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NOTES

A FUNCTIONAL VIEW OF THE RULE OF LENITY: DOES THEFT OF MISADDRESSED MAIL VIOLATE THE FEDERAL MAIL THEFT STATUTE?

INTRODUCTION

For over two hundred years, the United States Postal Service ("Postal Service") has served as the keystone of the American communication system. In recognition of the vital role that the Postal Service plays in both the commercial and private sectors, Congress has provided criminal penalties for a wide range of activities that interfere with the operations of the Postal Service.¹ One such provision, the federal mail theft statute, Section 1708 of Title 18,² is designed to protect the "sanctity and integrity"³ of the mail by punishing those who steal mail while it is under the duty and authority of the Postal Service.⁴ Section 1708, however, does

1. See 18 U.S.C. §§ 1691-1738 (1982).

2. The statute provides:

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein;

.....

Shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1708 (1982) (originally enacted as Act of June 25, 1948, Pub. L. No. 772, ch. 645, § 1708, 62 Stat. 683, 779).

3. H.R. Rep. No. 1674, 82d Cong., 2d Sess. 2-5 (1952), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1853-57; S. Rep. No. 980, 82d Cong., 1st Sess. 2 (1951); *cf.* United States v. Palmer, 864 F.2d 524, 527 (7th Cir. 1988) (recognizing that the statute was designed to protect the integrity of the mails), *cert. denied*, 109 S. Ct. 3166 (1989).

4. See United States v. Davis, 461 F.2d 83, 89 (5th Cir.), *cert. denied*, 409 U.S. 921 (1972).

The government must prove three elements to sustain a conviction under section 1708. See United States v. Hines, 256 F.2d 561, 563 (2d Cir. 1958). First, the government must prove that the article was stolen from the "mail". See 18 U.S.C. § 1708 (1982). This element has "consistently [been] construed so as not to require direct proof of theft or taking from the mails." United States v. Indelicato, 611 F.2d 376, 381 (1st Cir. 1979).

If the government proves that the article was mailed to the addressee, *see, e.g.,* Webb v. United States, 347 F.2d 363, 363-64 (10th Cir. 1965) (proof of routine procedures of state welfare department in preparation and mailing of welfare checks was sufficient to support inference that check reached the mail), that it was never received by the addressee and that it was subsequently found in defendant's possession, the fact finder may infer, absent a contrary explanation, that the article was stolen from the mail. See *Hines*, 256 F.2d at 564; *accord Indelicato*, 611 F.2d at 384; United States v. Matzker, 473 F.2d 408, 411 (8th Cir. 1973); United States v. Lopez, 457 F.2d 396, 398 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972); *see also* Whitehorn v. United States, 380 F.2d 909, 912 (8th Cir. 1967) (same

not prohibit theft of a letter or package after it leaves the "mail."⁵ Therefore, judicial interpretation of when an article is in the "mail" is critical to an understanding of the scope of section 1708.

A correctly addressed and properly delivered article is in the "mail" under the federal mail theft statute from the time that it is properly mailed by the sender until it is delivered by the Postal Service to the intended recipient at the correct address.⁶ Once the intended recipient lawfully removes such an article from the mailbox, his objectives and those of the sender are met; the article is no longer in the "mail" and any subsequent theft of that article falls outside the purview of section 1708.⁷

Quite often, however, mail is "misaddressed"⁸ by the sender or "mis-

inference is permissible if item was sent to addressee's former residence after addressee had filed a proper notice of change of address).

This inference, however, will not ease the government's burden when the indictment charges theft from a particular mail receptacle. See *Indelicato*, 611 F.2d at 381-82. In such cases, the defendant must have formed the intent to steal before or at the instant the article is removed from the authorized depository. See *supra* note 12; *Allen v. United States*, 387 F.2d 641, 643 (5th Cir. 1968); *Goodman v. United States*, 341 F.2d 272, 273 (5th Cir. 1965) (per curiam). If this intent is subsequently formed, courts have found that the misappropriation took place after the article left the mail and that the unlawful activity fell outside the purview of section 1708. See *Allen*, 387 F.2d at 643; *Goodman*, 341 F.2d at 273.

Second, the government must prove that defendant possessed the stolen article. See *Hines*, 256 F.2d at 563.

Third, the government must prove that the defendant knew that the article was stolen. See *id.* To prove this element, the government does not have to show defendant knew that the article was stolen from the mail, but simply that he knew it was stolen. See *Barnes v. United States*, 412 U.S. 837, 847 & n.14 (1973); *Smith v. United States*, 343 F.2d 539, 543 (5th Cir.), cert. denied, 382 U.S. 861 (1965); *Hines*, 256 F.2d at 563. But see *United States v. Lynn*, 461 F.2d 759, 761-62 (10th Cir. 1972) (requiring proof that defendant knew credit card he possessed was stolen from the mail).

Before 1939, however, the statute explicitly required proof that defendant knew the article was stolen from the mail. See 18 U.S.C. § 317 (1934), as amended by 18 U.S.C. § 1708 (1982); *Barnes*, 412 U.S. at 847 n.14; see also *Brandenburg v. United States*, 78 F.2d 811, 812 (3d Cir. 1935) (government failed to establish, under section 317, that defendant knew the article he possessed was stolen from the mail). The statute was later amended to only require proof that defendant knew the mail in his possession was stolen. See *Barnes*, 412 U.S. at 847 n.14. This alleviated an almost impossible burden cast on the government to show that an accused knew how the article in his possession was stolen. See *Smith*, 343 F.2d at 543; *Hines*, 256 F.2d at 563; H.R. Rep. No. 734, 76th Cong., 1st Sess. (1939); S. Rep. No. 864, 76th Cong., 1st Sess. (1939).

The jury may infer that the defendant knew the mail was stolen if the government proves he possessed the stolen mail and cannot explain how he came to possess it. See *United States v. Indelicato*, 611 F.2d 376, 384 (1st Cir. 1979) (citing *Barnes*, 412 U.S. at 841).

5. See *Allen v. United States*, 387 F.2d 641, 642 (5th Cir. 1968); see, e.g., *United States v. Logwood*, 360 F.2d 905, 907-08 (7th Cir. 1966) (letter stolen from addressee's landlady was not in the "mail" when stolen).

6. See *United States v. Palmer*, 864 F.2d 524, 525 (7th Cir. 1988), cert. denied, 109 S. Ct. 3166 (1989); *Logwood*, 360 F.2d at 907-08.

7. See *Palmer*, 864 F.2d at 525; *Logwood*, 360 F.2d at 907-08.

8. Misaddressed mail is mail that "bears an address other than the residence of the person to whom it was sent." *Palmer*, 864 F.2d at 526. It can take one of two forms—either the sender has made a mistake in addressing the envelope (usually due to typo-

delivered"⁹ by the Postal Service. In both cases, the Postal Service's initial delivery of the article fails to reach the intended recipient, thwarting his objectives and those of the sender. Every court that has considered the question to date has held that the term "mail" in section 1708 includes *misdelivered* mail that is stolen after the initial delivery by the Postal Service and the lawful removal of the article by the unintended recipient.¹⁰ However, courts disagree on whether the term "mail" under section 1708 includes *misaddressed* mail that is stolen after its lawful removal from the authorized depository at the place of initial delivery.¹¹

Under one view, section 1708 does not apply to theft of misaddressed mail because the unintended recipient of the misaddressed article must form the intent to steal it before or at the instant he realizes it is in his mail receptacle.¹² Under this narrow view, the Postal Service's duty and

graphical error), or the article is out-of-date because the addressee has moved. *See id.* at 527.

9. Misdelivered mail is mail that is "left at an address other than the one on the envelope." *Id.* at 525-26.

10. *See id.* at 527; *United States v. Lavin*, 567 F.2d 579 (3d Cir. 1977); *United States v. Anton*, 547 F.2d 493 (9th Cir. 1976); *United States v. Davis*, 461 F.2d 83 (5th Cir.), *cert. denied*, 409 U.S. 921 (1972).

11. *Compare United States v. Palmer*, 864 F.2d 524, 527 (7th Cir. 1988) (theft of misaddressed mail is a section 1708 violation), *cert. denied*, 109 S. Ct. 3166 (1989) and *United States v. Douglas*, 668 F.2d 459, 461 & n.3 (10th Cir.) (sustaining section 1708 conviction in case involving theft of misaddressed mail), *cert. denied*, 457 U.S. 1108 (1982) and *United States v. Indelicato*, 611 F.2d 376, 381-82 (1st Cir. 1979) (stating elements of section 1708 offense in a way that covers misaddressed mail) with *United States v. Lavin*, 567 F.2d 579, 583 (3d Cir. 1977) (interpreting section 1708 to include theft of misdelivered mail but implying there is no section 1708 violation for theft of misaddressed mail) and *United States v. Anton*, 547 F.2d 493, 495 (9th Cir. 1976) (same) and *United States v. Davis*, 461 F.2d 83, 87-90 (5th Cir.) (same), *cert. denied*, 409 U.S. 921 (1972) and *Allen v. United States*, 387 F.2d 641, 643 (5th Cir. 1968) (theft of misaddressed mail not a section 1708 violation) and *Goodman v. United States*, 341 F.2d 272, 273 (5th Cir. 1965) (per curiam) (same).

12. *See Davis*, 461 F.2d at 88-89; *Allen*, 387 F.2d at 643; *Goodman*, 341 F.2d at 273. The Ninth Circuit, however, has applied section 1708 to theft of misaddressed mail in the case of out-of-date mail, but only if a proper change-of-address form has been filed. *See United States v. Birnstihl*, 441 F.2d 368, 369 (9th Cir. 1971).

The practical impossibility of satisfying this instantaneously formed intent requirement effectively precludes application of the statute to cases involving theft of misaddressed mail. An unintended recipient cannot form the intent to steal a misaddressed article until he learns that it has been delivered to him. Almost without exception, he will not realize that he has received it until he removes it from his mailbox, at which time, under the narrow view, it is no longer in the mails for purposes of the statute.

According to the First Circuit, the courts adhering to the narrow view erroneously conclude that section 1708 cannot cover theft of misaddressed mail because of the instantaneously formed intent requirement. In *United States v. Indelicato*, 611 F.2d 376 (1st Cir. 1979), the First Circuit, recognizing that the statute prohibits theft from any "mail, . . . mail receptacle, or any mail route or other authorized depository for mail matter," determined that the term "mail" is broader than the term "mail receptacle." *See id.* at 381 n.4 (quoting 18 U.S.C. § 1708 (1982)). "While proof of theft of materials from a receptacle . . . obviously would prove theft from the mails, it is equally obvious that proof of theft from the mails would not necessarily prove theft from a postal receptacle." *Id.* at 381.

This distinction is significant to the operation of the permissible inference established in

authority over all mail terminates once it delivers the article to the address that the sender has specified and the article is lawfully removed from that mail receptacle.¹³

United States v. Hines, 256 F.2d 561, 563-64 (2d Cir. 1958). In *Hines*, the court concluded that absent a contrary explanation, the trier of fact can infer that materials were stolen from the *mail* if the government can show that the materials were mailed, that the addressee never received them and the defendant later possessed the materials. When operative, the *Hines* inference obviates any problem with proving instantaneously formed intent. See *Indelicato*, 611 F.2d at 381-82. The *Indelicato* panel determined that the *Hines* inference permits the trier of fact to infer theft from the *mail*, although it does not allow the more specific inference of theft from a particular *mail receptacle*. See *id.* Therefore, the *Hines* inference overrides this restrictive requirement when the charge is theft from the "mail" generally, even for thefts of misaddressed mail. From a procedural standpoint, theft of misaddressed mail can violate the statute if the indictment charges theft from the "mail" and the government proves the elements of the *Hines* inference. See *id.*; see also *United States v. Palmer*, 864 F.2d 524, 525 (7th Cir. 1988) (Defendants "were not charged with stealing out of a 'letter box [or] mail receptacle,' which would make [defendant's] intent at the time of the withdrawal pertinent. They were charged with stealing out of the 'mail.'"), *cert. denied*, 109 S. Ct. 3166 (1989).

13. Under this view, theft of misdelivered mail is a section 1708 violation, but theft of misaddressed mail is not. See *Anton*, 547 F.2d at 495; *Davis*, 461 F.2d at 88-89; cf. *Lavin*, 567 F.2d at 581 n.6 (court finds distinction between misaddressed and misdelivered mail significant in section 1708 context, thereby implying theft of misaddressed mail is not a section 1708 violation).

In *Davis*, a postman mistakenly delivered an envelope, properly addressed to a third party, to the front counter of defendant's pharmacy. The envelope was removed from defendant's mail receptacle and transferred to his desk at the back of the pharmacy where it was mistakenly opened. Rather than delivering the envelope, which contained 100 money orders, to the proper addressee or returning it to the Postal Service, the proprietor instructed his employee to cash them. *Davis*, 461 F.2d at 84-85. The court held that, for the purposes of section 1708, "the duty and authority of the Postal Service over mail placed in its custody ceases to exist once a letter is *delivered to the address which the sender has specified* and is lawfully removed from a letterbox or other mail receptacle." *Id.* at 89 (emphasis added).

Thus, the Fifth Circuit carved out a new rule for misdelivered mail stating that a "misdelivered letter continues in the custody of the postal service, and therefore remains in the 'mail,' until it has been *returned to the sender or delivered to its addressee*." *Id.* (emphasis added). This holding expands the scope of section 1708 protection for cases of misdelivered mail beyond the protection provided in ordinary situations and in cases involving misaddressed mail. Under the *Davis* rule, the lawful removal of misdelivered mail from the authorized depository at the place of *initial* delivery does not terminate section 1708 protection. See *id.* Therefore, the exact time at which the unintended recipient forms the intent to steal the misaddressed mail is irrelevant. The article remains in the mails at all times while the misdelivered article is in the unintended recipient's hands, even if his intent to steal is formed after he removes the item from the authorized mail receptacle. Therefore, any theft of that article is a section 1708 violation. See *id.*

In *Anton*, the court stated that:

The distinction between improperly addressed mail and misdelivered mail is crucial. . . .

. . . .

. . . . The Postal Service has a duty to deliver postal matter to the address indicated by the sender. When it satisfies this obligation and the material is received at that address, its concomitant authority over the mail ends. Conversely, when the Postal Service *misdelivers* an item, thus breaching its duty, its authority over the item continues after the item is received.

Anton, 547 F.2d at 495 (emphasis added).

Under another approach, however, courts treat theft of misaddressed mail in the same way as theft of misdelivered mail; under this view, theft of misaddressed mail is covered by section 1708.¹⁴ In *United States v. Palmer*,¹⁵ the principal case supporting this broad interpretation of the statute, Judge Easterbrook chose to disregard a long-standing canon of interpretation of penal statutes, the rule of strict construction known as the "rule of lenity."¹⁶

The rule of lenity provides that "penal statutes should be strictly construed against the government or parties seeking to enforce statutory penalties and in favor of the persons on whom penalties are sought to be imposed."¹⁷ Had Judge Easterbrook properly applied the rule, he could not have construed the statute to include theft of misaddressed mail. Therefore, in order to reach the result he wanted, Judge Easterbrook adopted a functional view of the rule that is both misguided and unprecedented.

This Note argues that although the statute should be interpreted to include theft of misaddressed mail, Judge Easterbrook's approach in *Palmer* was improper. Part I outlines the traditional process of statutory analysis focusing on when and how the rule of lenity is applied. Part II applies this traditional analysis to section 1708 and examines how the functional view of the rule of lenity that Judge Easterbrook adopted circumvents this traditional approach. Part III analyzes Judge Easterbrook's approach and concludes that his functional view of the rule of lenity is flawed. Finally, Part IV reviews the compelling policy arguments in favor of applying section 1708 to theft of misaddressed mail.

I. TRADITIONAL STATUTORY ANALYSIS

The first step in determining whether a specific act violates a penal statute is analyzing the language of the statute.¹⁸ When the statutory language is unambiguous, the "plain meaning" rule applies.¹⁹ The plain meaning rule provides that "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and

14. See *Palmer*, 864 F.2d at 527; see also *United States v. Douglas*, 668 F.2d 459 (10th Cir.) (sustaining conviction under section 1708 in a case involving theft of misaddressed mail), *cert. denied*, 457 U.S. 1108 (1982); *United States v. Indelicato*, 611 F.2d 376, 381-82 (1st Cir. 1979) (stating the elements of a section 1708 offense in a way that covers misaddressed mail).

15. 864 F.2d 524 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).

16. *Id.* at 527-28.

17. 3 N. Singer, *Sutherland Statutory Construction* § 59.03, at 11 (4th ed. 1986); see *infra* notes 24-34 and accompanying text.

18. See *Caminetti v. United States*, 242 U.S. 470 (1917). "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." *Id.* at 485; see 2A N. Singer, *Sutherland Statutory Construction* § 46.01, at 73 (4th ed. 1984).

19. See 2A N. Singer, *supra* note 18, § 46.01, at 73.

the rules which are to aid doubtful meanings need no discussion."²⁰ When the statutory language is ambiguous, however, the plain meaning rule does not govern and judicial interpretation is required.²¹ In this instance, the judiciary must ascertain the legislative intent behind the statute.²² If legislative history removes ambiguity from the statute, judicial interpretation must be in accord with legislative intent.²³

If the statute remains ambiguous after legislative intent is scrutinized, courts should apply the rule of lenity.²⁴ The rule of lenity requires that courts construe penal statutes strictly against the state.²⁵ The judiciary of eighteenth-century England devised the rule in an effort to "stem the march to the gallows" caused by the "vast and irrational proliferation of capital offenses" that resulted from the apparent blood-lust of the Parliament.²⁶

The rule of lenity is essential because it implements the principle of legality, a fundamental principle of criminal law that forbids the creation of crimes by the judiciary.²⁷ Moreover, the rule of lenity embraces the concepts of separation of powers, notice and the rule of law.²⁸ Separation of powers mandates the division of the legislative, executive and judicial branches to ensure the liberty of a representative democracy.²⁹ Because the legislature, not the judiciary, has the power to enforce societal judgments through the penal law, separation of powers cannot be preserved unless judges are prevented from construing statutory mandates liberally.³⁰ The notice rationale provides that crimes must be clearly de-

20. *Caminetti*, 242 U.S. at 485; see *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 399 (1805) ("Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently, no room is left for construction."); see also 2A N. Singer, *supra* note 18, § 46.01, at 73 and cases cited therein.

21. See T. Sedgwick, *Statutory Construction* 195 (2d ed. 1874) ("It is only when the language is ambiguous that the courts are called on to construe or interpret").

22. See *id.*

23. See 2A N. Singer, *supra* note 18, § 45.05, at 20-22.

24. 3 N. Singer, *supra* note 17, § 59.03, at 11 and cases cited therein.

The United States Supreme Court recently reasserted its "longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Liparota v. United States*, 471 U.S. 419, 427 (1985) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)); see *Busic v. United States*, 446 U.S. 398, 406-07 (1980); *United States v. Bass*, 404 U.S. 336, 347 (1971).

25. See Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 198 (1985).

26. See Jeffries, *supra* note 25, at 198; see also Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 748-51 (1935) (doctrine of strict construction emerged against the background of unmitigated severity in penalties for serious crimes prior to the nineteenth century).

27. See Jeffries, *supra* note 25, at 190. The principle of legality forbids the retroactive definition of crimes because it is desirable to have a clear knowledge of what constitutes criminal misconduct in advance. See *id.*

28. See *id.* at 201-19.

29. See *id.* at 202.

30. See *id.*

fined so that individuals have fair warning of what is forbidden.³¹ Notice ensures that the statute does not trap the innocent and does not violate due process of law.³² The rule of law provides that courts should apply known principles or laws without the intervention of discretion.³³ Such restraint encourages equal treatment under the law and accountability in the use of government power.³⁴

II. APPLICATION OF THE RULE OF LENITY TO THE FEDERAL MAIL THEFT STATUTE

The ambiguities in the language of section 1708³⁵ obviate the application of the plain meaning rule. Therefore, courts must analyze the legislative intent behind the statute to determine whether theft of misaddressed mail after initial delivery is a section 1708 violation. Despite the statute's long history and many amendments,³⁶ however, "[t]here is almost no legislative history worth reading."³⁷ What little there is suggests only that section 1708 was designed to protect the "sanctity and integrity" of the United States postal system.³⁸ Because

31. *See id.* at 205.

32. *See id.* (citing *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

33. *Black's Law Dictionary* 1196 (5th ed. 1979).

34. *See Jeffries, supra* note 25, at 212.

35. *See supra* note 2.

36. Congress enacted the current federal mail theft statute, 18 U.S.C. § 1708 (1982) (originally enacted as Act of June 25, 1948, Pub. L. No. 772, ch. 645, § 1708, 62 Stat. 683, 779), in 1948 as part of the comprehensive revision of the federal criminal laws. The first statute protecting the mail, enacted in 1792, punished violators with death. The statute provided:

[I]f any person or persons shall rob any carrier of the mail of the United States, of such mail, or if any person shall rob the mail, in which letters are sent to be conveyed by post, of any letter or packet, or shall steal such mail, or shall steal and take from or out of the same, or from or out of any post-office, any letter or packet, such offender or offenders shall, on conviction thereof, *suffer death*.

Act of February 20, 1792, § 17, 1 Stat. 237 (emphasis added). By 1872, however, Congress had mitigated this harsh penalty for mail theft, punishing violators with fines and imprisonment of up to five years. *See* 70 Rev. Stat. §§ 5469, 5470, 18 Stat. 1066 (1873).

Congress has transformed the statute from one that, hundreds of years ago, served predominantly to punish "depredations of highwaymen," to one that now must contend with the "anonymity of the modern postal system." *Smith v. United States*, 343 F.2d 539, 542 (5th Cir.), *cert. denied*, 382 U.S. 861 (1965). However, it is up to "judicial appraisal of the realities of delivering and receiving mail in a modern urban environment" to further protect the sanctity and integrity of the mails. *Id.*

37. *United States v. Palmer*, 864 F.2d 524, 527 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).

38. *See* H.R. Rep. No. 1674, 82d Cong., 2d Sess. 2-5 (1952), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1853-57; S. Rep. No. 980, 82d Cong., 1st Sess. 2 (1951); *cf. Palmer*, 864 F.2d at 527 (recognizing that the statute was designed to protect the integrity of the mails).

The Second Circuit determined that "[t]he variety of terms employed in the statute indicates that it was broadly conceived to assure the proper functioning of the postal system," *United States v. Lopez*, 457 F.2d 396, 398 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972), and many courts have interpreted terms of the statute liberally to further broaden the statute's scope. For example, the terms "mail," "mail route," "mail receptacle" and

this imprecise language does not eliminate ambiguity from the statute,³⁹ traditional statutory analysis requires that the rule of lenity be applied. Accordingly, courts should interpret the term "mail" narrowly and exclude thefts of misaddressed mail from the purview of section 1708.

In *United States v. Palmer*,⁴⁰ however, Judge Easterbrook refused to allow the rule of lenity to dictate a narrow reading of the statute.⁴¹ In *Palmer*, approximately one month after settling into a new residence, one of the defendants found three envelopes in her mailbox that were addressed to the former occupant.⁴² Instead of returning the envelopes, the defendant opened them and found three checks which she later attempted to negotiate.⁴³

In deciding whether the defendant's acts violated section 1708, Judge Easterbrook adopted a "functional" view of the rule of lenity, stating that "[t]he rule of lenity . . . extends no further than the function it serves. It does not preclude the implementation of the criminal law every time a statute needs construction, for all enactments require elucidation."⁴⁴ After acknowledging the underlying principles behind the

"other authorized depository for mail matter" have been liberally construed. See, e.g., *United States v. Rosen*, 245 U.S. 467, 472-73 (1918) (unlocked boxes in hallway are authorized depositories); *United States v. Douglas*, 668 F.2d 459, 461 (10th Cir.) (envelope clipped to rod permanently attached to mailbox is in "mail receptacle"), *cert. denied*, 457 U.S. 1108 (1982); *United States v. White*, 510 F.2d 448, 451 (10th Cir. 1975) (mail clipped by a clothespin to a mailbox lid is in a "mail receptacle"); *Lopez*, 457 F.2d at 399 (mail left on floor of hallway is in a "mail route"); *United States v. Smith*, 343 F.2d 539, 542-43 (5th Cir.) (unlocked box placed just inside front door of hotel and used for general delivery of mail to all residents is authorized depository), *cert. denied*, 382 U.S. 861 (1965).

This broad interpretative pattern is further demonstrated by cases holding that the statute covers misdelivered mail even if it is stolen after it was lawfully removed from an officially authorized mail receptacle. See *United States v. Lavin*, 567 F.2d 579, 583 (3d Cir. 1977); *United States v. Anton*, 547 F.2d 493, 495 (9th Cir. 1976); *United States v. Davis*, 461 F.2d 83, 88-89 (5th Cir.), *cert. denied*, 409 U.S. 921 (1972).

Despite the line of cases construing the terms in section 1708 broadly, courts have recognized certain limitations. See, e.g., *United States v. Logwood*, 360 F.2d 905, 907-08 (7th Cir. 1966) (landlady's windowsill not an authorized mail depository); *Heubner v. United States*, 28 F.2d 929, 930 (6th Cir. 1928) (open pasteboard box on windowsill located on second floor and far removed from entrance of building not an "authorized depository for mail matter"); *United States v. Lophansky*, 232 F. 297, 298 (E.D. Pa. 1916) (top of a letter box not an authorized mail depository); *United States v. Thomas*, 361 F. Supp. 978, 980 (N.D. Tex. 1973) (mail parcel delivered to addressee's front porch because it did not fit into mailbox not in an "authorized depository for mail matter"); *United States v. Askey*, 108 F. Supp. 408, 410 (S.D. Tex. 1952) (floor in a private home, where mail was delivered to several persons, equally accessible to all and was delivered by dropping mail through a small letter slot in the wall beside front door not an "authorized depository for mail matter"). These cases, however, should not be construed as precluding application of the statute to misaddressed mail.

39. See *infra* notes 70-72 and accompanying text.

40. 864 F.2d 524 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).

41. See *id.* at 527-28.

42. See *id.* at 525.

43. See *id.*

44. *Id.* at 527.

rule—separation of powers, notice and the rule of law—Judge Easterbrook decided that these goals would not be furthered by a narrow reading of the term “mail.”⁴⁵ Focusing entirely on the “notice” rationale, Judge Easterbrook determined that the defendants were on notice that their conduct was unlawful under either state law or Section 1702 of Title 18, a statute complementary to section 1708.⁴⁶ He reasoned that because “[t]he penalty provisions of § 1702 and § 1708 are identical . . . [a]n application of the rule of lenity would simply transfer this prosecution to § 1702—leading straight to the same outcome—or to state law.”⁴⁷

45. See *id.* at 528.

46. See *id.* Section 1702 provides:

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than \$2,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1702 (1982) (originally enacted as Act of June 25, 1948, Pub. L. No. 772, ch. 645, § 1702, 62 Stat. 683, 778).

The Seventh and Eighth Circuits compared section 1708 with section 1702 and concluded that section 1702 is broader. Section 1702 provides protection for mail until it is physically delivered to the person to whom it was directed, while section 1708 protection terminates when the article is lawfully removed from the mail receptacle. See *United States v. Ashford*, 530 F.2d 792 (8th Cir. 1976); *United States v. Logwood*, 360 F.2d 905 (7th Cir. 1966).

In *Ashford*, the Eighth Circuit held that although “[t]he protection of § 1708 is limited to mail matter which is still in the possession or control of the Postal Service or which has been placed in an authorized receptacle for mail matter such as a private letter box and which has not lawfully been removed therefrom,” *Ashford*, 530 F.2d at 795-96, the protection extended by section 1702 does not end “until the mailed material is physically delivered to the person to whom it is directed or to his authorized agent.” *Id.* at 795. In *Logwood*, the Seventh Circuit noted that “it is obvious from the differences in the specific language and terminology employed that § 1708 is not intended to and does not reach as far as § 1702 extends.” *Logwood*, 360 F.2d at 908.

It might be argued that because of the existence of section 1702, the scope of section 1708 should always terminate at the instant the article is lawfully removed from the mail receptacle. This argument, however, cannot withstand scrutiny because every court that has considered whether an exception to the narrower interpretation of section 1708 is warranted for misdelivered mail has adopted such an exception, see *United States v. Lavin*, 567 F.2d 579, 583 (3d Cir. 1977); *United States v. Anton*, 547 F.2d 493, 495-96 (9th Cir. 1976); *United States v. Davis*, 461 F.2d 83, 90 (5th Cir.), *cert. denied*, 409 U.S. 921 (1972), thus lengthening the operative period of the statute to match or even exceed that of section 1702. Recognizing the legislative intent to protect the mails and the modern realities of delivering and receiving mail, those courts hold that the duty and authority of the Postal Service does not end when the mail is misdelivered; rather, they continue until the mail has been returned to the sender or delivered to its addressee. See *Lavin*, 567 F.2d at 583; *Davis*, 461 F.2d at 88-89; *cf. Anton*, 547 F.2d at 495 (recognizing that in some instances Postal Service’s duty may not continue until the mail is returned to sender or delivered to its addressee). Because these courts have broadened the scope of section 1708 in these cases, it cannot be argued that section 1708 should always cover a narrow time period solely because of the existence of section 1702.

47. *United States v. Palmer*, 864 F.2d 524, 528 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).

Judge Easterbrook also examined the interests and expectations of senders, unintended recipients, intended recipients and the Postal Service. He concluded that from the perspectives of these parties, misdelivered and misaddressed mail are the same.⁴⁸ The sender's interest is in ensuring that the intended recipient receives mail at the correct address.⁴⁹ From the sender's viewpoint, the consequences of a misaddressed article and a misdelivered article are the same because in either case the mail does not reach the intended recipient. Similarly, the intended recipient's expectation to receive the mail is thwarted upon initial delivery by the Postal Service whether mail is misdelivered or misaddressed.⁵⁰

In contrast, the unintended recipient has no legitimate interest in receiving mail that the sender does not intend him to have. Judge Easterbrook reasoned that whether the unintended recipient receives an article that is misaddressed or misdelivered, he learns that the mail does not belong to him by simply looking at the envelope.⁵¹ Knowing that the item was meant for someone else, the unintended recipient should return it to the Postal Service.⁵² Finally, the Postal Service's has the same interest in making further attempts to deliver mail to the addressee or in returning it to the sender whether the mail is misaddressed or misdelivered.⁵³ Although in the case of out-of-date mail⁵⁴ the filing of a proper change-of-address form makes the Postal Service's continuing obligation easier to fulfill,⁵⁵ the failure to file this form does not entitle the

48. *See id.* at 527.

49. *See id.*

50. *See id.*

51. *See id.*

52. *See id.*

53. *See id.* The Seventh Circuit, in *Palmer*, disagreed with the Fifth Circuit and characterized the Fifth Circuit view as totally foreclosing the application of section 1708 to misaddressed mail, stating that the Fifth Circuit held "that § 1708 does not apply to mail after it reaches the address on the envelope." *Id.*

Theoretically, however, it is possible to violate section 1708, even under the Fifth Circuit's view, if the recipient of misaddressed mail forms an intent to steal it "at the time it was removed from his post office box, or at the time he *first discovered* it as being in his mail." *Goodman v. United States*, 341 F.2d 272, 273 (5th Cir. 1965) (per curiam) (emphasis added). The recipient may first discover an envelope in his mail at the moment he removes it from the mailbox, when he first sifts through the mail or sometime thereafter. Although the Fifth Circuit adopted the instantaneously formed intent requirement, *see supra* notes 4 & 12 and accompanying text, the statute could apply to misaddressed mail even in the Fifth Circuit if, for example, the recipient decides to steal the misaddressed article as he is sifting through his mail or decides before he sees it that he will steal it. *See Allen v. United States*, 387 F.2d 641, 642-43 (5th Cir. 1968); *Goodman*, 341 F.2d at 273; *see also* *United States v. Anton*, 547 F.2d 493, 495 (9th Cir. 1976) ("The situations in which one would have the requisite intent to steal at the moment he withdraws his mail from its receptacle [or first discovers it in his mail] are few. In the normal case . . . only after removal does the intent arise and the theft occur.") (emphasis added).

54. *See supra* note 8.

55. *See* *United States v. Palmer*, 864 F.2d 524, 527 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989). Even the Ninth Circuit, which adheres to the restrictive view of misaddressed mail, adopts the position that the scope of the statute does not terminate

Postal Service to leave the mail with the occupant or entitle the recipient to open it without penalty.⁵⁶ Thus, if given the opportunity, the Postal Service will attempt to remedy either error by delivering the article to the proper addressee or returning the article to the sender without charging additional postage.⁵⁷

Judge Easterbrook concluded that because “[e]very court that has spoken to the question has held . . . that § 1708 covers misdelivered mail”⁵⁸ and because the interests of the parties are the same whether mail is mis-addressed or misdelivered, the statute should be interpreted to include thefts of misaddressed mail.⁵⁹ Furthermore, because no court had given a persuasive reason for distinguishing between misdelivered and misaddressed mail and the legislative history of the statute indicated “that § 1708 was designed to protect the [sanctity and] integrity of the mails,”⁶⁰ Judge Easterbrook decided that a broad application of the statute was warranted in order to encourage unintended recipients of misaddressed mail to return it to the Postal Service.⁶¹

upon initial delivery of out-of-date mail as long as the intended recipient filed a proper change-of-address form. *See* *United States v. Birnstihl*, 441 F.2d 368, 369 (9th Cir. 1971).

56. *See Palmer*, 864 F.2d at 527.

57. *See id.*; *supra* notes 80-81 and accompanying text.

58. *Id.*

59. *See id.* Although the *Palmer* court specifically mentions “first class” mail in dictum, the holding is not limited to first class mail, stating that “§ 1708 applies to misaddressed mail.” *Id.* Nevertheless, the statute will almost always be implicated in cases involving first-class mail because a check or credit card is usually sent first-class. However, in the case of theft of mail sent under another classification, the statute should still be implicated under the *Palmer* holding.

60. *Id.*; *see* H.R. Rep. No. 1674, 82d Cong., 2d Sess. 2 (1952), *reprinted in* 1952 U.S. Code Cong. & Admin. News 1853-57; S. Rep. No. 980, 82d Cong., 1st Sess. 2 (1951).

61. *See United States v. Palmer*, 864 F.2d 524, 527 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989). The *Palmer* court relied on opinions from the First and Tenth Circuits to support its argument that misaddressed mail and misdelivered mail should be treated similarly for purposes of section 1708.

The *Palmer* court relied on *United States v. Indelicato*, 611 F.2d 376 (1st Cir. 1979), and concluded that although the First Circuit “did not consider misaddressed mail as a separate category [it] stated the elements of the § 1708 offense in a way that covers misaddressed envelopes.” *Palmer*, 864 F.2d at 526.

Palmer also cited *United States v. Douglas*, 668 F.2d 459 (10th Cir.), *cert. denied*, 457 U.S. 1108 (1982), in which the Tenth Circuit sustained a conviction under section 1708 in a case involving theft of misaddressed mail. In *Douglas*, the payee of a social security check had recently moved and the check in question was delivered to the mailbox at his old address. The new occupant removed the envelope from the mailbox and later clothes-pinned it, unopened, with the check inside, to a metal rod attached to the mailbox. Subsequently, both the envelope and the check disappeared. Defendant took the envelope and negotiated the check. *See id.* at 461.

The defendants in *Palmer* advanced the argument that in *Douglas*, the article ceased to be in the “mail” with the initial deposit in the mail box and re-entered the “mail” when the occupant clipped the envelope to the post. Thus, they argued that the *Douglas* court concluded that extending the protection of the statute to cover misaddressed mail was unnecessary. The *Palmer* court rejected this theory, reasoning that the *Douglas* court explicitly concluded that because of the rule favoring broad construction of the statute “[a]n item does not cease to be mail within the custody of the postal system until it is

III. JUDGE EASTERBROOK'S FUNCTIONAL VIEW OF THE RULE OF LENTY

Although the result reached in *Palmer*—that section 1708 should be interpreted to include theft of misaddressed mail—is sound, Judge Easterbrook's analysis was flawed in several ways. First, a major premise of Judge Easterbrook's functional view of the rule of lenity was that the rule of lenity "does not preclude the implementation of the criminal law every time a statute needs construction, for all enactments require elucidation."⁶² Accordingly, because section 1708 is not ambiguous but merely requires elucidation, it was unnecessary to apply the rule of lenity, and thus, the statute could be interpreted broadly to include theft of misaddressed mail.

Judge Easterbrook has invented a distinction between statutes that are "ambiguous" and those that merely require "elucidation."⁶³ When a statute is vague, courts may declare it constitutionally invalid under the void-for-vagueness doctrine.⁶⁴ When a statute is not vague but merely ambiguous, the statute remains valid, but the rule of lenity restricts the statute's meaning to that which should have been foreseen.⁶⁵ Judge Easterbrook's functional view of the rule of lenity adds a third step to this hierarchy in which the rule of lenity is not triggered when a statute merely requires elucidation.

Judge Easterbrook's distinction between statutes that are ambiguous and those that merely require elucidation poses an obvious and troubling question: when does a statute that requires interpretation rise to the level of ambiguity? Arguably, in the context of statutory interpretation, a statute requiring elucidation *is* an ambiguous statute. Moreover, the distinction between ambiguity and elucidation merely arms the judiciary with the dangerous power arbitrarily to circumvent the rule of lenity and the essential functions it serves.

The second premise of Judge Easterbrook's argument was that the functions of the rule of lenity will not be served by a "crabbed reading"⁶⁶ of the term "mail." It is curious, then, that he acknowledged the three basic functions of the rule of lenity—notice, separation of powers and the rule of law—but attempted to refute, albeit improperly, only the notice

delivered to the *proper addressee.*" *Palmer*, 864 F.2d at 526 (quoting *Douglas*, 668 F.2d at 461 n.3) (emphasis added).

62. *Palmer*, 864 F.2d at 527.

63. *See id.*

64. *See Jeffries, supra note 25*, at 195-96, 206. The void-for-vagueness doctrine mandates that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

65. *See Jeffries, supra note 25*, at 206.

66. *See United States v. Palmer*, 864 F.2d 524, 528 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).

function.⁶⁷ Judge Easterbrook determined that notice was satisfied because, even if defendants were not on notice that their conduct violated section 1708, they were on notice that their conduct was unlawful under a complementary statute, section 1702, or under state law.⁶⁸ He reasoned that because the penalty provisions of section 1702 and section 1708 are identical and the penalties for felony theft under the law of most states are even greater, applying the rule of lenity to section 1708 would simply transfer the prosecution to section 1702 or to state law leading to the same or even greater penalty.⁶⁹

If defendants' conduct violated section 1702 and Judge Easterbrook believed that a reading of section 1702 would place defendants on notice that their acts were unlawful, the defendants should have been prosecuted under section 1702, not section 1708. Because defendants were indicted under section 1708, not section 1702, defendants should have had specific notice that their conduct violated section 1708. Moreover, if section 1708 is not ambiguous, as Judge Easterbrook has determined, then a reading of that section would have provided the requisite notice. It is puzzling then that Judge Easterbrook imputed notice under section 1702 to section 1708. He probably did so because section 1708 is ambiguous and a reading of that statute would not have provided the requisite notice. Therefore, the rule of lenity should have been invoked.

Judge Easterbrook could have avoided the conflict between the rule of lenity and a broad interpretation of section 1708 by concluding that the statute's legislative history, which indicates that the statute was conceived to protect the "sanctity and integrity" of the mail,⁷⁰ removed the ambiguity in the statute. This would have rendered the rule of lenity inapplicable,⁷¹ but Judge Easterbrook did not consider this alternative. Instead, Judge Easterbrook interpreted the statute broadly by improperly manipulating a basic and essential canon of statutory construction that is deeply rooted in American jurisprudence.⁷²

67. *See id.*

68. *See id.*

69. *See id.*

70. *See supra* note 3.

71. *See supra* notes 22-24 and accompanying text. Such a determination might be improper for two reasons. First, this legislative history may be too broad to remove ambiguity from the statute. Second, the legislature that proffered this language did so in amending section 1708 to increase the penalty for its violation, over one hundred years after it was originally enacted.

This alternative justification for interpreting section 1708 broadly, however, is less objectionable than Judge Easterbrook's manipulation of the rule of lenity.

72. Support for the rule of lenity, however, has waned somewhat in recent years. One commentator argued that "strict construction no longer commands the allegiance of the courts," and therefore, "rejection of strict construction in itself [is] unobjectionable." *Jeffries, supra* note 25, at 219.

The same commentator argues that the theory of separation of powers should not guide judicial interpretation of criminal law because "[p]enal legislation exists in such abundance that wholesale judicial creativity is simply unnecessary." *Id.* at 202. Often, notice is unrealistic because publication of a statute's text without further government

IV. SECTION 1708 SHOULD BE APPLIED TO THEFT OF MISADDRESSED MAIL

Notwithstanding the conflict between the rule of lenity and a broad interpretation of section 1708, the policy reasons for applying the statute to theft of misaddressed mail are sound. First, the stated legislative purpose of the statute is to protect the sanctity and integrity of the mails.⁷³ Interpreting section 1708 to include theft of misaddressed mail satisfies this purpose by encouraging the unintended recipient to return the misaddressed article to the Postal Service.⁷⁴

Second, although the sender has erred when mail is misaddressed, either by negligently addressing the envelope or by not knowing where the addressee currently resides,⁷⁵ the unintended recipient is in the best position to spot the error and correct it. Therefore, the efficiency of the postal system would be enhanced by encouraging the unintended recipi-

effort to apprise people of the content of the law is deemed sufficient notice. *See id.* at 207. The notice concept is also unrealistic because most often trained lawyers are needed to determine whether an act violates a statute and even they find statutory interpretation time-consuming and tricky. *See id.* at 208. The rule of law does not support the traditional rule of strict construction because strict construction does not bear any necessary or predictable relation to the concerns suggested by the rule of law. *See id.* at 219.

The rule of lenity, therefore, no longer fits the pattern of the business of judging and what is left of the rule is closer to a slogan than to a practice. *See id.* at 244.

Moreover, "Where public or social interest in penal legislation is especially great, the policy of giving penal laws a very strict construction may be relaxed." 3 N. Singer, *supra* note 17, § 59.05, at 33. More specifically, the author asserted that there is great social or public interest in penal legislation regarding matters of public health and safety and organized crime. *See id.* Arguably, there is little public or social interest in protecting against theft of misaddressed mail. Therefore, strict construction should not be relaxed.

73. *See supra* note 3 and accompanying text.

74. Avoiding criminal prosecution under section 1708 would provide this encouragement. *See United States v. Palmer*, 864 F.2d 524, 527 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).

75. In the case of misdelivered mail the Postal Service, not the sender, has erred. Therefore, if the scope of section 1708 is analyzed in terms of the source of the error, it is arguable that a broader interpretation of the statute is warranted when mail is misdelivered, but in the case of misaddressed mail, only where a proper change-of-address form is filed. However, the proper analysis should focus on who can correct the error, not who made the error.

Even the Ninth Circuit, which adheres to the restrictive view of misaddressed mail, holds that section 1708 applies to out-of-date mail if a change-of-address form is on file. *See United States v. Birnstihl*, 441 F.2d 368, 369 (9th Cir. 1971) (*per curiam*). This exception is logical because it recognizes that in this limited circumstance, the Postal Service has received express notice under its own procedures that the addressee has moved. *See United States Postal Service Domestic Mail Manual* § 159.132 (Mar. 19, 1989) (codified at 39 C.F.R. § 159.132) (hereinafter *Postal Service Manual*). Therefore, the Postal Service should not be relieved of its duty over that article of mail by a mere delivery to the address indicated by the sender.

The holding in *Palmer*, however, is not limited to out-of-date mail when a change-of-address form has been filed, but rather extends application of the statute to all cases involving misaddressed mail. The court stated that "§ 1708 applies to misaddressed mail," without limiting its holding to out-of-date mail when a proper change-of-address form is filed. *See Palmer*, 864 F.2d at 527.

ent to cooperate, not by punishing the sender or intended recipient for an excusable error.

Third, although there is no affirmative duty on the part of the Postal Service to locate the intended recipient of misaddressed mail, absent the filing of a change-of-address form,⁷⁶ the Postal Service appears to be obligated to attempt to return the misaddressed mail to the sender if it is unable to locate the intended recipient.⁷⁷ The Postal Service's internal regulations indicate that the obligations of the Postal Service do not end after it initially delivers misaddressed mail to the address on the envelope.⁷⁸ Combining both types of misaddressed mail—out-of-date mail and typographical errors⁷⁹—in a category entitled "Mail Undeliverable-as-Addressed,"⁸⁰ the regulations state that "mail that is undeliverable as addressed may be forwarded, returned to the sender, or treated as dead mail."⁸¹

It would be impossible for the Postal Service to locate the intended recipient, as mandated by the regulations, if the unintended recipient retained possession of the misaddressed mail because the Postal Service has no initial obligation to determine whether the intended recipient resides at the address on the envelope. Furthermore, the practical realities of sending, delivering and receiving mail in today's anonymous urban environment make it impractical to expect the Postal Service to be aware that the intended addressee does not reside at the address on the envelope.⁸² Another mechanism, therefore, must be used to promote compliance with the regulatory mandate and improve the chances that the misaddressed article will reach the intended recipient. An interpretation of the

76. See *United States v. Birnstihl*, 441 F.2d 368, 369 (9th Cir. 1971); *Postal Service Manual*, *supra* note 75, § 159.132.

77. See *Postal Service Manual*, *supra* note 75, §§ 159.11 (b), (c), 159.151, exhibits 159.151a-f; *United States v. Palmer*, 864 F.2d 524, 527 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989). Because the misaddressed article remains under the Postal Service's authority after it is initially delivered to the wrong address, the return addressee (sender) may be viewed as the new addressee under section 1708.

78. See *Postal Service Manual*, *supra* note 75, §§ 159.11 (b), (c), 159.151, exhibits 159.151a-f.

79. See *supra* note 8.

80. See *Postal Service Manual*, *supra* note 75, § 159.11 (b), (c).

81. *Id.* at § 159.151. The treatment depends on what is authorized for that particular class of mail. See *id.* at exhibits 159.151a-f. The Postal Service regulations appear to require that if the sender is known, first class mail will either be forwarded or returned to the sender depending on the sender's endorsement. Only if the sender is unknown, the misaddressed article can be classified as dead mail, and the Postal Service will have no further obligation after initial delivery. See *id.* at exhibit 159.151a.

82. See *Smith v. United States*, 343 F.2d 539, 542 (5th Cir.), *cert. denied*, 382 U.S. 361 (1965). "[T]he sheer volume of mail . . . has . . . fostered an anonymity between today's mail carriers and addressees that was not characteristic of the relationship between postriders and our founding fathers." *United States v. Davis*, 461 F.2d 83, 88 (5th Cir.), *cert. denied*, 409 U.S. 921 (1972). For example, over 147 billion pieces of mail were handled by the Postal Service in 1986, an increase of approximately one thousand percent since 1900. Bureau of the Census, U.S. Department of Commerce, *Statistical Abstract of the United States* at 520 (108th ed. 1988).

federal mail theft statute that encourages the unintended recipient to return misaddressed mail to the Postal Service would provide such a mechanism.⁸³

Finally, Judge Easterbrook's well-conceived analysis based on the interests of the parties further supports the inclusion of theft of misaddressed mail under the purview of section 1708.⁸⁴ Judge Easterbrook reasoned that the consequences of misaddressed and misdelivered mail are identical from the perspectives of the sender, unintended recipient, intended recipient and the postal system.⁸⁵ Moreover, courts agree that the statute applies to theft of misdelivered mail and no court has given a persuasive reason for applying the statute differently for misaddressed mail.⁸⁶ Therefore, section 1708 should apply to theft of misaddressed mail as well.⁸⁷

83. See *United States v. Palmer*, 864 F.2d 524, 527 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989).

84. See *id.*

85. See *id.*; *supra* notes 48-57 and accompanying text.

86. See *Palmer*, 864 F.2d at 527.

87. See *id.* There are two causes of misaddressed mail; either the sender has incorrectly addressed the article, perhaps due to a typographical error, or the sender has used an out-of-date address. After scrutinizing the four circuit court cases that have dealt with misaddressed mail, a pattern emerges along these lines. In each case involving an out-of-date address, the courts have held that the theft violated the statute. See, e.g., *id.*; *United States v. Douglas*, 668 F.2d 459, 461 (10th Cir.), *cert. denied*, 457 U.S. 1108 (1982). In each case involving an incorrect address, the scope of the statute was limited to exclude thefts of misaddressed mail. See, e.g., *Allen v. United States*, 387 F.2d 641, 643 (5th Cir. 1968); *Goodman v. United States*, 341 F.2d 272, 273 (5th Cir. 1965) (*per curiam*). To conclude that the statute should be interpreted along these lines, including theft of out-of-date mail under the statute, but excluding thefts of incorrectly addressed articles, would be improper.

The circuit courts that have addressed the issue of whether theft of misaddressed mail violates the statute have not limited their holdings to the facts before them and have chosen to promulgate broad holdings covering all instances of misaddressed mail. See *United States v. Palmer*, 864 F.2d 524, 527-28 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3166 (1989); *Douglas*, 668 F.2d at 461; *Allen*, 387 F.2d at 642-43; *Goodman*, 341 F.2d at 273.

In *Goodman* and *Allen*, where the Fifth Circuit refused to apply section 1708 to misaddressed mail, the sender had erred by improperly addressing the envelope. Reversing the convictions in both cases, the Fifth Circuit not only failed to recognize a distinction between the two types of misaddressed mail, it also did not discuss whether a broader interpretation of the statute is warranted for misaddressed mail at all. See *Allen*, 387 F.2d at 642-43; *Goodman*, 341 F.2d at 372-73.

In addition, in *Palmer* and *Douglas*, the two out-of-date mail cases holding that theft of misaddressed mail is a section 1708 violation, the courts did not limit their holdings to outdated mail. Although the *Palmer* court did acknowledge that the different types exist, stating "[w]e must decide whether converting the contents of an envelope violates § 1708 when the envelope was delivered to an outdated address," *Palmer*, 864 F.2d at 525 (emphasis added), the court properly held "that § 1708 applies to misaddressed mail" without any qualification that its holding is limited to out-of-date mail. See *id.* at 527.

Furthermore, this pattern is not supported by at least one district court case holding that theft of an out-of-date article was not a section 1708 violation. *United States v. Askey*, 108 F. Supp. 408, 410 (S.D. Tex. 1952).

The pattern among the four circuit court cases involving misaddressed mail, therefore, does not affect the proper application of the statute to all misaddressed mail cases.

CONCLUSION

The realities of sending, delivering and receiving mail in today's anonymous urban environment demand reappraisal of the scope of the federal mail theft statute. When mail is misaddressed, the unintended recipient must be encouraged to return the misaddressed article to the Postal Service. Application of section 1708 to misaddressed mail would provide such incentive because the unintended recipient could avoid criminal prosecution by returning the misaddressed article.

Although such a flexible interpretation of section 1708 is strongly supported by public policy, this interpretation cannot be advanced without offending the rule of lenity. The rule of lenity cannot be disregarded, however, because it serves many essential functions and it continues to be applied by the United States Supreme Court.

While Judge Easterbrook, in *United States v. Palmer*, held that theft of misaddressed mail is a section 1708 violation, he improperly circumvented the rule of lenity by adopting a functional view of the rule that is poorly reasoned, incompletely analyzed and without precedent. Judge Easterbrook failed to consider that the legislative history of section 1708 could be interpreted as removing ambiguity in the statute, obviating application of the rule of lenity. Instead, Judge Easterbrook adopted the only other approach that allowed him to construe the statute broadly without irrefutably conflicting with the rule of lenity. His proposal is improper, however, and the *Palmer* decision has created a means by which the judiciary can circumvent this essential canon of statutory construction.

The only available solution is legislative action. Because the arguments for interpreting section 1708 to include theft of misaddressed mail are compelling and the rule of lenity prohibits such an interpretation, Congress should amend the federal mail theft statute to eliminate this conflict.

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