THE COURT'S FRAUD DUD

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In this contribution to a collection of essays on the Supreme Court's 2009 October Term, I comment on the Court's trilogy of mail fraud cases, disposed of principally through the majority's opinion in Skilling v. United States. *The Court's solution to the problem of "honest services fraud" was tidy but somewhat arbitrary and quite shallow. The Court seemed to recognize that the cases presented the problem of how to deal with frauds that involve indirect benefits to violators and/or intangible harms to victims. This can be termed the "relationship and context" problem in fraud or, if one prefers, the "duty problem." But the Court failed to engage with this problem conceptually, missing a golden opportunity to develop the jurisprudence of fraud that is not likely to arise again for a long time. I explain the problem, demonstrate that it is not limited to the recent tempest over the "honest services" statute and its constitutionality, and suggest some directions for addressing it that the Court might have pursued.*

For those of us who study criminal fraud, the most recent Supreme Court term had promised a very big day in the sun. The Court granted certiorari and heard argument in no fewer than three cases presenting questions of great import about the federal criminal law of fraud.[1] Two of the three cases involved major prosecutions of high-profile executives of public companies. The third involved a state legislator prosecuted in a federal campaign against graft in and around the Alaska statehouse. The Court's endeavor—its largest ever in this field—presented an occasion for signal jurisprudence in the field of fraud.

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1. Black v. United States, 130 S. Ct. 2963 (2010); Skilling v. United States, 130 S. Ct. 2896 (2010); Weyhrauch v. United States, 130 S. Ct. 2971 (2010).

What a disappointment. The Court decided fraud questions in only one of the three cases. Two cases were sent back to courts of appeals for further analysis in light of the decided case.[2] The case with which the Court genuinely engaged, *Skilling v. United States*,[3] produced opinions occupied mostly with the fairness of a single jury selection, so fact-bound as not likely to be of great influence in the law of criminal procedure.[4] On the fraud issues, the *Skilling* majority opinion, authored by Justice Ginsburg and winning six votes, was result-oriented and sketchy—even if it may have satisfied many of the constituencies who have been complaining for years about the statute in question. Justice Scalia's concurring opinion, perhaps for having too easy of a target or for being preoccupied with his favorite claims about judicial function, also did not engage with the conceptual problems at the root of the fraud questions brought forth in the 2009 October Term.

My intention in this brief essay is to discuss what the Court failed to address as a way of demonstrating (and perhaps warning) that difficult problems in the criminal law of fraud are likely to persist with nearly as much force in the wake of the Court's big "mail fraud" trilogy as they did before its arrival. In particular, the Court did not engage with the conceptual problem underlying the brouhaha that presumably caused the Court to grant certiorari in these cases. The issue before the Court was the meaning and constitutional viability of a statute prohibiting frauds designed to deprive another of "the intangible right to honest services" (the "honest services" problem).[5] But beneath this issue lies the question under what conditions, if any, a breach of fiduciary duty may constitute a fraud. Or, put a bit more generally, what is the relationship between fiduciary duties and fraud?

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2. *Black*, 130 S. Ct. at 2963; *Weyhrauch*, 130 S. Ct. at 2971.

3. Skilling v. United States, 130 S. Ct. 2896 (2010).

4. It remains a mystery to me why the Court granted certiorari on the jury issue in *Skilling*, agreeing for the first time in a long while to address the issue of prejudice in jury pools due to media exposure, only to produce a 6-3 decision that will stand, *Bush v. Gore*-like, for the proposition that "this one was okay."

5. The mail and wire fraud statutes, 18 U.S.C.A. § 1341 (West 2010) and 18 U.S.C.A. § 1343 (West 2010), prohibit, among other things, any "scheme or artifice to defraud." The "honest services" statute, 18 U.S.C.A. § 1346 (West 2010), states that the term "scheme or artifice to defraud" in the mail and wire fraud statutes "includes a scheme or artifice to deprive another of the intangible right of honest services."

Fiduciary duties and fraud have long been well acquainted.[6] These questions predate the late twentieth-century story of honest services fraud in federal court and they have persisted throughout the history of fraud law. They will continue to arise in spite of the Court's effort in *Skilling* to limit the mail fraud statute's reach. The law continues to need instruments for determining when fraud—especially criminal fraud—is committed in fiduciary relationships. The Supreme Court failed to provide those instruments. I cannot do so in this brief essay on three Court decisions, but I will suggest possible directions for locating such instruments.

In Part I, I begin by briefly summarizing what the Court did with its fraud cases from the October 2009 term. In Part II, I describe the problem involving fiduciary duty that was not adequately addressed. In Part III, I finish by explaining why the problem will persist and by suggesting some means of dealing with it.

I. THE COURT'S MAIL FRAUD TRILOGY

The Court granted certiorari and heard argument in three cases plainly meant to settle, or at least ameliorate, a long-brewing controversy about federal mail fraud law. The kerfuffle was over whether the concept of defrauding another of "the intangible right of honest services" was too vague to be a basis on which to ground criminal liability consistent with the Constitution's due process guarantee. In the post-war period, but mostly during the 1970s and 1980s, the federal courts had uniformly found this concept to be included within the more general concept of fraud—at least for purposes of the mail and wire fraud statutes, which criminalize virtually all fraud using mail or interstate wires.[7] In 1987, the Court ruled in *McNally v. United States*[8] that the concept of "honest services fraud" did not exist because it did not appear in the statutes and could not be implied from them.[9] Congress promptly contravened the Court by enacting a new statute explicitly stating that mail and wire fraud

6. *See, e.g.*, W. PAGE KEATON ET AL., PROSSER AND KEATON ON TORTS § 106, 738–39 (5th ed. 1984).

7. *See, e.g.*, United States v. Bush, 522 F.2d 641, 648 (7th Cir. 1975) ("Much was said at trial about the fact that the city did not lose money . . . . However, that argument is not convincing. [T]he mail fraud statute seeks to prohibit fraudulent conduct regardless of ultimate loss or damage to the victims of the crime.").

8. McNally v. United States, 483 U.S. 350 (1987), *superseded by statute*, 18 U.S.C.A. § 1346 (West 2010) *as recognized in* Skilling v. United States, 130 S. Ct. 2896 (2010).

9. *McNally,* 483 U.S. at 359–60.

included efforts to deprive another of "the intangible right of honest services."[10]

For over two decades, hundreds of people were sent off to federal prison under the authority of this statute. All the while, the criminal defense bar, some academics, and some federal judges (who remained dissenters only) complained that the new statute did not provide constitutionally sufficient notice of what conduct it criminalized and that it criminalized non-blameworthy behavior.[11] These faults compounded themselves by generating excessive discretionary power in the hands of federal prosecutors.

A routine move in such arguments was to decry the prosecution of individuals at the outer boundaries of the honest services concept: a law firm partner who, without disclosing the conflict to anyone, took on a client whose opponent was represented by his partners;[12] a sports agent who established relationships with college players in violation of NCAA rules;[13] a party boss who arranged for county jobs to be doled out in exchange for political contributions;[14] and a professor who awarded doctorates without merit with the expectation of receiving grant money from the students once they obtained government jobs.[15] For unknown reasons, the Court decided that 2009 was the year that it would be moved by these voices.

In *Weyhrauch v. United States*,[16] the Court granted review on the question of whether the statute should be narrowed to require proof that the accused violated a state law (plus other elements of the offense) in an honest services prosecution.[17] Weyhrauch, an Alaska legislator at the relevant time, allegedly solicited future employment

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10. 18 U.S.C.A. § 1346 (West 2010).

11. *See, e.g.*, Julie R. O'Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC 23, 24 (2010) (suggesting that the statute be struck on grounds of unconstitutional vagueness); Mathew N. Brown, *Prosecutorial Discretion and Federal Mail Fraud*, 21 GEO. J. LEGAL ETHICS 667, 667 (2008) (arguing that mail fraud statutes are unnecessarily vague and result in prosecutorial abuses); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 177 (1994) (discussing that the mail fraud statutes fail to provide adequate notice of criminality).

12. United States v. Bronston, 658 F.2d 920, 922–33 (2d Cir. 1981).

13. United States v. Walters, 997 F.2d 1219, 1221 (7th Cir. 1993); United States v. Walters, 913 F.2d 388, 390 (7th Cir. 1990).

14. United States v. Margiotta, 688 F.2d 108, 113–14 (2d Cir. 1982).

15. United States v. Frost, 125 F.3d 346, 352–53 (6th Cir. 1997).

16. Weyhrauch v. United States, 130 S. Ct. 2971 (2010).

17. Brief for Petitioner at i, Weyhrauch v. United States, 135 S. Ct. 2971 (2010) (No. 08-1196).

from an oil company while helping the same company block proposed legislation.[18] He was fairly typical of the public sector defendants who had been appearing in honest services prosecutions over the years.

In *United States v. Black*,[19] the Court granted review on the question whether the statute should be narrowed to require proof that the defendant contemplated economic or property harm to the victim, in addition to other elements of the offense.[20] Black was a Canadian newspaper magnate who, as controlling shareholder of a public company, arranged for sales of his company's newspaper assets to include large non-compete payments to him that lacked substance or justification and allegedly were disguised bonuses.[21] Black was an example of a private sector defendant in an honest services prosecution charged with a form of corporate looting.

United States v. Skilling also involved a corporate executive in the private sector. Here the substance of the charge was accounting fraud. Skilling, the former CEO of the collapsed Enron Corporation, was convicted for committing both securities fraud and honest services fraud by misrepresenting the financial condition of his company in order to inflate and maintain a false stock price.[22] Along with the jury issue in *Skilling*, the Court granted certiorari on the question whether the honest services fraud statute should be narrowed to require that the government prove that the defendant intended to gain personally from his conduct, in addition to other elements of fraud.[23] The Court also granted review on the question whether the statute was unconstitutionally vague.

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18. United States v. Weyhrauch, 548 F.3d 1237, 1239–40 (9th Cir. 2008), *cert. granted in part*, 129 S. Ct. 2863 (2009), *vacated and remanded*, 130 S. Ct. 2971 (2010).

19. Black v. United States, 130 S. Ct. 2963 (2010).

20. Brief for Petitioner at i, United States v. Black, 130 S. Ct. 2963 (2010) (No. 08-876).

21. United States v. Black, 530 F.3d 596, 599–600 (7th Cir. 2008), *reh'g and suggestion for reh'g en banc denied* (Aug. 13, 2008), *cert. granted*, 129 S. Ct. 2379 (2009), *vacated and remanded*, 130 S. Ct. 2963 (2010).

22. *See* United States v. Skilling, 554 F.3d 529 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (2009), *aff'd in part, vacated in part, remanded*, 130 S. Ct. 2896 (2010). Some have viewed the "honest services" theory in *Skilling* as envelope-pushing, even within the controversy over the mail fraud statute. *See*, *e.g.*, NORMAN ABRAMS, SARA SUN BEALE, & SUSAN RIVA KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 175–77 (5th ed. 2010). But if a corporate fiduciary owes *any* duty beyond the duty not to steal from the corporation it would seem to include the duty not to commit accounting fraud. Even if there were not reported decisions embracing this theory prior to *Skilling*, I am sure I have seen it in many corporate fraud indictments. Granted, I am readily chargeable with bias, having been one of the Department of Justice prosecutors who conducted the criminal investigation in the Enron matter (though I left the government before the honest services theory was placed in Skilling's indictment).

23. Brief for Petitioner at i, Skilling v. United States, 130 S. Ct. 2896 (2010) (No. 08-1394).

All of this action at the certiorari and argument stages produced only a single opinion. In *Skilling*, a six-justice majority—eschewing all of the potential limitations to the statute on which review had been granted in the three cases—held that the honest services portion of the mail fraud statute is limited to cases involving "bribes and kickbacks."[24] The Court styled this decision as statutory interpretation with a heavy dose of constitutional avoidance. Indeed, the majority went so far as taking the extraordinary step of warning Congress in a footnote that any effort to expand the mail fraud statute further would have to navigate through perilous constitutional shoals.[25] The rationale in *Skilling* was simply that early honest services cases, predating Congress's statutory fix after *McNally*, tended to involve bribes or kickbacks, and that limiting the statute to that "core" of coverage would avoid vagueness difficulties by cutting out all forms of fraud prosecution that did not involve such clear-cut venality. The Congress that enacted the statute, the Court said, would have preferred inclusion of bribery and kickback cases to nothing, so this was the most deferential available ruling.[26]

Justice Scalia, not surprisingly, leapt to point out the result-oriented weaknesses of the majority's argument. He denied that there had ever been any such thing as an identifiable "core" of honest services cases involving bribes and kickbacks.[27] He exclaimed that neither the statute nor the lower courts prior to the statute's enactment had ever said anything about such a category. And he asserted that even such a "core" theory was likely to produce many cases of intolerably vague application. Scalia went on to chastise the majority at some length for legislating a new federal crime. He would have declared the statute unconstitutionally vague as applied to Skilling's case and left it at that.[28]

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24. Skilling v. United States, 130 S. Ct. 2896, 2931 (2010).

25. *Id*. at 2933 n.45. This was, after all, a third volley in an inter-branch engagement, albeit one that had seen twenty-five years of quiet.

26. *Id.* at 2931 n.43.

27. *Id.* at 2936–37 (Scalia, J., concurring in part and concurring in the judgment).

28. *Id.* at 2940 (Scalia, J., concurring in part and concurring in the judgment). In *Black*, the Court, while writing briefly on a procedural issue involving preservation of an objection, said reversal was required because of *Skilling* and remanded for harmless error analysis. Black v. United States, 130 S. Ct. 2963, 2970 (2010). In *Weyhrauch*, the Court merely vacated and remanded for analysis in light of *Skilling*. Weyhrauch v. United States, 130 S. Ct. 2971, 2971 (2010). The lack of any opinion in *Weyhrauch* is especially disappointing given that questions about the duties that public officials do or do not owe to their constituents, for purposes of the law of fraud, have been legion and controversial, raising important issues about regulation of politics, especially federal regulation of state politics.

II. THE PROBLEM OF "FIDUCIARY" DUTY

Fraud is no simple concept, and I cannot get it fully in view in this brief essay. The essential points for discussing the Court's mail fraud cases perhaps can be developed with a few stylized examples.

Suppose A deals antiques and B, a fifty-five-year-old Wall Street lawyer, is clearing out the family place in Vermont after her parents have passed away. B puts an old chest of drawers in the back of her SUV and drives it down to A's shop in the village. B asks A, "I'd like to sell you this chest. How much is it worth and what can you give me for it?" A looks it over carefully and says, "It might fetch $1,000 at auction. I'll give you $800." B sells the chest to A. In fact, the chest is a rare example in mint condition. A's assessment is that it is likely worth at least $10,000.

Result? Clear fraud. Not only because this fits with common intuitions about fraud (which is, after all, a social construct before it is a legal concept): A has cheated B out of about $9,000 by using deception to get her to deliver her property to A. But also because the law of fraud has long been clear that a misrepresentation of opinion, especially from a speaker with specialized knowledge on whom the listener is likely to rely with justification, can be just as actionable a deception as a bald lie about a fact.[29]

Now suppose that A is the same antique dealer and C is the lawyer's mother, still alive and well at the age of eighty-eight. C invites A over for tea after church. A says how much he admires the same chest of drawers as he sees it sitting in C's living room. C says it is taking up space and she would like to get it out of the house. A offers to pay her $500 to take it away, saying that he "might use it or see what I can get for it." C says that would be wonderful. Again, A's eyeball assessment is that the chest is likely to fetch $10,000 or more.

Result? Probably not fraud, but the matter is a bit more complicated. Intuitions could cut both ways here. We might think A did not misrepresent anything and so did not really deceive C, and caveat emptor should apply (caveat venditor, actually). Or we might think that C, knowing A's expertise and having invited A over for tea after church, expected A to tell her if he knew the chest was very valuable and not to take advantage of her in this way. Poor C. She has no means to protect herself in this kind of encounter other than to

29. *See* RESTATEMENT (SECOND) OF TORTS § 539 (1977).

rely on A to make any affirmative disclosure that ought to be made in the circumstances. C was deceived by A's silence into delivering the chest into A's hands. That's fraud.

The law has to take a normative stance here. It has to decide whether this form of conduct coupled with silence should be treated the same as affirmative misrepresentation for purposes of the law of fraud. Plainly there can be no general answer. Whether silence and behavior wrongfully deceive another is dependent on context. The best the law can do is to sort kinds of relationships into one category or another—this one does carry a duty of disclosure, this one does not, and so on.

What criteria can the law use for that sorting? The question in fraud is whether wrongful deception is present. Deception is a tango. It takes two. A speaker (or, better, a deceiver, since speech is not always required) initiates some form of social intercourse that produces a result in a listener (or, perhaps better, a recipient). That result is the state of being deceived: believing x-prime is true when in fact x is true, and having that incorrect belief as a result of something the deceiver did or said. Whether a recipient arrives at this state of mind at the hands of the deceiver is heavily dependent on the recipient's ex ante state of mind, in particular the relevant set of expectations she held before her interaction with the deceiver.

The law therefore can (and does) generalize about relationships for purposes of fraud by considering the kinds of expectations that inhere in each context. People expect lots of disclosure in the lawyer's or doctor's office, for example, and so are much more likely to be deceived by nondisclosure in those places than on the used car lot where shoppers arrive with low expectations about candor.

"Fiduciary duty," at least for purposes of the present discussion, is simply a label used to designate relationships in which one party's expectations about disclosure make nondisclosure more likely to produce a deception that the law of fraud might want to sanction as wrongful. As Justice Scalia pointed out in his concurrence in *Skilling*, it is not a particularly helpful label because it only begins the inquiry.[30]

What kinds of relationships count as "fiduciary"? The law has to decide this as a normative matter. One method is circular: fiduciary

30. *Skilling*, 130 S. Ct. at 2936 (Scalia, J., concurring in part and concurring in the judgment) (*citing* SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1943)).

relationships are those the law has traditionally called fiduciary, like a trustee or the director of a public company. This method is not satisfying because it freezes the law, lacks conceptual strength, and does not relate sufficiently to the underlying problem of determining the kinds of relationships in which greater disclosure is expected. Another method is to think about the concept of a fiduciary and its fundamental element of a relationship in which one party, for one or more beneficial purposes, reposes more than the ordinary degree of trust in another. This points back to the need to articulate fraud law contextually.

Let me suggest a rough framework. In nondisclosure cases, courts might ask whether the particular kind of relationship is one in which nondisclosure constitutes wrongful deception because: (1) the deceived party had an expectation of receiving the relevant information; and (2) the law should deem that expectation (a) reasonable, because most of us would have had the same expectation, and (b) worthy of remedy, because it will be useful to encourage disclosure in this setting or the failure to have provided it is blameworthy for imposing or risking undue harm.[31]

Thus, we might more fruitfully think of the problem of fiduciary duty in fraud as the problem of "relationship and context," leaving aside the potentially misleading legal term "fiduciary," the familiarity of which might tend to cause us to miss the essential conceptual problem in a particular case. Fiduciary duty, after all, is not a one-size-fits-all concept. The duties of a fiduciary depend almost entirely on the kind of fiduciary she is. To say that someone has a "fiduciary duty" is simply to say that the law has decided she has more duties than the man on the street.

The relationship and context problem in fraud can be seen at work in the honest services cases as easily as in the antique examples. To borrow from one aspect of the manifold accounting manipulations at Enron,[32] suppose that A is the chief executive of a Fortune 500 company that has two very large business units, one of which is in the

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31. *See* RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977) (providing that for purposes of tort liability for misrepresentation, a party is under a duty to disclose facts basic to the transaction to the other party "if he knows that the other is about to enter into [the transaction] under a mistake as to [the facts], and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.").

32. United States v. Skilling, 554 F.3d 529, 534–38 (5th Cir. 2009), *cert. granted*, 130 S. Ct. 393 (2009), *aff'd in part, vacated in part, remanded*, 130 S. Ct. 2896 (2010).

retail energy delivery business and the other of which is in the wholesale energy trading business. The retail business is doing badly. It has failed to deliver on early predictions of great profitability that had driven up the parent company's stock price, and faces the necessity of disclosing $100 million in losses that will publicly signal its failure for the first time. The wholesale business, meanwhile, has made much more money than expected by buying and selling energy contracts, much of it by placing speculative bets that have been highly profitable due to energy shortages. Reporting all of this income would alarm investors by signaling that the parent company's earnings are those of a volatile trading company, rather than the steady "market maker" it has portrayed itself to be. Indeed, the company has been holding back a large amount of those trading earnings for several quarters in a reserve account designated for funding of "litigation risks."

After consulting with his chief accounting officer, CEO A authorizes the following measures: The retail and energy businesses will be combined into a single business unit and the parent company will no longer break out separately the financial results of the two businesses. The company will draw down the reserve account in the wholesale business by $100 million, deeming the litigation risk to have declined. No loss associated with the retail business will have to be reported. When the reorganization is announced to investors at the end of the quarter, the CEO tells the market it was done "to enhance efficiency" and says, in vague terms, that both businesses had a good quarter.

Fraud? There has been a deception: the company's shareholders are led to believe that all is well and steady when in fact the retail business is struggling and the wholesale business is dependent on volatile earnings produced by energy shortages. The deception was brought about by a series of actions and nondisclosures, rather than (or at least more than) outright lies. The deceiver (the CEO) is clearly a fiduciary in the eyes of the law, owing more than the ordinary person's duties of disclosure. Do his duties include disclosure of the material facts here? I think most people would say yes, at least applying the analysis I have recommended for this kind of problem. Shareholders of a large public company would expect a CEO to tell them if two of the company's largest businesses were in fundamentally different financial health than public information would lead one to believe. And they would certainly expect a CEO to

refrain from taking affirmative actions designed to conceal that truth. Those expectations are both reasonable and ones that the law would want to recognize in order to incentivize the kind of behavior by corporate managers that is likely to make markets attractive to investors.

Notice something else about this fact pattern, something that distinguishes it from the antique case. The deceiver (the CEO) does not obtain property from the deceived party (the shareholders), though the deceived party may lose a great deal of money as a result of his conduct (by buying or holding an inflated stock that plummets in value when the truth outs). The CEO is not directly selling the shareholders anything. He is attempting to boost the price by making buyers in a secondary market for the company's stock more eager to acquire the stock from other investors who are not affiliated with the company. A higher price in the secondary market makes the CEO more valuable in the market for CEOs, enhances his prestige, and makes his own stock option compensation more valuable when he exercises and sells it later (which may or may not be the very different fraud of insider trading).

This is what the majority was talking about in its *Skilling* opinion when it explained how honest services prosecutions often involve what we might call a triangular fraud rather than a linear one.[33] In a simple linear fraud, A cheats B to get B to give B's property to A. In a triangular fraud, C gets A to do something that benefits C, as a result of which B is deceived and suffers a loss that does not go to either C or A.

For example, suppose that C is a chemical company and A is a partner at a big law firm. For a year, A's firm has been representing B, who is suing C on a very large personal injury claim that could involve punitive damages. C convinces A to drop the representation of B by implying that A's firm might win a large and reliable book of business from C in the future. A tells B that she can no longer represent B because she does not have time and A obtains court permission to withdraw. A has harmed B through deceit. As B's lawyer, A certainly has a greater than ordinary duty of candor toward both B and the court.

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

This type of triangular pattern is only part of what the honest services theory of fraud has been after. What makes the lawyer case special and difficult is not just the appearance of C in the scenario—and the movement of a benefit from C to A rather than from B to A—but also that B has suffered a less tangible or quantifiable form of harm than the typical fraud victim. What B lost was not money directly (although that might ultimately result from A's withdrawal) but her right to have her lawyer deal with her and the court honestly. That is a right in the eyes of the law, without doubt. And it is a valuable right, the deprivation of which is harmful to B—or at the very least places B at a risk of harm from which B arguably has a right to be free.

The problem of relationship and context in fraud (or "the duty problem") therefore has two dimensions. One is the dimension of expectation: How do we determine whether expectations regarding disclosure render a relationship one in which conduct and nondisclosure, not just misrepresentation, can work a fraud? The other is the dimension of harm: How do we determine when relationships are such that persons have rights less concrete than money or tangible property, but nonetheless substantial enough for deprivation of them to amount to the wrong of fraud? The honest services cases usually have raised at least one of these questions and sometimes, but not always, both of them.

The controversy over honest services fraud prosecutions, of course, has the major added element of being a controversy over whether the deceptive party ought to go to prison rather than simply pay damages. From this perspective, many people would see a major distinction between the sly antique dealer who makes away with the chest and the corporate executive whose accounting fraud brings down a Fortune 500 company. More on the criminal dimension shortly. For now, the important point is that the duty problem in fraud is general to both civil and criminal sanctioning.

A deception is not necessarily less serious simply because it is accomplished subtly through nondisclosure rather than overtly through a bald-faced lie. Indeed, one might say that the craftier a deception, the more likely it is to succeed—and therefore the more severely it ought to be sanctioned. The same goes for the matter of harm. A harmful deception is also not necessarily less serious because it deprives the victim of, for example, a legal right rather than a liquid asset. And cases involving nondisclosure and less tangible harm are

especially likely to be serious when they involve abuse of relationships of trust.

III. THE PERSISTENCE OF THE PROBLEM

In its opinion in *Skilling*, the Court seemed to recognize the two dimensions of the duty problem in fraud. But it failed to engage with them conceptually. The majority noted that some frauds are triangular, with the benefit (and inducement) to the deceiver flowing not from the victim who is deceived, but from a third party.[34] The deceived party in such a scenario may thereby suffer a loss that is not the loss of a conventional property interest. The majority also referenced an early district court opinion on the subject of honest services fraud, stating, "[t]he actual deception that is practiced is in the continued representation by the employee to the employer that he is honest and loyal to the employer's interests."[35] In other words, the nature of a particular relationship between A and B may render A's nondisclosure to B deceptive and harmful because B is led to continue unwittingly in a course of reliance on A from which B otherwise would have exited. This may be fraud. It depends also, as we have said, on whether B rightfully would have expected such disclosure from A and therefore rightfully would have assumed the nonexistence of the factual matter in the absence of its disclosure.

The Court supplied nothing of further assistance to these conceptual challenges facing fraud law. Instead of exploring the question of how the law might determine the kinds of relationships in which this theory of fraud ought to be viable, the Court drew a mostly arbitrary line around a set of cases that include a payment to the defendant that would be called a "bribe" or a "kickback." Reasonable consensus for some time has been that the idea of a single duty of honest services ("the" duty of honest services, in the wording of the statute) sweeps far too broadly. It leaves the statute open to the kind of easy ridiculing it received at oral argument in the Court, with Justice Breyer, for example, asserting that an employee could be prosecuted in federal court for secretly reading the racing form when he knew he was supposed to be busily at work.[36]

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34. *Id*. at 2926–27.

35. *Id*. at (quoting United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942)).

36. Transcript of Oral Argument at 30–31, Black v. United States, 130 S. Ct. 2963 (2010) (No. 08-876).

The Court's effort to limit the statute, however, lacked principle. It made no distinctions on the dimension of relationship. In the eyes of the Court, Skilling, reporting a billion dollars in financial results as the CEO of Enron, seems no different as to his shareholders than the janitor reading the paper with his feet up on the desk as to the boss who pays him minimum wage. The Court simply said that there must be a bribe or a kickback of some sort flowing to the defendant in order for a theory of honest services deprivation to lie. This saves the statute from any vagueness difficulty, the Court said, because people who receive these kinds of secret and illicit payments are up to no good and cannot be heard to complain of surprise at being treated as fraudsters.

One can defend the Court's action on the ground that it successfully and clearly limited a statute that had been plagued with problems of vagueness and overbreadth. That was what everyone really wanted out of these certiorari grants and the Court gave it to them.

The problem is that the Court's ruling on the honest services statute will not in fact reduce uncertainty about the law of fraud, and the Court's opinion provided no intellectual grist for a discussion that might have improved matters. The limitation to bribes and kickbacks has its own difficulties. Justice Scalia is probably right that the majority oversold the extent to which the old pre-*McNally* honest services cases were clear about what a bribe or a kickback really is in this context.[37] Does the new rule require proof of a quid pro quo arrangement of the sort required under federal bribery statutes? Or would it be enough for a prosecutor to argue, for example, that a corporate executive committing accounting fraud expected a "kickback" in the form of illicit profits he would take from the sale of inflated stock options (or even in the form of additional options his employer might lavish on him for his success in running up the company's stock price)? And, as Justice Scalia pointed out, won't we still need some law on what kinds of employment, political, and other relationships give rise to this duty not to take bribes or kickbacks in the first place?[38]

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37. *Skilling,* 160 S. Ct. at 2936–38 (Scalia, J., concurring in part and concurring in the judgment).

38. *Id.*

Supreme Court opinions, of course, almost always open up new issues and fail to resolve old ones. The more serious deficit in the *Skilling* opinion is the missed opportunity to grapple seriously with the relationship and context problem in the law of fraud. The Court might have tried to develop some tools for determining what kinds of contexts give rise to fraud in this special form: A and B have a preexisting relationship of some legal significance; A gets some indirect benefit, not from B, as a result of deceiving B; A's deceit takes the form of a nondisclosure or course of conduct rather than an affirmative misrepresentation; A's nondisclosure or course of conduct causes B to continue to trust A and not to exercise B's right or ability to exit the relationship with A; B is thereby wrongfully harmed or placed at risk of harm.

This is not a problem that arose accidentally just because some federal courts, and a later Congress, chose to use the verbal formulation "honest services" with the mail and wire fraud statutes. It is a general problem for the law of fraud. Arguably it is the concept of fraud itself, not the modern formulation of "honest services," that presents the vagueness difficulty.[39] Yet no one has suggested that it is unconstitutional to criminalize fraud. Given the long and settled Anglo-American history of doing so, any such claim likely would not be taken seriously.

Consider securities fraud, for example. The applicable statute and rule, somewhat like the mail and wire fraud statutes but with a different jurisdictional hook, proscribe all fraud.[40] Courts have been left to do almost all of the work in determining what counts as fraud. There is not space here to cover the law of securities fraud, but take just three illustrations. First, the Supreme Court has held that a market-maker with control over the market for a particular security—because of the particular relationship that exists between him and holders of the security—may commit fraud by failing to disclose to a seller of the security that the market-maker was obtaining a substantially higher price for those securities from a particular kind of buyer.[41] Second, the courts have famously based the law of insider trading on the theory that certain kinds of sellers of securities, in possession of certain kinds of information, can defraud buyers by not

39. Prosser called fraud "a term so vague that it requires definition in nearly every case." KEATON ET AL., *supra* note 6, § 105, at 727.

40. 15 U.S.C.A. § 78j (West 2010); 17 C.F.R. § 240.10b-5.

41. Affiliated Ute v. United States, 406 U.S. 128, 152 (1972).

disclosing to the buyers that they have such information.[42] Third, the very same accounting manipulations charged as honest services fraud in *Skilling* were charged as securities fraud and no one, including Skilling himself, suggested to the Supreme Court that there was any constitutional deficiency in *that* legal theory.

These are theories of fraud based upon nondisclosure and duties arising from relationships in which victims are deemed to have certain rightful expectations of disclosure. After *Skilling*, we may see these kinds of theories still pressed even in mail fraud prosecutions, as prosecutors explore whether courts will recognize "property" interests of victims that are less tangible, like the right to accurate information about what a fiduciary to whom one has entrusted funds is doing with one's money or that of others.[43] In addition, Congress might respond to the *Skilling* decision by launching another volley in the back-and-forth over the mail and wire fraud statutes, perhaps broadening the definition of "property" for purposes of the statutes or attempting to define something about fiduciary duties with a different verbal formulation than "honest services."

If the Court had really wanted to grapple with these conceptual problems in the law of fraud, what might it have done with the mail fraud cases? First, the Court could have said that not everyone owes a duty of "honest services" and at least begun to specify the types of relationships in which such a duty exists. Second, the Court could have said that, even among those who owe such a duty, the content of that duty is not uniform—it may demand a little extra or a lot of the actor bearing it. Third, the Court could have said that no actionable fraud exists unless the person to whom that duty is owed is not only deceived but suffers some harm. The Court might have described actionable harm as taking the form of direct loss, being placed at a risk of loss that a person has a right to be free of, or being deprived of the ability to exit a relationship in circumstances in which exit likely would have been chosen.

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42. *See* United States v. O'Hagan, 521 U.S. 642 (1997) (holding that a person who trades securities using information misappropriated from another in violation of a fiduciary duty can be liable for insider trading).

43. *Cf.* Carpenter v. United States, 484 U.S. 19, 20–21 (1987), *superseded by statute,* 18 U.S.C.A. § 1346 (West 2010), *as recognized in* United States v. Brumley, 116 F.3d 728, 730 (5th Cir. 1997) (holding, in prosecution for stock trades based on inside information, that advance knowledge about content of influential Wall Street Journal column constituted "property" for purposes of mail fraud statute).

These three moves would not have been enough. A fluid, contextual analysis about duty would have perpetuated concerns about notice and vagueness. The Court needed, perhaps above all, to draw some lines around criminal fraud in the mail fraud trilogy. The Court's holding about "bribes and kickbacks," at least as a formal matter, seems to do that. But it is an arbitrary line that is not grounded in any account of what makes some frauds involving abuse of trust relationships particularly condemnable such that they merit criminal punishment. And knowing what fraud *is* is a precondition for successfully sorting criminal cases from civil ones.

I have written at length about how mental state inquiry in fraud law can be used both to draw the line between civil and criminal sanctions and to lessen concerns about fair notice that inevitably arise in the application of as broad a legal concept as fraud.[44] The notice problem in fraud is not only about limitations on vagueness in criminal prohibitions—it is also about blameworthiness. A fraud tends to merit criminal punishment if the actor proceeds with fulsome awareness of the wrongfulness of her endeavor. Such actors also tend to be poor candidates for advancing sympathetic claims about lack of notice. The Justices, however, were nearly silent about mens rea in their *Skilling* opinions—a genuine oddity given that analysis in substantive criminal law nearly always begins, and often ends, with the question of the culpable actor's mental state.

CONCLUSION

My present intervention is to say only that the problem of nondisclosure as fraud in particular kinds of relationships is an enduring one. The Justices missed a golden opportunity in the 2009 October Term to develop a conceptual framework for confronting that problem. I say this fully aware, of course, that the Court is a voting body with nine members. What one jurist could have done with the mail fraud problem might be a far different thing than the outcome that could win five or more votes. Perhaps the Court's "bribes and kickbacks" holding is simply the artifact of a compromise among the Justices to avoid striking down the statute entirely. But for now, the problem of nondisclosure as fraud will endure. These cases presented the Justices with a golden opportunity to develop a conceptual framework for confronting the relationship and context

44. *See* Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1976–77 (2006).

problem in the law of fraud, but—as is often the case when we look to the Court to tackle big, conceptual problems—the result was disappointing.