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## WHEN DOES SLEAZE BECOME A CRIME? REDEFINING HONEST SERVICES FRAUD AFTER *SKILLING V. UNITED STATES*

TERESA M. BECVAR

### INTRODUCTION

On February 4, 2010, the United States Attorney's Office in Chicago did a curious thing. Prosecutors amended their indictment of former Illinois governor Rod Blagojevich for seeking to improperly profit from his office, including new charges—charges that no longer relied on a theory that Blagojevich breached his duty to provide his honest services to the public and refrain from self-dealing.<sup>1</sup> The validity of the federal statute criminalizing “honest services” fraud had been challenged in the Supreme Court, and the eight additional counts against Blagojevich ensured that he would face the same allegations at trial even if the Supreme Court struck the statute down.<sup>2</sup> But what was the honest services theory, why was it imperiled, and why did prosecutors rely on it in the first place?

Honest services fraud is just one tool in the federal government's extensive arsenal used to prosecute public corruption and private corporate fraud. The honest services doctrine is an outgrowth of the federal mail fraud statute, a law that prosecutors valued for over a century because of its simplicity and adaptability.<sup>3</sup> Beginning in the 1940's, courts began to interpret the mail fraud statute's prohibition of a scheme to defraud to include not only depriving someone of money or property, but also depriving one of intangible rights.<sup>4</sup> These decisions led to what is known as the honest services theory of fraud, which maintains that actionable harm lay in a betrayed party's right to the offender's “honest services,” even if the party was not deprived of money or property.

1. Jeff Coen, *Blagojevich Case Tweaked*, CHI. TRIB. (Feb. 5, 2010), [http://articles.chicagotribune.com/2010-02-05/news/chi-100205supremecourt-blago-story\\_1\\_warmed-up-old-soup-limits-or-tosses-indictment-against-former-gov](http://articles.chicagotribune.com/2010-02-05/news/chi-100205supremecourt-blago-story_1_warmed-up-old-soup-limits-or-tosses-indictment-against-former-gov).

2. *Id.*

3. Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 1 (1998).

4. *See, e.g.*, *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941).

The Supreme Court has curtailed the rapid expansion of this versatile theory twice in the past three decades. It first halted the development of the intangible rights doctrine in 1987 in *McNally v. United States*, holding that the mail fraud statute was limited in scope to the protection of property rights.<sup>5</sup> In response, Congress swiftly enacted 18 U.S.C. § 1346, providing that, “For the purposes of th[e] chapter [of the U.S. Code that prohibits mail fraud and wire fraud], the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”<sup>6</sup>

In June 2010—four months after the government amended the Blagojevich complaint—the Supreme Court “eviscerated” the honest services theory for a second time.<sup>7</sup> Seeking to balance Congress’s intention to preserve the substantial body of federal appellate precedent upholding § 1346 with the Court’s concerns about its vagueness, the Court in *Skilling v. United States*, held, *inter alia*, that the statute covers only bribery and kickback schemes and not undisclosed self-dealing.<sup>8</sup> In *Skilling*, Enron executive Jeffrey Skilling allegedly engaged in a scheme to deceive investors regarding Enron’s financial performance by manipulating its publicly reported financial results and making false and misleading statements.<sup>9</sup> Skilling challenged his conviction on the grounds that the honest services statute either should be interpreted narrowly to exclude his actions or should be invalidated as unconstitutionally vague.<sup>10</sup> The Court declined to go so far as to strike down the statute as unconstitutional, but limited its scope to cases involving bribery and kickbacks.<sup>11</sup> Months later in 2010, members of Congress proposed legislation to undo some of the effects of the *Skilling* decision. This Honest Services Restoration Act (HSRA) seeks to restore the prohibition on undisclosed self-dealing by public officials and corporate fiduciaries.<sup>12</sup>

This Note argues that although the proposed HSRA properly seeks to restore the honest services statute to once again criminalize undisclosed self-dealing, in some instances it criminalizes too narrow or too

5. 483 U.S. 350, 365 (1987) (Stevens, J., dissenting).

6. 18 U.S.C. § 1346 (1988).

7. Elizabeth R. Sheyn, *Criminalizing the Denial of Honest Services after Skilling*, 2011 WIS. L. REV. 27, 27 (2011).

8. 130 S. Ct. 2896, 2931 (2010).

9. *Id.* at 2908.

10. *Id.* at 2925-26.

11. *Id.* at 2931.

12. S. 3854, 111th Cong. (2010).

broad a range of conduct. To address concerns about overcriminalization of petty misconduct, abuse of prosecutorial discretion, and violation of federalism principles, any amendment to the honest services statute must go beyond restoring the state of pre-*Skilling* case law, which is littered with a hodgepodge of approaches. Instead, the amendment should draw upon past federal appellate court rationale and implement reasoned limiting principles to clearly define the scope of the statute. In particular, a reformulated honest services statute should specify 1) the source of the fiduciary duty, the breach of which constitutes fraud; 2) the specific intent to defraud as the *mens rea* of the crime; and 3) illegitimate gain to the accused or harm to the victim as alternative sufficient limiting principles to ensure that conduct rises to the level of criminal fraud.

Part I of the Note chronicles the development of honest services theory from its roots in the federal mail fraud statute to its first major stumbling block in *McNally v. United States*. Part II describes the codification of honest services fraud and its subsequent limitation in *Skilling v. United States*. Part III discusses the challenges in crafting a comprehensive honest services theory and surveys the restrictions adopted by the federal appellate courts in determining what conduct constitutes an honest services violation. Finally, Part IV analyzes the shortcomings of the Honest Services Restoration Act and sets out recommendations for reconceiving the proposed legislation.

#### I. THE RISE AND STUMBLE OF THE INTANGIBLE RIGHTS THEORY OF FRAUD

The crime of honest services fraud originated in the federal mail fraud statute.<sup>13</sup> Beginning with *Shushan v. United States*, the theory gained recognition within federal appeals courts over the course of the second half of the twentieth century.<sup>14</sup> However, in 1987, the Supreme Court limited the mail fraud statute to exclude intangible rights fraud, holding that a scheme or artifice to defraud violates the mail fraud statute only if it defrauds someone of money or property.<sup>15</sup> Consequently, the Court temporarily halted the expansion of the honest services doctrine.

13. *McNally v. United States*, 483 U.S. 350, 364-65 (1987) (Stevens, J., dissenting).

14. 117 F.2d 110, 115 (5th Cir. 1941); *see also Skilling*, 130 S. Ct. at 2927; *McNally*, 483 U.S. at 365.

15. *McNally*, 483 U.S. at 356.

### A. *The Mail Fraud Statute*

The first federal mail fraud statute, enacted in 1872, broadly prohibited the use of the United States mails to advance “any scheme or artifice or defraud.”<sup>16</sup> The statute’s sponsor indicated that measures were needed “to prevent the frauds . . . by thieves, forgers, and rascals generally, for the purpose of deceiving and fleecing the innocent people in the country.”<sup>17</sup> Indeed, in enacting the mail fraud statute, Congress intended to prevent the United States postal system from being used as an instrument to perpetrate crime.<sup>18</sup>

Over the course of the past century, the mail fraud statute was amended several times in order to enlarge its coverage over novel types of fraud.<sup>19</sup> For instance, a 1909 amendment added the words “or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises” in order to clarify that the statute applied to misrepresentations as to the past and present as well as promises about future conduct.<sup>20</sup>

In construing the two phrases, “any scheme or artifice to defraud, or for obtaining money or property,”<sup>21</sup> courts uniformly held that the disjunctive wording meant that a scheme need not involve defrauding someone of money or property in order to violate the statute.<sup>22</sup> Instead, a person could be prosecuted for mail fraud simply by “defraud[ing] citizens of their intangible rights to honest and impartial government.”<sup>23</sup> This construction opened up the door to prosecution based on an honest services theory of fraud.

16. *See id.*

17. *Id.* (quoting CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth)).

18. *United States v. Brewer*, 528 F.2d 492, 498 (4th Cir. 1975) (citing *Durland v. United States*, 161 U.S. 306, 314 (1896)).

19. *McNally*, 483 U.S. at 374 (Stevens, J., dissenting); *see also* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980) (“[W]here legislatures have sometimes been slow to enact specific prohibitory legislation, the mail fraud statute has frequently represented the sole instrument of justice that could be wielded against the ever-innovative practitioners of deceit.”).

20. *McNally*, 483 U.S. at 357-58.

21. 18 U.S.C. § 1341 (2008) (italics added). The statute currently reads, in relevant part, “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article . . .”

22. *McNally*, 483 U.S. at 358.

23. *Id.* at 355.

B. *Shushan v. United States and an Intangible Rights Theory of Fraud*

A 1941 Fifth Circuit opinion concerning the corrupt dealings of a local governing board<sup>24</sup> is considered to have first articulated an intangible rights theory of fraud.<sup>25</sup> In *Shushan*, a group of businessmen schemed to influence the board to award them a public contract with favorable terms.<sup>26</sup> The scheme entailed the bribery of a board employee and kickbacks paid out to other board members.<sup>27</sup> The court rejected the argument that the prosecution failed to prove that the businessmen intended to defraud because the board actually saved money through the ill-gotten contract.<sup>28</sup> The court stressed that “any scheme to obtain an advantage by corrupting [a public official] must in the federal law be considered a scheme to defraud [the public].”<sup>29</sup>

The honest services doctrine of fraud differs from traditional fraud in its relationship between the defrauder and the victim. Traditionally, a victim’s loss is a defrauder’s gain, with a mirror-image relationship between the two.<sup>30</sup> However, the honest services doctrine introduces a third party who enriches the defrauder instead of the victim.<sup>31</sup> Rather than deprive the victim of tangible money or property, the defrauder and the third party deprive the victim of his intangible right to the defrauder’s honest services.<sup>32</sup> As exemplified in *Shushan*, the paradigmatic honest services fraud case involves a contractor paying a bribe to a public official in exchange for the award of a contract. Regardless of whether the contract provides better or worse terms than one negotiated at arms-length, the public official deprives the public of its right to the official’s “honest services.”<sup>33</sup>

24. *Shushan v. United States*, 117 F.2d 110, 114 (5th Cir. 1941).

25. See *Skilling v. United States*, 130 S. Ct. 2896, 2926 (2010).

26. 117 F.2d at 114-15.

27. *Id.*

28. *Id.* at 119.

29. *Id.* at 115.

30. *Skilling*, 130 S. Ct at 2926.

31. *Id.*

32. *Id.*

33. *Id.*; see also *United States v. Dixon*, 536 F.2d 1388, 1400 (2d Cir. 1976) (holding that even though a public official’s actions may have enriched the fisc, “they are nonetheless frauds since the public official has been paid to act in breach his duties”); *United States v. Rauhoff*, 525 F.2d 1170, 1175 (7th Cir. 1975) (holding that even though all parties, including the state of Illinois, were reaping profits as a result of a bribery scheme, the “people of Illinois . . . were defrauded of their right to have the business of the [State] conducted free from bribery, their right to loyal and faithful service of their state officials, and the right to those secret profits obtained by [the schemer]”).

C. *McNally v. United States: Halting the Intangible Rights Theory*

Until the Supreme Court took up intangible rights theory in 1987, all the Federal Courts of Appeals which had considered the issue had held that the mail fraud statute supported the intangible rights theory of fraud.<sup>34</sup> However, in *McNally v. United States*, the Supreme Court rejected this position and held that “a scheme or artifice to defraud does not violate the [mail fraud] statute unless its purpose is to defraud someone of money or property.”<sup>35</sup>

*McNally* involved the conspiracy and mail fraud convictions of a former Kentucky state official and a private individual who schemed with other public officials to direct insurance commissions to an entity in which they had an ownership interest.<sup>36</sup> The mail fraud count alleged that the defendants “had devised a scheme . . . to defraud the citizens and government of Kentucky of their right to have the Commonwealth’s affairs conducted honestly.”<sup>37</sup>

In an opinion by Justice White, the Court justified limiting the mail fraud statute to exclude intangible rights fraud based on legislative intent and the common understanding of the meaning of the word “defraud.” White found that the statute protects property rights because its original purpose was to protect people from schemes “by thieves, forgers, and rapsCALLIONS” to deprive them of their money or property.<sup>38</sup> In addition, the words “to defraud . . . usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching.”<sup>39</sup>

Justice White acknowledged that the disjunctive phrasing of “to defraud” *or* “for obtaining money or property by means of false or fraudulent pretenses, representations, or promises” could arguably be construed so that the second phrase did not limit schemes to defraud to money or property.<sup>40</sup> He further recognized that each of the Courts of Appeals which had addressed the issue had construed the meaning of “to defraud” to include intangible rights.<sup>41</sup> Despite these concessions, White maintained that the money-or-property phrase was not added with the intent to support a broad definition of defraud, but

34. *McNally v. United States*, 483 U.S. 350, 358 (1987); *see also Skilling*, 130 S. Ct at 2927.

35. *McNally*, 483 U.S. at 365 (Stevens, J., dissenting).

36. *Id.* at 352-53.

37. *Id.* at 353.

38. *Id.* at 356 (quoting CONG. GLOBE, *supra* note 17).

39. *Id.* at 358 (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

40. *Id.* at 358.

41. *Id.*

rather simply to clarify that the statute reached false promises about the future as well as other frauds.<sup>42</sup>

Finally, Justice White applied the rule of lenity, concluding that in order to justify criminal punishment, a case must plainly fit within the statute.<sup>43</sup> He found it problematic that the outer boundaries of the statute were ambiguous regarding when a person could be charged for violating intangible rights, such as the right to have public officials perform their duties honestly.<sup>44</sup> He was further concerned that prosecution under an intangible rights theory involves the federal government setting standards of disclosure and good government for local and state officials.<sup>45</sup> Rather than construe the statute in a manner that raised these federalism and ambiguity concerns, Justice White opted to limit the scope to the protection of property rights only.<sup>46</sup>

Justice Stevens wrote a strong dissent that criticized the Court for rejecting the “longstanding” construction of the mail fraud statute and going against the “tide of well-considered opinions” of the lower courts.<sup>47</sup> First, Stevens argued that the intangible rights construction, systematically adopted by the Courts of Appeals, is consistent with the common understanding of the term “defraud” and furthers Congress’s goal of preserving the integrity of the Postal Service.<sup>48</sup> Second, he maintained that any ambiguity in the statute had already been resolved by judicial construction.<sup>49</sup> Congress leaves gaps in statutes, he asserted, to implicitly delegate to the courts the authority to flesh them out through judicial construction.<sup>50</sup> Finally, Stevens found that it was wrong for the Court to assume that the defendants, as sophisticated individuals dealing with the government, would lack fair notice that their conduct was unlawful; indeed, orchestrating an arrangement to secretly make hundreds of thousands of dollars in kickbacks is hardly questionably unlawful.<sup>51</sup> Thus, Stevens concluded that “there is no reason . . . to upset the settled, sensible construction that the federal

42. *Id.* at 358-59.

43. *Id.* at 360.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 376 (Stevens, J., dissenting).

48. *Id.* at 368-69.

49. *Id.* at 375.

50. *Id.* at 373.

51. *Id.* at 375.



courts have consistently endorsed” and reject the intangible rights theory of fraud.<sup>52</sup>

## II. INTANGIBLE RIGHTS RESURRECTED . . . AND DEVITALIZED: THE HONEST SERVICES STATUTE AND *SKILLING V. UNITED STATES*

In *McNally*, the Court sent an explicit message to Congress that if it intends to endorse intangible rights fraud, “it must speak more clearly than it has.”<sup>53</sup> Congress acted quickly, enacting a new statute the following year, § 1346, which defined “scheme or artifice to defraud” to include “a scheme or artifice to deprive another of the intangible right of honest services.”<sup>54</sup> Congress enacted the statute specifically to cover the rights that the courts had protected before *McNally*.<sup>55</sup> According to Representative Conyers, the statute was intended to “restore[] the mail fraud provision to where that provision was before the *McNally* decision,” and “it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property.”<sup>56</sup>

Despite Congress’s assertions, § 1346 failed to completely overturn the *McNally* decision. Although it did restore a breach of intangible rights cause of action, the addition of § 1346 did not alter the mail fraud statute itself to address *McNally*’s imposition of a property requirement on any other “scheme or artifice to defraud.”<sup>57</sup> Thus, any scheme to defraud *not* involving honest services still must involve money or property.<sup>58</sup>

In 2010, the Supreme Court again addressed the limitations of the honest services theory of fraud, granting certiorari in a series of three cases, *Skilling v. United States*, *Black v. United States*, and *Weyhrauch v. United States*.<sup>59</sup> The Court decided *Skilling* first and then disposed of the other two cases by remanding them for reconsideration in light of *Skilling*’s holding. Justice Ginsburg authored the unanimous *Skilling* decision, holding that scope of § 1346 is limited to prohibiting only

52. *Id.* at 368.

53. *Id.* at 360.

54. 18 U.S.C. § 1346 (1988).

55. *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000).

56. 134 CONG. REC. 33,297 (1988) (statement of Rep. John Conyers, Jr.).

57. *Cleveland*, 531 U.S. at 26.

58. *See id.* at 20 (holding that the mail-fraud statute “does not reach fraud in obtaining a state or municipal license . . . [because] a license is not ‘property’ in the government regulator’s hands”).

59. *See Black v. United States*, 130 S. Ct. 2963, 2968 (2010); *Skilling v. United States*, 130 S. Ct. 2896 (2010); *Weyhrauch v. United States*, 130 S. Ct. 2971, 2971 (2010) (per curiam).

bribery and kickback schemes.<sup>60</sup> If the statute proscribed a wider range of conduct, it would be unconstitutionally vague.<sup>61</sup>

*Skilling* concerned Jeffrey Skilling's appeal of his conviction for honest services fraud regarding his participation in a conspiracy to defraud Enron Corporation shareholders. Skilling was the chief executive officer of Enron in 2001, just before Enron entered bankruptcy.<sup>62</sup>

After Enron's collapse, a government investigation uncovered an internal conspiracy to prop up Enron's stock prices by overstating the company's financial well-being.<sup>63</sup> Dozens of Enron employees were prosecuted, and Skilling was indicted in 2004.<sup>64</sup> The government's indictment alleged that Skilling manipulated Enron's publicly reported financial results and made false and misleading statements about Enron's financial performance.<sup>65</sup> As a result, the indictment continued, Skilling and co-conspirators "deprive[d] Enron and its shareholders of the intangible right of [their] honest services," enriching themselves through salary, bonuses, stock options, and other profits.<sup>66</sup>

The Court held that Congress did not intend the honest services statute to reach Skilling's conduct because the government did not allege that Skilling solicited payments or engaged in bribery in exchange for his misrepresentations.<sup>67</sup> According to Ginsburg, the intangible right of honest services held a specific meaning to Congress in enacting § 1346, and that meaning encompassed the "core" of the pre-McNally precedents.<sup>68</sup> The "vast majority" of these precedents consistently applied the statute to bribery and kickback schemes,<sup>69</sup> while its application to other categories of conduct resulted in disarray and inconsistency.<sup>70</sup> Thus, the Court salvaged the statute from being struck down as unconstitutionally vague by adopting a limiting construction.

In limiting the range of honest services fraud to bribery and kickback schemes, the Court expressly excluded the category of conduct involving "undisclosed self-dealing by a public official or private em-

60. 130 S. Ct at 2931.

61. *Id.*

62. *Id.* at 2907.

63. *Id.*

64. *Id.*

65. *Id.* at 2908.

66. *Id.*

67. *Id.* at 2934.

68. *Id.* at 2929, 2931 (quoting *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997)).

69. *Id.* at 2930.

70. *Id.* at 2929.

ployee.”<sup>71</sup> The Court rejected the government’s contention that *McNally* itself was based on the theory of nondisclosure of a conflicting financial interest, instead characterizing *McNally* as a case concerning a paradigmatic kickback scheme where a public official conspired with a third party in order to profit from a public contract.<sup>72</sup> Conflict-of-interest prosecutions were too “amorphous” as a category of cases, handled with inconsistency among the circuits, and were not clearly covered by the statute.<sup>73</sup> In contrast, a limiting construction of § 1346 “establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress’s goal of ‘overruling’ *McNally*.”<sup>74</sup>

Justice Scalia wrote a separate opinion, concurring in the judgment, but arguing that the honest services statute was indeed unconstitutionally vague and could not be saved by a narrow construction.<sup>75</sup> Simply stated, the statute fails to define the right of honest services; it therefore falls prey to the fair notice and arbitrary enforcement dangers that constitute a due process violation.<sup>76</sup> Scalia argued that in limiting the applicability of § 1346 to bribe-and-kickback schemes, the Court had created a new federal crime and manufactured a distinction that was not supported by the pre-*McNally* case law.<sup>77</sup> Though the Court’s prohibition of bribery and kickbacks comprised the core of the pre-*McNally* case law, the doctrine actually reached a wider range of culpable conduct.<sup>78</sup>

Justice Scalia further argued that the Court’s holding did not address a fundamental problem that makes the statute vague: § 1346 fails to define the fiduciary duty that is the basis for the violation.<sup>79</sup> In Scalia’s words, even in light of the entire body of pre-*McNally* case law, the duty is “hopelessly undefined.”<sup>80</sup> There is no agreement regarding whether the duty applies to public officials, private individuals, or both,<sup>81</sup> or whether the duty has its source in general principles of obli-

71. *Id.* at 2932.

72. *Id.*

73. *Id.*

74. *Id.* at 2933.

75. *Id.* at 2935 (Scalia, J., concurring).

76. *Id.*

77. *Id.*

78. *Id.* at 2939.

79. *Id.* at 2936.

80. *Id.* at 2937.

81. *Id.*

gation or specific state or federal law.<sup>82</sup> In addition, courts disagreed as to the extent that harm to the betrayed party or financial gain to the defrauder is necessary.<sup>83</sup> In short, Scalia asserted that the majority failed to answer the basic question, “What is the criterion of guilt?”<sup>84</sup>

### III. DEFINING HONEST SERVICES FRAUD BEFORE *SKILLING*

Even though the *Skilling* Court declined to strike down § 1346 as unconstitutional, it sent an unequivocal message that it is Congress’s job, not that of the courts, to clearly define the prohibited conduct under the statute. “Honest services” is not a well-understood a term of art, but a phrase used to describe a general fiduciary duty.<sup>85</sup> This section first discusses the problems that arise when it is unclear to what extent unethical conduct is criminalized. Then it explores how the federal circuits have struggled to define the fiduciary duty and discern a set of limiting principles necessary to apply the honest services statute uniformly.<sup>86</sup>

#### A. *Problems in Criminalizing the Denial of Honest Services*

At the very least, the courts that interpreted the honest services statute before *Skilling* agreed that it “[did] not encompass every instance of official misconduct.”<sup>87</sup> Because honest services fraud is based on the fiduciary duties of loyalty and honesty, courts and juries could easily confuse criminal conduct and conduct that is merely unethical.<sup>88</sup> Such a blurry line leads to further problems with offenders receiving clear notice that their conduct is criminal.<sup>89</sup> At the same time, however, fraud generally is an open-ended crime, both to deter a wide range of undesirable conduct and to frustrate an offender’s attempts to manipu-

82. *Id.* at 2936.

83. *Id.* at 2937.

84. *Id.* at 2939.

85. Pamela Mathy, *Honest Services Fraud After Skilling*, 42 ST. MARY’S L.J. 645, 668 (2011).

86. See *McNally v. United States*, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting) (“[T]he Courts of Appeals have struggled to define just when conduct which is clearly unethical is also criminal.”).

87. *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003) (noting that the statute is “not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing”); *United States v. Bloom*, 149 F.3d 649, 651 (7th Cir. 1998) (“[F]ew violations of ethical duties are federal crimes.”); *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996); see also *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari) (“[I]t would seemingly cover a salaried employee’s phoning in sick to go to a ball game.”).

88. Moohr, *supra* note 3, at 44.

89. *Id.*

late conduct to avoid prosecution.<sup>90</sup> As such, the statute benefitted prosecutors because it was adaptable and could be widely applied.<sup>91</sup> Courts faced a challenge in narrowly circumscribing § 1346 to avoid notice problems and jury confusion while preserving its versatility.

Commentators have expressed additional concerns that § 1346 criminalized conduct that was not culpable. In critiquing the use of § 1346 to prosecute corporate executives for making bad judgments, Lisa Casey argues that “we should reserve criminal law to punish the most damaging wrongs and the most culpable defendants for conduct that society believes lacks any social utility.”<sup>92</sup> She describes three forms of overcriminalization that § 1346 can reach. First, overcriminalization can mean criminalizing behavior that society does not deem sanction-worthy or is best policed through civil tort liability.<sup>93</sup> Certain breaches by a corporate fiduciary—like a duty of care, but not a duty of loyalty—arguably fall into this category.<sup>94</sup>

The second form of overcriminalization stems from vague laws that encompass both culpable wrongdoing and other similar conduct that is not morally blameworthy.<sup>95</sup> This type of overcriminalization, in conjunction with substantial prosecutorial discretion, can lead to an uneven and selective prosecution of the laws.<sup>96</sup>

Casey’s final form of overcriminalization involves redundancy, where the defendant’s alleged conduct violates several criminal statutes requiring distinct proofs and punishments.<sup>97</sup> Prosecutors gain leverage over criminal defendants through their power to choose among various crimes to prosecute.<sup>98</sup> Casey argues that, depending on the specific facts of a case, prosecutions under § 1346 before the *Skilling* decision could conceivably have run into each of these overcriminalization issues.

Indeed, the honest services statute was criticized as being misused to “forbid[] whatever recent headlines have labeled as sleazy or unethical [conduct], under nothing more than an ‘I know it when I see

90. Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L. 1, 90-91 (2010).

91. *Id.* at 94.

92. *Id.* at 87 (internal quotation omitted).

93. *Id.* at 91.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 92.

98. *Id.*

it' standard."<sup>99</sup> However, despite all of these problems, the crime of honest services fraud has persisted for decades despite a multitude of constitutional challenges. This longevity suggests that, despite its shortcomings, a federal honest services crime has a recognized and accepted place in American society. Properly limited and defined, it could serve a significant public interest.

### B. Fiduciary Duty

In *United States v. George*, the Seventh Circuit concisely asserted, "Not every breach of every fiduciary duty works a criminal fraud."<sup>100</sup> Although this precept is generally agreed upon, courts have struggled to define the line demarcating fraudulent breaches from non-culpable conduct. Justice Scalia honed in on this problem in his *Skilling* dissent, arguing that courts have failed to establish comprehensively (1) whether a fiduciary duty applies differently to public officials and private individuals,<sup>101</sup> or (2) whether the duty has its source in general principles of obligation or specific state or federal law.<sup>102</sup> Courts have adopted a variety of approaches to each of these issues, with the *Skilling* Court ultimately declining to address the subject of fiduciary duty at all.

#### 1. Public Versus Private Fiduciary Duty

"Fraud in its elementary common law sense of deceit . . . includes the deliberate concealment of material information in a setting of fiduciary obligation."<sup>103</sup> Under common law, fraud requires a breach of a duty. However, courts tend to view the source of the fiduciary obligation in honest services fraud more expansively in the public context than the private context.

Courts typically find that the source of a public official's duty to provide honest services inheres in the official's fiduciary duty to the public.<sup>104</sup> That duty extends to private actors who are treated as public

99. Timothy P. O'Toole, *The Honest-Services Surplus: Why There's No Need (or Place) for a Federal Law Prohibiting "Criminal-esque" Conduct in the Nature of Bribes and Kickbacks*, 63 VAND. L. REV. EN BANC 49, 51 (2010).

100. 477 F.2d 508, 512 (7th Cir. 1973).

101. *Skilling v. United States*, 130 S. Ct. 2896, 2937 (2010) (Scalia, J., concurring).

102. *Id.* at 2936.

103. *United States v. Panarella*, 277 F.3d 678, 695 (3d Cir. 2002) (quoting *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987), *vacated and remanded for consideration in light of McNally v. United States*, 483 U.S. 350 (1987)).

104. *See, e.g., United States v. Sawyer*, 85 F.3d 713, 733 n.17 (1st Cir. 1996).

fiduciaries when others rely on them because of a special relationship with the government or when they in fact make governmental decisions.<sup>105</sup> At least one court has suggested that public officials may be held to a higher standard of public trust than individuals in the private sector.<sup>106</sup>

In the private context, the D.C. Circuit has held that a duty parallel to the public duty “may stem from an employment relationship of the sort that imposes discretion and consequently obligations of loyalty and fidelity on the employee.”<sup>107</sup> The Second Circuit in *United States v. Rybicki* extended that duty to include any person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers.<sup>108</sup> Hence, courts have gone so far as to recognize general principles of loyalty and honesty as a source of a fiduciary duty in both the public and private sectors. However, the Supreme Court in *Carpenter v. United States*—a case that was decided in the wake of *McNally’s* sharp limitation on the mail fraud statute to property rights—specifically characterized an employer’s contractual right to an employee’s honest and faithful service as “an interest too ethereal in itself to fall within the protection of the mail fraud statute.”<sup>109</sup> Such a breach of loyalty combined with a scheme to defraud of tangible or intangible property rights can, however, constitute an honest services violation.<sup>110</sup>

## 2. Breach of State Law Requirement

Circuits have come to differing conclusions regarding whether a violation of state ethics or criminal law is either necessary or sufficient to establish a breach of fiduciary duty giving rise to federal criminal liability. Two circuits seem to agree that a violation of state ethics law can be sufficient to establish a breach of fiduciary duty, although such violation may not be necessary.<sup>111</sup> Thus, a state law violation may in-

105. *United States v. Margiotta*, 688 F.2d 108, 122 (2d Cir. 1982); *see also* *United States v. Turner*, 465 F.3d 667, 675 (6th Cir. 2006).

106. *United States v. Lemire*, 720 F.2d 1327, 1337 n.13 (D.C. Cir. 1983).

107. *Id.* at 1335-36; *see also* *United States v. Barta*, 635 F.2d 999, 1007 (2d Cir. 1980) (“Indeed, the employment relationship, by itself, may oblige an employee not to conceal, and in fact to reveal, information he has reason to believe is material to the conduct of his employer’s business.”).

108. 354 F.3d 124, 126-27 (2d Cir. 2003) (en banc) [hereinafter *Rybicki II*].

109. 484 U.S. 19, 25 (1987).

110. *Id.*

111. *See, e.g.,* *United States v. Carbo*, 572 F.3d 112, 117 n.4 (3d Cir. 2009); *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997).

form the analysis of whether conduct rises to the level of criminal fraud, even if the state law violation may not constitute the determinative factor.

The Fifth Circuit, in holding that state law creates the source of the fiduciary duty, maintains that to violate § 1346 a public official must fail to deliver services owed under state law.<sup>112</sup> The court rooted its holding in the plain language of § 1346, reasoning that the official accused of an “honest services” violation must consciously act contrary to state law requirements.<sup>113</sup> If the official renders “just the services which would be rendered by a totally faithful employee, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services.”<sup>114</sup>

The Third Circuit, on the other hand, held that a public official deprives the public of his honest services whenever he conceals a financial interest in violation of state criminal law and takes discretionary action in his official capacity that he knows will directly benefit the concealed interest.<sup>115</sup> The honest services violation exists regardless of whether the official acted with the purpose of having the concealed interest influence his actions.<sup>116</sup> When the official’s failure to disclose a conflict of interest violates state ethics laws, the misconduct rises to the level of criminal fraud.<sup>117</sup>

Several justifications support a requirement that conduct must violate state ethics law in order to violate federal criminal law. First, because it restricts federal criminal liability to conduct prohibited by the states themselves, it addresses the concern that federal prosecutors might exert an unwarranted influence over state and local ethics standards, contravening principles of federalism.<sup>118</sup> Second, it allays concerns about fair notice of the conduct subject to criminal penalty by tying liability to violations of specific state statutes.<sup>119</sup> Third, it establishes clear boundaries to the honest services statute so that every dishonest act does not necessarily lead to federal criminal liability.<sup>120</sup>

112. See *Brumley*, 116 F.3d at 734.

113. *Id.*

114. *Id.*

115. *United States v. Panarella*, 277 F.3d 678, 680 (3d Cir. 2002).

116. *Id.* at 680.

117. See *United States v. Carbo*, 572 F.3d 112, 117 (3d Cir. 2009) (analyzing the holding in *Panarella*).

118. *United States v. Weyhrauch*, 548 F.3d 1237, 1244 (9th Cir. 2008) (citing *Brumley*, 116 F.3d at 734), *vacated*, 130 S. Ct. 2971 (2010).

119. *Id.* at 1245.

120. *Id.* at 1244-45.



Finally, to the extent many public officials' constituencies can punish dishonest or unethical conduct directly at the ballot box, there is logic behind reserving to the states control over ethical standards for their own public officials.<sup>121</sup>

Despite these justifications, most circuits have declined to adopt any requirement of state law violation at all.<sup>122</sup> The Seventh Circuit pointed out that the "vast majority" of circuits recognize that a fiduciary obligation can come from sources other than state law.<sup>123</sup> Furthermore, the fact of being a public official carries with it an inherent duty to discharge duties in the public's best interest.<sup>124</sup> This duty of honesty creates a uniform standard that does not vary from state to state.<sup>125</sup> Congress did not intend the criminality of conduct under federal law to depend on geography.<sup>126</sup> Moreover, the federal government has a significant interest in establishing a uniform standard of conduct for public officials that at least balances the state interest in the same.<sup>127</sup>

### 3. The *Skilling* Approach

Significantly, the Supreme Court has not expressly recognized any limitation on honest services liability based on a predicate state law violation. In the *Skilling* majority opinion, Justice Ginsburg hardly referred to a fiduciary duty at all, in stark contrast to Justice Scalia's emphasis on the "hopelessly undefined" case law on the subject.<sup>128</sup> In a

121. *Id.* at 1245.

122. *See* United States v. Urciuoli, 513 F.3d 290, 298 (1st Cir. 2008) (finding that just how far state law might be a premise for honest services fraud is a "tricky" question); United States v. Sorich, 523 F.3d 702, 712 (7th Cir. 2008) (declining to add a "minority" state law limiting principle to its private gain requirement); *Weyhrauch*, 548 F.3d at 1245 (declining to adopt the state law limiting principle); United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007) (holding that "an honest services mail fraud or mail fraud conviction does not require proof of a state law violation"); United States v. Frost, 125 F.3d 346, 366 (6th Cir. 1997) ("Federal law governs existence of fiduciary duty under the mail fraud statute.").

123. *Sorich*, 523 F.3d at 712 (citing United States v. George, 477 F.2d 508, 514 n.7 (7th Cir. 1973), where the source was an employee handbook, and United States v. Williams, 441 F.3d 716, 723-24 (9th Cir. 2006), where the source was a power of attorney agreement).

124. *Sorich*, 523 F.3d at 712; *see also* *Weyhrauch*, 548 F.3d at 1245 ("[T]he basis for prosecuting public officials for honest services fraud rests on the deprivation of the public's right to honest and faithful government.") (internal quotes omitted). *But see* United States v. Brumley, 116 F.3d 728, 735 (5th Cir. 1997) (criticizing the use of "§ 1346 as an enforcer of federal preferences of 'good government' with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness").

125. *Weyhrauch*, 548 F.3d at 1245.

126. *Id.* at 1246.

127. *Id.*

128. *See supra* Part II.

footnote, Ginsburg defended the omission, explaining, “The existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute” in bribe and kickback cases.<sup>129</sup> Thus, there was no need to consider the issue.

### C. Limiting Principles Adopted by the Circuit Courts

As Scalia emphasized in his concurrence in *Skilling*, prior to the *McNally* decision and enactment of the honest services statute, the federal circuits had provided varying answers to basic questions regarding not only the source and extent of the fiduciary duty underlying the honest services doctrine, but also whether harm or gain was needed to establish a breach of that duty. Even after an honest services statute was enacted, various Courts of Appeals disagreed on the appropriate standards. However, the courts typically adopted one of two requirements to limit the application of § 1346: (1) the conduct of the accused must result in illegitimate gain to the accused or a third party; or (2) the conduct of the accused must cause harm to the alleged victim of the fraud.

#### 1. The Gain Requirement

The Seventh Circuit has adopted a standard requiring an offender to act in pursuit of private gain for a breach of fiduciary duty to rise to the level of honest services fraud.<sup>130</sup> In *United States v. Bloom*, the court held that a city alderman did not commit honest services fraud because he did not misuse his position as alderman to personally benefit from his actions.<sup>131</sup> Bloom allegedly counseled a client to use a proxy bidder at a tax scavenger sale, in contravention of state law.<sup>132</sup> The prosecution argued that Bloom owed a fiduciary duty to the city in his capacity as alderman, and was thus prohibited from giving legal advice that could reduce the city’s tax revenues.<sup>133</sup> However, the court held that unless Bloom somehow misused his position to privately gain from his advice, he did not breach his duty of honest services.<sup>134</sup> The court summarized its position, explaining that “[m]isuse of office . . . for pri-

129. *Skilling v. United States*, 130 S. Ct. 2896, 2930-31 n.41 (2010).

130. *See, e.g., United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998).

131. *Id.*

132. *Id.* at 650-51.

133. *Id.* at 651.

134. *Id.* at 655.

vate gain is the line that separates run of the mill violations of state-law fiduciary duty . . . from federal crime.”<sup>135</sup>

The Seventh Circuit later qualified its position in *Bloom*, holding in *United States v. Sorich*, that by “private gain,” it simply meant “illegitimate gain.”<sup>136</sup> In *Sorich*, the court upheld the convictions of four defendants who were key players in a scheme to award city jobs to members of the mayor’s political organization.<sup>137</sup> The beneficiaries of the fraudulent scheme were not the defendants themselves, but the campaign workers who received jobs.<sup>138</sup> The court opined that the spoils of a fraudulent scheme need not go directly to the defendant to constitute a breach of a fiduciary duty; rather, the defendant is just as culpable if the proceeds are directed toward a third party.<sup>139</sup> This refinement is consistent with the private gain requirement’s purpose to prevent the conviction of individuals who merely breached a fiduciary duty without any personal gain.<sup>140</sup>

Other circuits have rejected a private gain limitation to honest services fraud.<sup>141</sup> For example, instead of utilizing private gain to draw a distinction between innocent and blameworthy conduct, the Tenth Circuit characterized private gain as merely one method, among others, to prove fraud.<sup>142</sup> The court criticized the Seventh Circuit approach as under-inclusive because it excludes fraudulent conduct involving significant foreseeable harm to the victim or others merely

135. *Id.* The court did not seem to articulate any principle justifying its holding except that it was consistent with the Supreme Court’s conception of intangible rights expressed in *McNally* that “misuse of [a public official’s] office for private gain is a fraud” and the fact that the court could not find a case holding that a breach of fiduciary duty constitutes an intangible rights fraud without misuse of one’s position for private gain. *Id.* at 655 (quoting *McNally v. United States*, 483 U.S. 350, 355 (1987)).

136. 523 F.3d 702, 709 (7th Cir. 2008).

137. *Id.* at 705.

138. *Id.* at 708.

139. *Id.* at 709.

140. *Id.* at 710.

141. See *United States v. Welch*, 327 F.3d 1081, 1106 (10th Cir. 2003); *United States v. Rybicki*, 287 F.3d 257, 265 (2d Cir. 2002) [hereinafter *Rybicki I*]; *United States v. Panarella*, 277 F.3d 678, 692-93 (3d Cir. 2002).

142. *Welch*, 327 F.3d at 1106 (“[P]roof of potential, actual, or contemplated gain simply is one means of establishing the necessary intent to defraud.”). Notably, the Seventh Circuit’s broader “illegitimate gain” refinement in *Sorich* could have applied on the facts of *Welch*. In *Welch*, the Tenth Circuit upheld charges of bribery and fraud against leaders of a committee who bid to hold the Olympic Winter Games in Salt Lake City based on evidence that they made payments and gave other things of value to International Olympic Committee members in order to secure their votes. *Id.* at 1084-85. While the defendants did not personally gain from their bribes, their actions could have met the broader illegitimate gain standard. If the bribes worked, Salt Lake City illegitimately received the privilege of hosting the Olympic Games, a tremendous monetary boon.

because private gain is absent.<sup>143</sup> In addition, the private gain requirement excludes breaches of duty that only involve deliberate non-disclosure of a conflict of interest—conduct that the Third Circuit asserted was included in the definition of fraud “in its elementary common law sense of deceit.”<sup>144</sup> The Third Circuit further found that the private gain approach is over-inclusive because it could criminalize conduct beyond the contemplation of the statute, like a public official taking home pencils from the office supply cabinet.<sup>145</sup> Finally, the courts that reject a private gain requirement stress that the intent to defraud depends on the intent to deprive another of the intangible right of honest services, not the intent to effect private gain.<sup>146</sup>

## 2. The Harm Requirement

A second limiting principle adopted by some circuits, usually as an alternative to the private gain limitation, is the requirement of detriment or harm to a victim of the fraud, like corporate shareholders or the public. The Second Circuit, in *Rybicki II*, examined how this limiting principle originated in pre-*McNally* honest services fraud case law.<sup>147</sup> The court concluded, in dictum, that because the existence of a conflict of interest alone is not sufficient to constitute a crime, the defendant’s behavior in the self-dealing context must cause or be capable of causing some harm to a victim.<sup>148</sup> The court further suggested that the detriment should be economic or pecuniary.<sup>149</sup> Finally, it emphasized that the detriment requirement does not apply in the bribery or kickback context because undisclosed bribery in itself is sufficient to make out the crime.<sup>150</sup>

In adopting the “detriment to victim” requirement, the Second Circuit emphasized the distinction between traditional fraud and honest services fraud.<sup>151</sup> Traditional fraud involves both gain to the defrauder and detriment to the victim. However, honest services fraud cases do not necessarily involve both. Instead, as the Second Circuit maintained,

143. *Id.* at 1107.

144. *Panarella*, 277 F.3d at 695 (quoting *United States v. Holzer*, 816 F.2d 304, 307 (7th Cir. 1987), *vacated and remanded for consideration in light of McNally v. United States*, 483 U.S. 350 (1987)).

145. *Panarella*, 277 F.3d at 692.

146. *Rybicki I*, 287 F.3d at 262; *Welch*, 327 F.3d at 1106.

147. 354 F.3d 124, 138-41 (2d Cir. 2003).

148. *Id.* at 141.

149. *Id.*

150. *Id.*

151. *See supra* Part I.A.

they tend to fall into two general categories: cases involving bribes and kickbacks and cases involving self-dealing.<sup>152</sup> Bribes and kickbacks can be classified as fraud where the defrauder receives a direct pecuniary gain from his misconduct, even though the victim may not experience harm. On the other hand, in a typical self-dealing case, the defrauder merely induces his employer to do business with a corporation or other entity in which the defrauder has an undisclosed interest.<sup>153</sup> Such self-dealing may only cause indirect gain to the defrauder. The Second Circuit found that such cases do not rise to the level of a crime unless the conflict of interest is accompanied by actual or probable harm to the victim employer.<sup>154</sup>

Although the Second Circuit limits its analysis to the private sphere, courts have applied a modified detriment-to-victim requirement in public sector cases as well.<sup>155</sup> These cases typically involve bribery of a public official or the official's failure to disclose a conflict of interest.<sup>156</sup> When an official accepts a bribe or fails to disclose a personal interest in a matter over which the official has decision-making power, the harm is not usually pecuniary. Rather, "the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act."<sup>157</sup>

Some courts have not actually imposed a detriment-to-victim requirement, but simply recognized it as one way of establishing the intent to defraud.<sup>158</sup> While the intent to cause economic harm or injury can constitute circumstantial evidence of the intent to defraud, it is not necessary to establishing that element of the crime.<sup>159</sup> For instance, the First Circuit held in *United States v. Sawyer* that when an intended victim does not experience harm, something more is needed, like a bribery-like, corrupt intent to influence official action or deprive of honest

152. *Rybicki II*, 354 F.3d at 139.

153. *Id.* at 140.

154. *Id.* at 141.

155. *See, e.g.*, *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996).

156. *Id.*

157. *Id.*

158. *United States v. Welch*, 327 F.3d 1081, 1104-05 (10th Cir. 2003) ("The notion of harm in a mail or wire fraud prosecution is important only in the sense that proof of contemplated or actual harm to the victim or others is one means of establishing the necessary intent to defraud."); *see also* *United States v. Cochran*, 109 F.3d 660, 665 (10th Cir. 1997) (acknowledging "that where actual harm exists as a natural and probable result of a scheme, fraudulent intent may be inferred"); *United States v. Bowen*, 946 F.2d 734, 737 (10th Cir. 1991) (noting that proof of loss may bear on the question of intent to defraud).

159. *Welch*, 327 F.3d at 1105.

services.<sup>160</sup> In *Sawyer*, a lobbyist's intent to violate state-law gift and gratuity statutes by purchasing dinners and rounds of golf for legislators did not automatically establish the intent to induce a public official to deprive the public of his honest services.<sup>161</sup> The court found that "[i]f the 'scheme' does not, as its necessary outcome, deprive the public of honest services, then independent evidence of the intent to deprive another of those services must be presented."<sup>162</sup>

The *Skilling* Court declined to embark on an analysis of how some courts limited the application of § 1346 by adopting the limiting principles found in pre- and post-*McNally* case law or by narrowly defining the circumstances under which a fiduciary duty arises or is breached. In opting to recognize only what it deemed to be the "core" meaning of the honest services statute, the Court held that § 1346 covers only bribery and kickback schemes.<sup>163</sup> By limiting § 1346 to this fundamental category of cases, the Court avoided the need to define the precise outer dimensions of the statute's reach. Instead, echoing *McNally*, the Court invited Congress to "speak more clearly" if it intends to go further.<sup>164</sup>

#### IV. THE HONEST SERVICES RESTORATION ACT

The Supreme Court, in excluding from the statute fraudulent conduct that courts had previously assumed was covered, has challenged Congress to redraw the line once again and answer the question: to what extent should unethical conduct be criminalized? This task of defining the crime of honest services fraud with more precision requires a value judgment about what conduct constitutes a crime. Unlike the federal circuit courts who tackled the task head-on, in confining § 1346 to only bribery and kickback schemes, the Supreme Court declined to explore the outer contours of honest services fraud. Indeed, commentators have pointed out that bribery and kickback

160. 85 F.3d at 730; *see also* *United States v. Lamoreaux*, 422 F.3d 750, 754 (8th Cir. 2005) (holding that in a business context, absent proof of actual harm, the government must produce evidence to show fraudulent intent).

161. 85 F.3d at 729.

162. *Id.* at 725.

163. *Skilling v. United States*, 130 S. Ct. 2896, 2907 (2010).

164. *Id.* at 2933.

schemes are already criminalized by a host of other statutes and argue that the Court has effectively rendered § 1346 superfluous.<sup>165</sup>

Despite their apparent disarray, the varied approaches of the Courts of Appeals still provide what Justice Stevens referred to as a “tide of well-considered opinions”—powerful insight for crafting a new, unifying statute.<sup>166</sup> Building upon this substantial body of well-reasoned case law, a new definition of honest services fraud should include both the core bribe-and-kickback cases upheld in *Skilling* as well as the self-dealing category of cases that the *Skilling* court declined to recognize.

On September 28, 2010, about three months after the *Skilling* decision was announced, Senator Pat Leahy introduced a bill designed to restore the mail fraud law to its pre-*Skilling* state.<sup>167</sup> In particular, the bill sought to insert a section to the mail fraud statute after § 1346 “to expand the definition of scheme or artifice to defraud with respect to mail and wire fraud.”<sup>168</sup> In contrast to the spartan twenty-eight words originally adopted to codify honest services fraud, the Honest Services Restoration Act (HSRA) sought to circumscribe exhaustively the contours of the offense. The proposed legislation is broken into two subsections, with the first concerning undisclosed self-dealing by public officials and the second concerning undisclosed self-dealing by corporate officers or directors.<sup>169</sup>

According to the HSRA, undisclosed self-dealing occurs when two conditions are met. For public officials, the first condition requires a public official to “perform[] an official act for the purpose, in whole or in part, of benefitting or furthering a financial interest of” the public

165. O’Toole, *supra* note 99, at 51, 60 n.27 (arguing that there are federal laws, including 18 U.S.C. § 201, the Anti-Kickback Act of 1986, and Chapter 11 of Title 18 of the United States Code, specifically criminalizing bribes and kickbacks).

166. *See supra* note 47.

167. Samuel Rubenfeld, *Leahy Introduces Bill to Expand “Honest services” Statute*, WALL ST. J. (Sept. 28, 2010), <http://blogs.wsj.com/corruption-currents/2010/09/28/sen-leahy-introduces-bill-to-restore-honest-services-replacement/>.

168. The Honest Services Restoration Act, *supra* note 12. The bill was referred to the Senate Judiciary committee, but never made it any further during the legislative session. *See S. 3854—111th Congress: Honest Services Restoration Act*, GOVTRACK.US (2010) (last visited Feb. 25, 2013), <http://www.govtrack.us/>. Representative Anthony Weiner re-introduced the bill in the House of Representatives in 2011, but it again never advanced beyond committee referral. *See H.R. 1468—112th Congress: Honest Services Restoration Act*, GOVTRACK.US (2010) (last visited Feb. 25, 2013), <http://www.govtrack.us/>.

169. The Honest Services Restoration Act, *supra* note 12, at § 2(a). A “public official” is defined as, “an officer, employee, or elected or appointed representative, or person acting for or on behalf of the United States, a State, or subdivision of a State, or any department, agency, or branch thereof, in any official function, under or by authority of any such department agency or branch of Government.” *Id.* at § 2(b)(1)(B).



official himself, his spouse or minor child, his general partner, or, to paraphrase, a business or organization with which the official has dealings or from which the official has received a thing of value.<sup>170</sup> Second, the public official must “knowingly falsif[y], conceal[], or cover[] up material information that is required to be disclosed regarding that financial interest by any Federal, State, or local statute, rule, regulation, or charter applicable to the public official, or knowingly fail[] to disclose material information regarding that financial interest.”<sup>171</sup>

Undisclosed *private* self-dealing occurs when a corporate officer or director “performs an act which causes or is intended to cause harm to the officer’s or director’s employer, and which is undertaken in whole or in part to benefit or further by an actual or intended value of \$5,000 or more a financial interest of” the officer’s himself, his spouse or minor child, his general partner, or a business or organization with which the officer has dealings.<sup>172</sup> The second condition directly mirrors the second condition for public officials.<sup>173</sup>

In essence, the HSRA strives to restore and clarify the crime of honest services fraud by explicitly proscribing undisclosed self-dealing, creating distinctions between the offense as applied to public officials and private actors, and holding those actors to different standards of culpability. Although the HSRA addresses some of the vagueness problems of § 1346, the proposed legislation still suffers from shortcomings that restrict the statute’s potential application, in some instances, or can lead to overcriminalization in others. First, the legislation fails to define the source of the fiduciary relationship that is breached in honest services fraud. Second, the statute criminalizes knowingly failing to disclose a financial interest without requiring a specific intent to defraud. Finally, the HSRA does not adopt illegitimate gain to the accused or harm to the victim as alternative sufficient limiting principles, and instead reflects an unduly narrow interpretation of the crime of honest services fraud.

170. *Id.* at § 2(b)(1)(A)(i). “The term ‘official act’ (i) includes any act within the range of official duty, and any decision, recommendation, or action . . . in such public official’s official capacity or in such official’s place of trust or profit; (ii) can be a single act, more than one act, or a course of conduct; and (iii) includes a decision or recommendation that the Government should not take action.” *Id.* at § 2(b)(1)(C).

171. *Id.* at § 2(b)(1)(A)(ii).

172. *Id.* at § 2(b)(2)(A)(i). For purposes of this subsection, “the term ‘employer’ includes publicly traded corporations, and private charities under section 501(c)(3) of the Internal Revenue Code of 1986.” *Id.* at § 2(b)(2)(B). In addition, “the term ‘act’ includes a decision or recommendation to take, or not to take action, and can be a single act, more than one act, or a course of conduct.” *Id.* at § 2(b)(2)(C).

173. *Id.* at § 2(b)(2)(A)(ii).



A. *The HSRA Should Adopt Standards for Breach of Fiduciary Duty*

A revised honest services statute must delineate the basic elements that constitute the scheme or artifice to defraud. Under criminal theory, a crime requires, *inter alia*, an act and a culpable state of mind.<sup>174</sup> Echoing the Third Circuit's position in *Panarella*, Geraldine Moohr argues that the necessary deceptive and fraudulent act constituting honest services fraud is the "fail[ure] to disclose a breach of fiduciary duty to the principal."<sup>175</sup> Unpacking this requirement further, Professor Moohr asserts that this failure requires (1) a mailing; (2) a fiduciary relationship; (3) a breach of a duty inherent in that relationship; and (4) the deceptive act of not disclosing the breach.<sup>176</sup> Professor Moohr does not delve into the precise source of the fiduciary relationship, instead merely noting that it is defined by "common law."<sup>177</sup>

Although the HSRA delineates some of the basic elements that constitute the scheme or artifice to defraud in the context of undisclosed self-dealing, it fails to reference a fiduciary duty at all. Instead, it limits the crime to the failure to disclose a financial interest requiring disclosure under applicable laws or regulations. This formulation is markedly narrower than the traditional application of honest services fraud, in which breaches of obligations of honesty and loyalty are penalized, especially in cases involving a public official's duty to discharge his services to the public in a disinterested manner. Indeed, the undefined term, "financial interest" leaves an open question as to whether certain non-pecuniary gains—such as City jobs, as in the *Sorich* case—constitute such an interest. Further, anchoring the duty to disclose in federal, state, or local law results in a lack of uniformity in how the law is applied to public officials who act in similar capacities, depending on where their conduct occurs.<sup>178</sup>

As Justice Scalia insisted in his *Skilling* dissent, the source of a fiduciary relationship should be clearly defined where the undisclosed breach of that relationship constitutes a crime.<sup>179</sup> Accordingly, Congress should adopt two standards for establishing a fiduciary duty—one for public officials and one for private actors, reflecting differing

174. Moohr, *supra* note 3, at 16.

175. *Id.* at 19.

176. *Id.* at 20.

177. *Id.*

178. Sheyn, *supra* note 7, at 51.

179. *See supra* Part II.

societal standards for their conduct.<sup>180</sup> First, public officials have a widely recognized fiduciary duty to discharge their responsibilities in the public interest. Thus, a breach of this duty through acting in one's own self-interest should be sufficient to establish the *actus reus* of honest services fraud. This duty of honesty would create a uniform standard for all public officials that does not vary from state to state.

Private actors, on the other hand, should be subject to a narrower standard for a breach of fiduciary duty than public officials. This distinction follows the prevailing sentiment that a breach of the public trust is more criminally serious than employee misconduct. Thus it is appropriate to limit the fiduciary duty of private actors to applicable ethical obligations imposed by state law in the jurisdiction where the accused's conduct occurred. Defining the fiduciary duty in this manner addresses fair notice concerns because the conduct subject to criminal penalty is rooted in state law. Furthermore, it addresses federalism concerns because it restricts federal criminal liability to conduct prohibited by the states themselves. Finally, it avoids criminalizing behavior that should not be criminalized—like taking home pencils from the office supply cabinet<sup>181</sup>—leaving such commonplace employee loyalty lapses to internal employer regulation.

### B. *The HSRA Should Require the Specific Intent to Defraud*

In addition to an act, a crime requires a culpable state of mind. The HSRA omits a specific intent to act with the purpose to defraud. Instead, a public or private official must act (1) with the purpose of furthering a financial interest and (2) knowingly failing to disclose information related to that interest. While these two conditions, taken together, could lead to an inference of deceptive intent, criminal fraud traditionally requires more than a general intent to deceive. Even though the HSRA seems to incorporate a specific intent element in requiring the accused to act “knowingly” in failing to disclose information, the HSRA's standard is susceptible to overcriminalization of inadvertent breaches of the law. This danger exists because the statute criminalizes knowingly failing to disclose a financial interest without requiring a specific intent to defraud.

Accordingly, Congress should instead adopt the *mens rea* standard advocated by Professor Moohr, under which honest services fraud

180. See *supra* text accompanying note 106.

181. See *supra* note 145.

requires not only the general intent to deceive, but also the specific intent to cause the result of defrauding another.<sup>182</sup> Courts often confound this distinction because they tend to use the terms “defraud” and “deceive” interchangeably.<sup>183</sup> However, evidence of concealment, false statements, and so forth—although deceptive—does not establish specific intent unless it persuades the finder of fact that the accused acted with the purpose to defraud.<sup>184</sup> This standard is desirable because it defines culpability narrowly, ensuring that the accused will not be convicted in the absence of a fraudulent scheme or for a wholly inadvertent breach of the law. Moreover, it limits the statute’s reach to only culpable conduct because a mere failure to disclose an interest or breach of fiduciary duty does not constitute a crime without the requisite intent to defraud.<sup>185</sup> Thus, “not every breach of every fiduciary duty works a criminal fraud.”<sup>186</sup>

*C. The HSRA Should Address Both Limiting Principles of Gain and Harm*

Finally, the HSRA adopts an unduly narrow standard for prosecuting private officers and directors. Specifically, a private officer must act with the purpose of causing harm to his employer in addition to furthering a personal financial interest.<sup>187</sup> Requiring an intent to cause harm fails to ensure that the statute reaches the full range of culpable conduct. First, requiring an officer to act with the purpose of causing harm is narrower than merely adopting harm as a limiting principle because as a state-of-mind requirement, rather than a factual limitation, it is more difficult to establish. When harm is required as a limiting principle, it reflects a value judgment that a victimless act is not worthy of criminal sanction. However, when intent to cause harm is the *mens rea* of the crime, even in a case where harm to the victim is apparent, a prosecutor must take the additional step of proving that the accused intended such harm.

Second, requiring intent to cause harm unnecessarily restricts how the intent element of fraud can be established. Intent to defraud is

182. Moohr, *supra* note 3, at 22-23.

183. *Id.* at 22.

184. *Id.* at 23.

185. *Id.* at 39.

186. *United States v. George*, 477 F.2d 508, 512 (7th Cir. 1973).

187. The financial interest at issue also must meet a minimum value of \$5,000 for private officers or directors, while no such limitation applies to public officials. The Honest Services Restoration Act, *supra* note 12, at § 2(b)(2)(A)(i).

the *mens rea* element of mail fraud.<sup>188</sup> “Defraud” means “to deprive of something by deception or fraud.”<sup>189</sup> Intent to cause pecuniary harm is just one way of showing that the accused intended to deprive his fiduciary of something by deception.<sup>190</sup> Intent to defraud can also be inferred through proving illegitimate gain or falsifying or concealing material information, but the HSRA further restricts this already narrow definition of culpability. As a result of this restriction, an officer or director who intends to defraud his employer may mount a successful defense in establishing that he intended his self-dealing to benefit a personal financial interest without hurting his employer—effectively meaning that self-dealing is not illegal when everybody profits.

Instead of requiring intent to cause harm, the HSRA should address both limiting principles of gain and harm recognized within federal circuit jurisprudence. The courts have considered and applied these limiting principles in a multitude of commonly occurring fact patterns, and have carefully considered whether misconduct should be considered criminal fraud in each case. Congress should delineate the two alternative categories of conduct that have been found to rise to the level of criminal fraud. Thus, the HSRA should require fraud prosecuted as undisclosed self-dealing to show one or both of the following elements: (1) the conduct of the accused results in illegitimate gain to the accused or a third party; or (2) the conduct of the accused causes harm to the alleged victim of the fraud, including either pecuniary harm or harm resulting from the failure of a public official to engage in disinterested decision-making. Including these limitations in the statute preserves the bulk of pre-*Skilling* case law, while recognizing the variation in fact patterns that have given rise to honest services violations.

## CONCLUSION

Although it codifies an honest services doctrine that developed over decades of case law, §1346 consists of a mere twenty-eight words. Such economy of language led to wide prosecutorial discretion in charging criminal conduct as well as myriad judicial approaches to

188. See, e.g., *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995) (“to convict a person of mail fraud, the government must prove specific intent to defraud”); *United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981) (noting that mail fraud requires a specific intent to defraud).

189. *Defraud*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/defraud> (last visited Feb. 25, 2013).

190. See *supra* Part III.C.2.

reign in ever-expanding and evolving application of the statute. The *Skilling* decision has provided Congress with an opportunity to reassess its conception of what conduct rises to the level of honest services fraud, and to craft a new statute that gives the public adequate notice of what conduct is condemned under the law. Congress should take this opportunity to learn from past mistakes and no longer rely on judicial gloss to define the contours of criminal law. Rather, Congress should draw on the body of reasoned judicial analysis to craft a clear and precise honest services statute that passes constitutional muster.