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## Skilling: More Blind Monks Examining the Elephant

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## ***SKILLING*: MORE BLIND MONKS EXAMINING THE ELEPHANT**

*Julie Rose O'Sullivan\**

- I. The Statute was Unconstitutionally Vague and the Court's  
"Limiting Construction" Constituted Improper Legislation...345
- II. "Honest-Services" Fraud as an Object Lesson in Why  
Congress Ought to be Charged with Defining the Scope of  
Criminal Law .....351

Most academics and practitioners with whom I have discussed the result in *Skilling v. United States* believe that it is a sensible decision.<sup>1</sup> That is, the Supreme Court did the best it could to limit the reach of 18 U.S.C. § 1346, which all nine justices apparently believed—correctly—was, on its face, unconstitutionally vague.<sup>2</sup> My friends reason that the Court had already tried once, in *McNally v. United States*,<sup>3</sup> to force Congress to “speak more clearly than it has”<sup>4</sup> in defining the outer limits of “honest-services”<sup>5</sup> fraud. Congress responded quickly and with little consideration with the supremely under-defined § 1346. In the over twenty years since the statute’s enactment, the Courts of Appeals have been unable to come up with any unified limiting principles to contain its reach. The *Skilling* Court, evidently reluctant to again throw the matter back to Congress given that institution’s previous default, and not satisfied with the

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\* Associate Dean and Professor, Georgetown University Law Center. I would like to thank Jessica Wash and Andrew Prodromos for their research assistance and the staff of this journal for their patience and understanding.

1. 130 S. Ct. 2896 (2010).

2. *See id.* at 2929 (“[W]e acknowledge that *Skilling*’s vagueness challenge has force”); *id.* at 2931 (“Reading the statute to proscribe a wider range of offensive conduct [beyond bribery and kickbacks], we acknowledge, would raise the due process concerns underlying the vagueness doctrine.”); *id.* at 2931 n.42 (“Apprised that a broader reading of § 1346 could render the statute impermissibly vague, Congress, we believe, would have drawn the honest-services line, as we do now, at bribery and kickback schemes.”); *id.* at 2935 (Scalia, J., concurring).

3. 483 U.S. 350 (1987).

4. *Id.* at 360.

5. *Id.* at 362–64.

Courts of Appeals' efforts, was determined to come up with its own "narrowing interpretation."<sup>6</sup> Thus, the majority deemed it appropriate to rewrite the statute to cover what it concluded was the "core" of the criminality the prosecutors had addressed in bringing § 1346 cases—bribery and kickbacks.<sup>7</sup> The Court comes up with narrowing constructions to avoid constitutional difficulties in many statutory interpretation cases, the argument goes, and this construction is one that many in the academic and practice communities believe is reasonable.

My only quibble with this consensus lies in my conviction that what the Court did in *Skilling* is as patently unconstitutional as § 1346—and that its foray into legislation is not of only academic concern. It clearly accepted Congress' delegation of law-making authority and essentially promulgated a new statute out of the "dog's breakfast" that was pre-*Skilling* § 1346.<sup>8</sup> Some would argue that this is a good thing from a practical, if not an orthodox separation-of-powers, point of view. In what I hope will be taken as a back-handed compliment, I will focus on Professor Dan M. Kahan's long-standing arguments in this regard. Kahan favors administrative specification of the content of arguably vague criminal prohibitions, but he believes that if one has to choose between judicial gap-filling and congressional action, the former is preferable to the latter. Kahan has argued that the Court ought to come clean and simply acknowledge that it has long been engaged in interstitial lawmaking because Congress has declined to legislate with any specificity and "[a] criminal code at least partially specified by courts is both less costly and more effective than is a code fully specified by Congress."<sup>9</sup> Even were I prepared to join Professor Kahan in discounting the effect of judicial law-making on normative commitments to the "democratic accountability, notice and other rule-of-law values,"<sup>10</sup> I disagree with his conclusion about the viability and attractiveness of this delegation of authority to federal courts to fill in the blanks in otherwise underspecified statutory schemes. It strikes me that the history of the honest-services fraud theory, which

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6. *Skilling*, 130 S. Ct. at 2931 n.43.

7. *Id.* at 2931.

8. Sara Sun Beale, *An Honest Services Debate*, 8 OHIO ST. J. CRIM. L. 251, 254 (2010).

9. Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5, 12 (1997) [hereinafter Kahan, *Three Conceptions*]; see also Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996) [hereinafter Kahan, *Chevron*].

10. Kahan, *Three Conceptions*, *supra* note 9, at 11.

culminated in *Skilling*, presents a wonderful example of how criminal law ought *not* be made, whether viewed from an institutional, societal, or individual standpoint.

### I. THE STATUTE WAS UNCONSTITUTIONALLY VAGUE AND THE COURT'S "LIMITING CONSTRUCTION" CONSTITUTED IMPROPER LEGISLATION

All the justices concluded that § 1346, viewed on its face, was vague. If a statute is unconstitutionally vague, such that it does not give ordinary citizens fair notice and is susceptible to arbitrary and discriminatory enforcement, what should the Court do? The *Skilling* majority asserted that “[i]t has long been our practice . . . before striking a federal statute as impermissibly vague to consider whether the prescription is amenable to a limiting construction.”<sup>11</sup> Thus, the majority contended, it “does not *legislate*, but instead *respects the legislature*, by preserving a statute through a limiting interpretation.”<sup>12</sup> When one examines the nineteen precedents cited in support of this supposedly hallowed practice,<sup>13</sup> however, its legitimacy looks a lot shakier than the Court lets on—at least in this context. First, in only three of the nineteen cases cited did the Court directly address a vagueness challenge.<sup>14</sup> In the others, the Court employed its “constitutional avoidance” canon of construction to avoid potential First Amendment and other specific constitutional issues. Second, only ten of the cases involved a challenge to a criminal statute.<sup>15</sup> More to the point, in only one case hailing from 1954 did the Court actually adopt a limiting construction to avoid holding a criminal statute unconstitutionally vague.<sup>16</sup> In another, it found that even a judicially-created limiting construction could not save the vague criminal prohibition at issue—a prohibition that threatened First Amendment values.<sup>17</sup>

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11. *Skilling*, 130 S. Ct. at 2929.

12. *Id.* at 2931 n.43.

13. *Id.* at 2929 n.40.

14. *See* *Boos v. Barry*, 485 U.S. 312, 330–31 (1988); *United States v. Harriss*, 347 U.S. 612, 618 (1954); *Winters v. New York*, 333 U.S. 507, 517 (1948); *see also* *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (overbreadth).

15. *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971); *United States v. Rumely*, 345 U.S. 41 (1953); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *United States ex rel Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909); *Hooper v. California*, 155 U.S. 648 (1895); *United States v. Coombs*, 12 Pet. 72 (1838); *see supra* note 14.

16. *See Harriss*, 347 U.S. at 618. In *Boos*, the Court found that the criminal statute at issue was not vague. *Boos*, 485 U.S. at 332.

17. *Winters*, 333 U.S. at 518–19.

I think these distinctions—based on the criminal character of the case and the type of constitutional challenge lodged—are important in assessing the legitimacy of the Court’s remedy. As the Court has pointed out, “[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement,” and for very good reason.<sup>18</sup> “[T]he first principle”<sup>19</sup> of criminal law—the principle of legality—outlaws the retroactive definition of criminal offenses.

It is condemned because it is retroactive and also because it is judicial—that is, accomplished by an institution not recognized as politically competent to define crime. Thus, a fuller statement of the legality ideal would be that it stands for the desirability in principle of advance legislative specification of criminal misconduct.<sup>20</sup>

This foundational principle simply does not apply in civil cases.

The vagueness doctrine’s “connection to [the principle of] legality is obvious: a law whose meaning can only be guessed at remits the actual task of defining criminal misconduct to retroactive judicial decisionmaking.”<sup>21</sup> Where a statute is vague—and thus by definition lacks ascertainable standards to guide citizens or law enforcement in the administration of criminal penalties—it is difficult to conceive how the Court can articulate such standards without legislating. Despite the Court’s inexplicable reliance on the rule of lenity in declining to include undisclosed conflicts of interest in the newly articulated honest-services canon, this is not a case of ambiguity. The Court was not asked to elect between two equally plausible definitions of a term (or grammatical constructions of a phrase) embedded in otherwise reasonably articulated elements. Nor was it, as in other constitutional avoidance cases, making a choice among reasonably defined alternatives. For example, in First Amendment overbreadth cases, the Court is tasked with construing a clear statute that could, if not narrowed, impinge on protected speech. The Court was not, in short, asked to elect among two or even five alternative meanings. Rather, it was tasked with electing among a wealth of alternative means of defining and thus limiting the reach of a statute in which none of the big three

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18. *Id.* at 515.

19. HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79–80 (1968). The legality principle is one of the most basic of the human rights identified in a myriad of international treaties and declarations.

20. John Calvin Jeffries Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985).

21. *Id.* at 196.

of criminal statutes—the conduct, mens rea, and attendant circumstances—are defined with any particularity.

Indeed, such were the smorgasbord of choices that required resolution to truly define the reach of this statute that even if one were to conclude that judicial definition of some vague statutes is permissible, this statute is not one that is susceptible to a reasonable narrowing interpretation.<sup>22</sup> As I have laid out at greater length elsewhere, this statute represents “vagueness on steroids,”<sup>23</sup> in part because “when courts (let alone ordinary citizens) cannot agree on what *conduct*—attended by what *mental state* and what *attendant circumstances*—constitutes a crime, it is a vagueness trifecta.”<sup>24</sup> The Court took these cases to decide three issues, although it ultimately failed to address them: must the government prove that it was reasonably foreseeable that the honest-services scheme could cause some economic or pecuniary harm to the victims (*Black v. United States*);<sup>25</sup> must the duty to disclose, the violation of which constitutes the “fraud,” arise under state law (*Weyhrauch v. United States*);<sup>26</sup> and must the defendant intend to obtain private gain from the victim to whom honest-services are owed (*Skilling*).<sup>27</sup> But these are only three of the many questions that have split the circuits. Other critical questions include: what creates a duty of honest-services; what constitutes a breach of that duty; must a separate duty to disclose be found or is such a duty inherent in any case in which a duty of loyalty is found; what mental state need be proven and does the mental state differ, as most circuits hold, in public and private honest-services cases; must the government prove the attendant circumstances of the materiality of the breach, as well as the non-disclosure?<sup>28</sup>

The Court was determined to strike out on its own and adopt a limiting construction that had not occurred to any of the many courts struggling with this statute for the past twenty years.<sup>29</sup> Instead of an-

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22. See, e.g., Julie R. O’Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC 23 (2010).

23. *Id.* at 26.

24. *Id.* at 30.

25. 130 S. Ct. 2963 (2010).

26. 130 S. Ct. 2971 (2010).

27. 130 S. Ct. 2896 (2010).

28. See O’Sullivan, *supra* note 22, at 31–41.

29. *Skilling*, 130 S. Ct. at 2939 (Scalia, J., concurring) (“Among all the pre-*McNally* smorgasboard-offerings of varieties of honest-services fraud, *not one* is limited to bribery and kickbacks. That is a dish the Court has cooked up all on its own.”).

swering the questions presented and resolving at least three circuit splits, then, it decided to “rule in” two categories of conduct—bribes and kickbacks—while eliminating a third—undisclosed conflicts of interest.<sup>30</sup> On what principled basis can one argue that the Court is merely adopting a reasonable narrowing construction rather than recrafting the statute by making these novel distinctions? The Court’s argument for why its holding represents the former, not the latter, is sloppy at best and disingenuous at worst. It identifies bribery and kickbacks as the “core” honest-services precedents in the pre-*McNally* period based on quotations from Courts of Appeals decisions and the Solicitor General’s (“SG’s”) assertion.<sup>31</sup> It concludes on this basis that Congress, in § 1346, must have intended to include at least these two types of offenses.<sup>32</sup> There are any number of problems with this analysis.

The first is a factual difficulty evident to those who have studied the honest-services caselaw over time. I, at least, have seen no empirical proof for the proposition that these two categories of cases predominate the pre-*McNally* caselaw and do not believe that this assertion is necessarily correct. Justice Stevens, in his *McNally* dissent, documented the amazing variety of pre-*McNally* “honest-services” cases, demonstrating that the “intangible rights” held to be protected extended far beyond a right to the honest-services of public and private employees to intangibles such as the right to honest elections and the right to privacy.<sup>33</sup> In its *Skilling* brief, the SG cited twenty-nine cases involving either bribery or kickbacks, but it also identified thirteen cases that dealt only with undisclosed conflicts of interest.<sup>34</sup> When the rest of the intangible rights are added to the mix, I doubt whether the bribery or the kickback cases do indeed predominate as represented. Certainly, if these two criteria—isolated quotations from Courts of Appeals decisions and the SG’s proffers—control, then the SG was correct that undisclosed conflicts of interest ought also have to have been considered core offenses, but were not.<sup>35</sup>

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30. *Id.* at 2932.

31. *Id.* at 2930–31.

32. *Id.* at 2931.

33. *McNally v. United States*, 483 U.S. 350, 363–64 (1987) (Stevens, J., dissenting).

34. Brief for the United States at 42–44, nn.4–5, *Skilling v. United States*, 130 S. Ct. 2896 (2010).

35. Indeed, in many post-*Skilling* decisions in which courts are required to review old convictions or test current indictments, courts have given many defendants relief on the ground that they were not charged with bribery or self-dealing or that it is im-

A second problem is presented by the state of the pre-*McNally* caselaw and the legislative history underlying § 1346: the notion that the Court can look to what even the majority acknowledges was a mass of conflicting caselaw in the pre-*McNally* period and come up with any credible guess regarding the congressional intent in passing § 1346 is ludicrous.<sup>36</sup> The legislative history of § 1346 says nothing about which of these many intangible rights ought to be protected by that statute. Indeed, § 1346 was attached, as one of thirty unrelated provisions, to an omnibus drug bill that was passed on the last day of the 100th Congress.<sup>37</sup> The enacted language was “never referred to any committee of either the House or the Senate, was never the subject of any committee report from either the House or the Senate, and

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possible to tell whether the jury convicted on self-dealing or these other theories because juries were usually charged on self-dealing with bribery and kickbacks. *See, e.g.*, *United States v. Ford*, 639 F.3d 718 (6th Cir. 2011); *United States v. Coniglio*, 417 F. App'x 146 (3d Cir. 2011); *United States v. Jaramillo*, 413 F. App'x 979 (9th Cir. 2011); *Turner v. United States*, 2011 WL 3859726 (C.D. Ill. Sept. 1, 2011) (order granting in part motion to vacate); *United States v. Lynch*, 2011 WL 3862842 (E.D. Pa. Aug. 31, 2011) (order granting motion for relief); *United States v. Jimenez*, 2011 WL 3652773 (M.D. Fla. Aug. 19, 2011) (order granting in part motion for acquittal); *United States v. Panarella*, 2011 WL 3273599 (E.D. Pa. Aug. 1, 2011) (coram nobis granted and conviction vacated); *United States v. Cabrera*, 804 F. Supp. 2d 1261 (M.D. Fla. 2011); *United States v. Sprouse*, 2011 WL 2414322 (W.D.N.C. June 10, 2011) (order granting motion for new trial); *Stayton v. United States*, 766 F. Supp. 2d 1260 (M.D. Ala. 2011) (orders granting motion to vacate, set aside, or correct sentence and granting motion to vacate conviction); *United States v. Maricle*, 2010 WL 5139420 (E.D. Ky. Dec. 10, 2010) (order granting motion for acquittal and denying motion for new trial); *Geddings v. United States*, 2010 WL 2639920 (E.D.N.C. June 29, 2010) (order granting post-conviction motion to release Geddings).

36. *See, e.g. Skilling*, 130 S. Ct. at 2929 (“[H]onest-services decisions preceding *McNally* were not models of clarity or consistency”). The Second Circuit explained the difficulties of forging “a” meaning from the pre-*McNally* caselaw:

Some circuits have implemented § 1346 by resurrecting pre-*McNally* law. Thus, the Sixth Circuit has held that “§ 1346 has restored the mail fraud statute to its pre-*McNally* scope.” . . . And the Fifth Circuit, after noting that “Congress could not have intended to bless each and every pre-*McNally* lower court ‘honest services’ opinion,” observed that “Congress . . . has set us back on a course of defining ‘honest services’”; and that Court has “turn[ed] to that task.” . . . However, one of these approaches simply reinstates the entire, dissonant body of prior circuit precedent, while the other invites the creation out of whole cloth of new judicial interpretations of “honest services”—interpretations that will undoubtedly vary from circuit to circuit. The result is “a truly extraordinary statute, in which the substantive force of the statute varie[s] in each judicial circuit.”

*United States v. Handakas*, 286 F.3d 92, 103 (2d Cir. 2002) (citations omitted) (alterations in original).

37. *United States v. Brumley*, 116 F.3d 728, 739 (5th Cir. 1997) (Jolly, J. & DeMoss, J., dissenting).



was never the subject of any floor debate reported in the Congressional Record.”<sup>38</sup> What little we can discern about Congress’ intent is found in snippets of post-enactment declarations stating only that the legislation was designed to overturn the Court’s decision in *McNally*.<sup>39</sup> Therefore, all one can reasonably conclude from the record is that Congress intended simply to reverse *McNally*’s ruling that mail and wire fraud were confined to schemes targeted at property interests. Any assertion that it thereby ruled “in” or “out” any particular theory of intangible rights is pure fiction. The Court’s own analysis demonstrates the unlikelihood that Congress intended to limit the statute in the way the Court identified. The majority notes that bribery and kickbacks have accepted meanings, citing two federal statutes that explicitly outlaw such conduct.<sup>40</sup> If Congress intended to criminalize only these two categories of cases, the Court’s own cites demonstrate that Congress knew how to do so, and it did not.

My final problem is a conceptual one that may be best illustrated by reference to a hypothetical. Consider a statute that proscribes “any bad act.” This prohibition, like the prohibition on “honest-services” fraud, does not identify any particular conduct, mens rea, or attendant circumstances. It may cover such varied activities as murder, improperly parking in a handicapped zone, financial fraud, or fishing without a license. Were the Court to conclude, rightfully, that this statute is unconstitutionally vague, could the Court—consistent with its duty to interpret, not legislate—identify a limiting construction whereby the statute applies only to improperly parking in a handicapped zone and fishing without a license? I assume that most people will agree that this would be patent, and silly, “law-making.” To say that Congress “must have” intended to endorse prosecutions of “at least” bribery and kickbacks is like saying that a prohibition on “any bad act” can be reduced to criminalization of fishing without a license.

But, some might argue, if the Court were to limit the “bad acts” statute to just murder and financial fraud, that would be alright because those are also obviously wrongful acts that anyone should know are criminal. Even leaving aside, for the moment, notice issues, I

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38. *Id.* at 742.

39. *See id.* at 743 (stating that Congress intended to “reinstate” the pre-*McNally* case law “without change” when it enacted § 1346); *id.* at 742 (quoting 134 Cong. Rec. H11108-01 (Oct. 21, 1988), with Rep. Conyers stating that the section “restor[ed] the mail fraud provision to where that provision was before the *McNally* decision” and that “[n]o other change in the law [was] intended”).

40. *Skilling*, 130 S. Ct. at 2933–34.

cannot see the sense in this argument. This vague prohibition could also proscribe rape and robbery, which are wrongful. Why is it any less “legislation” to pick these two out of the range of possible *malum in se* choices than it is to identify fishing without a license or improperly parking in a handicapped zone as the limits of the statute? In *Skilling*, for example, the Court adopted a limiting construction that rules “in” bribery and kickbacks, but rules “out” acting on undisclosed conflicts of interest for personal gain. The latter category of honest-services cases have been very common—indeed, many courts have identified this type of offense, with bribery and kickbacks, as among the “core” of honest-services prosecutions.<sup>41</sup>

My more practical friends would argue that this is the best result our system can yield under the circumstances. Congress has had forty years to identify what it means by honest-services fraud with particularity, and has declined, repeatedly, to do so. In such circumstances, the Court is justified in stepping in to remedy this congressional default and identify two areas that everyone agrees ought to be covered. I believe, however, that this “sensible” resolution is not only patently unconstitutional law-making on the Court’s part, but it also has very real deleterious consequences that are largely ignored.

## II. “HONEST-SERVICES” FRAUD AS AN OBJECT LESSON IN WHY CONGRESS OUGHT TO BE CHARGED WITH DEFINING THE SCOPE OF CRIMINAL LAW

When Congress passes vague statutes such as § 1346, it is effectively delegating law-making power to the judiciary.<sup>42</sup> By doing so, Congress maximizes its ability to make law in spite of resource and time constraints.<sup>43</sup> The constraints operating on Congress include the “difficulty of generating consensus on politically charged issues, which can easily stifle controversial legislation. . . . One way to escape the political heat on such questions is to enact highly general or vague statutory language, which spares members of Congress from having to

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41. See, for example, *United States v. Panarella*, 277 F.3d 678, 690 (3d Cir. 2002), where the court explained:

Honest services fraud typically occurs in two scenarios: (1) bribery, where a legislator was paid for a particular decision or action; or (2) failure to disclose a conflict of interest resulting in personal gain.” *United States v. Antico*, 275 F.3d 245, 262, 2001 U.S.App. LEXIS 25318, at \*45 (3d Cir. 2001); see also *United States v. Woodward*, 149 F.3d 46, 54-55 (1st Cir. 1998).

42. See Kahan, *Three Conceptions*, *supra* note 9, at 11.

43. *Id.* at 10.

take definitive stands that could disappoint powerful constituencies.”<sup>44</sup> Delegation also permits Congress to maximize its ability to satisfy the demands of important constituencies for legislation; the time and effort that otherwise would be spent consumed in the details of criminal statutes can be directed to more politically productive areas.<sup>45</sup>

Apart from constitutional separation-of-powers, rule of law, and notice quibbles, why might we conclude that it is not necessarily a bad thing for the Court to attempt to arrive at “sensible” solutions to the problem of underspecified criminal prohibitions? Professor Kahan has argued as follows:

The cost-savings of delegated common-lawmaking stem from the generative character of open-textured statutory norms. When treated as a delegation of lawmaking authority . . . the criminal fraud statutes, and like offenses spawn scores of distinct prohibitions. To achieve the same result without implied delegation, Congress would have to bear the high practical and political costs of specifying each of these prohibitions itself. Courts can also update the criminal code more rapidly than can Congress.<sup>46</sup>

Delegated common-lawmaking not only reduces the cost of federal criminal law but it also improves its quality. Congress, which necessarily makes rules in anticipation of future cases, lacks full information about how these rules will operate in the real world. Courts, in contrast, perform their delegated lawmaking function in the course of deciding actual cases. Consequently, they see more completely how statutes interact with real-world circumstances and with each other and can use this information to fashion rules of law that fully implement legislative goals and that avoid unforeseen conflicts with other values and policies.<sup>47</sup>

Concerns about democratic legitimacy, Kahan argues, should not trouble us when courts adopt readings of statutes that reflect a broad societal consensus—such as one that bars trading guns for drugs.<sup>48</sup> The same is true of notice concerns. Kahan argues, in essence, that where the Court extends a statute to cover otherwise “wrongful” conduct, defendants have no equitable claim to our sympathy. Courts only need demand greater specification from Congress when the stat-

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44. *Id.* at 9–10.

45. *Id.* at 10.

46. *Id.* at 12.

47. *Id.* at 12–13.

48. *Id.* at 13.

ute at issue tests “the border between socially desirable and socially undesirable conduct.”<sup>49</sup>

My own take is diametrically opposed to that staked out by Professor Kahan, especially regarding the virtues of judicial law-making in honest-services cases. Our first, and perhaps greatest, disagreement concerns the appropriate scope and function of federal criminal law. As an empirical matter, no useful purpose is served by *easing* Congress’ ability to enact yet more open-textured federal criminal laws. “[T]he federal ‘code’ contains a profusion of laws so complex and sprawling that the laws susceptible to criminal sanction *cannot even be counted*.”<sup>50</sup> A recent estimate that there are more than 4000 federal crimes does not take into account the estimated tens of thousands of federal regulations that can be criminally enforced.<sup>51</sup> Most commentators bemoan not only the accelerating<sup>52</sup> “overcriminalization” phenomenon,<sup>53</sup> but also the degree to which Congress has “federalized” crimes that traditionally were left to state law.<sup>54</sup> In such circumstances, the last thing we should be doing is enabling Congress’ profligate tendencies by permitting it to legislate in

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49. *Id.* at 14.

50. Julie R. O’Sullivan, *The Federal Criminal “Code” is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 648 (2006).

51. *Id.* at 649.

52. “Whatever the exact number of crimes that comprise today’s ‘federal criminal law,’ it is clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades.” TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, CRIMINAL JUSTICE SECTION, AM. BAR ASS’N, *THE FEDERALIZATION OF CRIMINAL LAW* at 10 (1998), available at [http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization\\_of\\_Criminal\\_Law.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf).

The ABA Task Force’s research revealed that “[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970. *Id.* at 7. This “explosive” growth has “continued unabated.” JOHN S. BAKER, JR., *THE FEDERALIST SOC’Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION* 8 (2004), available at <http://www.fed-soc.org/publications/detail/measuring-the-explosive-growth-of-federal-crime-legislation>. Indeed, the number of statutory provisions susceptible to criminal enforcement has increased by one-third since 1980. *Id.*

53. See, e.g., Ellen S. Podgor, *Overcriminalization: the Politics of Crime*, 54 AM. U. L. REV. 541 (2005). Professor Erik Luna has pointed out that this one phenomenon actually comprises a number of problems: “(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations.” Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005).

54. See Luna, *supra* note 53, at 708.

general terms, confident that courts will pick up the constitutional slack.

Allowing Congress to avoid the costs—in time and political capital—of appropriate specificity, moreover, is also not a societal good. Certainly our constitutional structure and procedural safeguards evidence a choice: that it *should* be difficult to enact criminal legislation and it *should* be difficult to subject individuals to criminal sanction. Where a sufficiently strong consensus does not exist to move Congress and the President to agree to criminalize identified conduct, it ought not be criminalized.

Political actors should be required to make political choices before exposing individuals to jail time or worse. Judges not only lack the democratic legitimacy to do so, but they also may lack any awareness that the issue they are addressing actually contains policy trade-offs. For example, Kahan notes that efforts “to specify what or who constituted ‘organized crime’ in RICO . . . provoked strong opposition by organized labor, civil libertarians, and other interest groups.”<sup>55</sup> In all the time I have written about and taught RICO, the threat this contested legal definition might pose to labor never crossed my radar screen. I assume that judges are similarly unaware of the political and policy trade-offs inherent in the statutory questions presented to them. They are trained to believe that such trade-offs should generally be irrelevant to their jobs.

My second principal disagreement with the above analysis concerns the assessment that judges will produce better, more up-to-date criminal statutes if they accept congressional invitations to flesh out the specifics of vague prohibitions. Quite simply, the common law method of adjudication does not lend itself to effective legislation.

Judges hear principally from two stakeholders: the defense and the prosecution. In a perfect world, defense counsel will try to move judges to adopt a more defense-favorable (i.e., limited) construction of applicable statutory prohibitions. But defense counsel have an ethical obligation to do their best for one client at a time, in one case at a time. Their focus is necessarily narrow and exclusive. Unless the views of others will serve the interests of their clients, counsel are unlikely to solicit or share with the court the perspectives of those who may be affected by the legislation. For example, defense counsel would generally have no time or incentive to solicit labor or civil libertarians to weigh in on the proper construction of the term “orga-

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55. Kahan, *Three Conceptions*, *supra* note 9, at 9–10.

nized crime,” even if the court were willing to entertain the views of such amici.

Federal prosecutors, who share an obligation to “do justice” as well as to represent zealously the government in each particular case, can take a longer view, litigating over time to achieve pre-determined policy goals. But again, the Department of Justice’s (DOJ’s) perspective is narrow and partial. It, too, is unlikely to be concerned about bringing to the court’s attention the varied interests of those who may have a stake in the outcome. Congress, then, is likely—if it actually considers the legislation on the merits before passage—to have a better sense of the “right” policy choice given all the competing interests implicated or at least will be able to claim democratic legitimacy in reconciling competing political druthers.

Some argue that courts have the benefit of seeing the statute applied in the “real world,” so that judges’ decisions about the scope of a statute are likely to be based on actual experience, not projections. This, too, is questionable. Judges only see what prosecutors charge; it is the DOJ, not judges, who will determine if, when, and how issues will be presented to courts for determination. Strategic choices may be made, for example, to bring the more palatable but legally questionable cases for initial determination and, once judges have signed on, then to proceed with cases that are factually less sympathetic. Further, many cases come before the Court simply as guilty pleas—indeed upwards of 95% of federal criminal cases are concluded by plea.<sup>56</sup> And these cases of course receive the most minimal judicial scrutiny other than a quick allocution under Federal Rule of Criminal Procedure 11. In the overwhelming majority of cases, then, the defendant has concluded for whatever reason to take the plea, and the Court is never asked to rule on the legitimacy of the prosecution’s theory of fraud.<sup>57</sup>

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56. See U.S. SENTENCING COMMISSION, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS FIGURE C (2010), [http://www.ussc.gov/Data\\_and\\_statistics/Annual\\_Reports\\_and\\_sourcebooks/2010/SBTOC10.htm](http://www.ussc.gov/Data_and_statistics/Annual_Reports_and_sourcebooks/2010/SBTOC10.htm). Plea rates in federal courts have remained in the 95%–97% range for a decade or more. See, e.g., *id.* (96.8% guilty pleas in 2010, 96.3% in 2009, and 95.7% in 2006); U.S. SENTENCING COMMISSION, 2003 ANNUAL REPORT 35 (2003), [http://www.ussc.gov/Data\\_and\\_statistics/Annual\\_Reports\\_and\\_Sourcebooks/2003/ch5-2003.PDF](http://www.ussc.gov/Data_and_statistics/Annual_Reports_and_Sourcebooks/2003/ch5-2003.PDF) (95.7% guilty pleas in 2003).

57. See, e.g., *United States v. Lynch*, 2011 WL 3862842, at \*16 (E.D. Pa. Aug. 31, 2011) (citing two cases in which defendants took guilty pleas under theories that were subsequently invalidated in *Skilling*.) The court concluded that “both defendants were convicted of conduct that is no longer a crime and that, as a result, they are entitled to collateral relief.” *Id.* at \*8.

Judges are like the proverbial blind monks examining the elephant—they each see only a fragment of the picture because what comes before them is necessarily random and happenstantial. Trial judges only have this immediate connection with cases in their courtrooms. And on appeal, where much of the definitive assessment is made of the reach of the statute, the government has a huge advantage. On appeal of a conviction, the appeals court must construe the evidence in the light most favorable to the government, and must affirm unless no reasonable jury could have concluded on the evidence that the defendant was guilty beyond a reasonable doubt. And although I cannot prove it, I believe based on my anecdotal experience that appellate judges are extremely reluctant to overturn jury verdicts on the facts or the law—and will go to great lengths, even when dealing with legal issues, to resolve them in favor of retaining the jury's guilty verdict.

If efficiency is what is prized, then common law adjudication is a terrible way of proceeding. Take the honest-services doctrine. The original mail fraud provision, enacted in 1872, was amended in 1909 to create a disjunctive prohibition—that is, using the mails to perpetrate “any scheme or artifice to defraud” or “for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.”<sup>58</sup> The government started bringing “intangible” rights prosecutions, arguing that given the statutory disjunction between the “schemes to defraud” and “money or property” clauses, the former must have been intended to vindicate non-property rights.<sup>59</sup> Starting in 1941, the “Courts of Appeals, one after the other, agreed, interpreting the term ‘scheme or artifice to defraud’ to include deprivations not only of money or property, but also of intangible rights.”<sup>60</sup>

The problem was that the decisions of the Courts of Appeals were, to put it mildly, “not models of clarity or consistency.”<sup>61</sup> The Supreme Court ignored the “considerable disarray”<sup>62</sup> below until its decision in *McNally v. United States* in 1987—that is, for forty-six years.<sup>63</sup> In *McNally*, the Court held that despite forty-six years of unbroken Courts of Appeals opinions upholding various versions of honest-services fraud, it was not in fact a crime because mail and wire

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

59. *Id.* at 2926.

60. *Id.*

61. *Id.* at 2929.

62. *Id.*

63. *McNally v. United States*, 483 U.S. 350 (1987).

fraud were confined to schemes to defraud victims of money, not intangible non-property rights.<sup>64</sup>

Congress responded by enacting, the following year, a statute (§ 1346) that defined the term “scheme or artifice to defraud” for purposes of mail and wire (and other) frauds to include a scheme to “deprive another of the intangible right of honest-services.”<sup>65</sup> The Courts of Appeals, faced with this un-illuminating prohibition, spent decades trying to ascertain the meaning of § 1346, with widely divergent results.<sup>66</sup> The circuits split on the mens rea, *actus reus*, and attendant circumstances necessary to prove this crime. It was only after twenty-two years of conflicting decisions in all the Courts of Appeals that the Supreme Court decided *Skilling*.<sup>67</sup> And in that case, the Court did not address the three circuit splits that apparently warranted its intervention, coming up with a novel theory of its own for defining the scope of the statute.<sup>68</sup> Not unexpectedly, this has generated yet more litigation below as lower courts attempt to apply the Court’s holding.

The Court’s evident decision to let circuit splits again “percolate,” this time for twenty-plus years, indicates a truly shocking lack of awareness that these are splits about the meaning of criminal statutes that are supposedly only legitimate if reasonably facially clear. To countenance splits on their fundamental elements for decades is to accept that our supposed commitment to fair notice and non-retroactive definitions of criminal sanctions is a patently empty one. Perhaps equally discouraging is the institutional arrogance—and waste—inherent in the Court’s willingness to ignore the distilled wisdom of years of lower court efforts. The Court was apparently taken with amicus briefs that proposed a novel rule stating that § 1346 should be defined as confined to bribery and kickbacks and, without more, decided to adopt that rule.<sup>69</sup> The problem, of course, is painfully evident in the Court’s own cites to code sections in which Congress defined “bribery” and “kickbacks.” Congress clearly knew how to outlaw such behavior and did not do so in § 1346.

What is truly infuriating about all this are the practical costs that are so comprehensively ignored. Yes, if the law is in a real sense inaccessible, people cannot make the rational calculation necessary for

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64. *Id.* at 360.

65. 18 U.S.C. § 1346 (2011).

66. *Skilling*, 130 S. Ct. at 2927.

67. *Id.*

68. *Id.* at 2933.

69. *Id.* at 2907.



effective deterrence. Yes, a code that does not give fair notice will undermine faith in the criminal justice system as a whole, and undercut the moral stigma upon which the credibility of the system must rest. These abstractions ought to carry great weight. But the ultimate value protected by the legality principle and attendant interpretive doctrines is nothing short of the value of individual freedom.

No one can put a price on that, and it may seem simply an ideal to some. But surely everyone should understand and appreciate the cumulative misery visited upon suspects and defendants over the last sixty-eight years as courts have attempted to figure out what honest-services fraud does and does not cover. Hundreds if not thousands of individuals have been subjected to investigations and prosecutions and jail time for conduct that we know, only after the Court belatedly ruled in *McNally* and now *Skilling*, was not in fact criminal.

These investigations and trials are humiliating and often financially disastrous: homes lost and savings ravaged. Such prosecutions are inevitably highly stressful: they can tear apart families and traumatize the defendant's children. The defendants usually lose their jobs and, not infrequently, their livelihood by virtue of the stigma and collateral consequences of a conviction. The defendant can, under the federal sentencing guidelines, be subjected to long prison terms.<sup>70</sup> Given the length of these terms, many of them will not qualify for the so-called "Club Feds," but rather will serve their time in "real" prisons often located far from family and friends. It is cold comfort to these defendants—and should be a real scandal—that the Supreme Court, years after their convictions, can say that we were all wrong in believing that the statute covered such conduct. As Professor Andrew Leipold explains:

[A] factually innocent defendant confronts the problem of being publicly accused by the government of criminal behavior with no real prospect of ever being officially vindicated [as "innocent" rather than simply "not guilty"]. An innocent suspect may have the charges dismissed or may be acquitted, but the sequella of an indictment may leave the defendant's reputation, personal relationships, and ability to earn a living so badly damaged that he may never be able to return to the life he knew before being accused. More subtly, a person who was once charged with a crime is put on a different (and far less desirable) track in the legal system than someone who has

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70. See U.S. Sentencing Guidelines Manual Ch. 5, Pt. A (2011), available at [http://www.ussc.gov/Guidelines/2011\\_Guidelines/Manual\\_PDF/Chapter\\_5.pdf](http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_PDF/Chapter_5.pdf).

never been arrested. A later acquittal or dismissal does surprisingly little to relieve an innocent defendant of the resulting burdens.<sup>71</sup>

“Oops, sorry,” or “better late than never” obviously does not cut it. “This is the way the system works, imperfect as it is” should not do either because this is not the way the system should or has to be. First, the Court should not have allowed sixty-eight years to elapse during which the scope of the doctrine was uncertain. Second, the Court should have thrown this obviously vague statute right back into Congress’ lap. Perhaps if the Court did so more often, instead of trying to “fix” deficient statutes, Congress would get the message that it must define criminal conduct at least to let citizens know what conduct, attended by what mens rea and attendant circumstances, can subject them to criminal prosecution and stigma. And it apparently *is* possible to draft a decent statute, including one that defines intangible rights.<sup>72</sup>

Some might argue that what many of the defendants in these cases did was “wrong” even if not expressly proscribed by criminal law. Thus, they would point to those who manipulated an undisclosed conflict of interest for personal gain—that is, those whose conduct the *Skilling* Court decreed does not fall within the honest-services prohibition. These were cases in which the prosecutor, jury, and judges all agreed that what the defendant did was criminally reprehensible. Apparently the view would be that these folks should have known that what they did was “wrong.” I have heard this argument, implicitly or explicitly, from many folks. In such circumstances, we need lose little sleep over the improper prosecutions of people who were morally, if not legally, guilty.

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71. Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1299 (2000); see also *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979) (“[W]hile in theory a trial provides a defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo.”); *In re Fried*, 161 F.2d 453, 458–59 (2d Cir. 1947) (“[A] wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man’s escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal.”).

72. See, e.g., *United States v. Coppola*, 671 F.3d 220 (2d Cir. 2012) (holding that a provision of the Labor-Management Reporting and Disclosure Act of 1959 was not void for vagueness where it stated that labor organization officials occupy positions of trust within such organizations and are trusted by their members as a group, and specified the duties the officials owed to the union and members they serve.).

The problems with this argument are many. First, it rests on the unsustainable assumption that we can agree on who has acted “immorally” — by no means a given in our diverse society — and the naïve assumption that the government will apply a usefully vague statute only to pursue such “immoral” people. Neither assumption is, in my view, provable. Second, from an institutional point of view, this contention is contrary to the foundations of our system of constitutional criminal justice. Our system of government makes it difficult for the executive to deprive any citizen of his or her liberty. I hardly need to recite the complete litany: the defendant is presumed innocent; the government bears the burden of proof beyond a reasonable doubt; and the defendant is entitled to due process in a fair and impartial public trial with the assistance of counsel and the benefit of a right against compelled self-incrimination. All of this is designed to allow the average citizen to operate securely in the knowledge that he is free to act as he wishes unless he steps over a clearly defined legal, not moral, line. There are many other social means by which those who cross moral lines can be held to account. Prosecutions are, and should be, reserved for those who cause criminal harm.

To contend that that line ought to depend, instead, on prosecutors’ views of the “morality” of a defendant’s actions is a repudiation of the framers’ wisdom. And it is downright scary to those of us who do not believe men are angels, and who recognize our own fallibility.