

## THE FEDERAL COMMON LAW CRIME OF CORRUPTION\*

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*This contribution to the North Carolina Law Review's 2010 symposium, Adaptation and Resiliency in Legal Systems, considers the compatibility between the common law nature of honest services fraud and the dynamic quality of public integrity offenses. Corruption enforcement became a focal point of recent debates about overcriminalization because it typifies expansive legislative mandates for prosecutors and implicit delegations to courts. Federal prosecutions of political corruption have relied primarily on an open-textured provision: 18 U.S.C. § 1346, the honest services extension of the mail fraud statute. Section 1346 raises notice concerns because it contains few self-limiting terms, but it has also acquired some principled contours through common law rulemaking. Those boundaries are consistent with an animating principle of public corruption prosecutions: ensuring detached decisionmaking in the public interest. The distortive potential of significant personal financial gain may best distinguish actionable corruption from ordinary political dealings. Although the Supreme Court granted certiorari in the Skilling, Black, and Weyhrauch trio of cases in part to consider the link between harm and liability for honest services fraud, the Court did not address the issue, instead simply limiting the statute to bribes and kickbacks. Recent public corruption prosecutions illustrate some shortcomings of that decision and indicate that the courts could better confine honest services fraud by building on the harm constraint that had begun to emerge through the common law. The concluding sections here explore both the way in which a purposive interpretation might limit honest services prosecutions and the extent to which unanswered questions in the Skilling decision still allow for development of the harm concept.*

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## INTRODUCTION

Public corruption describes a complex set of crimes that covers offense conduct far beyond the paradigm form of a vote purchased with cash in a brown paper bag or an official dipping into public coffers. It often entails layers of transactions and deferred exchanges of benefits.<sup>1</sup> And the damage caused by corrupt official action generally involves diffuse social consequences rather than material economic injury. It may cause substantial harm, but only through indirect losses, borne only by constructed victims.

Regulating public integrity thus requires a dynamic enforcement response. That response has been framed by the theory that federal prosecutions for fraud protect not only concrete money and property rights but also intangible rights like the loyalty of government officials to their constituents. “Honest services fraud” emerged from common law rulemaking and has expanded and contracted through judicial interpretation, legislative clarification, and executive self-regulation. As detailed below, courts endorsed early prosecutorial extensions of the mail and wire fraud statutes to intangible harms until the

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1. Former Illinois Governor Rod Blagojevich, for example, was charged in a 4-defendant, 24-count, 112-page indictment alleging various acts of political corruption. *See* Second Superseding Indictment at 1, 7–40, 105, 112, *United States v. Blagojevich*, 662 F. Supp. 2d 998 (N.D. Ill. 2009) (No. 08 CR 888). In addition to honest services charges, the indictment alleged racketeering conspiracy, wire fraud, extortion conspiracy, attempted extortion, and false statements. *See id.* at 7–43, 67–78, 88–96. Although some of the allegations involved Blagojevich directly promising or threatening official action in exchange for benefits, most of the alleged corruption took the form of more complex transactions. *See, e.g., id.* at 26–27. Blagojevich associates, for example, allegedly assisted other parties in gaining some influence over the investment activity of the State of Illinois Teachers’ Retirement System pension plan. Those third parties then directed both investments and related legal work to firms selected by the Blagojevich associates. In exchange, the firms would make campaign contributions to Blagojevich. *Id.* at 9.

Supreme Court's decision in *McNally v. United States*,<sup>2</sup> which limited fraud prosecutions to offenses involving the deprivation of property. Congress responded with 18 U.S.C. § 1346, which codified a definition of mail and wire fraud that includes "a scheme or artifice to deprive another of the intangible right of honest services."<sup>3</sup> In the twenty-year period that followed, courts gave some meaning to the deprivation of honest services by adopting various limiting interpretations, some of which focused on the nature of the damage the corruption caused or risked. The *Skilling*, *Black*, and *Weyhrauch* trio of cases last term offered an opportunity to synthesize and clarify the role of harm. The Supreme Court granted certiorari in part to consider that issue but instead concluded that vagueness problems could be addressed by limiting § 1346's scope to bribes and kickbacks.<sup>4</sup> Imposing workable limits on the honest services theory, however, may require a more integrated approach that is consistent with the purposes of prosecuting corruption and compatible with its common law origins.

Part I describes the development of honest services fraud and various attempts to impose narrowing constructions on the theory. Part II explains the fit between context-dependent corruption prosecutions and common law rulemaking. Although there are serious objections to delegating the task of defining crimes,<sup>5</sup> and many valid critiques of flexibility in the criminal law,<sup>6</sup> public corruption prosecutions display some of the advantages of judicial rulemaking and analogical reasoning. Corruption itself may be difficult to define with any precision, but the harm that it causes to the political process—leverage over public officials that precludes neutral decisionmaking—can signal actionable offense conduct. Part

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2. 483 U.S. 350 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508, *as recognized in* *Skilling v. United States*, 130 S. Ct. 2896, 2904 (2010).

3. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2006)).

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

5. *Cf.* Richard E. Myers II, *Complex Times Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1851 (2011) (critiquing delegations to agencies that render "as yet undefined conduct criminal").

6. *See, e.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 245 (1985) ("Case-by-case criminalization, whether accomplished under the rubrics of the common law or the aegis of a modern statute, threatens both the general values of regularity and evenhandedness in the administration of justice and our more specific societal commitment to equality before the law."); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1102 (1952) (arguing that some amount of discretion is essential to the prosecutorial function but that its existence "cannot be accepted as a substitute for a sufficient law").

III argues that a renewed focus on harm has the potential to maintain a dynamic standard while also addressing notice concerns and disquiet about excessive prosecutorial discretion.<sup>7</sup>

### I. CRIMINALIZING DISHONEST GOVERNMENT

The enforcement challenges of public corruption cases have made the generous language of mail fraud the first place that federal prosecutors turn when drafting an indictment.<sup>8</sup> There is no parallel to the federal fraud statute that focuses on the general problem of political corruption, but there are narrower provisions that criminalize various self-enriching actions by public officials. For example, a federal bribery statute, 18 U.S.C. § 201, includes the element of a *quid pro quo* (a direct link between the bribe and some official act).<sup>9</sup> That requirement often makes bribery a difficult charge to prove,<sup>10</sup> as the multifactor decisionmaking in which public officials engage can preclude proof of the link to an illicit benefit. A similar narrowing construct also appears in some applications of 18 U.S.C. § 666, the statute that proscribes theft and bribery by local government officials in connection with programs that receive federal funds.<sup>11</sup> The Hobbs Act supplies additional theories to combat threats

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7. For some classic formulations of the “harm principle” as it relates to the criminal law, see 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 11 (1984); see also DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 66 (2008) (arguing for an internal constraint on overcriminalization in the form of a nontrivial harm or evil requirement); JOHN STUART MILL, *ON LIBERTY* 70 (Michael B. Mathias ed., Pearson Longman 2007) (1859) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”); John Gardner, *Justifications and Reasons*, in *HARM AND CULPABILITY* 103, 127 (A.P. Simester & A.T.H. Smith eds., 1996) (“[H]armless immoralities should not be officially prohibited or punished . . .”).

8. See, e.g., Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1553 (2008) (“Federal fraud law is very broad, and its breadth is driven in part by an agenda of maintaining supple legal tools to deal with inventive and resourceful persons determined to appropriate the interests of others.”).

9. 18 U.S.C. § 201 (2006).

10. See *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404–05 (1999) (“[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act.”); *United States v. Alfisi*, 308 F.3d 144, 149 (2d Cir. 2002) (“[B]ribery involves the giving of value to procure a specific official action from a public official.”).

11. Section 666 prohibits bribery involving state and local officials employed by agencies that receive more than \$10,000 in federal program grants. 18 U.S.C. § 666 (2006). It includes a “corrupt intent” requirement, although not a *quid pro quo* limitation, and it has been read recently to cover payments made with the intention to produce future, as yet unidentified, favors. *Id.*; see *United States v. McNair*, 605 F.3d 1152, 1188 (11th Cir. 2010) (“To accept the defendants’ argument would permit a person to pay a significant

and extortion by government officials,<sup>12</sup> and the Foreign Corrupt Practices Act applies to the bribery of foreign officials.<sup>13</sup> There are corresponding administrative provisions and ethics canons, and each state has its own bribery statutes as well. Despite these parallel provisions and additional layers of enforcement—including lobbying and campaign finance regulations and state and federal conflict-of-interest provisions<sup>14</sup>—the mail and wire fraud statutes have been the “principal vehicle” for the development of public corruption law.<sup>15</sup>

#### A. *Honest Services Fraud*

The prohibitions on mail and wire fraud—codified in 18 U.S.C. §§ 1341 and 1343<sup>16</sup>—had traditionally been moored to the deprivation of money or property. The evolvability of the fraud provisions, however, has long been recognized as a core characteristic; they were drafted with sufficient mutability to address “the new varieties of fraud that the ever-inventive American ‘con artist’ is sure to develop.”<sup>17</sup> The fraud statute’s original House sponsor spoke in sweeping terms of its design to “prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rascallions

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sum to a County employee intending the payment to produce a future, as yet unidentified favor without violating § 666. The requirement of a ‘corrupt’ intent in § 666 does narrow the conduct that violates § 666 but does not impose a specific *quid pro quo* requirement.”), *cert. denied*, 79 U.S.L.W. 3512 (U.S. Mar. 7, 2011) (No. 10-533).

12. Hobbs Act, 18 U.S.C. § 1951 (2006).

13. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1 to -3 (2006).

14. *See, e.g.*, 2 U.S.C. § 437g(d)(1)(A) (2006) (authorizing criminal prosecution of campaign finance violations); 18 U.S.C. §§ 203–209 (2006 & Supp. 2009) (conflict-of-interest statutes).

15. John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 453 (1998).

16. 18 U.S.C. § 1341 (2006) imposes penalties on anyone who devises or intends to devise “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” 18 U.S.C. § 1343 (2006)—first adopted in 1952—states:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

17. *United States v. Maze*, 414 U.S. 395, 405–07 (1974) (Burger, C.J., dissenting).

generally, for the purposes of deceiving and fleecing the innocent people of the country.”<sup>18</sup>

Section 1341 broadly proscribes any “scheme or artifice to defraud,” and “defraud” has a sufficiently “generative character” that courts have extended the statute to “emerging forms of misconduct” without additional legislation.<sup>19</sup> Thus, beginning in the 1940s and then with greater frequency by the 1970s, courts acquiesced in prosecutors’ use of the fraud laws to pursue more abstract harms to the ideal of honest and disinterested government. They “readily accepted the proposition that a deprivation of the honest services owed by a fiduciary constituted the fraudulent taking that is normally associated with larceny, and therefore sufficient to establish a scheme to defraud.”<sup>20</sup>

Once courts agreed that prosecutors could pursue charges against officials who deprived the public of their faithful services, the theory “quickly overgrew the legal landscape in the manner of the kudzu vine until by the mid-1980s few ethical or fiduciary breaches seemed beyond its potential reach.”<sup>21</sup> But despite concerns about its increasing span, every federal court of appeals to consider the constitutionality of the intangible rights theory of fraud, over the course of almost fifty years of litigation, upheld it against vagueness challenges.

In the 1987 *McNally* case, however, the Supreme Court concluded that the statute did not protect “the intangible right of the citizenry to good government” and that mail fraud schemes required

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18. Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 442 (1995) (quoting CONG. GLOBE, 41ST CONG., 3D SESS. 35 (1870) (statement of Rep. John Farnsworth) (concerning a bill similar to the mail fraud provision that was introduced in the preceding Congress)) (internal quotation marks omitted).

19. Dan M. Kahan, *Lenity and Federal Common Law Crime*, 1994 SUP. CT. REV. 345, 377; see also *United States v. Brown*, 459 F.3d 509, 519 (5th Cir. 2006) (stating that the fraud statutes “were intentionally written broadly to protect the mail and, later, the wires from being used to initiate fraudulent schemes”); Henning, *supra* note 18, at 465 (“By not defining the scope of the statute, Congress can hide behind a general legislative grant of authority to prosecutors to ‘call them as they see them.’”); Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 783 (1980) (“On its face, the wording of the statute explains in large part how the courts came to attribute to the crime of mail fraud many of the qualities that, when viewed in light of the statute’s very different present-day wording seem so peculiar.”).

20. PETER HENNING & LEE RADEK, *THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION* 153 (2011).

21. Coffee, *supra* note 15, at 427.

a deprivation of “money or property.”<sup>22</sup> *McNally* involved two Kentucky officials who had directed the state to buy workers’ compensation insurance through a particular agent. That agent shared commissions with another agency that was partly owned by one of the officials. Kentucky received legitimate insurance policies, and the government did not allege that the state paid inflated premiums, but the officials also profited from the transactions.<sup>23</sup> They were convicted of having “defrauded the citizens and government of Kentucky of . . . the right to have the Commonwealth’s affairs conducted honestly.”<sup>24</sup> The Court overturned the conviction because of the absence of any measurable economic loss and then instructed Congress to “speak more clearly” if it intended the fraud statute to reach beyond the protection of property rights to broader violations of public fiduciary duties.<sup>25</sup>

Congress responded the same year with passage of § 1346, which specified that honest services violations indeed fell within the definition of fraud.<sup>26</sup> The legislation added virtually no substance beyond codification of the court-made intangible rights theory. The statutory language was inserted in an omnibus drug bill on the same day that the provision was passed by both the House and the Senate.<sup>27</sup> It was never referred to any committee, discussed in any congressional report, or debated on the floor.<sup>28</sup> The only indication of legislative intent is the desire to overturn *McNally*<sup>29</sup> and restore the broad definition of fraud that had evolved prior to that decision.<sup>30</sup>

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22. *McNally v. United States*, 483 U.S. 350, 356 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508, *as recognized in* *Skilling v. United States*, 130 S. Ct. 2896, 2904 (2010).

23. *Id.* at 352–54.

24. *Id.* at 352.

25. *Id.* at 360.

26. The statute reads, in its entirety: “For the purposes of [mail 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.” Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2006)).

27. *See* *United States v. Brumley*, 116 F.3d 728, 742 (5th Cir. 1997) (en banc) (Jolly & DeMoss, JJ., dissenting) (discussing the absence of any legislative history).

28. *Id.*

29. *See* 134 CONG. REC. 33,297 (1988) (statement of Rep. Conyers) (“This amendment restores the mail fraud provision to where that provision was before the *McNally* decision.”); 134 CONG. REC. S17,376 (daily ed. Nov. 10, 1988) (statement of Sen. Biden) (“This section overturns the decision in *McNally v. United States* . . . . Under the amendment, [the fraud] statutes will protect any person’s intangible right to the honest services of another, including the right of the public to the honest services of public officials.”).

30. *See* *Cleveland v. United States*, 531 U.S. 12, 19–20 (2000).

Codifying the expansion of fraud liability to cases of “intangible” rights violations thus did nothing at all to clarify how far the statute ultimately extends. The courts had allowed prosecutors to press beyond the property boundary, and it then fell entirely to the courts to redefine the limits of prosecutorial discretion once that line was crossed.<sup>31</sup> Among the disadvantages of this interstitial development of the law was that, while fluid and responsive, it also created inconsistency. Between enactment of § 1346 and the Court’s decision in *Skilling*, conflicts arose among the federal circuits with respect to the appropriate mens rea standard, the significance of loss and gain, the nature of the duty of good faith, and the body of law governing whether that duty had been breached.<sup>32</sup> Many of the differences in interpretation turned on whether and to what extent prosecutors had to demonstrate harm.<sup>33</sup> Some courts required only that harm be reasonably foreseeable,<sup>34</sup> while others called for some showing that the defendant caused actual harm or achieved some measurable gain.<sup>35</sup>

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31. See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 764 (1999) (observing that the legislative and executive branches have pushed a broad conception of discretionary enforcement power in an ongoing conversation with the courts).

32. Compare *Brumley*, 116 F.3d at 735 (“The reference to such [intangible] ‘rights’ of citizens has little relevant meaning beyond a shorthand statement of a duty rooted in state law and owed to the state employer. Despite its rhetorical ring, the rights of citizens to honest government have no purchase independent of rights and duties locatable in state law. To hold otherwise would offer § 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. Congress did not use those words, and we will not supply them.”), with *United States v. Martin*, 195 F.3d 961, 966 (7th Cir. 1999) (holding that a fiduciary duty, the breach of which was charged as mail fraud, had its source in federal—not state—law). See also *United States v. Urciuoli*, 513 F.3d 290, 300 (1st Cir. 2008) (decrying the absence of any “clear cut answers to borderline problems”); *United States v. Rybicki*, 354 F.3d 124, 162–63 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting) (identifying the conflicts in authority).

33. Compare *United States v. Bloom*, 149 F.3d 649, 655–57 (7th Cir. 1998) (requiring that harm—for example, in the form of misuse of a public office for private gain—be shown as an element of mail fraud), with *United States v. Panarella*, 277 F.3d 678, 692 (3d Cir. 2002) (refusing to require misuse of public office for personal gain as an element of mail fraud because it “risks being both over-inclusive and under-inclusive as a limiting principle”).

34. See *Rybicki*, 354 F.3d at 141 (holding, in the context of private-sector honest services fraud, that the defendant’s behavior must “cause, or at least be capable of causing, some detriment”).

35. See *United States v. Jordan*, 112 F.3d 14, 19 (1st Cir. 1997); *United States v. Czubinski*, 106 F.3d 1069, 1074–77 (1st Cir. 1997) (reversing a conviction based on the defendant’s unauthorized accessing of confidential tax records because the defendant neither intended to disclose nor otherwise used the confidential information for personal gain).

The “unprincipled theory of harm” was, for some, the primary source of constitutional concern.<sup>36</sup> Critics of § 1346 cited these notice problems and argued that porous charging provisions can lead to arbitrary and even abusive enforcement. Generative prohibitions can also unduly empower prosecutors, and detractors from the honest services theory raised federalism concerns and the specter of partisan motivations or external political pressure on prosecutors as well.<sup>37</sup> Federal prosecutors responded that this catch-all tool was essential in order for them to pursue corruption that state and local officials might ignore, because they were insufficiently resourced, politically vulnerable, or laboring under conflicts of interest.<sup>38</sup> Some scholars have also cited the important federal role in maintaining the integrity of state and local governments in order to preserve the “balance established by federalism.”<sup>39</sup> A more subtle claim is that federal interests are themselves implicated in the prosecution of state and

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36. See *United States v. Brown*, 459 F.3d 509, 534–35 (5th Cir. 2006) (DeMoss, J., concurring in part and dissenting in part).

37. See, e.g., *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari) (arguing that the statute “invites abuse by headline-grabbing federal prosecutors in pursuit of local officials, state legislators, and corporate CEOs”); *United States v. Kincaid-Chauncey*, 556 F.3d 923, 949–50 (9th Cir.) (Berzon, J., concurring) (“The conflict of interest theory, unhinged from an external disclosure standard, places too potent a tool in the hands of zealous prosecutors who may be guided by their own political motivations. . . . [and] might also feel political pressure to pursue certain state or local officials . . .”), *cert. denied*, 130 S. Ct. 795 (2009), *abrogated in part by United States v. Jaramillo*, No. 09-50480, 2011 U.S. App. LEXIS 3036, at \*3 (9th Cir. Feb. 15, 2011). On the potential for improper purposes like political motivations to taint factual interpretation by prosecutors, see, for example, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 903 (2009); Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and the *Allocation of Prosecutorial Power*, 69 OHIO ST. L.J. 187, 188 (2008).

Prosecutors implementing the honest services provision also acted without any centralized authority to review indictments. In contrast, for example, to RICO prosecutions, some money laundering cases, and prosecutions involving election fraud, the Department of Justice has not required prior approvals before individual U.S. attorney’s offices proceed with fraud cases that rest on intangible rights theories. See Ellen S. Podgor, *Intangible Rights—A Déjà Vu*, 63 VAND. L. REV. EN BANC 63, 68–69 (2010); Richman, *supra* note 31, at 802–03.

38. See NORMAN ABRAMS & SARA SUN BEALE, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 187–88 (4th ed. 2006) (discussing constitutional origins of the federal government’s role in policing state and local corruption); Norman Abrams, *The Distance Imperative: A Different Way of Thinking About Public Official Corruption Investigations/Prosecutions and the Federal Role*, 42 LOY. U. CHI. L.J. 207, 230–33 (2011).

39. Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 81 (2003); see also *id.* at 82 (“The constitutional design to eliminate corruption demonstrates the Framers’ intent to guard against the threat to liberty from the misuse of public authority.”).

local corruption, and fraud prosecutions at times provide the only vehicle for protecting those interests.<sup>40</sup>

*B. The Skilling Decision*

Mounting criticism that judicial gap-filling in the statute was actually *too* dynamic finally prompted the Supreme Court in 2009 to grant certiorari in a trio of cases concerning § 1346.<sup>41</sup> Honest services prosecutions had long been “searching in a Pirandello-like fashion for a plot,”<sup>42</sup> and Justice Scalia had recently decried the absence of limiting principles and the statute’s reach to “any manner of unappealing or ethically questionable conduct.”<sup>43</sup> *Weyhrauch*, *Skilling*, and *Black* together offered an opportunity to resolve the constitutionality of the statute and determine its outer boundaries.

Bruce Weyhrauch was an Alaska legislator who was poised to leave government for private law practice and allegedly sought future legal work from an oil field services company. Weyhrauch failed to disclose that conflict of interest and voted in the company’s favor on a pending oil tax bill.<sup>44</sup> The Court agreed to review his conviction for honest services fraud and, in particular, to decide whether charges against a state official for depriving the public of honest services required a showing that the defendant had violated a disclosure duty imposed by state law.<sup>45</sup> That issue had divided the appeals courts and presented a fairly narrow question, but two companion cases from the private sector—*United States v. Skilling* and *United States v. Black*—added broader debates about how to distinguish lawful from unlawful conduct under the statute.

Jeffrey Skilling, Enron’s CEO, was indicted in 2004 for securities fraud and mail and wire fraud.<sup>46</sup> Among the allegations in the mail

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40. See Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 266 (2010) (“Of course federal prosecutions of state and local corruption raise federalism concerns. But there are countervailing interests as well. In addition to the inability of state and local actors to respond effectively when corruption is entrenched and pervasive, other federal interests may be implicated. In the *Weyhrauch* case, the corruption affected critical legislation on oil field production. Rod Blagojevich was prosecuted for trying to sell the nomination for the U.S. Senate seat vacated by Barack Obama.”).

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

42. Coffee, *supra* note 15, at 430.

43. *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari).

44. *United States v. Weyhrauch*, 548 F.3d 1237, 1239 (9th Cir. 2008), *vacated*, 130 S. Ct. 2971 (2010).

45. *United States v. Weyhrauch*, 129 S. Ct. 2863, 2863 (2009) (granting certiorari).

46. *Skilling*, 130 S. Ct. at 2907.

fraud counts was the claim that Skilling had deprived Enron and its shareholders of the intangible right to his honest services when he deceived them and the public about the company's financial status in order to inflate its stock price.<sup>47</sup> *Skilling* raised the question whether § 1346 requires the government to prove that the defendant's conduct was intended to achieve some private gain rather than to advance the employer's interests.<sup>48</sup>

The Court also granted certiorari in *Black v. United States*, which concerned the status of a harm-based narrowing construction. The charges arose from Canadian newspaper magnate Conrad Black's concealment of the recharacterization of management fees to manipulate after-tax income, and from Black's collection of non-compete payments that functioned as disguised bonuses to him.<sup>49</sup> One of the issues presented was whether, in order to prove that Black deprived his company, Hollinger International, of honest services, the government had to demonstrate "a reasonably contemplated identifiable economic harm" to the victim.<sup>50</sup>

Despite this promising constellation of issues, the Supreme Court's ultimate decision failed to engage the core concerns about honest services fraud. Rather, the Court cited constitutional avoidance and addressed the vagueness challenge by circumscribing the application of § 1346 to cases of "bribes and kickbacks."<sup>51</sup> As Sam Buell commented, "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."<sup>52</sup> The failure of the decision is in large measure procedural rather than substantive. The Court's solution could be read as a mechanical overcorrection that strips § 1346 of any content independent of parallel prohibitions (if bribes and kickbacks are taken as terms of art), or as the meaningless addition of two more undefined terms to the already ambiguous language of § 1346 (if many different forms of conduct fit

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47. *See id.* at 2908.

48. *See id.* at 2928 n.36.

49. *See* *United States v. Black*, 530 F.3d 596, 599 (7th Cir. 2008), *vacated*, 130 S. Ct. 2963 (2010).

50. *See* Petition for Writ of Certiorari at i, *Black v. United States*, 129 S. Ct. 2379 (2009) (No. 08-876).

51. *Skilling*, 130 S. Ct. at 2931. Justice Scalia's concurrence states his view that the statute as a whole is unconstitutionally vague because it provides "no ascertainable standard of guilt." *Id.* at 2936 (Scalia, J., concurring) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921)) (internal quotation marks omitted).

52. Samuel W. Buell, *The Court's Fraud Dud*, 6 DUKE J. CONST. L. & PUB. POL'Y 31, 32 (2010).

within the new bribery paradigm). Its substantive impact thus remains to be determined. Procedurally, though, the decision reads like an abrupt end to an interbranch conversation that began in the 1940s, continued through prosecutors' most recent efforts to curb public corruption, and included the lower courts' various attempts to impose appropriate limits on that power. By declining to tackle the questions that had divided the lower courts, including the sources of fiduciary duties and the place of harm and gain in determining whether those duties had been breached, the Court disregarded the common law nature of the offense.

## II. CONCEPTUALIZING CORRUPTION

Courts should be explicit about the difficulties of marking out the precise contours of corruption in advance, and the need to work within broader strokes.<sup>53</sup> Regulating public corruption through the criminal law has unavoidably engaged them in fact-specific inquiries and some accretive crime definition. And the *de facto* common law status of honest services fraud by public officials comports with the nature of the regulated conduct and the enforcement goals. It became untethered from traditional conceptions of money or property loss because the harm that it causes has broad normative content. Both theoretical approaches to the meaning of corruption and the language of corruption prosecutions stress concerns like integrity, fidelity, and transparency, and preserving those values requires a pliant statutory scheme.

### A. *Common Law Crimes*

To point out the merits of analyzing honest services fraud as a common law offense is to advocate for something that does not exist in theory. Since the First Congress, it has been axiomatic that there are no federal common law crimes,<sup>54</sup> and Justice Scalia recently restated this "rule" and criticized the "common-law crime of

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53. *Cf.* *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting in part and concurring in part) ("If judges perceive a need for a catch-all federal common law crime, the issue should be addressed explicitly with some recognition of the dangers, rather than continue an inexorable expansion of the mail and wire fraud statutes under the pretense of merely discharging Congress' will.").

54. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *see also* *United States v. Bass*, 404 U.S. 336, 348 (1971) ("[L]egislatures and not courts should define criminal activity."); *Jerome v. United States*, 318 U.S. 101, 104 (1943) ("There is no common law offense against the United States . . ."); Jeffries, *supra* note 6, at 195 ("Judicial crime creation is a thing of the past."); Kahan, *supra* note 19, at 366 (observing that courts have displayed "antagonism toward analogical reasoning").

unethical conduct” that developed around § 1346.<sup>55</sup> Numerous scholars of criminal law have explained, however, that courts necessarily add meaning to criminal statutes,<sup>56</sup> and that the refrain against interstitial lawmaking relies on a “truth so partial that it is nearly a lie.”<sup>57</sup> As Dan Kahan notes, although it is an unacknowledged practice, it is nevertheless a well-established one that “Congress may delegate criminal lawmaking power to the courts.”<sup>58</sup> Similarly, Dan Richman observes that the extent of delegated enforcement in the criminal realm is commensurate with delegations in other parts of the “bureaucratic state.”<sup>59</sup>

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55. *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). Justice Scalia’s objection in *Sorich* evokes the core concern about common law crimes, that “[i]t is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail.” *Id.*; see also *United States v. Reese*, 92 U.S. 214, 221 (1875) (“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.”); *United States v. Brown*, 459 F.3d 509, 522 n.13 (5th Cir. 2006) (commenting on the dangers of the “ever-expanding and ever-evolving federal common-law crime” of honest services fraud).

56. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 471 (1996) (“To be sure, Congress must *speak* before a person can be convicted of a federal crime, but it needn’t *say* much of anything when it does.”); see also Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 660 (1981) (observing that “the ‘rule system’ is upheld only occasionally, and in a very un-rule-like fashion”). But see Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 635 (2005) (noting that judges formerly played a more significant role in defining exceptions and defenses to criminal offenses established by the legislature).

57. Kahan, *supra* note 56, at 471. The refrain that there are no federal common law crimes sounds periodically in the case law as well. See, e.g., *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) (“[I]t is frightening to contemplate the prospect that the federal mail fraud statute makes it a crime punishable by five years’ imprisonment to misunderstand how a state court in future years will delineate the extent of impermissible conflicts . . . . [In that case,] we would have a federal common-law crime, a beastie that many decisions say cannot exist.”). But see *United States v. Kozminski*, 487 U.S. 931, 965–66 (1988) (Stevens, J., concurring) (arguing that Congress intended the definition of a term in a statute “to be developed in the common law tradition of case-by-case adjudication”), *superseded by statute*, Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1464, 1486–89.

58. Kahan, *supra* note 19, at 347.

59. Richman, *supra* note 31, at 760; see also *McNally v. United States*, 483 U.S. 350, 372–73 (1987) (Stevens, J., dissenting) (“Statutes like the Sherman Act, the civil rights legislation, and the mail fraud statute were written in broad general language on the understanding that the courts would have wide latitude in construing them to achieve the remedial purposes that Congress had identified.”), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508, as recognized in *Skilling v. United States*, 130 S. Ct. 2896, 2904 (2010).

There are practical and policy reasons to recognize this reality, as “[t]he same constraints that prevent Congress from enacting a detailed solution to a complex or controversial problem may also prevent Congress from adapting any such solution to changed circumstances.”<sup>60</sup> Congress has “every incentive” to proceed in the criminal realm just as it does in the civil one, “resorting to highly general language that facilitates legislative consensus by deferring resolution of controversial points to the moment of judicial application.”<sup>61</sup> Legislative efforts to articulate detailed theories of offenses can also be cumbersome and can quickly grow outdated.<sup>62</sup> And criminal rulemaking in its legislative form often unfolds in reaction to high-visibility cases or regulatory problems that are perceived as acute.<sup>63</sup> The standards set in that reactive mode may later scale poorly to the workaday applications that prosecutors pursue. Common law crime definition allows for a more gradual response, with occasional distortions arising from high-profile cases<sup>64</sup>

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60. Kahan, *supra* note 19, at 352; *see also id.* at 353 (“[O]pen-textured statutory language may facilitate more efficient updating of legal norms; the generality of these statutes means that courts can modify or overrule prior decisions without awaiting amendment of the statutory language by Congress.”).

61. *Id.* at 369–70. William Stuntz adds that a common law system of criminal law holds the potential to produce supermajoritarian rules. *See* William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1895 (2000).

62. *See, e.g.*, Honest Services Restoration Act, S. 3854, 111th Cong. (2010) (stating that the Act’s purpose was to “expand the definition of scheme or artifice to defraud with respect to mail and wire fraud”). The Honest Services Restoration Act was an attempt to respond to the *Skilling* decision by recriminalizing undisclosed conflict-of-interest violations in necessarily underinclusive detail. Press Release, Patrick Leahy, Leahy Introduces Bill to Address Supreme Court’s *Skilling* Decision (Sept. 28, 2010), [http://leahy.senate.gov/press/press\\_releases/release/?id=d6346bbc-22d0-40a8-832b-017465c53ce8](http://leahy.senate.gov/press/press_releases/release/?id=d6346bbc-22d0-40a8-832b-017465c53ce8). Although the legislation attempted a comprehensive definition of the public officials to whom its terms applied, the official duties it contemplated, and the prohibited benefits that had to be disclosed, it was a self-contained demonstration of the difficulty of answering those questions *ex ante*. The Honest Services Restoration Act remained in the Senate Committee on the Judiciary at the end of 2010. A similar bill has been introduced in the 112th Congress. *See* Honest Services Restoration Act, H.R. 1468, 112th Cong. (2011).

63. The Sarbanes-Oxley Act, for example, was a response to the Enron and WorldCom scandals of the early 2000s. *See* Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.).

64. This concern applies at the margins to the high-profile cases that often produce adjustments to legal standards as well. *See* Frederick Schauer & Richard J. Zeckhauser, *The Trouble with Cases*, in REGULATION VERSUS LITIGATION: PERSPECTIVES ON ECONOMICS AND LAW 45, 63 (Daniel P. Kessler ed., 2011) (“[T]he problem of the distortingly available example is almost always a problem with regulation by litigation, but only sometimes—even if increasingly—a problem with *ex ante* rule-making.”); *see also* Buell, *supra* note 8, at 1522 (“If prosecutors tend to select threatening actors for sanction

but a flexible quality that suits the dynamic nature of many modern crimes.

This has been particularly true when it comes to the law of criminal fraud. Fraud is about gaining advantage through deception,<sup>65</sup> and that is a concept so encompassing that it cannot be definitively expressed *ex ante*. Fraud is inherently evasive, often inventive, and context dependent. Corruption prosecutions evolved as a subset of fraud enforcement in part because the two concepts share important characteristics. Corruption likewise takes creative forms and occurs in relationships structured to avoid detection.<sup>66</sup> Moreover, although the norms against deceptive practices are at least somewhat stable, the norms concerning what constitutes “corrupt” behavior by public officials shift, vary across jurisdictions, and interact with the regulation of political campaigns. Interstitial lawmaking allows the offense definition to keep pace with evolving forms of misconduct to protect an important but imprecise set of interests.

### *B. The Harm of Corruption*

Disloyalty in general defies quantification, and the harm of dishonest government is no exception. Even the more straightforward bribery statute raises what David Mills and Robert Weisberg have identified as a “basic philosophical challenge.”<sup>67</sup> Bribery typically involves a consensual arrangement and the exchange of something of material value, but “the most significant ‘thing taken’ by the malefactors is the public’s entitlement to uncorrupted loyalty of service by government officials, something impossible to measure.”<sup>68</sup> Although the harm of public corruption cannot be measured precisely, some effort to express what corrupt conduct actually

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under broad liability rules, judges, seeing the serious wrongs that narrow interpretations of rules would exclude from sanctioning regimes, will resist narrow rulings.”).

65. See, e.g., *Durland v. United States*, 161 U.S. 306, 312–13 (1896).

66. Cf. *United States v. Laljie*, 184 F.3d 180, 194 (2d Cir. 1999) (discussing application of section 3B1.3 of the U.S. Sentencing Guidelines and querying whether the defendant possessed “‘substantial discretionary judgment’” in a relationship of trust that yielded the “‘freedom to commit a difficult-to-detect wrong’” (quoting U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 cmt. n.1 (1998); *United States v. Viola*, 35 F.3d 37, 45 (2d Cir. 1994))).

67. David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1393 (2008).

68. *Id.*; see also Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 786 (1985) (describing corruption as a “black core” of bribery with “gray circles [that] surround the bribery core, growing progressively lighter” until they “blend into the surrounding white area that represents perfectly proper and innocent conduct”).

damages or degrades is essential to defining the offense.<sup>69</sup> Articulating either the conduct rule (a guide to the actions public officials are prohibited from taking) or the decision rule (according to which enforcers draw lines around cases to be prosecuted)<sup>70</sup> starts with the core concerns about distorting the decisions of public officials.

The law of public corruption, according to Samuel Issacharoff's recent analysis, is preoccupied with ensuring "public" rather than "private" outputs from the government and avoiding a client relationship between elected officials and contributors.<sup>71</sup> A related conception arises from political philosophy and trusteeship theory: the idea that public officials must privilege the public interest rather than either political considerations or private gain.<sup>72</sup> Case law also stresses general ideals of "good government," including unbiased decisionmaking and the fair and open exchange of information.<sup>73</sup> Other descriptions of corruption enforcement focus on the integrity of the electoral process instead of the outputs or functions of government.<sup>74</sup> Regulating corruption can also be viewed as animated by equality principles, by a desire for maximum reflection of divergent political views, or by a concern for the legitimacy of public officials. No entirely unifying theory emerges from the corruption laws, and political theorists evaluating them have relied on "vague criteria such as consensus notions of the public interest or culture-specific norms."<sup>75</sup>

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69. See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 73–74 (1997) ("There is no nonarbitrary way to arrive at the proper legal rules, no way to get to sensible bottom lines by something that looks and feels like legal analysis. . . . [C]ourts' decisions . . . are embedded in a system shaped by more open-ended—and more flagrantly political—judgments: How bad should something be before we call it a crime?").

70. See Meir Dan Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630–31 (1984).

71. See Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 126–30 (2010).

72. See Lowenstein, *supra* note 68, at 833.

73. See, e.g., *McNally v. United States*, 483 U.S. 350, 366 (1987) (Stevens, J., dissenting) (discussing the right to "honest government" and "unbiased public officials"), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508, *as recognized in* *Skilling v. United States*, 130 S. Ct. 2896, 2904 (2010).

74. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 76 (1980) ("[I]t is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open.").

75. Mills & Weisberg, *supra* note 67, at 1381 (discussing Lowenstein, *supra* note 68, at 791–95); see also *United States v. Brumley*, 116 F.3d 728, 736 (5th Cir. 1997) (en banc).

Accordingly, as Mills and Weisberg have explained, the victim of public corruption is always a constructed one, an “abstraction.”<sup>76</sup> The harm done takes shape through the “conceptual expressions of the courts, abetted of course by prosecutorial arguments and the framing of indictments.”<sup>77</sup> What finds expression in many court opinions is the notion that corruption undercuts aspirations for honesty, openness, and free-flowing information.<sup>78</sup> The Sixth Circuit, for example, has stated that “the right of the public to the honest services of its officials derives at least in part from the concept that corruption and denigration of the common good violates ‘the essence of the political contract.’”<sup>79</sup> Some of the earliest cases recognizing the honest services theory also cited its role in protecting “moral uprightness, . . . fundamental honesty, fair play and right dealing.”<sup>80</sup> Those terms have frequently reappeared, as in the 2005 federal indictment alleging that Representative Randy “Duke” Cunningham

conspired and agreed to devise a material scheme to defraud the United States of its right to defendant’s honest services, including its right to his conscientious, loyal, faithful, disinterested, unbiased service, to be performed free of deceit, undue influence, conflict of interest, self-enrichment, self-dealing, concealment, bribery, fraud, and corruption . . . .<sup>81</sup>

Highlighting honest and open government as the primary target of corruption enforcement merely begins the definitional work. Almost every elected official has engaged in conduct that fits somewhere within the broad allegations of moral disloyalty in the

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(Jolly & DeMoss, JJ., dissenting) (stating that courts applying the statute are “somewhere between a philosopher king and a legislator”).

76. Mills & Weisberg, *supra* note 67, at 1372.

77. *Id.*

78. *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1361 (4th Cir.) (explaining that the mail fraud statute covers any “scheme involving deception that employs the mails in its execution that is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing”), *aff’d in part*, 602 F.2d 653 (4th Cir. 1979) (en banc).

79. United States v. Frost, 125 F.3d 346, 365 (6th Cir. 1997) (quoting United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996)).

80. Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958); *see also, e.g.*, Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941) (referencing the “sacred duties” of a public official and the “essential immorality” of gaining advantage through corrupting or unduly influencing an official), *overruled by* United States v. Cruz, 478 F.2d 408, 412 (5th Cir. 1973).

81. Information at 3–4, United States v. Cunningham, No. 05 CR 2137 (S.D. Cal. Nov. 28, 2005).

Cunningham indictment and in the spare terms of the statute.<sup>82</sup> Open-textured rules may provide the level of flexibility that enforcers need, but common law limitations like harm must then draw some boundaries between frivolous and meritorious cases.

### III. USING HARM AS AN ADAPTIVE SORTING PRINCIPLE

The *Skilling*, *Black*, and *Weyhrauch* cases presented an opportunity to conform the definition of honest services to the goals of the enforcement scheme. The Court instead shifted the focus away from questions about the harm or impact of offense conduct and toward the form that corruption takes. The Court reasoned that the earliest honest services fraud cases—those that arose before the interaction between the Court and Congress in *McNally* and § 1346—tended to involve paradigm situations of bribes or kickbacks. By carving away all of the other theories of honest services violations, the Court ostensibly resolved the vagueness problems with the statute.<sup>83</sup> This development has made it harder, but not impossible, to imagine a limiting principle that suits the nature of corruption and sorts for the most serious cases. The decision left many questions unanswered about the meaning of “bribes and kickbacks,” as well as the extent to which cases that do not fit within that framework can nonetheless be prosecuted as pecuniary frauds. Harm considerations inform the approach to those issues and aid in the ongoing effort to delineate the boundaries of the offense.

#### A. A More Contextual Definition of Corruption

An intriguing feature of the Court’s interpretation is that it creates both over- and underbreadth. Scholarship on white collar crime often highlights the overcriminalization in federal law by reciting a litany of superfluous statutes and cases of prosecutorial overreaching.<sup>84</sup> Slippery offense definitions typically prompt criticism because they allow for prosecutions of innocuous conduct. According to Justice Scalia, § 1346, pre-*Skilling*, could

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82. Cf. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 684 (1990) (Scalia, J., dissenting) (“[V]irtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically ‘corrosive.’”), *overruled by Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 882 (2010).

83. *United States v. Skilling*, 130 S. Ct. 2896, 2928–31 (2010).

84. See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755–56 (2005).

render[] criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation; [or] a public employee's recommendation of his incompetent friend for a public contract.<sup>85</sup>

The limitation to bribes and kickbacks, though, excised not only this specter of prosecutorial opportunism but also conflict-of-interest cases with important public policy dimensions. Thus, the narrowed version of honest services opens a window on a different subset: factual scenarios in which the merits of prosecution seem obvious but the option to pursue charges no longer exists. Many of the situations the courts confronted in the honest services context involved bribes and kickbacks, but there were also many prosecutions, both pre-*McNally* and post-section 1346, that did not.<sup>86</sup> Bribes and kickbacks do not necessarily demarcate the most salient cases of harm to the political process. Small favors that have no longstanding influence present less compelling facts than undisclosed self-dealing that compromises a lawmaker's integrity.<sup>87</sup> But after *Skilling*, political nest-feathering may not be actionable absent a direct link between the benefit and official action.

A closer look at the facts of four honest services cases demonstrates the potential for a more adaptive approach that includes an account of harm. Recall that in *McNally*, Kentucky officials directed the state to buy insurance through an agent who shared commissions with another agency partly owned by one of the officials.<sup>88</sup> Because the insurance policies provided the requisite

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85. *Sorich v. United States*, 130 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari).

86. *See Skilling*, 130 S. Ct. at 2932 (noting that there were pre-*McNally* convictions for "schemes of non-disclosure and concealment of material information" but "no consensus on which scheme[s] qualified" (quoting *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979))); *see also* Coffee, *supra* note 15, at 459-60 ("In public fiduciary cases, the pre-*McNally* standards apply, and § 1346 can be applied to the conduct of state officials who receive undisclosed financial benefits or who have undisclosed financial interests in connection with transactions before them.").

87. *See* Beale, *supra* note 40, at 268 ("Bribes and kickbacks may or may not be particularly harmful. It depends on a variety of factors including the size of the bribe or kickback and the effect of the payments. On the other hand, some self-dealing and/or other undisclosed conflicts of interest could have a much greater impact than a small bribe or kickback.").

88. *McNally v. United States*, 483 U.S. 350, 352 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181, 4508, *as recognized in Skilling*, 130 S. Ct. at 2904.

coverage at market rates, the state did not suffer economic injury. This is efficient corruption, the sort of dishonesty that does not affect whether the streets are plowed or the buildings are constructed to code.<sup>89</sup> Although corruption that does not impact public funds or constituent services might be termed “high functioning”—Chicago, after all, is the “City that Works”—it can nonetheless cause significant social harm. The loss to the public in *McNally* stemmed not from the kickback itself but from withheld information about the divided loyalty of the officials and its potential impact on their public duties. But the *Skilling* decision, if left unrefined, precludes prosecutions based solely on a conflict-of-interest theory.

*Weyhrauch*<sup>90</sup> offers a more recent illustration of the underbreadth that can result from the wholesale removal of self-dealing from the honest services theory. Seeking a job from an oil field services company while supporting oil tax legislation favored by the firm closely relates to straightforward corruption. It does not involve extorting a briefcase full of cash from an interested party, but it does implicate the harm to disinterested decisionmaking that corruption prosecutions seek to prevent. Because that harm stems from an indirect exchange, the conduct may no longer fit within the statutory scheme. The case is pending on remand, but the Ninth Circuit has ruled that evidence concerning Weyhrauch’s conflict of interest with respect to future employment is no longer admissible because nondisclosure of that conflict forms no basis for prosecution after *Skilling*.<sup>91</sup> As with *McNally*, however, there is more to the loss than nondisclosure. The concealment is harmful because it masks self-dealing that deprives the public of its right to unbiased decisionmaking. There is no bribe per se, and the gain to Weyhrauch

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89. Other scholars analyzing corruption have suggested that in some contexts, it can produce net benefits, particularly in developing countries. Mills and Weisberg note that “[t]o the legal economist, in a second-best world with preexisting policy-induced distortions, graft may sometimes encourage productive economic transactions and prod the government to help entrepreneurs at critical times in economic development by reducing the uncertainties of investment.” Mills & Weisberg, *supra* note 67, at 1379. Corruption, they explain, “can be a force for democracy, or at least egalitarian distribution, and it is an open question whether a fair and honest public administration can accomplish these things better than petty bribery can.” *Id.* A similar argument can be made with respect to communist countries, where “[u]nder the so-called ‘covert participant’ model, a dominant private ethos can be harmonious with the government, as individual self-interest can lead an official to disdain official rules, but at the same time, to aim for higher system outputs.” *Id.*

90. *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (per curiam).

91. *See United States v. Weyhrauch*, 623 F.3d 707, 708 (9th Cir. 2010) (upholding the trial court’s exclusion of evidence relating to Weyhrauch’s concealed conflict of interest).

is neither immediate nor easy to identify; but his tainted vote alone may harm the integrity of the political process.

*Sorich*—the case that prompted Justice Scalia’s impassioned dissent from the denial of certiorari and primed the Court for the *Skilling* trio the following term—arguably lies on the other side of this harm boundary.<sup>92</sup> There, the defendants were city employees in Chicago’s Office of Intergovernmental Affairs. They engaged in patronage hiring and promotions in civil service jobs according to a list they received from campaign coordinators, and that favoritism violated a consent decree banning city promotions and hiring based on political factors.<sup>93</sup> The government’s theory was that the employees breached their duty of honest services to abide by the decree, even though they received no direct economic benefit from the patronage. Although they did not enrich themselves, they did improperly reward the thousands of individuals who received the city jobs and promotions.<sup>94</sup> The Seventh Circuit agreed that the illegitimate gain from the “dishonest services” could flow to parties other than the defendants.<sup>95</sup> Defendants actively concealed the scheme and therefore fit within the pre-*Skilling* conflict-of-interest paradigm. In the absence of some pecuniary gain to conceal, however, the harm the *Sorich* defendants caused might be insufficient to support prosecution under § 1346 post-*Skilling*.

At the far end of this spectrum of potential harms lies the *Thompson*<sup>96</sup> case. In *Thompson*, a Wisconsin state employee circumvented a bidding process to award a government contract to a politically connected travel agency that was also the low bidder.<sup>97</sup> The prosecution’s theory was that a politically motivated departure from state administrative rules could be characterized as a deprivation of honest services, and thus that Thompson’s effort to please her supervisors sufficed for liability.<sup>98</sup> The Seventh Circuit reversed

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92. See *Sorich v. United States*, 129 S. Ct. 1308, 1310–11 (2009) (Scalia, J., dissenting from denial of certiorari).

93. *Id.*

94. See *United States v. Sorich*, 523 F.3d 702, 708 (7th Cir. 2008). The government’s primary argument was that a scheme to defraud exists where there is “personal gain to a member of the scheme *or another*.” *Id.* (emphasis added). Alternatively, the government asserted that to the extent third-party gain was insufficient, the error was nonetheless harmless because the defendants also gained “job security for keeping the patronage machine running.” *Id.*

95. *Id.* at 709.

96. *United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007).

97. *Id.* at 878–79.

98. *Id.* at 882.

Thompson's conviction immediately after hearing oral argument and cited her case as a self-contained demonstration of the dangers of "ambulatory criminal prohibitions" like § 1346.<sup>99</sup> "Haziness designed to avoid loopholes through which bad persons can wriggle," Judge Easterbrook wrote, "can impose high costs on people the statute was not designed to catch."<sup>100</sup> Not only was Thompson "doing her job," as in *Sorich*, but she was also "pursu[ing] the public interest as [she] understood it."<sup>101</sup> While Thompson's decisionmaking was not entirely disinterested, her ordinary professional motivations (including favorable job evaluations and receiving a \$1,000 raise in her annual salary) did not breach the public trust in the same way that self-dealing would.<sup>102</sup>

A purposive view of public-sector corruption prosecutions suggests some important distinctions between the *Weyhrauch* and *Thompson* cases. Focusing on the underlying goals of regulating public corruption through the criminal law—not just the meaning of the words in the statute, but the point of drafting them in the first place—reveals potential categories of conflict-of-interest cases that may still be subject to prosecution as honest services fraud.<sup>103</sup> If *Weyhrauch* took actions favorable to a potential employer with the understanding that he would receive future work, the favorable actions themselves "could be sufficient to show a bribe."<sup>104</sup> Thompson, in contrast, acted under some institutional pressures but reached the same conclusion that a totally honest official would have made, without regard to any undisclosed financial interest.

#### B. *A Focus on Failures of Detached Decisionmaking*

The material costs of political corruption are diffuse, largely incalculable, and at times nonexistent, but the social costs—to the

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99. *Id.* at 884.

100. *Id.* For further discussion of this case, see Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 388–90 (2009).

101. *Thompson*, 484 F.3d at 884.

102. *Id.* (concluding that it would stretch the notion of "private gain" to include "a public employee's regular compensation, approved through above-board channels"); *cf.* *United States v. Defries*, 129 F.3d 1293, 1306 (D.C. Cir. 1997) (determining that making the same decision as a "totally honest official" cannot give rise to fraud liability).

103. Douglas Husak has advocated for criminalizing only conduct that causes "nontrivial harms" and for reviewing statutes to ensure that they serve significant government interests. HUSAK, *supra* note 7, at 66–67; *see also* STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 94–98 (2010) (supporting statutory interpretation that aligns with broader legislative goals).

104. HENNING & RADEK, *supra* note 20, at 163.

political process, the body politic, or the public good—appear more plainly in some cases than others. The aspirational conception of “good government” is decisionmaking from a baseline position of neutrality.<sup>105</sup> That is rarely attainable: public officials never proceed in a completely disinterested vein, and it would be impossible to uncover all of the potential motivations that factor into their decisions.<sup>106</sup> But certain deviations from that baseline are more corrosive than others. Although there are many failures of detached decisionmaking, the influence of personal financial gain is presumptively unrelated to “voting sentiment.”<sup>107</sup> Arguably, whenever officials’ hidden motivations are pecuniary ones, “nontrivial harm” results.<sup>108</sup>

The harm may become sufficiently cognizable only when the conflict of interest concerns financial benefits, but the loss itself need not be an economic one in order for § 1346 to apply. As Judge Posner explained when the Seventh Circuit recently considered the *Black* case on remand, there is still harm where “an employee who is owed \$100 by his employer forges a check to himself for the amount and thus fraudulently appropriates money owed him.”<sup>109</sup> Likewise, when a public official makes a decision that would otherwise be legitimate but fails to disclose a pecuniary interest in the matter, the public suffers a loss because it is “deprived of its right either to disinterested decisionmaking itself or, as the case may be, to full disclosure as to the official’s potential motivation behind an official act.”<sup>110</sup> Judge

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105. See Lowenstein, *supra* note 68, at 834–35.

106. Compare Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 115–16 (asserting that motive-based restrictions on official behavior are incoherent because it is impossible to distinguish the interest in reelection from financial considerations and therefore public-minded from private-minded motivation), with Daniel Hays Lowenstein, *Campaign Contributions and Corruption: Comments on Strauss and Cain*, 1995 U. CHI. LEGAL F. 163, 176 (“The wrongfulness lies in the means of influencing the outcome, not in the outcome itself.”).

107. See Lowenstein, *supra* note 68, at 807.

108. See HUSAK, *supra* note 7, at 66; see also *id.* at 70–71 (further describing the “nontrivial harm” constraint on criminalization and giving it some content through Joel Feinberg’s conception of “setbacks of interests that are wrongs, and wrongs that are setbacks to interest” (quoting 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* 34 (1988))).

109. *United States v. Black*, 625 F.3d 386, 392 (7th Cir. 2010) (citing *United States v. Richman*, 944 F.2d 323, 330 (7th Cir. 1991)), *petition for cert. filed*, 79 U.S.L.W. 3494 (U.S. Feb. 17, 2011) (No. 10-1038); see *United States v. Gole*, 158 F.3d 166, 168 (2d Cir. 1998); see also *United States v. Vinyard*, 266 F.3d 320, 330 (4th Cir. 2001) (determining that “objectively fair” business transactions are not immune from liability under § 1346 if the transaction is nonetheless distorted).

110. *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996); see also *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court’s Skilling Decision*:

Posner's hypothetical is reminiscent of both *McNally* and the Supreme Court's explanation in *Skilling* that accepting a bribe in exchange for awarding a contract is paradigmatic pre-*McNally* corruption, even when the terms of the contract are identical to those that would have been negotiated with any other provider.<sup>111</sup> Where there is financial gain to the defendant, without regard to any material loss to constituents, the undisclosed conflict of interest breaches norms of fidelity and causes systemic harm.

C. *Points of Entry Post-Skilling*

A standard that culls out secret schemes for private gain may be useful to separate significant distortions from trivial conflicts of interest, but *Skilling*'s categorical dismissal of pure self-dealing cases seems to preclude this formulation.<sup>112</sup> In the private-sector context, the Court rejected the government's argument that honest services fraud includes the "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty."<sup>113</sup> Yet even though intangible rights now count only within the bribery framework, some self-dealing might produce sufficiently concrete

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*Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 44 (2010) [hereinafter *Restoring Key Tools*] (statement of Sen. Russell D. Feingold, Member, S. Comm. on the Judiciary), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_senate\\_hearings&docid=f:64789.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:64789.pdf) (asserting that honest services fraud should extend to harm that "undermines people's faith in their government and destroys the integrity of our democracy").

111. *United States v. Skilling*, 130 S. Ct. 2896, 2926 (2010); see also *United States v. Lemire*, 720 F.2d 1327, 1336, 1337 n.13 (D.C. Cir. 1983) (maintaining that cognizable harm can stem from "significant intangibles" like the "illusion of unfairness").

112. The Senate has recently considered the need for legislation designed to put self-dealing back on the table and reach those "public officials who hid[e] their own financial interests and then act[] to benefit those interests." See *Restoring Key Tools*, *supra* note 110, at 46 (statement of Sen. Patrick Leahy, Chairman, S. Comm. on the Judiciary); see also *id.* at 36 (statement of Lanny A. Breuer, Assistant Att'y Gen. of the United States) ("A public official who conceals his financial interests and then takes official action to advance those interests engages in behavior every bit as corrupt as if he accepts a clear bribe from a third party. The Department urges Congress to act quickly to restore our ability to prosecute individuals for this kind of undisclosed self-dealing.").

113. *Skilling*, 130 S. Ct. at 2933 n.44 (quoting Brief for the United States at 43–44, *Skilling*, 130 S. Ct. 2896 (No. 08-1394)) (internal quotation marks omitted); see also Randall D. Eliason, *The Future of Honest Services Fraud*, NAT'L L.J., July 5, 2010, at 30, 30 ("A politician who steers a public contract to his own company commits essentially the same wrong as one who accepts a bribe to steer the contract to the bribe payer. In each case, the politician's official actions are being driven not by the public interest, but by the politician's desire to line his own pockets. Both should be paradigm honest-services violations, but after *Skilling* only the bribery case may be prosecuted under § 1346.").

harm to allow for prosecution under a property rights theory of fraud instead. Many post-*McNally* cases upheld fraud convictions on the theory that pecuniary fraud was an alternative grounds for conviction.<sup>114</sup> Post-*Skilling*, parallel property theories might preserve some prosecutions as well. In *Sorich*, for example, the government argued that the harm of the patronage scheme was not merely the undisclosed conflict of interest but also the city's loss of valuable assets in the form of the jobs and promotions distributed through the scheme.<sup>115</sup>

Another conception of property fraud—grounded in the value of free-flowing information in the political process—may also support conflict-of-interest cases. In *Carpenter v. United States*,<sup>116</sup> the Supreme Court recognized that information can be property and thus that divulging financial reporting that would affect stock prices deprived the Wall Street Journal of the “intellectual property” inherent in its right to control the timing of publication.<sup>117</sup> Later, the appeals courts

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114. See *Ryan v. United States*, No. 1:10CV05512, 2010 U.S. Dist. LEXIS 134912, at \*84 n.14 (N.D. Ill. Dec. 21, 2010) (citing, inter alia, *United States v. Catalfo*, 64 F.3d 1070, 1077 (7th Cir. 1995) (upholding the conviction under pecuniary fraud theory of an options trader who made unauthorized trades because “he deprived [the firm that sponsored him] of the right to control its risk of loss, which had a real and substantial value”); *United States v. Cherif*, 943 F.2d 692, 697 (7th Cir. 1991) (upholding the mail fraud conviction of a bank employee who traded on the basis of confidential information obtained from the bank, because “it is not idle speculation to conclude that the confidentiality of the information was commercially valuable to the bank because breaches of confidentiality could harm the bank’s reputation and result in lost business”); *Ginsburg v. United States*, 909 F.2d 982, 987 (7th Cir. 1990) (concluding, in a § 2255 case, that the defendant lawyer’s payment of cash bribes for fixing tax appeals constituted pecuniary fraud because it deprived the county of its right to collect taxes from the defendant’s clients); *Bateman v. United States*, 875 F.2d 1304, 1309 (7th Cir. 1989) (per curiam) (denying relief on § 2255 review of an honest services conviction because the defendant’s bid-rigging scheme caused his employer “to pay substantially more for equipment than it would have if [the defendant] had not engaged in this scheme”); *Ranke v. United States*, 873 F.2d 1033, 1040 (7th Cir. 1989) (upholding a conviction based on a commercial kickback scheme because the defendant’s employer “was induced to part with its money on the basis of the false premise . . . that [defendant] would not receive a portion of that money”)).

115. Government’s Consolidated Response to Defendant’s Petition to Vacate and Set Aside Judgment and Sentence Pursuant to 28 U.S.C. § 2255 at 8–11, *United States v. Sorich*, No. 10 CV 1069 (N.D. Ill. Sept. 9, 2010) (“Defendants took money and property under the City’s control for political workers and other favored persons, depriving the City of its property rights in those jobs.”); see also *United States v. Defries*, 43 F.3d 707, 709–10 & n.2 (D.C. Cir. 1995) (surveying cases recognizing property interests in permits and licenses).

116. 484 U.S. 19 (1987).

117. Compare *id.* at 25–26 (“[The] intangible nature [of the company’s confidential business information] does not make it any less ‘property’ . . .”), with *United States v. Czubinski*, 106 F.3d 1069, 1072 (1st Cir. 1997) (noting that confidential information may be

developed this notion that both the “right to control” information and the “deprivation of potentially valuable information” support fraud charges independent of the honest services definition.<sup>118</sup> And post-*Skilling*, some courts have been receptive to arguments relying on these cases to fit undisclosed self-dealing within traditional money and property theories of fraud.<sup>119</sup> Harm or impact again helps draw some distinctions: information that could affect financial decisions and business conduct if disclosed tends to give rise to a property theory. Corruption causes injury to the integrity of the political process, and that harm is most acute when public officials act for personal gain.<sup>120</sup> Accordingly, information about official bias arising from pecuniary motives might also be sufficiently high-value to give rise to a “property right” in the public sector.

A focus on the meaning of bribes and kickbacks reveals another way in which harm might draw some distinctions while preserving a conflict-of-interest theory. “Bribes and kickbacks” are not self-defining, and it is not clear that the Supreme Court intended them as terms of art.<sup>121</sup> Some bribery statutes require that payments influence particular official actions, but not all pre-*McNally* bribery cases involved quid pro quos. And the common law of corruption encompasses cases where public officials receive gifts, conceal them, and act to benefit the donor, even when there is no direct connection between a specific contribution and an official decision. The *Skilling* decision cites cases accepting this influence-peddling or “stream of benefits” theory, perhaps leaving open the possibility that “implicit exchange[s]” still constitute bribery.<sup>122</sup> Bribing by retainer was

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intangible property, although merely accessing it—as opposed to disseminating it—does not constitute a deprivation).

118. See *United States v. Walker*, 191 F.3d 326, 335 (2d Cir. 1999).

119. See, e.g., *United States v. Queri*, No. 09-CR-418, slip op. at 7–9 (N.D.N.Y. Oct. 8, 2010).

120. See HENNING & RADEK, *supra* note 20, at 157 (“The misuse of authority to reward friends or divert benefits for one’s own benefit is a scheme to defraud because the breach of fiduciary duty is deceptive, and the gain is a fraud perpetrated on those who expect the person to exercise authority honestly.”).

121. The Court referred to federal statutes defining bribery and kickback schemes—including 18 U.S.C. §§ 201(b), 666(a)(2) and 41 U.S.C. § 52(2)—not all of which require a quid pro quo exchange of benefits for political favors. *Skilling v. United States*, 130 S. Ct. 2896, 2933–34 (2010).

122. *United States v. Kemp*, 500 F.3d 257, 281 (3d Cir. 2007), cited in *Skilling*, 130 S. Ct. at 2934; see also *United States v. Whitfield*, 590 F.3d 325, 352–53 (5th Cir. 2009) (concluding that a corrupt agreement to provide a judge with things of value constituted bribery even if the cause or proceeding to be influenced was not pending and the parties had no specific case in mind), cert. denied, 131 S. Ct. 136 (2010), cited in *Skilling*, 130 S. Ct. at 2934; *United States v. Ganim*, 510 F.3d 134, 142 (2d Cir. 2007) (“[T]he requisite quid

prominently featured in the prosecutions arising from lawmakers' relationships with lobbyist Jack Abramoff,<sup>123</sup> and it played a central part in a federal court's recent decision to uphold Illinois Governor George Ryan's honest services convictions as well.<sup>124</sup> Even if this conception of a bribe does not comport with the requirement of a quid pro quo arrangement, the definition of "kickbacks" appears broad enough to include rewards paid after an official action and payments made as part of a plan to "improperly obtain" a contract.<sup>125</sup>

If harm to the political process factors into the calculus, then bribery should include situations where a government official has received side payments or other items of value "with the understanding that when the payor comes calling, the government official will do whatever is asked."<sup>126</sup> The harm, again, stems from the failure to provide representation free of self-interest and deception; it does not turn on whether the bias occurs in a direct exchange or in an ongoing relationship. A "retainer" theory of bribes and kickbacks could have salvaged some of the cases dismissed in the wake of the

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pro quo for the crimes at issue may be satisfied upon a showing that a government official received a benefit in exchange for his promise to perform official acts or to perform such acts as the opportunities arise."), cited in *Skilling*, 130 S. Ct. at 2934.

123. See, e.g., Information at 6, *United States v. Ney*, No. 06-cr-272-ESH (D.D.C. Sept. 15, 2006) (alleging honest services charges based on "taking a stream of things of value intending to be influenced to take and to be rewarded for taking a stream of favorable official action").

124. See *Ryan v. United States*, No. 1:10CV055122, 2010 U.S. Dist. LEXIS 134912, at \*105-06 (N.D. Ill. Dec. 21, 2010).

125. See HENNING & RADEK, *supra* note 20, at 161 ("While the bribe must induce or influence the defendant's action, the kickback need only interfere with the person's exercise of authority, so that the government would not have to prove a *quid pro quo* agreement that links the benefit to a particular government action.") (internal quotations omitted).

126. *United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 n.15 (9th Cir. 2009), *abrogated in part by* *United States v. Jaramillo*, No. 09-50480, 2011 U.S. App. LEXIS 3036, at \*3 (9th Cir. Feb. 15, 2011). Another example of the sort of conduct that will be excluded from honest services prosecutions post-*Skilling*, in the absence of a broad reading of "bribes and kickbacks," is Mandeville, Louisiana Mayor Eddie Price's case. Price had his sentence reduced from sixty-four to forty months after *Skilling* was decided because there was no quid pro quo connected to the \$45,000 in gifts and gratuities that he received and failed to report from professional service contractors for the city and developers with business before the city. See Press Release, U.S. Attorney's Office for the E. Dist. of La., Former Mandeville Mayor Resentenced to 40 Months for Mail Fraud and Tax Evasion (Sept. 29, 2010), available at [http://www.justice.gov/usao/lae/news/2010/2010\\_09\\_29\\_eddie\\_price\\_resent.html](http://www.justice.gov/usao/lae/news/2010/2010_09_29_eddie_price_resent.html); Press Release, U.S. Attorney's Office for the E. Dist. of La., Former Mandeville Mayor Sentenced to over Five Years in Prison for Honest Services Mail Fraud and Tax Evasion (June 17, 2010), available at <http://neworleans.fbi.gov/dojpressrel/pressrel10/no061710.htm>; see also Plea Agreement at 1, *United States v. Price*, No. 2:09-CR-00343 (E.D. La. Sept. 30, 2009) (describing the benefits Price received, including vacations and other gifts from companies doing business with the city).

*Skilling* opinion. For example, former North Carolina Lottery Commissioner Kevin Geddings—who failed to disclose his financial interest in lottery vendors—had his honest services conviction vacated because the government acknowledged that “it is no longer a federal crime for state public officials to corrupt their public offices by engaging in undisclosed self-dealing.”<sup>127</sup>

*Skilling* may leave space for the government to resurrect honest services cases by arguing that there is parallel property loss, that the information withheld has the status of a property right, or that a conflict of interest is the functional equivalent of bribery on retainer. Not every case that gives rise to one of these theories will merit prosecution, however, and a context-specific inquiry into harm could help identify those that do threaten substantial federal interests.

#### D. *Thresholds of Harm*

Concepts that courts have applied to identify harm in private-sector cases provide some useful analogues. Frauds in general are actionable only if there is both the intent to deceive and some “material” deception. The materiality requirement means that the fraudulent conduct must be “capable of influencing” the victim,<sup>128</sup> or in the particular context of honest services fraud, that “the misinformation or omission would naturally tend to lead or is capable of leading a reasonable employer to change its conduct.”<sup>129</sup> Private-sector cases have maintained the distinction between harm and materiality. Every case requires materiality, but only about half of the federal circuits require a showing of something like “‘reasonably foreseeable economic harm’” before imposing liability for honest services fraud violations.<sup>130</sup> In Sam Buell’s terms, this harm might

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127. Government’s Memorandum of Law Regarding Impact of *Skilling v. United States* at 1, *Geddings v. United States*, 497 F. Supp. 2d 729 (E.D.N.C. 2010) (No. 5:06-CR-136-1D); *see also* Indictment at 8, *United States v. Bruno*, 700 F. Supp. 2d 175 (N.D.N.Y. 2010) (No. 5:09-CR-00029-GLS) (charging that Bruno “entered into direct and indirect financial relationships with persons or entities who were pursuing interests before the Legislature or State agencies”); Indictment at 52–54, *United States v. Jefferson*, 634 F. Supp. 2d 595 (E.D. Va. 2009) (No. 1:07CR209) (stating that six of Representative Jefferson’s sixteen counts of conviction were for concealed conflicts of interest).

128. *Neder v. United States*, 527 U.S. 1, 16 (1999).

129. *United States v. Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003) (en banc).

130. *United States v. Martin*, 228 F.3d 1, 17 (1st Cir. 2000) (quoting *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 973 (D.C. Cir. 1998), *aff’d in part* 526 U.S. 398 (1999)); *see, e.g.*, *United States v. DeVegter*, 198 F.3d 1324, 1328–29 (11th Cir. 1999) (concluding that private-sector honest services fraud is actionable only with foreseeable economic harm); *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997) (finding foreseeable economic harm necessary to support an honest services conviction); *United*

include not only actual losses but also “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.”<sup>131</sup>

With respect to public corruption, which involves a more general threat of harm to the public welfare, the meaning of “material” merges with the source of loss. Borrowing from the private-sector definitions, bribes obtained or information withheld are material when “capable of influencing” the victim—that is, when the undisclosed bias or benefit would be significant to the public. In one sense, shifting to Buell’s harm definition, this might mean that voters are deprived of honest services when concealed biases, if revealed, could prompt voters to “choose to exit” from an electoral relationship. There is a similar correspondence between harm and gain in most public corruption cases. Detecting side benefits largely answers the harm question because the very existence of gain from self-dealing is itself harmful to the political process.<sup>132</sup> The “nature of a political office is the official’s oath to serve the public or the electorate,”<sup>133</sup> and the hidden influence of any financial incentive could create actionable deprivation.

The boundaries of conflict-of-interest cases cannot, of course, encroach on conduct such as campaign contributions that the Supreme Court has ruled a legitimate part of the political process. In the *Citizens United* decision, for example, the Court reasoned that corporate “speakers” who purchase “influence over or access to elected officials” do not necessarily exert sufficient direct pressure to endanger representative government.<sup>134</sup> Campaign contributions require disclosure in many cases, and the analogue to a concealed conflict of interest may not arise in the first place. Where the

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States v. Jain, 93 F.3d 436, 441–42 (8th Cir. 1996) (requiring “harm to the victims’ tangible interests” in private-sector cases).

131. Buell, *supra* note 52, at 46.

132. Gain has in some cases been treated as a separate inquiry from loss. The Fourth, Seventh, and Eleventh Circuits all held before *Skilling* that § 1346 liability requires “[m]isuse of office . . . for private gain.” See, e.g., United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998).

133. Mills & Weisberg, *supra* note 67, at 1388.

134. *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 910 (2010); see also Scott Turow, *Blagojevich and Legal Bribery*, N.Y. TIMES (Aug. 17, 2010), <http://www.nytimes.com/2010/08/18/opinion/18turow.html> (commenting on the recurring situation in which “public officials become the beneficiaries of campaign largesse from those with business before them” and noting the First Amendment protections that corporations and unions enjoy in making those donations, even though “no idealistic patina of concern about good government or values-driven issues can burnish these payments”).

contribution is in exchange for specific official action, moreover, the core definition of bribery captures the conduct.<sup>135</sup> The Blagojevich indictment, for instance, includes bribery charges arising from the solicitation of campaign donations in exchange for state contracts.<sup>136</sup>

The category of cases between protected political activity and outright bribery requires further refinement to ensure that there is a substantial federal interest in the prosecutions that proceed. Undisclosed pecuniary gain causes harm to the political process when it leads to decisionmaking that deviates from a baseline position of neutrality.<sup>137</sup> Not every instance of self-dealing, however, threatens the public interest in this fashion. Some sorting is necessary to carve out situations where the gain is de minimis and thus no substantial distortion in the political process occurs. That threshold might emerge from parallel ethics codes and disclosure obligations, or there might be a general federal standard that side benefits valued in excess of a sum like \$5,000 presumptively imperil impartiality.<sup>138</sup> Any dollar amount will be an imperfect solution to problems of over- and underinclusion, but it at least bars prosecution of the most insignificant self-dealing and allows prosecutors to take action where there are damaging influences.<sup>139</sup> Requiring some quantification of actual or potential gain also means that courts must address difficult measurement problems. At what point do benefits like prospective employment, as in *Weyhrauch*, fit within monetary parameters? And

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135. See *United States v. Inzunza*, 580 F.3d 894, 902 (9th Cir. 2009) (stating that the quid pro quo must be sufficiently explicit to “distinguish between contributions that are given or received with the ‘anticipation’ of official action and contributions that are given or received in exchange for a ‘promise’ of official action” (quoting *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir. 1992))), *amended and superseded by* 2011 WL 1365590 (9th Cir. Apr. 12, 2011); *United States v. Tomblin*, 46 F.3d 1369, 1379 (5th Cir. 1995) (“Intending to make a campaign contribution does not constitute bribery, even though many contributors hope that the official will act favorably because of their contributions.”).

136. Second Superseding Indictment, *supra* note 1, at 89.

137. See Lowenstein, *supra* note 68, at 834–35.

138. Note that there was a \$5,000 threshold that would apply only to undisclosed self-dealing by private-sector defendants in the proposed Honest Services Restoration Act. But the draft statute proposed no comparable limitation for public officials. See S. 3854, 111th Cong. § 2 (2010). And the version of the bill introduced in the 112th Congress contains no monetary threshold at all. See *Honest Services Restoration Act*, H.R. 1468, 112th Cong. (2011).

139. This is not unlike the effort in narcotics statutes to calibrate the severity of the offense to the weight of the controlled substance. See 21 U.S.C. § 841(b) (2006). Most personal-use quantities do not merit forceful prosecutions, even though in some cases the defendants are retail-level dealers who may cause substantial social harm. Larger quantities more accurately signal broad wrongdoing and generalized harm, and thus a substantial federal interest is more apparent in those cases.

can valuable but even less quantifiable assistance—like actions taken to mitigate reputational harm or help avoid litigation peril—meet a numeric threshold?

Nonetheless, using harm as a limitation accounts for the somewhat imprecise purposes of political corruption prosecutions while also creating enough friction to score the slippery slope of discretion. Justice Scalia’s parade of horrors in *Sorich*,<sup>140</sup> including the mayor jumping the queue for a restaurant reservation, could not be prosecuted where the harm principle is taken seriously. A public figure’s ill manners or imperious nature might matter to voters, but getting a table is not a sufficiently pecuniary interest nor is it connected to any official act, and the conduct thus does not “dishonestly” provide any services. A more developed harm consideration might also have protected some of the real defendants who became icons of overcriminalization during the honest services debate, such as the basketball coaches charged with depriving a university of honest services for helping athletes cheat on coursework in order to maintain eligibility to play.<sup>141</sup>

Harm-based evaluations can do much of the work of screening out frivolous cases while ensuring the prosecution of meritorious ones.<sup>142</sup> Using harm to draw a boundary between legitimate and illegitimate official action also responds to notice and vagueness concerns.<sup>143</sup> Officials engaged in misconduct that strains public trust or the social fabric will generally know they have embarked on

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140. *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari).

141. *United States v. Gray*, 96 F.3d 769, 777 (5th Cir. 1996).

142. Harm also has potential to check prosecutorial discretion and focus prosecutorial resources because it is a familiar sorting device for prosecutors. The loss caused or risked already occupies a central place among the standards for executive self-regulation. *The United States Attorney’s Manual*, for example, cautions against prosecuting “inconsequential cases” and merely “technical” violations, and states that whether there is a substantial federal interest in a case turns in large part on the “actual or potential impact of the offense on the community and on the victim.” UNITED STATES ATTORNEY’S MANUAL § 9-27.230 cmt. 2 (1997). Moreover, internal prosecution guidelines concerning whether to indict business cases focus on the amount of economic loss. And similar conceptions about risk of harm and potential losses move the levers at sentencing as well. See generally Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5 (2001) (detailing the history and structure of the new economic crime guidelines).

143. A frequently cited statement of the vagueness problem that accompanies legislative delegation comes from *Connally v. General Construction Co.*, 269 U.S. 385 (1926): “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” *Id.* at 391.

wrongdoing.<sup>144</sup> A focus on harm also comports with the actual text of the statute (which speaks, after all, of “depriving” another of honest services), and credits and continues the common law development of the offense. Among its drawbacks are harm’s susceptibility to outcome-determinative recruitment,<sup>145</sup> and lingering practical questions about the source of the duty to disclose and how to discharge disclosure obligations, including at what point conflicts must be revealed and to whom.<sup>146</sup> The meaning and merits of the *Skilling* decision, and the administrability concerns that may arise from legislative and executive efforts to preserve a self-dealing theory under § 1346, warrant more extensive analysis. The analysis here has focused on the first-order question whether conceptualizing the loss that public corruption causes might help shape efforts to regulate it.

#### CONCLUSION

Just enforcement of the criminal laws requires a high degree of consistency, but crime definition must often be receptive as well, and public corruption prosecutions have engaged courts in teasing out case by case the principles and standards that define harmful influences. That common law process gives effect to Congress’s intent in § 1346, which was a self-conscious delegation on two fronts. The statute uses only twenty-eight words and leaves it to the courts to supply limiting principles and monitor extensions, and at the same time, it vests substantial discretion in prosecutors to test the

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144. See Coffee, *supra* note 15, at 461 (suggesting that public officials have implicit notice of anticorruption provisions).

145. See Avani Mehta Sood & John M. Darley, *The Plasticity of Harm: An Experimental Demonstration of the Malleability of Judgments in the Service of Criminalization 1* (July 15, 2010) (unpublished working paper), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1641022](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1641022) (noting that respondents presented with the necessity-of-harm constraint complied not by criminalizing less but by identifying harms that had not been reported). *But see* Nuno Garoupa & Marie Obidzinski, *The Scope of Punishment: An Economic Theory* 9 (Ill. Law & Econ. Research Papers Series, Paper No. LE10-06, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1635964](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1635964) (arguing that harm-based sanctions are preferable to act-based sanctions when potential criminals are better informed about losses, harm avoidance is advisable, changes in the law are expensive, and acquiring information is important).

146. The *Skilling* Court sounded a cautionary note about some of these unresolved questions: “How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey?” *Skilling v. United States*, 130 S. Ct. 2896, 2933 n.44 (2010). If Congress intends to criminalize undisclosed self-dealing, the Court wrote, then it must address these issues and do so according to “standards of sufficient definiteness and specificity to overcome due process concerns.” *Id.*

boundaries of the law.<sup>147</sup> The *Skilling* decision at first glance appears to bring the statute's evolution to a halt by limiting actionable deprivations of honest services to bribes and kickbacks. Although the Court purported to construe application of § 1346 to reach only cases of "seriously culpable conduct,"<sup>148</sup> that category is both broader and narrower than bribery. Carving out cases that merit prosecution is thus a classic common law undertaking. Common law interpretation is incremental and potentially inconsistent, but it is also patient and flexible enough to operationalize subtle limiting principles like harm. The Court's analysis does not reject this premise entirely; the opinion leaves space for courts to refine the definition of bribery to include cases where undisclosed conflicts of interest are the functional equivalent of quid pro quo inducements, or where they cause injury to the political process analogous to property loss. As courts interpret the *Skilling* decision, and as Congress perhaps reacts to it, harm can still serve as an adaptable limitation that is well suited to the normative contours of corruption and the dynamic values the statute seeks to protect.

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147. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1090 (1993) ("Executive discretion . . . operates as an important shock-absorber that protects legislatures from hostile reaction to law enforcement operations."); Stuntz, *supra* note 69, at 56 (explaining that Congress passes broad criminal prohibitions to "make proof of guilt easier, which converts otherwise contestable cases into guilty pleas, thereby avoiding most of the costs criminal procedure creates").

148. *Skilling*, 130 S. Ct. at 2933 (quoting Brief for Albert W. Alschuler as Amicus Curiae at 28–29, *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010) (No. 08-1196)).

