprisonment); Singh et al., *supra* note 65, at 1574–75.

91. Singh et al., *supra* note 65, at 1557 n.16 (alteration in original) (citing *United States v. Jefferson*, 674 F.3d 332, 367 (4th Cir. 2012)) (“[I]t is settled that each mailing or wire transmission in furtherance of the fraud scheme constitutes a separate offense . . .”).

92. See, e.g., *United States v. Takhalov*, 827 F.3d 1307 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh’g*, 838 F.3d 1168 (11th Cir. 2016). (“Following closing arguments, the jury convicted the defendants on several counts, including multiple counts of wire fraud and money laundering.”).

93. See Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 54 (2000) (examining the difficulty of finding “abuse of discretion” because of the deference granted to lower courts).

94. *Takhalov*, 827 F.3d at 1312 (citing *United States v. Eckhardt*, 466 F.3d 938, 947–48 11th Cir. 2006)).

95. *Id.* at 1316 (citing *Eckhardt*, 466 F.3d at 947–48).

96. *Id.* at 1316 (quoting *Eckhardt*, 466 F.3d at 947–48).

## IV. INSTANT DECISION

Judge Amul R. Thapar<sup>97</sup> wrote for the Eleventh Circuit’s three-judge panel, stating that the federal wire fraud statute “does not enact as federal law the Ninth Commandment given to Moses on Sinai” (“Thou shalt not bear false witness against thy neighbor.”).<sup>98</sup> Federal law “forbids only schemes to *defraud*, not schemes to do other wicked things, e.g., schemes to lie, trick, or otherwise deceive.”<sup>99</sup> The difference, according to Judge Thapar, is that “deceiving does not always involve harming another person; defrauding does.”<sup>100</sup> The court carefully distinguished schemes to deceive from schemes to defraud, noting that Black’s Law Dictionary “defines the word ‘defraud’ as ‘[t]o cause injury or loss to (a person or organization) by deceit’” and defines the word “‘deception’ as ‘[t]he act of deliberately causing someone to believe that something is true when the actor knows it to be false.’”<sup>101</sup> Thus, the court surmised, “deceiving is a necessary condition of defrauding but not a sufficient one. Put another way, one who defrauds always deceives, but one can deceive without defrauding.”<sup>102</sup>

With this in mind, the court reasoned that “to *defraud*, one must intend to use deception to cause some injury; however, one can *deceive* without intending to harm at all.”<sup>103</sup> Thus, in the court’s view, “deceiving does not always involve harming another person; defrauding does.”<sup>104</sup> Therefore, according to the court, in addition to deception, the government had to show that the deception caused an injury in order to satisfy the definition of actionable fraud.<sup>105</sup> In applying this rule, Judge Thapar used an analogy of a more common scenario:

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97. Judge Thapar, sitting by designation, was visiting from the U.S. District Court for the Eastern District of Kentucky. *Id.* at 1309 n.\*. Judge Thapar is known for being by the book; for example, he once sentenced an eighty-four-year-old nun to prison. See *United States v. Walli*, 976 F. Supp. 2d 998, 1001, 1006–07 (E.D. Tenn. 2013); Duane W. Gang, *Nun Sentenced to 35 Months in Nuclear Plant Break-in*, USA TODAY (Feb. 18, 2014, 11:13 AM), <https://www.usatoday.com/story/news/nation/2014/02/18/nun-nuke-protest-sentencing/5577947/>. Subsequent to the decision in *United States v. Takhalov*, Judge Thapar was nominated and confirmed for a seat on the U.S. Court of Appeals for the Sixth Circuit, receiving his commission on May 25, 2017. *Amul Thapar*, BALLOTPEdia, [https://ballotpedia.org/Amul\\_Thapar](https://ballotpedia.org/Amul_Thapar) (last visited Aug. 26, 2018).

98. *Takhalov*, 827 F.3d at 1310 n.1.

99. *Id.* (italics omitted).

100. *Id.*

101. *Id.* at 1312 (alterations in original) (quoting *Defraud*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Deception*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

102. *Id.*

103. *Id.*

104. *Id.* at 1310.

105. *Id.* at 1312.

[A] young woman asks a rich businessman to buy her a drink at Bob's Bar. The businessman buys the drink, and afterwards the young woman decides to leave. Did the man get what he bargained for? Yes. He received his drink, and he had the opportunity to buy a young woman a drink. Does it change things if the woman is Bob's sister and he paid her to recruit customers? No; regardless of Bob's relationship with the woman, the businessman got exactly what he bargained for. If, on the other hand, Bob promised to pour the man a glass of Pappy Van Winkle but gave him a slug of Old Crow instead, well, that would be fraud. Why? Because the misrepresentation goes to the value of the bargain.<sup>106</sup>

Here, the court noted that there was little doubt of the Defendants' intent to deceive; they even admitted as much during trial.<sup>107</sup> Further, when the facts are viewed as a whole – everything from the Defendants' arrangements with the B-girls, to the girls locating unsuspecting men at area hotels, to luring the men to the Defendants' clubs and running up bar tabs – an argument could be made that there was intent to defraud.<sup>108</sup> However, the court pointed out that, in order to sustain a wire fraud conviction, the scheme to defraud must have involved misrepresentations that go to the nature of the bargain underlying the transaction.<sup>109</sup> Even if the Defendants lied, and even if the victims made purchases based on those lies, “a wire fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims ‘received exactly what they paid for.’”<sup>110</sup> In this case, since the Defendants' misrepresentations regarded their arrangement with the B-girls, and those misrepresentations did not extend to either the price or quality of the goods sold to the victims, the court held the Defendants had merely deceived and not defrauded.<sup>111</sup>

However, lack of fraud alone on the part of the Defendants was not enough to overturn a jury verdict; instead, there needed to be a more significant error in the trial itself.<sup>112</sup> While the Defendants' appeal was grounded in a claim of failure to allow a proper jury instruction, and in this case that instruction was never given, that failure could only rise to abuse of judicial discretion if it was a correct statement of the law that dealt with a sufficiently important

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106. *Id.* at 1313 (footnotes omitted). Judge Thapar supplied two footnotes to explain that Pappy Van Winkle or “Pappy's” as it is often called, is a particularly rare bourbon varietal: nearly impossible to find, and nearly impossible to afford when one finds it.” Old Crow, on the other hand, despite having “a venerable pedigree – reportedly the go-to drink of Mark Twain, Ulysses S. Grant, Hunter Thompson, and Henry Clay – is not Kentucky's most-expensive liquor. Its ‘deluxe’ version, ‘Old Crow Reserve,’ retails for approximately \$15 per bottle.” *Id.* at 1313 n.5–6.

107. *Id.* at 1310.

108. *See id.*

109. *Id.* at 1313–14.

110. *Id.* (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)).

111. *Id.* at 1313–14.

112. *See, e.g., id.* at 1316–17 (finding the government did not prove the error was harmless).

point raised during trial that “was not substantially covered by a charge actually given” to the jury.<sup>113</sup>

The court acknowledged that the requested instruction, which was denied by the trial court, seemed to be a correct statement of the law because “‘failure to disclose the financial arrangement between the B-girls and the Bar’ was not ‘in and of itself’ sufficient to convict the defendants of wire fraud.”<sup>114</sup> Additionally, the court concluded that the denied instruction was certainly important enough that failure to give it might have critically interfered with the Defendants’ ability to put forth their defense.<sup>115</sup> After all, Judge Thapar explained, “[I]f the jurors believed that they could convict based only on the B-girls’ failure ‘to disclose the financial arrangement between the B-girls and the Bar,’ then the defense’s theory would have collapsed entirely.”<sup>116</sup>

However, even though the denied instruction was accurate and material, the court held that such instruction must not have been substantially covered by a similar instruction before an abuse of discretion could be found.<sup>117</sup> The court explained that whether a given instruction substantially covered a requested one depended on “the size of the logical leap that a juror would need to make to get from the instruction the court gave to the instruction the defendant requested.”<sup>118</sup> Here, to get from the given instruction<sup>119</sup> to the requested one,<sup>120</sup> the inference “that a person is not ‘deceived or cheated out of money or property’ if he gets exactly what he paid for even though he is deceived into paying in the first place” required too great of a logical leap.<sup>121</sup> After all, Judge Thapar observed, “[T]he average juror is not Mr. Spock.”<sup>122</sup> he or she needs to be specifically instructed by the judge on the legal issues.<sup>123</sup>

113. *Id.* at 1316 (quoting *United States v. Eckhardt*, 466 F.3d 938, 948 (11th Cir. 2006)).

114. *Id.* at 1314–15.

115. *Id.* at 1316 (quoting *Eckhardt*, 466 F.3d at 947–48).

116. *Id.*

117. *Id.*

118. *Id.* at 1318.

119. The trial court instructed the jurors “that the defendants were guilty of wire fraud only if they intended to ‘deceive or cheat someone out of money or property.’” *Id.*

120. 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.” *Id.* at 1317.

121. *Id.* at 1318.

122. Mr. Spock is a fictional character in the *Star Trek* franchise who, as a member of the “Vulcan” species, thinks in a very mechanical, highly logical manner. Mark Hensch, *Obama Explains ‘Spock-like’ Impression: It Was Hard Acting ‘Cheerful’ in 2009*, THE HILL (Jan. 19, 2017, 8:36 AM), <http://thehill.com/homenews/administration/315021-obama-it-was-hard-acting-cheerful-in-2009>.

123. See *Takhalov*, 827 F.3d at 1318. Judge Thapar jokingly noted, “As it stands, however, the vast majority of American juries are composed exclusively of humans. And humans, unlike Vulcans, sometimes need a bit more guidance as to exactly what the court’s instructions logically entail.” *Id.*

Thus, the Eleventh Circuit held that the district court had, in fact, abused its discretion by not allowing the proposed jury instruction requested by the Defendants.<sup>124</sup> Judge Thapar acknowledged that the district court had presided over a long and complex criminal trial and that the district court's evidentiary and other legal rulings were nearly flawless.<sup>125</sup> Nevertheless, "the district court refused to give a jury instruction that was a correct statement of the law, was critical to the defense's case theory, and was not substantially covered by other instructions."<sup>126</sup> Thus, the wire fraud convictions could not stand and, absent wire fraud, the conspiracy and money laundering convictions also could not stand.<sup>127</sup> In the end, with the exception of a visa violation, all of the Defendants' convictions were overturned.<sup>128</sup>

## V. COMMENT

Considering how important the offense of fraud is to white-collar crime and considering that white-collar crime has been in existence for decades, one might expect the definition of fraud to be clear by now. However, *United States v. Takhalov* highlights the ongoing uncertainty about what constitutes criminal fraud. Most common white-collar offenses include "fraud" in their title: mail fraud, wire fraud, credit card fraud, health care fraud, computer fraud, securities fraud, bank fraud, tax fraud, and so on.<sup>129</sup>

Because "fraud is infinite in variety,"<sup>130</sup> courts struggle in attempting to define it.<sup>131</sup> But, of course, a proper definition is needed because human ingenuity also concocts many schemes that may be deceptive at their core but are technically not criminal. Criminal law requires the drawing of lines between

124. *Id.* at 1319.

125. *Id.*

126. *Id.*

127. *Id.* at 1323–25.

128. *Id.* at 1325. In its original holding, the Eleventh Circuit reversed all of the wire fraud convictions except for one, which was allowed to stand because of a lie that the Defendants told to American Express. *See United States v. Takhalov*, 838 F.3d 1168, 1169 (11th Cir. 2016). However, the court held a rehearing three months later regarding the remaining wire fraud conviction. *Id.* Upon review, it was determined that the lie had not "furthered a fraud scheme" and it did not amount to "fraud after the fact." *Id.* at 1169–70. Thus, the final wire fraud conviction was also overturned, and the original holding was modified. *Id.* at 1170.

129. *See* 15 U.S.C. § 1644 (2012) (credit card fraud); 18 U.S.C. § 911 (2012) (citizenship fraud); *id.* §§ 1028, 1028A (identity theft fraud); *id.* § 1030 (computer fraud); *id.* § 1341 (mail fraud); *id.* § 1343 (wire fraud); *id.* § 1344 (bank fraud); *id.* § 1347 (2012) (health care fraud); *id.* § 1348 (securities fraud); 26 U.S.C. §§ 7202–04 (2012) (tax fraud).

130. *Reddaway v. Banham* [1896] 74 LT 289 (HL) at 297.

131. *See, e.g., Allcard v. Skinner* [1887] 57 L. Times 61 (Ct. of App.) [73] ("[N]o court has ever attempted to define fraud."); *Foshay v. United States*, 68 F.2d 205, 211 (8th Cir. 1933) ("To try to delimit 'fraud' by definition would tend to reward subtle and ingenious circumvention and is not done.").



conduct that actually amounts to fraud and conduct that is merely dishonest or unethical – and sometimes those lines can be quite blurry. As the great Justice Holmes once pondered, “[H]ow strong an infusion of fraud is necessary to turn a flavor into a poison?”<sup>132</sup>

For better or worse, and in spite of the men who were taken for their money, Judge Thapar and the Eleventh Circuit got the ruling in *Takhalov* correct.<sup>133</sup> The court’s duty is to merely interpret the law, not create it.<sup>134</sup> Although the Defendants’ actions were despicable, dishonest, misleading, and, as the court pointed out, deceitful, they were nonetheless legitimate business transactions. To hold otherwise – to find that a business transaction in which a customer orders an item, receives it, and is subsequently charged exactly what he or she agreed to pay as being improper – would be concerning. To take that a step further and find that such a transaction rose to the level of actionable fraud could threaten to crack the foundation of at least one constitutional amendment.<sup>135</sup>

Setting a precedent that deceit constitutes fraud would broaden the gray area between what is legal and what is criminal, and no doubt open the law to the proverbial slippery slope.<sup>136</sup> Imagine a scenario in which a lottery advertises a multi-million-dollar jackpot and an uneducated, unsuspecting young adult buys a ticket in hopes of hitting it big. Should the lottery organizers be held responsible when the ticket purchaser feels defrauded after realizing that his or her chances of hitting the jackpot are minuscule? In this scenario, as well as the case at hand, the plan organizers profited from the “scheme.” Further, in both instances, it is clear that the organizers used deception to their advantage. However, few would argue that the organizers of the lottery deserve significant time in jail as a result of their transgression. After all, the ticket purchaser knew what he or she was getting and got what he or she paid for.<sup>137</sup> Likewise, in the case at hand, sentencing the Defendants to a term of imprisonment for exploiting deception would be unjust.

132. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 247 (1918) (Holmes, J., dissenting).

133. See generally *United States v. Takhalov*, 827 F.3d 1307 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh’g*, 838 F.3d 1168 (11th Cir. 2016).

134. *Danforth v. Minnesota*, 552 U.S. 264, 290 (2008) (quoting *Am. Trucking Ass’n, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring)) (“[O]ur normal role is to interpret law created by others and ‘not to prescribe what it shall be.’”).

135. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905) (“The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution.”), *overruled in part by Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and *abrogated by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

136. A slippery slope is “[a] limited step that if taken now, in the view of one who warns against it, will inevitably lead to further, objectionable steps later.” *Slippery slope*, BLACK’S LAW DICTIONARY (10th ed. 2014).

137. For the very small price of a few dollars, he or she purchased an opportunity for lifelong financial security.

No, what the Defendants did was not illegal. 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. By combining booze with beautiful women, they willfully impaired the decision-making abilities of their customers and then capitalized on precisely that impairment. In effect, they did little more than take advantage of a legal loophole.<sup>138</sup>

While not illegal, there can be no doubt that the Defendants knew what they were doing was “wrong.”<sup>139</sup> Most would agree that there should have been at least some consequences to their suspect behavior, lest the public need be wary of this scam or similar scams popping up again not only in Miami, but in any tourist destination across the country flush with enough wealth to make the scheme practicable. After all, the plan would have worked. Absent legal fees, the Defendants would have been \$1,300,000 richer.<sup>140</sup>

In the case at hand, however, not only should there have been consequences, but if the prosecution would have charged the Defendants with violating Florida’s B-girl statute,<sup>141</sup> which prohibits employees of a bar from soliciting customers to purchase drinks for them, rather than with wire fraud,<sup>142</sup> the Defendants would have been certain to suffer those consequences. Since the statute’s enactment by the Florida General Assembly in 1961, several convictions arising from it have been upheld by various appellate courts involving circumstances that were far less objectionable than the scheme being operated by the Defendants.<sup>143</sup> But instead, the Defendants were never charged with violating the B-girl statute.<sup>144</sup>

Due to the unique circumstances surrounding this case, the Defendants’ trial, conviction, and appeal were widely covered by both local and national

138. Florida law already precludes a finding of civil injury where a person’s own drunkenness is the principal cause of the occurrence of the injury. *See* FLA. STAT. ANN. § 768.36(2) (West 2018). Although this applies to civil liability and not criminal, the reasoning underlying the statute would apply to either.

139. The Defendants even admitted as much at trial as part of their defense strategy. *United States v. Takhalov*, 827 F.3d 1307, 1310, 1317 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh’g*, 838 F.3d 1168 (11th Cir. 2016).

140. *See* Brief for the United States, *supra* note 2, at 79.

141. *See* FLA. STAT. ANN. § 562.131 (West 2018).

142. Granted, charging the Defendants under the Florida B-girl statute would have required the case to be brought in state court rather than federal court.

143. *See* *Shevin v. Bocaccio, Inc.*, 379 So. 2d 105, 106 (Fla. 1979) (constitutional); *De Joris v. Lee*, 151 So. 2d 830, 832 (Fla. 1963) (within the legislature’s police power); *215-22nd St., Inc. v. Bd. of Bus. Regulation, Div. of Beverage*, 330 So. 2d 821, 822 (Fla. Dist. Ct. App. 1976) (establishing elements); *Torch Club, Inc. v. Keating*, 174 So. 2d 746, 746–47 (Fla. Dist. Ct. App. 1965) (license revocation for violation).

144. *See* *United States v. Pavlenko*, No. 11-20279-CR, 2012 WL 222928, at \*3 (S.D. Fla. Jan. 25, 2012) (“[T]he jury will hear that a Florida criminal statute had been violated, even though nobody involved in this case was ever arrested for or charged with violating that statute.”).

media.<sup>145</sup> Throughout the coverage, one theme became common between legal commentators and legal bloggers alike – why was this case being tried in federal court instead of state court?<sup>146</sup> To borrow the words of Judge Thapar, it hardly requires “Holmesian feats of deduction”<sup>147</sup> to infer why the state backed off of what should have been an open and shut case in favor of allowing the federal government to bring a case in which the facts were not in their favor.<sup>148</sup> One possible explanation exists – greed.

The Defendants’ greed in this case cannot be denied; they all but admitted it as the lynchpin of their defense strategy.<sup>149</sup> In fact, their devious white-collar scheme quite literally spawned an episode of the popular CNBC TV series, *American Greed*.<sup>150</sup> But it is the prosecutorial greed here that should not be overlooked. If the government had brought its case under the Florida B-girl statute,<sup>151</sup> it is likely that it would have won. Albeit such a conviction would have come at considerably lower stakes than the twelve years that the Defendants’ were initially convicted of, since the Florida B-girl statute carries a maximum of sixty days imprisonment and a \$500 fine.<sup>152</sup>

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145. See, e.g., Weaver, *supra* note 14 (covering the trial); Jay Weaver, *Appeals Court Throws Out Miami Beach ‘Bar-Girl’ Convictions*, MIAMI HERALD (July 11, 2016, 7:41 PM), <http://www.miamiherald.com/news/local/community/miami-dade/miami-beach/article88982837.html> (covering the appeal).

146. See, e.g., David Markus, *Hot Girls Getting Guys Drunk on South Beach is Now a Federal Crime?*, S. DIST. OF FLA. BLOG (Nov. 5, 2012, 9:19 AM), <http://sdfla.blogspot.com/2012/11/hot-girls-getting-guys-drunk-on-south.html> (“Clearly if this happened, it’s criminal. But even if that happened, is it a federal offense? Why isn’t this a classic state court crime?”).

147. “Sherlock or Oliver Wendell: either Holmes will do here.” *United States v. Takhalov*, 827 F.3d 1307, 1318 n.9 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh’g*, 838 F.3d 1168 (11th Cir. 2016).

148. The Florida B-girl statute expressly prohibits any holder of a liquor license “to knowingly permit any person to loiter in or about the licensed premises for the purpose of begging or soliciting any patron or customer . . . to purchase any beverage,” and there can be little doubt that is exactly what the Defendants did, since they, in fact, hired the women to lure guys to their clubs to purchase drinks. FLA. STAT. ANN. § 562.131(2) (West 2018); *Takhalov*, 827 F.3d at 1307.

149. See *id.* at 1311.

150. *American Greed: The Bar Girls Trap* (CNBC television broadcast May 19, 2016), <https://www.cnbc.com/video/2016/05/12/the-bar-girls-trap-.html> (Episode Preview Description: “Beautiful women with looks that kill are controlled by Russian gangsters to seduce amorous men in nightclubs out of their money. It’s a super expensive hangover.”).

151. FLA. STAT. ANN. § 562.131 (West 2018) makes it illegal for a liquor license to “knowingly permit any person to loiter in or about the licensed premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any beverage, alcoholic or otherwise.” There can be little doubt that the Defendants’ plan directly violated the statute.

152. See *id.* § 562.131(3); see *id.* § 775.082(4)(b) (West 2018); *id.* § 775.083(1)(e) (West 2018).

Regardless, the states in general, including Florida, need to create alternative avenues that provide harsher penalties for perpetrators who go beyond merely hiring employees for the purpose of “begging or soliciting” customers to purchase drinks and instead go so far as to intentionally deceive people out of millions of dollars.<sup>153</sup> The law currently prohibits girls from entertaining guys at a bar, but perhaps there should be a separate penalty for girls that entice them to be there in the first place.<sup>154</sup>

State and local governments clearly need other means of pursuing these types of cases as well as statutes that carry more severe penalties. In the absence of harsher penalties or new statutes designed to curb these types of schemes, it is not unreasonable to suspect that similar schemes will continue. After all, the possibility of weighing a \$500 penalty against a multi-million-dollar upside simply makes these types of “business ventures” too easy to set up and too lucrative to pass up.

## VI. CONCLUSION

Lord Macnaghten famously quipped over a century ago that “fraud is infinite in variety.”<sup>155</sup> This holds true in today’s digital age, where schemes to make a quick buck at the expense of others are seemingly ubiquitous.<sup>156</sup> In *United States v. Takhalov*,<sup>157</sup> the Eleventh Circuit addressed precisely one such scheme, and, in doing so, added some much-needed refining to the judicially-crafted definition of fraud. Ultimately, while the Defendants’ scheme to use alcohol and women to seduce profits out of unsuspecting tourists was misleading and deceitful, the Defendants’ dose of fraud was not “strong enough here to need a remedy from the law.”<sup>158</sup>

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153. *See id.* § 562.131(2).

154. This Note, along with the case at hand, both generally refer to females as the ones soliciting the purchase of drinks, males as the ones being solicited, and universally makes use of the term “B-girls.” However, as modern views have become more sophisticated, such terms are increasingly being viewed as sexist. As a result, some jurisdictions have modified their laws to use a more politically correct phrase, such as “B drinkers.” *E.g.*, LA. STAT. ANN. § 26:286 (2018) (making it illegal to “[e]mploy or permit persons, commonly known as *B drinkers*, to solicit patrons for drinks . . . .”) (emphasis added); *see also* Adriane Quinlan, *In Kenner, B-drinkers Will Still Be Illegal, But Don’t Call Them Girls*, TIMES-PICAYUNE (Mar. 18, 2014), [https://www.nola.com/politics/index.ssf/2014/03/in\\_kenner\\_b-drinkers\\_will\\_stil.html](https://www.nola.com/politics/index.ssf/2014/03/in_kenner_b-drinkers_will_stil.html).

155. *Reddaway v. Banham* [1896] 74 LT 289 (HL) at 297.

156. Common examples of such schemes include, among others, email scams, phishing scams, and identify theft.

157. *See generally* 827 F.3d 1307 (11th Cir.), *as revised* (Oct. 3), *modified on denial of reh’g*, 838 F.3d 1168 (11th Cir. 2016).

158. In response to his statement about how strong an infusion of fraud is necessary to turn a flavor into a poison, Justice Holmes asserted in *International News Service v. Associated Press*, “the dose seems to me strong enough here to need a remedy from the law.” 248 U.S. 215, 247–48 (1918) (Holmes, J., dissenting).

