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An Indictment of Bright Line Tests for Honest Services Mail Fraud

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INTRODUCTION

The federal mail and wire fraud statutes have been lauded by prosecutors as their "Stradivarius, [their] Colt 45, [their] Louisville Slugger . . . [their] true love."[1] Yet scholars and judges attack the statutes, calling them "omnipotent and omnipresent"[2] and "broad and amorphous criminal statutes"[3] that create "a legal standard which amounts to little more than the rhetoric of sixth grade civics classes."[4] The mail fraud statute that draws such hyperbolized, dramatic language reads, in pertinent part:

> 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 . . . for the purpose of executing such scheme or artifice or attempting so to do,

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* J.D. Candidate, 2005, Fordham University School of Law. This Note is dedicated to the memory of my mother, Alice, a great educator who taught me the value and importance of education. I wish to thank my friends and family, especially my father, Jonathan, and my brother, Josh, for their unconditional and unending love and support, and Professor Daniel C. Richman for his help and guidance.

1. Hon. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 Duq. L. Rev. 771, 771 (1980). Judge Rakoff described, in full:

> To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.

Id. (internal citations omitted); *see also* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 Duke L.J. 945, 954 (1993) (describing the mail and wire fraud statutes and finding that "[w]ith regard to the statutory weapons available to prosecutors, they rank by analogy with hydrogen bombs on stealth aircraft").

2. Ellen S. Podgor, *Mail Fraud: Limiting the Limitless*, Champion, Dec. 1994, *at* http://www.nacdl.org/CHAMPION/ARTICLES/94dec01.htm.

3. Jason T. Elder, Comment, *Federal Mail Fraud Unleashed: Revisiting the Criminal Catch-All*, 77 Or. L. Rev. 707, 707 (1998).

4. United States v. Margiotta, 688 F.2d 108, 142 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part).

> places in any post office ... any matter or thing whatever to be sent or delivered by the Postal Service ... shall be fined.[5]

The statute's language may, at first glance, appear ordinary and unlikely to generate controversy or debate; however, throughout the 1970s, the seemingly straightforward elements of the mail fraud statute[6] became clouded by the development of the intangible rights doctrine.[7]

Under the intangible rights doctrine, proof of fraud does not turn on the acquisition of property based on false pretenses.[8] Rather, a defendant is criminally liable if he deprived another of the right to the defendant's honest and faithful services.[9] This doctrine frees prosecutors from the obligation of proving that the principal was damaged economically.[10]

Assuming that some limits to the application of the intangible rights doctrine are necessary, this Note rejects current circuit court tests as inadequate and inconsistent with the mail fraud statute's intent. This Note argues that a case-by-case, fact-intensive judicial analysis, in which courts consider and weigh a series of relevant factors, is a superior approach to the existing bright line, black letter tests to adjudicating intangible rights cases in the private sector.

Part I provides a brief history of the mail fraud statute and the development of the intangible rights doctrine in the private sector.[11]

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5. 18 U.S.C. § 1341 (2000). The elements of the wire fraud statute, 18 U.S.C. § 1343, parallel those of the mail fraud statute except wire fraud requires use of an interstate telephone call or electronic communication. *Id.* § 1343; *see, e.g.*, Raphael Rosenblatt & Adam Michaels, *Mail & Wire Fraud*, 34 Am. Crim. L. Rev. 771, 773 n.16 (1997) (citing, for example, United States v. Keller, 14 F.3d 1051, 1056 (5th Cir. 1994) (describing elements of wire fraud); Mark Zingale, Note, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 Colum. L. Rev. 795, 799 (1999).

6. This Note discusses the mail fraud and wire fraud statutes interchangeably, because they are substantially similar, and commentary and judicial decisions about one are imputed to the other. *See, e.g.*, United States v. Mills, 199 F.3d 184, 188 (5th Cir. 1999) (noting that "[t]he Supreme Court has said that because the mail and wire fraud statutes share the same language in relevant part, the same analysis applies to each" (citing Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987))).

7. *See, e.g.*, *Margiotta*, 688 F.2d at 142; United States v. States, 488 F.2d 761 (8th Cir. 1973); *see also* Brian C. Behrens, Note, *18 U.S.C. § 1341 and § 1346: Deciphering the Confusing Letters of the Mail Fraud Statute*, 13 St. Louis U. Pub. L. Rev. 489 (1993); Peter R. Ezersky, Note, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 Yale L.J. 1427, 1429 nn.10 & 11 (1985) (collecting pre-*McNally* examples applying the intangible rights doctrine in the public and private sectors).

8. Ezersky, *supra* note 7, at 1430-31.

9. *See, e.g.*, *id.* at 1430-31.

10. *See* Daniel Richman & Alan Vinegrad, 'Rybicki': *The Intangible Rights Theory of Criminal Fraud*, N.Y. L.J., Jan. 12, 2004, at 4.

11. Although many issues surrounding the intangible rights doctrine arise in the public sector, this Note focuses primarily on intangible rights issues in the private sector. See *infra* note 95 for an overview of these issues.

An examination of private sector application is especially timely in light of recent judicial opinions[12] and the enhanced penalties provided for in recent white-collar crime legislation.[13] Part II examines approaches that courts currently employ to limit the statutes. Circuit courts have been searching for, and settling on, bright line tests as a means to limit the expansive reach of the mail fraud statute. These tests, however, contravene important policy goals underlying the mail fraud statute and are ineffectual in ensuring consistent application of the intangible rights doctrine. Accordingly, Part III argues that, assuming the scope of the mail fraud statute needs to be limited, the most effective way to meet the policy goals of the mail fraud statute is to abandon the bright line tests. Rather, courts should rely on various factors that they already consider, such as materiality, self-dealing, and affirmative misrepresentations, in conjunction with one another, as a means of limiting the mail fraud statute to prosecutions in appropriate instances. This Note concludes that the continuing use of these factors, absent any court-adopted tests, limitations, or further directions from Congress, best reflects congressional intent, preserves the flexibility of the statute, and provides adequate notice to potential offenders.

I. THE DEVELOPMENT OF THE INTANGIBLE RIGHTS DOCTRINE

This part traces the history of the mail fraud statute from its inception to its modern form. This part discusses the development of the honest services doctrine, focusing on two critical cases in that development, *McNally v. United States*[14] and *United States v. Bronston.*[15] Finally, this part examines Congress's recent enhancements to the mail fraud statute and how those enhancements have done little to remedy the controversy surrounding the intangible rights doctrine's application in the private sector.

A. *Early Statutory Development*

In 1865, the Postmaster General, concerned about inappropriate materials being sent through the mails, turned to Congress for a solution.[16] When it became clear that the mails were being used for

12. *See, e.g.*, United States v. Rybicki, No. 00-1043, 2003 WL 23018917 (2d Cir. Dec. 29, 2003) (*in banc*) [hereinafter *Rybicki II*]; United States v. Rybicki, 287 F.3d 257 (2d Cir. 2002) [hereinafter *Rybicki I*]; United States v. Handakas, 286 F.3d 92 (2d Cir. 2002).

13. *See* 18 U.S.C. § 1961 (1)(A) (2002); Sarbanes-Oxley Act, Pub. L. No. 107-204, § 903, 116 Stat. 745, 805 (2002).

14. 483 U.S. 350 (1987).

15. 658 F.2d 920 (2d Cir. 1981)

16. D. Fowler, Unmailable: Congress and the Post Office 57 (1977) (citing Cong. Globe, 38th Cong., 2nd Sess. 661-62, 965-66, 1256-57, 1311, 1391).

not only obscene, but also fraudulent purposes,[17] Congress enacted the original mail fraud statute in 1872.[18] This law prohibited "misusing the post-office establishment" in furtherance of "any scheme or artifice to defraud."[19] No congressional debate, however, or other legislative history explained the statute's purpose.[20] An 1896 Supreme Court decision interpreting the statute[21] was codified in 1909,[22] when Congress inserted the language "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" after "scheme or artifice to defraud."[23] This amendment reflected a shift in Congress's concern from controlling misuse of the mails to controlling fraud more generally.[24] Over the next one hundred years, Congress further amended the statute seven times.[25]

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17. *See* Behrens, *supra* note 7, at 491-92.

18. The original mail fraud statute read:

> That if any person having devised or intending to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person (whether resident within or outside of the United States), by means of the post-office establishment of the United States, or by inciting such other person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice (or attempting so to do), place any letter or packet in any post-office of the United States . . . shall be guilty of a misdemeanor, and shall be punished with a fine of not more than five hundred dollars, with or without such imprisonment, as the court shall direct, not exceeding eighteen calendar months. The indictment, information, or complaint may severally charge offences to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323.

19. *Id.*; *see also* Paul Mogin, *Reigning in the Mail [F]raud Statute*, Champion, May 2002, at 12, 13.

20. Rakoff, *supra* note 1, at 779. There are, however, statements by the law's sponsor in Congress that the statute was intended to "prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." Mogin, *supra* note 19, at 13 (quoting Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth)).

21. *See* Durland v. United States, 161 U.S. 306, 313 (1896) (holding that mail fraud extends to "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future").

22. Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130.

23. *Id.* Congress also removed "misusing the post-office establishment"; mailing an item for the "purpose of executing" the scheme or artifice was sufficient. *See* Mogin, *supra* note 19, at 13. Many detailed accounts of the early statutory development are available, but will not be addressed here. *See, e.g.*, Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. Rev. 223 (1992); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 Ariz. L. Rev. 137 (1990); Behrens, *supra* note 7, at 491-506.

24. Mark C. Goodman, *The Federal Mail Fraud Statute: The Government's Colt 45 Renders Norby Walters and Lloyd Bloom Agents of Misfortune*, 10 Loy. Ent. L.J. 315, 322 (1990).

25. Act of Mar. 2, 1889, ch. 393, § 5480, 25 Stat. 873 (setting forth schemes to be

The Supreme Court first addressed the scope of the mail fraud statute in *Durland v. United States*,[26] when the Court broadly interpreted the phrase "scheme or artifice to defraud."[27] This broad interpretation foreshadowed future mail and wire fraud jurisprudence.[28]

B. *The Intangible Rights Doctrine*

The development of the intangible rights doctrine precipitated the confusion and controversy surrounding the scope of mail fraud. Despite early indications from the Supreme Court that the mail fraud statute applied to schemes directed at causing money or property injury,[29] courts began applying the statute to schemes that threatened "intangible rights" in the 1970s and 1980s.[30] At first, the intangible

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covered); Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 (codifying the Court's holding in Durland v. United States, 161 U.S. 306 (1896)); Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763 (simplifying language); Act of May 24, 1949, ch. 139, § 34, 63 Stat. 94 (grammatical correction); Act of Aug. 12, 1970, Pub. L. No. 91-375, § 6(j) (11), 84 Stat. 778 (changing "Post Office Department" to "Postal Service"); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346); Senior Citizens Against Marketing Scams Act of 1994 ("SCAMS"), Pub. L. No. 103-322, tit. XXV, § 250002, 108 Stat. 2081, 2082 (codified at 18 U.S.C. §§ 2325, 2326 (1994)). All of these amendments either enlarged the scope of the statute or made superficial changes. *See, e.g.*, Podgor, *supra* note 23, at 225; Rakoff, *supra* note 1, at 772.

26. 161 U.S. 306 (1896); *see also* Rakoff, *supra* note 1, at 778 (claiming "it is obvious that the prime concern of those who commit mail fraud, those who legislate against it, those who prosecute it, and those who judge it, is the fraud and not the mailing").

27. *Durland*, 161 U.S. at 313-14 (arguing that the phrase encompassed "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future"); *see also* Behrens, *supra* note 7, at 495 (noting that in *Durland*, the Court "went beyond the meaning attributed to common law fraud . . . to cover the rampant frauds that were now using the mails"); Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 Fla. L. Rev. 937, 944 (2003) ("Mail fraud is written broadly, and has been expansively interpreted, so that the offense now encompasses an extraordinarily wide range of deceptive conduct.").

28. *See, e.g.*, Podgor, *supra* note 23, at 232 & nn.61-62 (listing cases demonstrating the "full bloom" of the intangible rights doctrine in the 1970s and 1980s).

29. *See* Hammerschmidt v. United States, 265 U.S. 182, 188-89 (1924) (involving the general federal conspiracy statute); *see also* Behrens, *supra* note 7, at 506 ("It has been relatively clear since its enactment that the mail fraud statute could be applied in situations where victims were deprived out of their money or property . . . .").

30. The intangible rights doctrine, in its "pre-*McNally* form" did not come into existence until about 1973. Jeffrey J. Dean & Doye E. Green, Jr., McNally v. United States *and its Effect on the Federal Mail Fraud Statute: Will White Collar Criminals Get a Break?*, 39 Mercer L. Rev. 697, 703 (1988). The category of intangible rights was broad from its inception and "seemed to be limited only by prosecutors' imagination." Mogin, *supra* note 19, at 13. Mogin stated that:

> It expanded to include such diverse rights as the right to conscientious, loyal, faithful, disinterested and honest government, a state motor vehicle department's right to have its driver's-license program administered free

rights doctrine developed primarily in the public sector.[31] In the public sector, prosecutors typically used the mail fraud statute to prosecute either bribery of a public official or the failure of the public official to disclose information regarding a personal interest potentially affecting his judgment.[32] Thus undisclosed, biased decision making or misuse of government position for personal gain constituted a deprivation of honest services,[33] regardless of tangible harm to the public.[34]

In the private sector, these intangible rights included an employer's or other principal's right to the honest services of its employees or agents.[35] Intangible rights in the private sector also included rights unconnected to any special duty and where the victim suffered no actual economic loss, such as the right to privacy and the right to "time, effort, money, and expectations."[36] According to one commentator, this "exotic flower... quickly overgrew the legal landscape in the manner of the kudzu vine until... few ethical or fiduciary breaches seemed beyond its potential reach."[37] As prosecutors shifted their attention from protecting the integrity of the mails to white collar crime,[38] the mail fraud statute became "a strategic tool in fighting political corruption and increasingly sophisticated economic misconduct."[39] The scheme's relationship to the mails, if any, became increasingly less important.[40] Accompanying

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> from falsehood, a private employer's right to the honest services of his employee, and an electoral body's political rights to fair elections.

Id. (internal citations and quotations omitted).

31. *See* John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 Yale L.J. 1875, 1879 (1992); *see also* United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979); United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974); United States v. States, 488 F.2d 761 (8th Cir. 1973); Shushan v. United States, 117 F.2d 110 (5th Cir. 1941) (holding that a scheme involving the corruption of a public official is a fraud) (overruled on other grounds); United States v. Classic, 35 F. Supp. 457 (E.D. La. 1940) (holding that a "scheme to defraud" includes the deprivation of the intangible right of good government when election commissioner committed fraud).

32. Nirav Shah, *Mail and Wire Fraud*, 40 Am. Crim. L. Rev. 825, 834 (2003).

33. *See* Podgor, *supra* note 23, at 233 ("Prosecutors indicted and convicted public officials pursuant to the intangible rights doctrine with a finding that they had deprived the citizenry of the right to good government.").

34. *See id.*; *see also* United States v. Paradies, 98 F.3d 1266, 1283 n.30 (11th Cir. 1996) (collecting cases).

35. *See, e.g.*, United States v. Silvano, 812 F.2d 754 (1st Cir. 1987); United States v. Weiss, 752 F.2d 777 (2d Cir. 1985).

36. John E. Gagliardi, *Back to the Future: Federal Mail and Wire Fraud Under 18 U.S.C. § 1346*, 68 Wash. L. Rev. 901, 907 (1993) (citations omitted).

37. John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427, 427 (1998).

38. *See* Podgor, *supra* note 23, at 224 ("Although a 'mailing' is still necessary to procure a mail fraud conviction, the emphasis of the offense has shifted, drastically reducing the focus on the use of the postal system.").

39. 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, 438 (1995).

40. *See, e.g.*, *id.*; Behrens, *supra* note 7, at 490 (noting that the use of mails is no

the intangible rights doctrine's expansion was criticism from judges, which signaled their discontent with the statute's potential reach.[41] Criticism of the intangible rights doctrine and its reach in the private sector was especially sharp by academics.[42]

The intangible rights doctrine reached its "high water mark"[43] in 1981, when the Second Circuit upheld a mail fraud conviction in *United States v. Bronston*.[44] There, the defendant was a partner at a law firm, Rosenman, Colin, Freund, Lewis, & Cohen ("Rosenman Colin").[45] Rosenman Colin represented two venture capital companies investing in BusTop Shelters, Inc. ("BusTop").[46] At approximately the same time, a personal client of the defendant ("C&S") approached the defendant seeking representation in his own efforts to acquire BusTop.[47] The defendant's firm declined the representation because of the perceived conflicts with Rosenman Colin's representation of the BusTop minority shareholders.[48] Despite the firm's refusal, the defendant secretly began representing C&S, ultimately billing them $12,500, which he never shared with his partners.[49] There was no evidence that the defendant ever

longer an important requirement and today, only requires a "minute link" to the mail system).

41. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 502 (1985) (Marshall, J., joined by Brennan, Blackmun & Powell, J.J., dissenting) (criticizing the lower courts for allowing "extraordinary expansion" of §§ 1341 and 1343 "to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law" (internal quotations omitted)); United States v. Holzer, 816 F.2d 304, 309 (7th Cir. 1987) (Posner, J.) (criticizing the fundamental honesty and fair play formulation of the statute as "much too broad"); United States v. Margiotta, 688 F.2d 108, 141 n.4, 142 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part) (protesting extension of the mail fraud statute by "judicial fiat").

42. For an extensive critique of intangible rights and the private sector, see John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White Collar Crime*, 21 Am. Crim. L. Rev. 1 (1983) [hereinafter Coffee, *Metastasis*]; John C. Coffee Jr., *The Great Mail Fraud Flip-Flop: From Intangible Rights to Intangible Property*, White-Collar Crime Rep., May 1988, at 1, 2 (categorizing the mail fraud statute as a "serious overextension of federal criminal law"); Ezersky, *supra* note 7, at 1438-39 (arguing that "[j]udicial policing of loyalty, if worthwhile at all, ought not to be done in criminal cases, where the consequences of the inevitable failures of judgment are severe"); Williams, *supra* note 23; Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 Am. Crim. L. Rev. 423, 436 (1983) (advocating some restraint on the "virtually unbridled discretion prosecutors have been allowed in utilizing this statute"); *see also* Podgor, *supra* note 2 (referring to § 1346 as a "ridiculous provision that needs to be repealed" and accusing Congress of failing to define honest services, leaving a doctrine that can result in "arbitrary and discriminatory application").

43. *See* Coffee, *supra* note 37, at 432-33.

44. 658 F.2d 920 (2d Cir. 1981).

45. *Id.* at 922.

46. *Id.* Rosenman Colin did not otherwise represent BusTop. *Id.*

47. *Id.* at 922.

48. *Id.*

49. *Id.* at 922-23, 925.

misappropriated confidential information of BusTop.[50] Yet, the Second Circuit upheld the defendant's conviction on an intangible rights theory.[51]

Academics consistently use *Bronston* as a high water mark case in the development of the honest services doctrine.[52] The facts of *Bronston* indicate that any lack of candor or good faith to a former client, who had been represented in a one-time transaction, violates the mail fraud statute.[53] This is significant because the court upheld a finding of criminal liability even though there was no actual misuse of a fiduciary duty beyond the mere presence of conflict.[54] Since there was no actual misuse of the fiduciary duty or unfair self-dealing, only the fact of a knowing conflict, the *Bronston* court implicitly rejected any requirement of actual or intended harm.[55] Under this view, *Bronston* marked the beginning of a "slippery slope"[56] of cases that essentially established a new crime—corporate impropriety.[57]

C. McNally *and the Legislative Aftermath*

McNally v. United States[58] represents a major turning point in the development of the honest services doctrine, to which Congress responded with legislation that codified intangible rights. In *McNally*,[59] the Supreme Court sought to put an end to the unchecked expansion of the mail fraud statute.[60] The *McNally* Court rejected the

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50. *Id.* at 926; Coffee, *supra* note 37, at 433.

51. *Bronston*, 658 F.2d at 926-30.

52. *See* Coffee, *supra* note 37, at 432-34; *see also* Richman & Vinegrad, *supra* note 10.

53. Coffee, *supra* note 37, at 433.

54. *Id.*

55. *Id.* at 434. Coffee argued:

> *Bronston* thus crossed a critical threshold: before it, cases in which there was only a conflict of interests, but neither a transaction between the fiduciary and the client, nor any misappropriation of information or property by the fiduciary from the client, had been considered merely "constructive fraud," which did not amount to the type of "actual fraud" that transgressed the federal mail and wire fraud statutes.

Id.

56. *Id.*

57. *Id.* at 434 n.35 (citing United States v. Siegel, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting)). The decision upheld the conviction of corporate officials for mail fraud on an honest services theory where they had taken actions intended to benefit the firm but had not adequately disclosed those actions to the board or shareholders. *Siegel*, 717 F.2d at 22-23. Judge Winter, in dissent, argued that, "[i]n effect, a new crime—corporate improprieties—which entails neither fraud nor even a victim, has been created." *Id.* at 24.

58. 483 U.S. 350 (1987).

59. *Id.* *McNally* involved three defendants, a chairman of the state Democratic Party, a former Kentucky state official, and McNally, who devised a scheme to share commissions on Kentucky's workers compensation insurance policies. *Id.* at 352-53. The defendants were prosecuted on a theory that they deprived the citizens of Kentucky of their right to good government. *Id.*

60. *Id.* at 359-60.

intangible rights doctrine, holding that the "mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.... [T]he original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property."[61] The Court, limiting the application of the mail fraud statute to the deprivation of some money or property, reversed a conviction of a public official based on an honest services theory in which the prosecutors failed to allege a deprivation of money or property.[62] The Court invited Congress to speak more clearly on the issue if it sought to protect intangible rights.[63] Congress eventually responded.[64]

Six months later, the Court clarified its *McNally* holding in *Carpenter v. United States*.[65] There, the Court held that the coverage of the mail fraud statute extends to both tangible and intangible property rights.[66] Despite this clarification, the *McNally* decision endured criticism.[67]

In direct response to *McNally*, Congress passed an omnibus drug bill,[68] including a provision now codified as 18 U.S.C. § 1346.[69] There

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61. *Id.* at 356. The Court found that the mail fraud statute is "limited in scope to the protection of property rights." *Id.* at 360.

62. *Id.* at 358-61. For a more expansive discussion of *McNally*, see Thomas Brom, *Expanded Mail Fraud a Dead Letter*, Cal. Law., Oct. 1987, at 11; Dean & Green, *supra* note 30; Mogin, *supra* note 19, at 13-14; Podgor, *supra* note 23, at 233-34; Paul W. Barnett, Note, McNally v. United States*: Mail Fraud—The Procrustean Bed Couldn't Stretch this One*, 48 La. L. Rev. 723 (1988); Behrens, *supra* note 7, at 509-11; Donna Metcalfe Ducey, Note, McNally v. United States*: The Demise of the Intangible Rights Doctrine*, 66 N.C. L. Rev. 1035 (1988).

63. *See McNally*, 483 U.S. at 360 (stating that "[i]f Congress desires to go further, it must speak more clearly than it has").

64. *See infra* notes 68-69 and accompanying text.

65. 484 U.S. 19 (1987) (upholding the conviction of a *Wall Street Journal* reporter who had disclosed financial information obtained in course of his business to investors who traded on that information before its release in the *Journal*). This holding essentially reinforced *McNally*, requiring that the government prove a deprivation of money or property, but accounted for both tangible and intangible *property*. *See* Podgor, *supra* note 23, at 235.

66. *Carpenter*, 484 U.S. at 27-28. The Court held that the mail fraud statute does not require a showing of actual loss or injury when, as here, the victim was deprived of exclusive use of information. *Id.* Thus the Court recognized that there was such a thing as intangible property, such as confidential information or trade secrets, but distinguished this from the concept of intangible rights, like those to honest services. *Id.*

67. *See* Dean & Green, *supra* note 30, at 912-15; Ducey, *supra* note 62, at 1049-50 (arguing that the public will suffer the greatest loss under *McNally*, and encouraging Congress to amend the mail fraud statute, as the *McNally* decision "immunized an entire group of criminals from prosecution").

68. This bill was called the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

69. Sec. 7603, 102 Stat. at 4508 (codified at 18 U.S.C. § 1346). The section reads: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18

is limited legislative history[70] on the intent of § 1346.[71] In fact, the only legislative history is the record of remarks on the floor of the House by the sponsor of the amendment, Representative John Conyers. After describing *McNally* and its effect on various circuits, Representative Conyers stated that § 1346 was intended to overturn *McNally* and restore the reach of the mail and wire fraud provisions to their pre-*McNally* limits.[72]

D. *Recent Enhancements*

Section 1346 proved not to be Congress's final word on the reach of the mail fraud statute, and recent legislative enhancements have done little to resolve the controversy surrounding it.[73] Congress expanded the statute again in 1994 when it passed the Senior Citizens Against Marketing Scams Act ("SCAMS Act"),[74] legislation designed to combat telemarketing ploys directed at the elderly.[75] The SCAMS Act amended the mail fraud statute to cover not only U.S. Postal Service communications, but also communications sent by private

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U.S.C. § 1346 (2000). This section applies to both the mail and wire fraud statutes. *See id.*

70. See *infra* Part III.D. for a more complete discussion of the available legislative history.

71. As Judges Jolly and DeMoss described in *United States v. Brumley*:

> The specific text of what has become 18 U.S.C. § 1346 was inserted in the Omnibus Drug Bill for the first time on the very day that the Omnibus Drug Bill was finally passed by both the House and the Senate. The text of what is now section 1346 was never included in any bill as filed in either the House of Representatives or the Senate. As a result, the text of section 1346 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 was never the subject of any floor debate reported in the Congressional Record.

116 F.3d 728, 742 (5th Cir. 1997) (*in banc*) (Jolly & DeMoss, J.J., dissenting).

72. 134 Cong. Rec. H11108, H11251 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers). Representative Conyers stated:

> This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. The amendment also applies to the wire fraud provision, and precludes the *McNally* result with regard to that provision. The amendment adds a new section to 18 U.S.C. [chapter] 63 that defines the term 'scheme or artifice to defraud' to include a scheme or artifice to defraud another of 'the intangible right of honest services.' Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.

Id.

73. *See, e.g.*, SCAMS Act, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (1994) (codified at 18 U.S.C. § 1341); Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 (2000); Sarbanes-Oxley Act of 2002, § 903, Pub. L. No. 107-204, 116 Stat. 745, 805.

74. SCAMS Act, § 250006, 108 Stat. at 2087.

75. *Id.*

interstate commercial carriers, such as FedEx and UPS.[76] Furthermore, the statute enhanced penalties for mail and wire fraud convictions targeted at individuals over the age of fifty-five.[77] These enhancements seemed to indicate that Congress had no serious objection to the reach of the mail fraud doctrine as courts had applied it.[78]

A complete discussion of the history of the mail and wire fraud provisions would not be complete without noting the implications of the statute under the Sarbanes-Oxley Act[79] and examining the mail fraud statute's use as a Racketeer Influenced and Corrupt Organization Act ("RICO")[80] predicate act.[81] The White Collar Crime Penalty Enhancement Act ("WCCPA"), part of the Sarbanes-Oxley Act,[82] increased the maximum sentence for mail and wire fraud from five to twenty years.[83] In addition, mail and wire fraud are two predicate acts for civil RICO actions,[84] carrying with them treble damages and attorney's fees provisions.[85]

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989[86] ("FIRREA") also increased penalties for mail fraud, increasing the penalty to a maximum fine of $1 million and up to thirty years in prison when the fraud relates to a financial institution.[87]

76. *Id.*; *see also* Anne S. Dudley & Daniel F. Schubert, *Mail and Wire Fraud*, 38 Am. Crim. L. Rev. 1025, 1027-29 (2001).

77. Dudley & Schubert, *supra* note 76, at 1028.

78. *See* Moohr, *supra* note 27, at 945 (noting that as a "testament" to the effectiveness of the mail and wire fraud statutes, Congress did not alter mail fraud's substantive elements with the Sarbanes-Oxley Act).

79. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 804.

80. 18 U.S.C. § 1961 (2000). RICO prohibits the receipt of income from a pattern of racketeering, which requires two predicate acts of racketeering. *Id.* § 1961(5). Both mail fraud and wire fraud can qualify as racketeering predicate acts. *Id.* § 1961 (1)(B).

81. *Id.* § 1961; *see* United States v. Busher, 817 F.2d 1409 (9th Cir. 1987) (holding that mailing fraudulent tax returns is a predicate act under RICO because such mailing is indictable under mail fraud).

82. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. at 805 (amending 18 U.S.C. §§ 1341, 1343).

83. *Id.*

84. According to Ellen S. Podgor, "[t]he expansiveness of the mail fraud statute has resulted in 'garden variety frauds' being alleged in civil RICO actions." Podgor, *supra* note 2 (citing Susan Getzendanner, *Judicial 'Pruning' of 'Garden Variety Fraud' Civil RICO Cases Does Not Work: It's Time for Congress to Act*, 43 Vand. L. Rev. 673, 679 (1990)).

85. Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 Del. J. Corp. L. 519, 521 (2002). Applebaum argues that it is through the mail and wire fraud statutes that "'garden variety' common law fraud claims are said to be turned into federal treble damages suits." *Id.* Applebaum further argues that RICO has "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context." *Id.* at 519.

86. Act of Aug. 9, 1989, Pub. L. No. 101-73, § 961(i), 103 Stat. 183, 500. The Crime Control Act amended the maximum prison term to thirty years.

87. Act of Nov. 29, 1990, Pub. L. No. 101-647, § 2504(h), 104 Stat. 7989, 4861.

Therefore, the scope of mail fraud has serious criminal and civil repercussions for private individuals and businesses alike.[88]

If the mail fraud statute's history makes anything clear, it is that Congress's enactment of § 1346, codifying the honest services doctrine, and subsequent legislation, reflects a continuing desire to preserve the mail fraud statute as a potent weapon in a prosecutor's arsenal. The Supreme Court's attempt at demanding limits on the reach of the mail fraud statute in *McNally* fell victim to the legislative process, leaving lower courts around the country with the responsibility of determining the mail fraud statute's proper scope.

II. A SEARCH FOR LIMITS: CIRCUIT COURT APPROACHES TO LIMITING MAIL FRAUD HONEST SERVICES IN THE PRIVATE SECTOR

Part II begins by discussing the relevance of a focus on the private, as opposed to public, sector in the discussion of the honest services doctrine. Part II.A. discusses the various approaches taken by circuit courts in their attempts to limit the honest services doctrine in the private sector. Part II.B. focuses on two recent Second Circuit cases that highlight the tension among the circuits on the proper limits to the mail fraud statute.

With so little guidance from Congress,[89] the responsibility for determining the scope of § 1346 in the private sector has fallen to the judiciary.[90] At first glance, circuits seem to be split on the best way to limit the statute's application in the private sector.[91] Why should honest services fraud be limited in the private sector? As the Sixth Circuit noted in *United States v. Frost*, the "literal terms [of § 1346] suggest that dishonesty by an employee, standing alone, is a crime."[92] The Sixth Circuit is not alone in its refusal to interpret § 1346 that

88. *See, e.g.*, Act of Nov. 29, 1990, Pub. L. No. 101-647, § 2504(h), 104 Stat. at 4861.

89. Expounding on this lack of guidance, John Coffee noted that "[t]he contours of this 'intangible right' theory have always been uncertain, in part because the governing standard was the ineffable principle of 'fair play.'" John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 202-03 (1991); *see also* Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 St. Thomas L. Rev. 557, 562 (1998) ("A deprivation of the 'intangible right of honest services' could easily include a wealth of nefarious conduct if not constrained by the judiciary.").

90. *See* Gagliardi, *supra* note 36, at 915; Christopher Q. Cutler, Note, McNally *Revisited: The "Misrepresentation Branch" of the Mail Fraud Statute a Decade Later*, 13 BYU J. Pub. L. 77, 88-89 (1998) ("In the decade since *McNally*, a multitude of courts have played the judicial soothsayer, attempting to divine from the cryptic harbingers of the high Court and the Congress what fate has befallen the mail fraud statute.").

91. *See, e.g.*, Coffee, *supra* note 37. Entitling a section of his article "The Available Options: An Inventory," Coffee discusses various approaches taken by different circuits in mail and wire fraud cases. *Id.* at 449-59.

92. United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997).

broadly.[93] The pervasive reason justifying the court's attempts to limit the reach of § 1346, at least as applied to private actors, is a general fear of over-criminalization in the commercial setting.[94]

Moreover, there are different policy concerns and reasons for limits when the honest services doctrine is applied in the private sector than when it is applied in the public sector.[95] Inherent in the role of a public official is the duty to make decisions based on the public's best interest, not profitable self-dealing.[96] An honest services prosecution is appropriately applied in the public sector because, "[i]n a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated."[97] On the other hand, some courts explain the differences in the private sector, arguing that such a strict duty of loyalty is not ordinarily found in private sector relationships.[98] Even when they do exist, the nature of loyalty and fidelity in the private sector differs in kind from the public sector obligation.[99] This distinction also bears heavily on the problem of fair

93. *See infra* Part II.A. for a discussion of the circuit approaches to limiting the scope of § 1346; *see also* Podgor, *supra* note 89, at 560-68 & nn.55-99 (collecting cases).

94. *See* United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997) (noting that "where a private actor or quasi-private actor is deprived of honest services in the context of a commercial transaction, it would give us great pause if a right to honest services is violated by every breach of contract or every misstatement made in the course of dealing"); John C. Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 167 (1981). Coffee notes, "if merely depriving the victim of the loyalty and faithful service of his fiduciary constitutes criminal [mail] fraud, the ends/means distinction is lost. Once the ends/means distinction is abolished and disloyalty alone becomes the crime, little remains before every civil wrong is potentially indictable." *Id.*

95. *See* Coffee, *supra* note 37, at 461-63 (citing differing concerns about fair notice, overlapping statutory duties, judicial monitoring, relative harm, and selective enforcement in arguing that the mail fraud statute should be applied more aggressively in the public context than in the private context); *see also Frost*, 125 F.3d at 365 (arguing that enforcement of an intangible right to honest services has a much weaker justification in the private sector than in the public sector because "relationships in the private sector generally rest upon concerns and expectations less ethereal and more economic than the abstract satisfaction of receiving 'honest services' for their own sake").

96. *See* United States v. deVegter, 198 F.3d 1324, 1328 (11th Cir. 1999) ("'If the official instead secretly makes his decision based on his own personal interests—as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest—the official has defrauded the public of his honest services.'" (quoting United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997))).

97. United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996).

98. *See deVegter*, 198 F.3d at 1328.

99. *Id.* The court went on to explain this difference:

> "[E]mployee loyalty is not an end in itself, it is a means to obtain and preserve pecuniary benefits for the employer. An employee's undisclosed conflict of interest does not by itself necessarily pose the threat of economic harm to the employer." ... A public official's undisclosed conflict of

notice.[100] The expectation that public officials hold power "in trust for the citizenry" is ingrained in our democratic culture, and thus no surprise should come when the criminal law seeks to enforce these expectations.[101] The same premise is not as easily applied to private actors, who in many instances, are entitled to work towards and for the benefit of their own self-interest.[102] The difficulty in applying the honest services doctrine in the private sector has resulted in differing circuit court approaches to defining the mail fraud statute's scope.

A. *Circuit Court Approaches*

Each circuit that has considered the scope of § 1346 in the private sector essentially has agreed on the need for limits, but there is little agreement on what these limits should be.[103] Courts have framed the reach of honest services fraud in the private sector as the subject of a decisive circuit split.[104] For example, the Fourth Circuit, in *United States v. Vinyard*,[105] explicitly framed the analysis as one in which "[its] sister circuits . . . have split over the proper approach,"[106] identifying the two competing approaches as the reasonably foreseeable harm

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> interest, in contrast, does by itself harm the constituents' interest in the end for which the official serves—honest government in the public's best interest. The "intangible right of honest services" must be given an analogous interpretation in the private sector. Therefore, for a private sector defendant to have violated the victim's right to honest services, it is not enough to prove the defendant's breach of loyalty alone. Rather, as is always true in a breach of loyalty by a public official, the breach of loyalty by a private sector defendant must in each case contravene—by inherently harming—the purpose of the parties' relationship.

Id. at 1528-39 (quoting United States v. Lemire, 720 F.3d 1327, 1336 (D.C. Cir. 1983)).

100. *See id.* at 1329.

101. Coffee, *supra* note 37, at 461.

102. *See id.*; Ezersky, *supra* note 7, at 1437-38 (noting that almost all decisions made by managers can be construed as self-interested).

103. *See, e.g.*, *Rybicki II*, No. 00-1043, 2003 WL 23018917 (2d. Cir. Dec. 29, 2003) (*in banc*) (adopting the materiality test); *Rybicki I*, 287 F.3d 257 (2d Cir. 2002) (adopting a reasonably foreseeable harm test with a de minimis harm requirement); United States v. Handakas, 286 F.3d 92 (2d Cir. 2002) (drawing a distinction between a duty enforceable in tort and a duty enforceable in contract); United States v. Vinyard, 266 F.3d 320, 327-29 (4th Cir. 2001) (adopting the reasonably foreseeable harm test), *cert. denied*, 536 U.S. 922 (2002); United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000) (adopting a reasonably foreseeable harm test); *deVegter*, 198 F.3d at 1328-30 (adopting a reasonably foreseeable harm test); United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 973-74 (D.C. Cir. 1998) (adopting a reasonably foreseeable harm test); United States v. Jordan, 112 F.3d 14, 19 (1st Cir. 1997) (requiring the government to prove some articulable harm to the victim or some intended gain to the defendant).

104. The Second Circuit commented that "the [intangible rights] doctrine grew in an 'uneven' way, case-by-case and circuit-by-circuit; and court after court warned of the prosecutorial abuse." *Handakas*, 286 F.3d at 102; *see* Behrens, *supra* note 7, at 525 (calling for more uniformity among the courts).

105. 266 F.3d at 327-29.

106. *Id.*

test and the materiality test.[107] The reasonably foreseeable harm test requires the government to prove "'that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.'"[108] The materiality test requires the government to show that the employee "possessed a fraudulent intent and that the misrepresentation at issue was material."[109]

Various courts have simultaneously employed these, and other, approaches to analyzing private sector mail fraud cases.[110] These courts consistently frame the analyses in light of these supposedly divergent approaches.[111] At times, the First Circuit has required the government to prove that the deprivation of honest services either resulted in some articulable harm to the victim or was intended for some gainful use to the defendant.[112] In another "test," the court asks "whether the receipt of a side payment, or the failure to disclose a conflict, necessarily results in a deprivation of honest services."[113] The court answered that "if the defendant employee has performed the same services . . . that a totally honest employee would have provided, there has been no deprivation of honest services."[114] Another approach, unique to the Fifth Circuit, was set forth in *United States v.*

107. *Id.*

108. *Id.* at 327 (quoting United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997)). This test has been adopted by other circuits, in their quest for bright line limits on the reach of § 1346. *See, e.g., id.* at 327-29; *Martin*, 228 F.3d at 17; *deVegter*, 198 F.3d at 1328-31; *Sun-Diamond Growers*, 138 F.3d at 973-74; *Frost*, 125 F.3d at 368-69; United States v. Jain, 93 F.3d 436, 441-42 (8th Cir. 1996).

109. *Vinyard*, 266 F.3d at 327. The court defined materiality as "'any misrepresentation that has the natural tendency to influence or is capable of influencing' the employer to change his behavior." *Id.* at 328 (internal citations and quotations omitted). The Restatement (Second) of Torts instructs that a matter is material if:

> a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.

Restatement (Second) of Torts § 538.

The Second, Fifth, and Tenth Circuits adopted the materiality test. *See, e.g., Rybicki II*, 2003 WL 23018917, at *15; United States v. Cochran, 109 F.3d 660, 665 (10th Cir. 1997); United States v. Gray, 96 F.3d 769, 774-75 (5th Cir. 1996).

110. *See supra* note 103.

111. *See supra* note 103.

112. *See* United States v. Jordan, 112 F.3d 14, 19 (1st Cir. 1997); United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997). It should be noted that *Czubinski* was a public sector case.

113. Coffee, *supra* note 37, at 451.

114. *Id.* at 452.

Brumley,[115] where the court held that there must be an underlying violation of state law to justify a mail fraud prosecution.[116]

The Supreme Court weighed in once more on the subject of intangible rights in *Neder v. United States*.[117] The Court directly addressed the question of whether materiality is an element of the federal mail, wire, and bank fraud statutes.[118] Because both at the time of the mail fraud statute's original enactment and the later enactment of the wire fraud statute, "fraud" required a "misrepresentation or concealment of *material* fact,"[119] Congress presumably intended to incorporate that meaning.[120] The Court held, therefore, that "materiality of falsehood is an element of the federal . . . fraud statutes."[121] Subsequently, courts continued to adopt the reasonably foreseeable harm test, indicating that the materiality standard imposed a minimum limit on the reach of mail fraud, but not an exhaustive one.

B. *The Second Circuit:* Handakas *and* Rybicki

These seemingly divergent approaches to determining the scope of honest services mail fraud in the private sector have collided in the Second Circuit in a pair of decisions,[122] *United States v. Handakas*[123] and *United States v. Rybicki*,[124] which highlight the problems in the judiciary's quest for a bright line test. The Second Circuit's 2-1 decision in *Handakas* held, for the first time anywhere, that § 1346 was unconstitutionally vague as applied.[125] Defendant Handakas was convicted of, inter alia, various counts of mail fraud for failing to pay the prevailing rate of wages to his employees as required by both state law, and by the terms of a series of construction contracts that

115. 116 F.3d 728 (5th Cir. 1997).

116. *Brumley* was a public sector case, and its application to the private sector is unclear, especially because the court left open the question of whether the underlying breach had to be a violation of state criminal law. The Fifth Circuit did not reach the question, but the distinction is critical. *See* Coffee, *supra* note 37, at 452-54. As John Coffee Jr. pointed out, a limitation to state criminal law violations would "emasculate" § 1346. *Id.* at 452. If § 1346 is read, however, "to recognize the violation of . . . [a] common law norm . . . , then the . . . statutes would continue to reach most private fiduciary breaches." *Id.* at 452-53.

117. 527 U.S. 1 (1999).

118. *Id.* at 7.

119. *Id.* at 22.

120. *Id.* at 23.

121. *Id.* at 25.

122. *Handakas*, 286 F.3d 92 (2002), and *Rybicki I*, 287 F.3d 257 (2000), have been trumpeted as "perhaps the two most significant honest services cases in the Second Circuit since § 1346 was enacted 14 years ago." Richard M. Strassberg & Roberto M. Braceras, *Circuit Court Grapples with "Honest Services" Fraud* (September 2003), *at* http://articles.corporate.findlaw.com/articles/file/00338/008596.

123. 286 F.3d at 92.

124. 287 F.3d at 257.

125. *Handakas*, 286 F.3d at 112.

Handakas's company had entered into with the New York City School Construction Authority ("SCA").[126] The court concluded that by falsifying his payroll records, Handakas deprived SCA of its right to his honest services.[127]

On appeal, the Second Circuit expressed serious concern about the amorphous nature of the term "honest services" and indicated that were it not bound by precedent, the court would "likely find [the honest services language of § 1346] so vague as to be unconstitutional on its face."[128] The court distinguished *Handakas* from prior honest services cases in the Second Circuit[129] because here, the defendant's breaches would not be enforceable by an action in tort.[130] Rather, the court found "no principled distinction between the duties breached by Handakas and the garden-variety contractual duties usually collected under the rubric of 'representations and warranties.'"[131] This was a

126. *Id.* at 96.

127. *Id.*

128. *Id.* at 104 (arguing that the plain meaning of § 1346's honest services language "simply provides no clue to the public or the courts as to what conduct is prohibited under the statute").

129. The two major cases in the Second Circuit prior to *Handakas* were *United States v. Middlemiss*, 217 F.3d 112 (2d Cir. 2000), and *United States v. Sancho*, 157 F.3d 918 (2d Cir. 1998), *overruled by Rybicki II*, No. 00-1043, 2003 WL 23018917 (2d Cir. Dec. 29, 2003). In *Sancho*, a construction company ("TCC") contacted Sancho, who claimed to be a real estate developer. 157 F.3d at 919. Tishman, the President of TCC, expressed interest in being the construction manager for Sancho's project. *Id.* Sancho offered TCC the job, and they engaged in extensive contract negotiations. *Id.* During these negotiations, the FBI approached Tishman and informed him that they were investigating Sancho in an unrelated matter, and they set up an undercover agent posing as a financial consultant hired by TCC to perform due diligence. *Id.* At their first meeting, Sancho proposed that TCC provide a $500 million letter of credit that Sancho would place in an investment program operated by a company called Equidev. *Id.* The agent investigated Equidev and reported back to Sancho that Equidev was a fraud. The undercover agent further advised that he would conceal this from TCC and advise it to proceed if Sancho paid him $1.25 million. *Id.* Sancho agreed, devised a scheme to conceal the payments, and then challenged his honest services mail fraud conviction on the grounds that neither he nor the agent had a genuine fiduciary relationship with TCC. *Id.* at 919-20. The court rejected this claim, holding that a genuine fiduciary relationship was not required. *Id.* at 920-21. The *Handakas* court noted that the cases relied upon in the *Sancho* decision all involved a duty of disclosure enforceable in tort. *Handakas*, 286 F.3d at 106.

A similar duty of disclosure was the basis for the Middlemiss's mail fraud conviction, where the defendant had deprived his employer of "all the services that a totally faithful employee would have provided." *Middlemiss*, 217 F.3d at 120. There, the defendant also acted contrary to the best interest of his employer when a company seeking a food-concession license at the offices of a public authority conveyed a secret corporate interest to the defendant. *Id.* at 115-16, 120. The court, in *Handakas*, read the *Sancho* and *Middlemiss* decisions together as standing for the proposition that "a scheme to harm another by the breach of a duty enforceable by an action in tort may support a conviction for a scheme to defraud another of 'honest services.'" *Handakas*, 286 F.3d at 106.

130. *Handakas*, 286 F.3d at 106.

131. *Id.* at 106-07.

dispositive distinction for the court, and it was this limit that had an immediate impact on the scope of future § 1346 decisions.[132]

In *Rybicki I*, a decision issued less then five weeks after *Handakas*, a different panel of the Second Circuit defined the scope of conduct, in light of *Handakas*, that would justify a conviction under § 1346.[133] The court acknowledged and purported to accept the holding in *Handakas*,[134] but refused to find § 1346 unconstitutional as applied to the defendants in the case before them, apparently because the conduct in *Rybicki I*[135] involved "the breach of a duty owed by an employee or agent to his employer or principal that was enforceable by an action at tort."[136] The Court did, however, reinforce many of the same concerns that the *Handakas* panel expressed about the vagueness of § 1346.[137] After analyzing the different approaches, such as the materiality and reasonably foreseeable harm tests, that other circuits have taken to limit the honest services doctrine, the Second Circuit held that:

> the elements necessary to establish the offense of honest services fraud pursuant to 18 U.S.C. § 1346 are: (1) a scheme or artifice to defraud; (2) for the purpose of depriving another of the intangible right of honest services; (3) where it is reasonably foreseeable that the scheme could cause some economic or pecuniary harm to the victim that is more than *de minimis*; and (4) use of the mails or wires in furtherance of the scheme.[138]

The Second Circuit thus concluded that this test provides the necessary limits on what is otherwise "so boundless a concept."[139]

The standards laid out in *Rybicki I*, like the "tests" that other circuits have employed, possess fundamental problems.[140] Despite the Second Circuit's contention that the *Rybicki I* standards addressed the vagueness concerns pervading the honest services doctrine, many of these concerns raised in *Handakas* remain unaddressed.[141] In fact, even more vagueness problems seem to be created by the Second Circuit's de minimis requirement.[142] The distinction between a duty

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132. Strassberg & Braceras, *supra* note 122.

133. *Id.*

134. *See Rybicki I*, 287 F.3d 257, 263-64 (2d Cir. 2002). There does, however, remain an inherent tension between the two decisions. *See* Richman & Vinegrad, *supra* note 10.

135. The defendants were personal injury lawyers who used intermediaries to funnel money to insurance adjusters to obtain more favorable settlements for their clients. The defendants and the others involved took extensive steps to conceal the payments. *Rybicki I*, 287 F.3d at 260.

136. *Id.* at 264.

137. *Id.* (noting that "the potential reach of § 1346 is virtually limitless").

138. *Id.* at 266.

139. *Id.* at 265.

140. *See* Strassberg & Braceras, *supra* note 122.

141. *See id.*

142. *See id.*

enforceable by tort and a duty enforceable by contract is "malleable at best."[143] Moreover, what constitutes de minimis harm will vary from circuit to circuit. In addition, both the reasonably foreseeable harm requirement and the exclusion of de minimis violations seem to be without foundation in either the language of § 1346 or the legislative history of the statute.[144]

The Second Circuit itself revisited the *Rybicki I* decision in an *in banc* hearing to determine whether § 1346 was unconstitutionally

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143. *Id.*; *see also* Brief of the United States at 53-54, *Rybicki II*, No. 00-1043, 2003 WL 23018917 (2d Cir. Dec. 29, 2003) (*in banc*) [hereinafter Government's Brief]. The tort-contract distinction is an unprecedented one, and the Government properly questioned the wisdom of such a distinction and discussed why such a distinction is unnecessary to prevent the misuse of § 1346. *See id.* The distinction is also arbitrary. *See id.* An employee breaching a contract that expressly prohibited him from profiting from his discretionary decisions and required him to disclose such interests could not be prosecuted, whereas an employee without such a contract could be. *Id.* The government then proposed a more logical distinction—excluding "breaches of arms-length contracts that do not create fiduciary or agency relationships." *Id.* at 54. This limit would prohibit prosecution for ordinary breaches of commercial contracts without excluding cases involving fiduciary or agency relationships only because they arise from a contract. *Id.* Although this Note does not endorse any one bright line rule, the same effect is achieved by this Note's ultimate proposal. *See infra* Part III.

144. *See* Government's Brief at 54, *Rybicki II* (No. 00-1043); *see also infra* Part III.D. and accompanying text (discussing legislative history of § 1346). The Second Circuit reheard *Rybicki in banc*, and in the government's brief for that hearing, the government specifically questioned the "wisdom or utility of the 'more than *de minimis*' requirement." Government's Brief at 51, *Rybicki II* (No. 00-1043). Suggesting this requirement would create more uncertainty in the future, the government noted that there is no value threshold for § 1341 or § 1343, only a requirement that the jurisdictional predicates be met. *Id.* The government directly addressed the panel's conclusion that the de minimis requirement was necessary. *Id.* In justifying the de minimis requirement, the panel discussed a hypothetical case that the court sought to exclude from the purview of § 1346, the instance where an employee violated a company policy by giving her employer's telephone access code to a customer to make a long distance phone call. *Rybicki I*, 287 F.3d at 264. The government pointed out that a de minimis exception is "neither necessary nor sufficient" to prevent prosecution in that case. Government's Brief at 52, *Rybicki II* (No. 00-1043). Prosecution could be pursued as a traditional money or property wire fraud case, since the employer would be deprived of the cost of the call. *Id.* More importantly, however, the government noted that prosecutors are unlikely to waste resources by pursuing such a trivial offense, despite legal authority to do so. *Id.* In a footnote, the government supported this assertion by noting that although § 1346 was enacted almost fourteen years ago, the panel did not cite to one prosecution for conduct where the risk of harm was de minimis. Government Brief at 52-53 & n.2, *Rybicki II* (No. 00-1043).

Although this Note focuses on the problems of honest services prosecutions in the private sector, there is an important public sector implication of *Rybicki I* worth noting. One consequence of imposing a reasonably foreseeable harm requirement is that public corruption cases may be placed outside the reach of § 1346. *See* Strassberg & Braceras, *supra* note 122. This is because in many of the public corruption cases the public officials that improperly benefit from their positions do so without the "state victim" being foreseeably exposed to economic harm. *See id.* In light of the fact that the honest services doctrine was originally implemented to prosecute just this behavior, it remains to be seen how these types of cases will fare under *Rybicki I*'s analysis. *Id.*

vague.[145] The *in banc* panel, in a 7-4 vote, concluded that § 1346 is not unconstitutionally vague.[146] Notably, the *in banc* panel addressed their prior holding in *Handakas*, determined that there was no reason to reach the constitutional question in that case, and overruled the unnecessary constitutional ruling without review of the merits.[147]

The *in banc* panel also addressed and rejected the adoption of the reasonable foreseeability test and de minimis harm requirement set forth in *Rybicki I*, preferring the materiality test[148] adopted by the Fifth, Tenth, and Eighth Circuits.[149] In justifying this choice, the *in banc* court wrote that:

> it has the virtue of arising out of fundamental principles of the law of fraud: A *material* misrepresentation is an element of the crime. The 'non-*de minimis* reasonably foreseeable harm' test, by contrast,

145. *See Rybicki II*, 2003 WL 23018917, at *1. The original panel considered and rejected the defendant's argument that § 1346 was unconstitutionally vague as applied, but the court could not consider the facial unconstitutionality because the defendant's challenge was not based upon an impact on their First Amendment rights. *Id.* at *2. Since this is the only basis upon which such a challenge can be considered under Second Circuit case law, the circuit court granted the defendant's petition for rehearing *in banc* on this issue on July 3, 2002. *Id.* at *2-*3.

146. *Id.* at *4-*5, *12-*13. The court held that 18 U.S.C. § 1346, "together with section 1341 or section 1343, provides explicit standards for those who seek to apply the statute, including federal prosecutors and courts, at least in the context of private-sector bribery cases such as this one," *id.* at *5, and that "the statute is not unconstitutional on its face," *id.* at *13.

147. *Id.* In reaching this conclusion, the *in banc* panel found that:

> [I]t is clear that the defendant's conduct in that case was not within the scope of behavior proscribed by section 1346: Handakas was not an employee of a private entity purporting to act for and in the interests of his or her employer; neither was he rendering services in which the relationship between him and the person to whom the service was rendered gave rise to a duty of loyalty comparable to that owed by employees to employers. His actions therefore did not come within the reach of section 1346.... Because we conclude that Handakas's conduct was not within the scope of section 1346, we have no occasion to conclude, as the *Handakas* panel did, that "the intangible right to honest services" covered by section 1346 can *never* arise in that context.

Id. (internal citations omitted). Judge Reena Raggi, in a special concurrence, addressed the majority's *Handakas* analysis. *Id.* at *22-*23 (Raggi, J., concurring). Judge Raggi would have defined the right to honest services more broadly as any "legally enforceable claim to have another person provide labor, skill, or advice without fraud or deception," *id.* at *21, and further questioned whether there was "any principled reason to distinguish between an employee and an arms-length contractor when they engage in identical fraud schemes with the specific intent to deprive a victim of services whose value depends upon honest performance," *id.* at *23 (Raggi, J., concurring); *see also* Richman & Vinegrad, *supra* note 10.

148. Under the materiality test, "the trier of fact determines whether the misrepresentation 'has the natural tendency to influence or is capable of influencing the employer to change his behavior.'" *Id.* at *14 (quoting United States v. Vinyard, 266 F.3d 320, 328 (4th Cir. 2001)).

149. *Id.* at *14.

> seems to be something of an *ipse dixit* designed simply to limit the scope of section 1346.[150]

The *in banc* panel also expected the materiality test to cover cases intended to be covered by the reasonably foreseeable harm test.[151] This view of the materiality test also purportedly captures the de minimis requirement in a somewhat broader way: "It may capture some cases of non-economic, yet serious, harm in the private sphere."[152]

The implications of *Rybicki II* remain to be seen, but commentators argue that the decision is "unlikely to open the proverbial floodgates to criminal prosecution of trivial deceits or fiduciary breaches."[153] The decision does, however, contribute to the "potpourri of seemingly irreconcilable precedents,"[154] that create confusion and disagreement about the scope of the mail fraud intangible rights doctrine in the private sector.

C. *A Survey of the Circuits' Analytical Framework*

Courts continue to struggle with different bright line tests, illustrated in cases like *Rybicki II*, instead of focusing on the broader limitations they already impose in different types of mail fraud cases, because their analyses are often not sensitive to the facts of each case. For example, the Fourth Circuit's framework in *United States v. Vinyard*[155] illustrates such an approach. The court outlined the scope of § 1346 as a circuit split and addressed two separate tests, the materiality test and the reasonably foreseeable harm test.[156] In outlining the reasonably foreseeable harm test, the court relied on five cases.[157] Each of the five cases involved a failure to disclose where a duty to disclose arises.[158] In outlining the materiality test, the court

150. *Id.* at *15 (internal citations omitted).

151. *Id.*

152. *Id.* It is interesting to note that while the panel claims, "We doubt that the failure to disclose to an employer a *de minimis* 'bribe'—the free telephone call, luncheon invitation, or modest Christmas present—is a *material* misrepresentation in the sense in which we and other Circuits use the term," *id.* at *15, the panel offered no explanation or justification in the legislative history that Congress intended to exclude such bribes.

153. *See* Richman & Vinegrad, *supra* note 10.

154. *Id.*

155. 266 F.3d 320, 327 (4th Cir. 2001).

156. *Id.*

157. *Id.* (citing United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997), United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000), United States v. deVegter, 198 F.3d 1324, 1328-30 (11th Cir. 1999), United States v. Sun-Diamond Growers of Cal., 138 F.3d 961, 973-74 (D.C. Cir. 1998), United States v. Lemire, 720 F.2d 1327, 1337 (D.C. Cir. 1983)).

158. *See Martin*, 228 F.3d at 17; *deVegter*, 198 F.3d at 1328-30; *Sun-Diamond Growers*, 138 F.3d at 973-74; *Frost*, 125 F.3d at 368; *Lemire*, 720 F.2d at 1337.

cited three cases.[159] Although two of these involved a failure to disclose where a duty to disclose arises, both did have some significant element of affirmative misrepresentation[160] and one involved only an affirmative, material misrepresentation.[161] By failing to recognize that the different tests were being applied to different types of cases, the Fourth Circuit, like others,[162] has unnecessarily created an impression of this circuit split[163] and the false sense of need for one bright line test.

In analyzing pre-*McNally* case law, the *in banc* panel in *Rybicki II* utilized a framework similar to the one being proposed in this Note.[164] There, cases were divided into one of two categories.[165] In "The Bribery or Kickback Cases," a defendant "who ha[d] or [sought] some sort of business relationship or transaction with the victim secretly [paid] the victim's employee (or causes such a payment to be made) in exchange for favored treatment."[166] In "The Self Dealing Cases" the "defendant typically cause[d] his or her employer to do business with a corporation or other enterprise in which the defendant ha[d] a secret interest, undisclosed to the employer."[167] The primary difference between the Second Circuit's approach and this Note's analysis centers on dividing the paradigmatic cases by looking at the duty owed by the defendant and the specific way in which the defendant did (or did not) breach the duty owed. The divisions in *Rybicki II* draw a somewhat more superficial distinction based only on the nature of the deceitful action.[168]

Structuring its analysis of pre-*McNally* case law by recognizing that there are two distinct types of honest services cases in the private sector was a step in the right direction. Although the *Rybicki II in banc* panel stopped short of applying a similar framework to its analysis of cases post- § 1346, and ultimately adopted one of the very bright line tests that is critiqued here,[169] its framework is an optimistic sign, and tacit recognition, at least, that similar categorical divisions are important to any honest services analysis. As demonstrated above, the divergent circuit approaches have done little to quell

159. *Vinyard*, 266 F.3d at 327 (citing United States v. Cochran, 109 F.3d 660, 667 (10th Cir. 1997), United States v. Pennington, 168 F.3d 1060, 1065 (8th Cir. 1999), United States v. Gray, 96 F.3d 769, 775 (5th Cir. 1996)).

160. *See Pennington*, 168 F.3d at 1065; *Gray*, 96 F.3d at 775.

161. *Cochran*, 109 F.3d at 667.

162. *See, e.g*, *Rybicki I*, 287 F.3d 257, 264 (2d Cir. 2002).

163. See *supra* Part II.A.-B. for a more detailed examination of this circuit split.

164. *Rybicki II*, No. 00-1043, 2003 WL 23018917, at *9-*11 (2d Cir. Dec. 29, 2003) (*in banc*).

165. *Id.* at *9.

166. *Id.*

167. *Id.* at *10.

168. *See id.* at *23 (Raggi, J., concurring) (noting that the "critical factor is the type of service at issue, not the relationship of the parties").

169. *See id.* at *14-*15; *see also supra* note 148 and accompanying text.

criticisms of the reach of the intangible rights doctrine in the private sector. Rather, they create more confusion, while providing the illusion of clearly marked limits and well-defined boundaries.

III. COURTS IMPLICITLY LIMIT THE HONEST SERVICES DOCTRINE AND SHOULD ABANDON THEIR SEARCH FOR A BRIGHT LINE TEST

A. *An Overview*

The circuit courts' search for a bright line test undermines the way in which consideration of certain factors allows courts and prosecutors to effectively limit mail fraud. An approach explicitly rooted in a group of commonly used factors would obviate the need for recourse to the diverse and misleading tests that dominate the mail fraud opinions. The Second Circuit's attempts to limit the reach of § 1346 highlight the problems with the way the courts have been structuring their analyses. By comparing and contrasting these bright line rules to try to find the "best" one, courts ignore the reality of these cases. Thus, Part III argues that the courts, despite their conception of what specific test they apply, are all considering the same factors when they decide whether a particular breach constitutes a deprivation of a right to honest services, and that this deliberative, case-by-case approach is superior to one bright line test.

An examination of relevant case law reveals that the type of case involved determines how courts weigh various factors. These factors themselves limit the scope of § 1346, while preserving the malleability of the statute and providing prosecutors and judges the discretion necessary to prevent prosecution of everyday breaches of contract or relational duties that seem to trouble the courts. With this reality exposed, courts, prosecutors, defendants and the public are best served by abandoning the search, at least by the judiciary, for one bright line test.

Specifically, depending on the facts of each case, courts consider: (1) whether there was a fiduciary (or principal-agent) relationship;[170] (2) whether a failure to disclose was material;[171] (3) whether there was an affirmative misrepresentation;[172] (4) whether the affirmative misrepresentation was material;[173] (5) whether the defendant personally gained anything from the scheme;[174] and (6) whether economic harm was reasonably foreseeable.[175]

170. *See, e.g.*, United States v. Hausmann, 345 F.3d 952, 958 (7th Cir. 2003).

171. *See, e.g.*, *Rybicki II*, No. 00-1043, 2003 WL 23018917, at *15 (2d Cir. Dec. 29, 2003).

172. *See, e.g.*, United States v. Ervasti, 201 F.3d 1029, 1038 (8th Cir. 2000).

173. *See, e.g.*, *id.*

174. *See, e.g.*, United States v. Serafino, 281 F.3d 327, 331 (1st Cir. 2002).

175. *See, e.g.*, United States v. Martin, 228 F.3d 1, 17 (1st Cir. 2000); *see also supra* note 108.

In private sector honest fraud prosecutions—or at least those reported cases in which judicial analysis has been developed—there are two paradigmatic types of cases, each requiring a different analysis. An effective analysis of the scope of § 1346 has to begin by identifying these paradigms in order to see the effect of the various factors in different types of cases.[176]

In the first type of case, which is most often prosecuted under the intangible rights theory in the private sector, there is a kickback scheme and a failure to disclose in a relationship in which a duty to disclose arises.[177] In the second type of case, there is a kickback scheme and an affirmative misrepresentation.[178] Of course, these categories are not absolute, and often overlap.

B. *Category One Cases*

This section examines the first type of paradigmatic mail and wire fraud cases and the factors that courts consider in such cases. In the

176. Section 1346 has been accused of being applied "to a broad range of fact patterns having relatively little in common." Coffee, *Metastasis*, *supra* note 42, at 1. By examining the "paradigmatic cases," this Note hopes to show that the use of § 1346 is not nearly as inappropriate, subjective, or vague as courts and commentators suggest. The cases relied upon are solely those decided post-*McNally* that applied § 1346. There are many cases decided before *McNally* and those decided after, but which refused to apply § 1346 ex post facto, could also be used to illustrate these categories.

177. *See, e.g*, United States v. Hausmann, 345 F.3d 952 (7th Cir. 2003) (upholding conviction where a lawyer referred personal injury clients to a chiropractor in return for payments from that chiropractor); *Serafino*, 281 F.3d at 327 (upholding conviction where an employee instructed employer's vendors to inflate various charges and divert the surplus funds); United States v. Caldwell, 302 F.3d 399 (5th Cir. 2002) (upholding conviction where a CEO failed to disclose material information to the Board of Directors); United States v. Montani, 204 F.3d 761 (7th Cir. 2000) (upholding conviction where defendant-employee made $300,000 from a kickback scheme he failed to disclose); United States v. Pennington, 168 F.3d 1060 (8th Cir. 1999) (upholding conviction where a corporate officer failed to disclose kickbacks he was receiving from a hired consultant); United States v. Jordan, 112 F.3d 14 (1st Cir. 1997) (upholding conviction where defendant-employee charged employer-company for services by another company he owned and violated company policy against undisclosed outside business); United States v. Rosen, 130 F.3d 5 (1st Cir. 1997) (upholding conviction where the defendant failed to disclose an employment relationship designed to deprive a trustee of certain profits to be redirected towards himself). *Contra* United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997) (reversing conviction based on defendant's unauthorized accessing of confidential tax information where there was no showing that the defendant intended to disclose or otherwise use the confidential information for personal gain).

178. *See* United States v. Piggie, 316 F.3d 789 (8th Cir. 2003) (where a defendant paid athletes to play for his team and the athletes made false statements to their respective universities); United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000) (where defendants diverted funds from their client's impounded tax funds while indicating to the clients these monies had been properly forwarded to the IRS); *see also* United States v. Sancho, 157 F.3d 918 (2d Cir. 1998); United States v. Dinome, 86 F.3d 277 (2d Cir. 1996) (involving affirmative misrepresentations to obtain a loan); *supra* note 129 and accompanying text.

first category of cases ("Category One cases"), a defendant engages in or devises a kickback scheme and fails to disclose the existence of that scheme despite a duty to disclose, because the defendant has a fiduciary duty of loyalty to another. These types of relationships include, but are not limited to: employer-employee; lawyer-client; doctor-patient; and corporation-corporate officer.

In these types of cases, courts focus on a particular subset of factors. First, the courts consider whether there was a relationship that gave rise to a duty to disclose.[179] Next, courts look at whether the information that was not disclosed was material.[180] Finally, the courts consider whether the defendant personally gained, or potentially stood to gain, anything from the scheme.[181] There need not have been an affirmative misrepresentation, and whether or not economic harm was reasonably foreseeable to the victim is irrelevant,[182] because this category of cases deals with secret self-dealing and misuse of positions of trust and loyalty for personal gain, cases within the core of the honest services doctrine.[183] A mere breach of a fiduciary duty or duty of loyalty may not be sufficient to sustain a mail fraud conviction under § 1346.[184] To sustain a mail fraud conviction in this line of cases, the defendant must cause or intend to cause actual harm, and this intent can be inferred from willful non-disclosure of material information by a fiduciary.[185]

An examination of cases falling within Category One reveals a consistency in courts' analyses in considering the appropriate factors. For example, the Seventh Circuit upheld a mail fraud conviction when a personal injury lawyer received kickbacks from a chiropractor to whom he referred his clients.[186] The defendant-lawyer referred his

179. *See Hausmann*, 345 F.3d at 952; *Serafino*, 281 F.3d at 327; *Montani*, 204 F.3d at 761; *Pennington*, 168 F.3d at 1060.

180. *See Hausmann*, 345 F.3d at 952; *Serafino*, 281 F.3d at 327; *Montani*, 204 F.3d at 761; *Pennington*, 168 F.3d at 1060.

181. *See Hausmann*, 345 F.3d at 952; *Serafino*, 281 F.3d at 327; *Montani*, 204 F.3d at 761; *Pennington*, 168 F.3d at 1060.

182. Even if no economic harm is reasonably foreseeable, when a person misuses a fiduciary duty owed to another for personal gain, and does not disclose the scheme, the fact of the non-disclosure is material and the victim necessarily loses his/her right to honest services. *See Hausmann*, 345 F.3d at 958. This might not be the case where a fiduciary duty is breached, but the defendant does not gain anything from that breach, because the intent element will not be satisfied.

183. *See id.* at 952; *Serafino*, 281 F.3d at 327; *Montani*, 204 F.3d at 761; *Pennington*, 168 F.3d at 1060.

184. *See, e.g.*, United States v. Vinyard, 266 F.3d 320, 326-27 (4th Cir. 2001) (noting that although the plain language of § 1346 suggests that dishonesty by any employee, standing alone is a crime, courts are reluctant to interpret the statute that broadly and hesitate to "apply [it] in a way that would expose employees to mail fraud prosecution for 'every breach of contract or every misstatement made in the course of dealing'" (internal citations omitted)); *Pennington*, 168 F.3d at 1065.

185. *Vinyard*, 266 F.3d at 326-27 (noting that in most business contexts, the intended harm is usually financial or economic harm).

186. *Hausmann*, 345 F.3d at 952, 954.

clients to the chiropractor, and, in return, the chiropractor would make payments to the defendant personally or to third parties at the defendant's direction.[187] The chiropractor was paid out of the client's portion of a settlement after the defendant-lawyer had already received his fees.[188] The defendant argued that the chiropractor's fees were competitive, that the clients received an appropriate level of care, and that the clients were not entitled to the portion of the chiropractor's fees paid back to the defendant.[189] As such, the clients suffered no harm from the scheme.[190] The court rejected both of these arguments.[191] Although the court expressed its doubts as to whether a mail fraud prosecution could be sustained under an intangible rights theory that alleges only a breach of fiduciary duty and nothing more, it held that when there is a misuse or breach of that fiduciary relationship for personal gain, the defendant has breached his duty of honest services to those to whom the duty was owed.[192]

This conclusion makes sense. The chiropractor was kicking 20 percent of his fees back to the defendant.[193] The mere fact that the clients received the same services they would have absent the kickback scheme ignores the reality that if the chiropractor was willing to perform absent that 20 percent, that is 20 percent of the fees that the clients—not the defendant-lawyer—were entitled to.[194] By considering the personal gain to the defendant, coupled with the breach of fiduciary duty, the court correctly upheld the mail fraud conviction without forcing the prosecution to prove exactly where the loss lay.

The First Circuit implicitly considered defendant non-disclosure, the duty to disclose, and personal gain to the defendant in upholding an honest services conviction in *United States v. Serafino*.[195] There, defendant-employee of Milton Bradley Company ("MBC") instructed vendors to inflate various charges on their invoices to MBC and divert the surplus funds to the defendant.[196] The defendant never disclosed this scheme to MBC, despite a company policy that required him to do so.[197] The defendant argued that he had no control over MBC's decision to do business with those vendors, and that despite the inflated value, MBC was supposedly happy with the services provided because they continued their business relationships with those

187. *Id.*
188. *Id.*
189. *Id.* at 957.
190. *Id.*
191. *Id.*
192. *Id.* at 956.
193. *Id.* at 957.
194. *Id.*
195. 281 F.3d 327 (1st Cir. 2002).
196. *Id.* at 329.
197. *Id.*

vendors.[198] Relying on the fact that the defendant had a duty to disclose the kickback scheme and failed to do so coupled with his personal gain of over $800,000, the court upheld the conviction.[199]

Similarly, other circuits have properly considered, either explicitly or implicitly, this same subset of factors in analyzing honest services convictions where there was a failure to disclose (despite the existence of a duty to disclose) and the defendant gained from that non-disclosure.[200]

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198. *See id.* at 332.

199. *See id.* at 329, 332-33.

200. The Eighth Circuit, in *United States v. Pennington*, upheld the honest services conviction of a defendant who engaged in a kickback scheme. 168 F.3d 1060 (8th Cir. 1999). The defendant had a duty to disclose his scheme and failed to do so, and personally benefited as a result of that scheme. *See id.* at 1065. There, the defendant was the President of Harvest Foods, a grocery store chain. *Id.* at 1063. He received secret payments from a consultant and food broker based on monies they received from Harvest Foods. *Id.* at 1063-64. The defendant argued that Harvest Foods actually benefited from the contracts negotiated by and services provided by the consultant and food broker. *Id.* at 1065. In rejecting this argument the court noted the defendant's fiduciary duty to Harvest Foods, and held that a reasonable jury could infer that the defendant deprived Harvest Foods of his honest services in finding the most advantageous supplier and negotiating the best contracts he could. *Id.* The court implicitly considered the tremendous financial gain to the defendant as a result of the scheme. *See id.* at 1065-66.

Another case, *United States v. Montani*, nicely highlights the application of this factor analysis structure. 204 F.3d 761 (7th Cir. 2000). There, the defendant was an employee of Sears. *Id.* at 763. As part of standard company practice, the defendant agreed to abide by the company's code of business ethics, which prohibited, inter alia, self-dealing transactions. *Id.* The defendant became the national manager of logistics and was instructed to sell off, at the best possible price, furniture that Sears could not or did not want to sell in its own stores or catalog. *Id.* at 763-64. After researching the market, the defendant concluded that the best price Sears could get would be between 7 cents and 10 cents on the dollar of the original cost to Sears. *Id.* at 764. The defendant received approval to sell the furniture at 10 cents on the dollar. *Id.* The defendant met a man named Mark Israel, who subsequently formed a company, D&M Sales, and agreed to buy the furniture at 10 percent of cost. *Id.* D&M reached an agreement to resell the furniture to another company, Brutus, for fifty cents on the dollar, and the defendant received a payment, disguised as a bogus consulting fee, for part of the profit earned on the sale to Brutus. *Id.* at 764. The defendant made over $300,000 as a result of this scheme. *Id.* at 765.

The court concluded that the evidence was sufficient to show that the defendant deprived Sears of its right to his honest services by failing to disclose the payment to them and in fact, by undertaking steps to conceal the payment. *Id.* at 769. Although Sears did not lose money in the sense that they received the supposed market price, the defendant deprived Sears of premiums he was getting through the resale scheme. *See id.* at 763-65. Moreover, this non-disclosure enabled the defendant to accrue significant profit. *Id.* at 769. Standing alone, a conviction solely based on the breach of an employee manual might not be enough. But coupled with the personal gain to the defendant, the relevant factors led, to what many agree is a just result, and well within the core of honest services cases. *See id.*

The Second Circuit case, *United States v. Walker*, also provides an interesting example of a Category One paradigm. 191 F.3d 326 (2d Cir. 1999). The defendant operated a small law firm specializing in immigration work. *Id.* at 330. An INS investigation revealed that many of the applications filed by the defendant, presumably on behalf of his clients, were substantially similar and contained

C. *Category Two Cases*

In the second category of paradigmatic cases ("Category Two cases"), consideration of another set of factors is appropriate. In cases where there is a kickback scheme and an affirmative misrepresentation, the government need not establish a fiduciary relationship, a duty to disclose information, or whether the defendant personally gained anything from the scheme.[201] Instead, the factors that courts do, and should, consider in this second type of cases are whether there was an affirmative misrepresentation, whether that misrepresentation was material (which necessarily includes an analysis of whether harm was reasonably foreseeable), and whether the scheme was intended for or did result in personal gain to the defendant. Because there is no fiduciary relationship, a non-disclosure is not sufficient, unless it amounts to an affirmative, material misrepresentation.

A good illustration of how these factors operate in Category Two cases is found in *United States v. Ervasti*.[202] There, the two defendants owned and operated Corporate Financial Services ("CFS"), a company offering payroll processing services to employers.[203] CFS received tax monies that its clients, the employers, were required by law to withhold from their employees' pay.[204] The defendants then were responsible for preparing and filing their client's tax returns and making timely payments to the IRS.[205] The defendants opened a tax account into which the impounded tax funds were deposited.[206] The defendants then improperly took funds from this account to use for operating expenses.[207] Eventually, CFS lacked adequate capital to meet its expenses and the defendants' practice of borrowing money from the tax account stretched past the date the impounded money

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fabricated information. *Id.* at 330-31. The defendant challenged his mail fraud conviction, arguing that for the most part, his clients "received the results they were seeking." *Id.* at 334. The court disagreed and determined that the defendant deprived his clients of their intangible right to his honest services because he "exacted legal fees from his clients by submitting false asylum applications on their behalf, regardless of the clients' actual intentions or legal needs" and did "not [tell] them material information, information that might have led them to walk out of the office and not pay their fee." *Id.* at 335. Thus, the court upheld the intangible rights mail fraud conviction, in light of specific factors—fiduciary relationship, non-disclosure of material information, and gain to the defendant in the form of substantial legal fees—without employing any bright line test. *See id.*

201. *See, e.g.*, United States v. Caldwell, 302 F.3d 399 (5th Cir. 2002); United States v. Ervasti, 201 F.3d 1029 (8th Cir. 2000); United States v. Gray, 96 F.3d 769 (5th Cir. 1996).

202. 201 F.3d at 1029.

203. *Id.* at 1033.

204. *Id.* at 1032-34.

205. *Id.* at 1032-33.

206. *Id.*

207. *Id.*

was due to the IRS.[208] The defendants told their clients that the money due had been timely deposited, when the money had not.[209]

The Eighth Circuit upheld the mail fraud conviction in *Ervasti*, based on an honest services theory, finding unequivocally that the government need not prove the existence of a fiduciary relationship.[210] In doing so, the court implicitly considered the affirmative misrepresentation the defendants made to their clients, that the IRS payments had been made on time.[211] This misrepresentation was a material one, as its goes to the very purpose that CFS had been hired for. Although the defendants did not personally gain from the fraud (in fact, they lost a tremendous amount of money), it was enough that the money they had been taking from the tax account was used to meet the operating expenses of CFS, thus benefiting the defendants, albeit temporarily. [212] It was also reasonably foreseeable that the clients could suffer economic harm from the defendants' misrepresentations.[213]

Some private sector honest services mail fraud cases have an element of a fiduciary relationship, but to the courts, the dispositive factors were the affirmative, material misrepresentations, and this focus brings these cases under the umbrella of Category Two.[214] For example, in *United States v. Gray*,[215] the Fifth Circuit upheld the mail and wire fraud convictions of the men's basketball coaching staff at Baylor University, among others, who devised a fraudulent scheme to establish academic eligibility for five athletes to play on the team.[216] The defendants provided five players, recruited from two-year colleges, with written coursework and answers to correspondence exams.[217] Upon reviewing the convictions, the court found that the

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208. *Id.*

209. *Id.* at 1032-34. This case is especially interesting because there was, at minimum, the existence of a duty of loyalty to the clients, suggesting it is better identified as a Category One case. The court, however, focused on the fact that § 1346 does not require proof of a fiduciary relationship, so assuming there was not one here, this case fits squarely into Category Two. There was also cognizable financial harm to the clients, resulting from IRS tax penalties. This Note focuses, however, only on the portion of the prosecution involving an honest services theory. Facts cannot be examined in a vacuum though, and it is important to recognize that the court may have had both of these factors in mind in upholding the conviction.

210. *Id.* at 1036 (noting that although the existence of a fiduciary duty can be a powerful indication that a defendant has deprived another of the right to honest services, the existence of such a relationship is not a necessary element under § 1346).

211. *See id.*

212. *See id.*

213. *Id.* at 1037.

214. *See* United States v. Easton, 54 Fed. Appx. 242 (8th Cir. 2002) (unpublished) (per curiam); United States v. Caldwell, 302 F.3d 399 (5th Cir. 2002); United States v. Gray, 96 F.3d 769 (5th Cir. 1996).

215. 96 F.3d at 769.

216. *Id.* at 772, 777.

217. *Id.* at 772.

coaches deprived Baylor of its intangible rights to their honest services.[218] The court focused on the materiality of the non-disclosure of the scheme, as well as on the fact that the scheme went beyond non-disclosure to an employer; the defendants made affirmative misrepresentations to the universities.[219] Finally, the court rejected the defendants' contention that their scheme did not, and was not intended to, result in either gain to them or harm to Baylor.[220] In fact, Baylor's success as a basketball team would have benefited the coaches; one of the defendant coaches actually received his coaching position as a direct result of his recruitment efforts.[221] Thus, the affirmative, material misrepresentations, coupled with the coaches' assured benefit from a successful scheme, satisfied the court that honest services convictions here were appropriate.

Another case, *United States v. Caldwell*,[222] contains elements of both Category One and Category Two cases.[223] There, the defendant failed to disclose material information and made material misrepresentations intended for his own benefit.[224] The Court concluded that the several instances of omissions and false representations "involving significant sums of money and important

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218. *Id.* at 774.

219. *See, id.* at 774-76. To some extent, the court also discussed the fact that the coaches were employees who owed a fiduciary duty to the employer-University. *Id.* Because, however, the non-disclosures referred to by the court were really affirmative misrepresentations, this case is more appropriately labeled a Category Two case.

220. *Id.* at 776 n.10.

221. *Id.*

222. United States v. Caldwell, 302 F.3d 399 (5th Cir. 2002).

223. Sometimes cases involving fiduciary duties are more effectively considered solely under Category Two because they involve affirmative misrepresentations that make the existence of the fiduciary duty almost irrelevant to the analysis; the misrepresentation obviates the need to apply a failure to disclose analysis. *United States v. Easton*, 54 Fed. Appx. 242 (8th Cir. 2002) (unpublished) (per curium), presents such an example. There, the defendant and another Gateway employee established a partnership in their wives' maiden names, to circumvent Gateway's policy not to do business with its employees. *Id.* at 243. The defendant falsely claimed shipments had been received from this fake partnership, and Gateway paid those claims. *Id.* The defendant then paid its vendor and the prepaid materials were sent to Gateway, resulting in almost $220,000 to the defendant and his colleagues. *Id.* The court upheld the conviction without requiring the government to prove that Gateway suffered any harm, on the basis that the misrepresentations and personal gain were sufficient to establish intent to defraud. *See id.*

224. *See Caldwell*, 302 F.3d at 401-05. The defendant played a large role in advocating the passage of the Venture Capital Act. *Id.* at 402. In advocating the Act's passage, the defendant represented himself as being associated with Capital Strategies Group ("CSG"), a company he formed and wholly owned. *Id.* at 402. The Venture Capital Act formed three entities, including Magnolia Venture Capital Corp. ("Magnolia Venture"), in which the defendant sat on the board of directors, and held the position of chairman. *Id.* The defendant made various misrepresentations to the board while urging them to approve contracts between CSG and Magnolia Venture, as well as making certain unauthorized assurances to investors. *Id.* at 402-05. Internal investigation concluded that the defendant had acted in the best interest of CSG, not Magnolia Venture. *Id.* at 405.

business decisions" warranted an inference of materiality, especially in light of the personal gain the defendant's scheme intended.[225] The court here did not rely on any one test. Rather, it considered factors such as fiduciary relationship, non-disclosure, materiality, self-dealing, and affirmative misrepresentation to conclude that the defendant's honest services conviction was proper.

D. *Policy Considerations*

This section argues that the factors that courts consider[226] in each category of cases properly reflect the public policy goals of § 1346. For purposes of judicial interpretation, one of the leading policy concerns must be congressional intent. While § 1346 was being debated in Congress, there was little resistance to including private corruption within the statute's scope.[227] This debate indicates that kickback cases in the private sector are exactly the type of case that Congress intended the statute to cover.[228]

At one time, there was a proposal for two separate honest services statutes; one dealing with the private sector[229] and one dealing with the public sector.[230] Senator Biden's comments, with respect to the private sector proposal, are most instructive:

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225. *See, id.* at 409-10. These omissions and misrepresentations included (1) defendant's promise to an investor that he could withdraw part of his investment to satisfy his tax liability, (2) defendant's payment to himself of $225,000 drawn from the Magnolia fund, (3) his direction to pay a third party a certain percentage of Magnolia Venture's profits each month, (4) defendant's misrepresentation to the board that he only co-owned CSG, (5) defendant's false representation that the governing board approved of his relationship with CSG and Magnolia Venture, (6) defendant's misrepresentation that CSG was the only firm Magnolia Venture could hire for a certain purpose, and (7) defendant's misrepresentation that CSG incurred $14,000 in expenses that it did not in fact incur. *Id.*

226. *See supra* Part III.A. for a discussion of these factors.

227. Government's Brief at 40, *Rybicki II*, No. 00-1043, 2003 WL 23018917 (2d Cir. Dec. 29, 2003).

228. *See infra* notes 225-31 and accompanying text.

229. That statute would have defined "scheme or artifice to defraud" for the purposes of the mail and wire fraud statutes as including:

> a scheme or artifice to deprive an organization of the intangible right of honest services in which the defendant received or attempted to receive, for the defendant or another person, anything of value or in which the defendant intended or contemplated loss or harm to the organization.

134 Cong. Rec. S12581-04 (daily ed. Sept. 15 1988), 1988 WL 185718, at § 3.

230. The bill addressing only public sector corruption, the "Mail Fraud Amendment Act of 1987," was introduced by Representative Mfume on July 29, 1987. That bill provided, as applied to § 1341 and § 1343:

> the term "defraud" to include the defrauding of the citizens of a body politic of their right to the conscientious, loyal, faithful, and unbiased performance of official duties by a public official thereof; or of their right to have the public business conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct, and fraud.

133 Cong. Rec H 6798 (July 29, 1987).

> [T]he codification of the intangible rights doctrine is intended to allow the government to prosecute persons who violate the trust placed in them by their employers or some other organization and do so in order to get a bribe or kickback.... This is intended to permit prosecution of the kinds of cases that [were] approved by the appellate courts before McNally. It is not intended to criminalize mere breaches of fiduciary duty, or private confidence, or violations [of] ordinary rules of the workplace. Indeed, although the committee is aware of no such cases having been prosecuted before McNally under the intangible rights doctrine, in response to academic comment that such a result might someday occur, the codification of pre-McNally law in the bill is specifically limited to situations where the defendant is acting to obtain a thing of value, *or* to harm the organization. This provision will foreclose the abuse of the statute to prosecute trivial, noncriminal matters.[231]

Senator Biden added that "this is a bipartisan bill that has the unanimous support of the members of the Judiciary Committee,"[232] and every speaker but one advocated passage of the legislation.[233] Although this proposal was eventually redacted down to what is now the language of § 1346, no formal explanation for this redaction is contained in the record.[234] Representative Conyers expressed that "loss of property is not what is to be feared most. Abuse of trust in an interdependent society—whether of governmental character or otherwise—is far more threatening to our most basic and important values."[235] This legislative history is probative, however, of the fact that the courts are being consistent with legislative intent when they evaluate § 1346 cases by considering the factors discussed above.

Another important policy consideration is balancing the flexibility[236] of § 1346 with the need to prevent over-criminalization. Maintaining the flexibility of the mail and wire fraud statutes is important because it serves as a way for prosecutors to punish conduct that could not readily be charged under other statutes.[237] The mail fraud statute

231. 134 Cong. Rec. S16315-01, 1988 WL 177972 (Oct. 14, 1988) (emphasis added) (citations omitted).

232. *Id.*

233. *Id.*

234. Government's Brief at 42, *Rybicki II* (No. 00-1043).

235. H.R. 3089, 100th Cong. (1st Sess. 1987), § 2, *reprinted in* 133 Cong. Rec. E3240-02 (Aug. 4, 1987).

236. *See* Williams, *supra* note 23, at 137 n.4 (1990) (collecting cases demonstrating the wide range of activities that have been prosecuted by the mail fraud statute).

237. Mogin, *supra* note 19, at 13; *see also* John C. Coffee Jr. & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes, in* White Collar Crime: Business and Regulatory Offenses § 9.01 at 9-2 (Otto G. Obermaier & Robert G. Morvillo eds., 1990) (Federal prosecutors have long followed the maxim, "[w]hen in doubt, charge mail fraud."); Behrens, *supra* note 7, at 526 n.266 (citing Chief Justice Burger's dissent in *United States v. Maze*, 414 U.S. 395, 407 (1974), which argued that the scope of the mail fraud statute must be kept broad and "remain

serves as "a stopgap device" to deal on a temporary basis with the new phenomenon, "until particularized legislation can be developed and passed to deal directly with the evil."[238] Chief Justice Warren Burger endorsed it as a "first line of defense" in many new forms of private sector fraud.[239] Moreover, this malleability releases federal prosecutors from the often-technical jurisdictional requirements found in other federal fraud statutes.[240] Bright line rules, like those suggested in *Rybicki I*, threaten the very flexibility that the mail fraud statute is lauded for.[241]

Courts must exercise caution, however, so as not to over-criminalize behavior.[242] Over-criminalization refers to the excessive reliance on a criminal sanction, especially with malum prohibitum[243] types of crimes.[244] There must be a limit at which the law can legitimately punish behavior, lest we live in an over-regulated society,[245] where the law intrudes to places that are "not the law's business."[246] Over-criminalization results in "[i]ncreased disrespect for the law,

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strong to be able to cope with the new varieties of fraud that the ever-inventive American 'con-artist' is sure to develop."

238. Mogin, *supra* note 19, at 13; *see also* Cutler, *supra* note 90, at 93. Cutler noted that "[f]or the federal prosecutor, the capability to indict under alternate clauses of the mail fraud statute is a powerful tool. As efforts to prosecute mail fraud are stepped up, newer frauds will emerge as more devious schemes are employed to cheat." *Id.*

239. *Maze*, 414 U.S. at 405-06 (Burger, C.J., dissenting); *see* Cutler, *supra* note 90, at 94-95. Cutler noted:

> Fraud, by its nature, adapts and changes. Fraud is chameleon-like, altering its appearance to the hopes and expectations of a naïve public. As criminals become more creative, prosecutors need a pliable instrument to implement the law. The mail fraud statute has provided that tool, allowing prosecutors to delve into the fray armed with broad statutory mandates and expansive judicial directives.

Id. But see Rybicki II, No. 00-1043, 2003 WL 23018917, at *9 (2d Cir. Dec. 29, 203) (noting that there is "no reason to think that Congress sought to grant carte blanche to federal prosecutors, judges and juries to define 'honest services' from case to case for themselves").

240. Henning, *supra* note 39, at 437 n.12 ("Other broad federal criminal law provisions require proof of specific activities as an element of the offense, in addition to proof of the underlying harm.").

241. *See supra* notes 132-71 and accompanying text.

242. *See* Coffee, *supra* note 89, at 234-38.

243. Malum prohibitum refers to "[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral. Misdemeanors such as jaywalking and running a stoplight are *mala prohibita*, as are many regulatory violations." Blacks Law Dictionary (7th ed. 1999).

244. *See* Coffee, *supra* note 89, at 200-01.

245. There are greater economic risks in the corporate world. *See* Ezersky, *supra* note 7, at 1438-39 ("The heightened possibility of liability, . . . for business failure or suspect loyalty is likely to magnify the already excessive risk-aversion of corporate managers—or cause them to demand increased compensation to offset this risk of criminal liability—and thereby reduce returns to shareholders.").

246. *See* Landis Cox, *Targeting Sports Agents with the Mail Fraud Statute:* United States v. Norby Walters and Lloyd Bloom, 41 Duke L.J. 1157, 1203-04 (1991-92) (footnotes omitted).

discriminatory enforcement, and waste of judicial resources."[247] Furthermore, if criminal law is overused, it will lose its "distinctive stigma."[248] The proper balance between flexibility and over-criminalization is struck by the analysis already being employed by the courts; consideration of appropriate factors in certain types of cases that fall within the core of § 1346. Analyses based on these factors preserve the flexibility of the honest services doctrine to adapt to new types of fraud not addressed by specific statute, yet, in practice, prevent its use for trivial prosecutions.[249] Moreover, the United States Attorney's Manual instructs prosecutors to exercise discretion when deciding whether or not to pursue a mail or wire fraud prosecution.[250]

As noted by the *Handakas* court, proper notice of wrongdoing is an important policy element, indeed a constitutional requirement, as an "indefinite criminal statute creates opportunity for the misuse of

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247. *Id.*

248. Coffee, *supra* note 89, at 197.

249. The *Handakas* court expressed its concern regarding over-criminalization:

> If the 'honest services' clause can be used to punish a failure to honor [an organization's] insistence on the payment of prevailing rate of wages, it could make a criminal out of anyone who breaches any contractual representation: that tuna was netted dolphin-free; that stationary is made of recycled paper; that sneakers or T-shirts are not made by child workers; that grapes are picked by union labor—in sum so called consumer protection law and far more.

United States v. Handakas, 286 F.3d 92, 108 (2d Cir. 2002). Although a mail fraud prosecution would not be sustained in any of these cases, given the rubric employed by courts and the factors they consider, this serves as an appropriate vehicle to reiterate that just because a prosecutor *can* charge a crime does not mean that they will. The fact that no such prosecution was cited by the *Handakas* court, suggests that prosecutors are wisely and appropriately exercising their discretion, and are limiting honest services prosecutions to ones in which there is a true scheme to defraud, such as in cases involving kickbacks. *See infra* note 250.

250. The U.S. Attorney's Manual reads:

> Prosecutions of fraud ordinarily should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts. Serious consideration, however, should be given to the prosecution of any scheme which in its nature is directed to defrauding a class of persons, or the general public, with a substantial pattern of conduct.

United States Attorney Manual, tit. 9-43.100 (Prosecution Policy Relating to Mail Fraud and Wire Fraud), *at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/43mcrm.htm. *But see* Ezersky, *supra* note 7, at 1441-42. Ezersky pointed out that the open-ended nature of the mail and wire fraud statutes may

> tempt prosecutors to charge mail/wire fraud in lieu of the more difficult (and more costly) to prove offense actually involved . . . prosecutors add mail/wire fraud counts as insurance when the primary charges rest on unsure evidentiary footing . . . the prosecutor can fall back on easy-to-prove mail/wire fraud as a face-saving device when the primary counts are weakened during the course of the trial.

Id. (footnotes omitted).

government power,"[251] and "[t]he plain meaning of 'honest services' in the text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute."[252] Part of what created this uncertainty, however, is judicially created standards that draw arbitrary distinctions such as de minimis harm and tort/contract enforceability.[253] Overall, by consistently considering the same factors for different types of cases, courts have created de facto notice of what will constitute honest services mail fraud.[254] Moreover, as illustrated by the cases discussed above, the kind of behavior being punished is both consistent with the language of the statute and its history, and sufficient to put anyone on notice that participating in a fraudulent scheme, either in a fiduciary-agency relationship or through affirmative, material misrepresentations, may result in criminal sanctions.[255]

E. Bronston *Revisited*

It is useful to reexamine *United States v. Bronston*,[256] the often-criticized intangible rights decision, in light of the factors courts now consistently (though not explicitly) consider. In *Bronston*, the Second Circuit upheld a conviction where the defendant-lawyer pursued a case despite a firm conflict.[257] There was no actual misuse of the fiduciary relationship beyond the existence of that conflict.[258] Would the outcome be any different under this Note's proposed analysis? It most likely would.

Although the defendant there had a duty to disclose the conflict and the defendant failed to disclose the information to either his partners or his clients,[259] an intangible rights prosecution would be unlikely to succeed under the factor-based analysis recommended in this Note. There was no scheme designed to benefit the defendant or harm the victim, and thus *Bronston* seems to be outside the core of honest services cases to which the courts implicitly limit private sector

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251. United States v. Handakas, 286 F.3d 92, 107-08 (2d Cir. 2002).

252. *Id.* at 104.

253. *See supra* notes 143-44 and accompanying text.

254. Judicial interpretation of statutes is one way notice of what a law prohibits is given. *See* United States v. Lanier, 520 U.S. 259, 266 (1997) ("[A]lthough clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (citations omitted)).

255. *See supra* Parts III.B.-C.

256. 658 F.2d 920 (2d Cir. 1981).

257. *Id.*; *see also supra* notes 44-55 and accompanying text.

258. *Id.* at 922-26.

259. *See id.*

prosecutions.[260] The *Bronston* case is missing that critical element of Category One cases because the prosecution could not show *either* intended harm to the victim or gain to the defendant.[261] The money that the defendant received was fair value compensation for work performed, not a kickback or secret payment made in exchange for his representation.[262] Moreover, there was no misuse of the defendant's fiduciary position—merely a conflict in existence at the time that he represented his client.[263] In fact, *Bronston* seems to more closely resemble more recent cases in which honest services mail fraud convictions have been overturned than the cases where they have been upheld.[264]

The problem with *Bronston* seems to be fraudulent intent. Although this intent can often be inferred[265] where the defendant has caused actual or potential damage to the victims, or has himself manipulated a position for actual or potential gain, an inference here seems too large a leap.[266]

Without the element of self-dealing, a conviction seems to contravene legislative intent,[267] and a prosecution of all cases in which a conflict of interests exists, without more, would be a tremendous waste of federal judicial resources.[268] It seems as though the conduct that prosecutors should be (and probably would be) most concerned with is when conflicts of interest are intended for a gain or a loss, though not necessarily both, as in *Rybicki I*. One could argue,

260. In fact, the *in banc* panel in *Rybicki II* "interred *Bronston* in a footnote," giving it little weight even in the context of analyzing pre-*McNally* case law. *See* Richman & Vinegrad, *supra* note 10.

261. *See supra* notes 44-55 and accompanying text.

262. *See Bronston*, 658 F.2d at 922-26.

263. *See id.*

264. *See* United States v. Brown, 79 F.3d 1550, 1562 (11th Cir. 1996) (holding that exaggerated market prices were insufficient to show a scheme to defraud, acknowledging that "the line between unethical behavior and unlawful behavior is sometimes blurred"); United States v. Goodman, 984 F.2d 235, 240 (8th Cir. 1993) (distinguishing between legal and illegal promotion schemes, noting that "sleazy" and "shrewd" practices, absent further evidence of fraudulent intent, were insufficient to sustain a mail fraud conviction); *see also* United States v. Handakas, 286 F.3d 92 (2d Cir. 2002) (notably not involving bribes, kickbacks, or other secret self-dealing).

265. *See, e.g.*, United States v. Ham, 998 F.2d 1247, 1254 (4th Cir. 1993) ("Fraudulent intent may be inferred from the totality of the circumstances and need not be proven by direct evidence."). *But see* Podgor, *supra* note 2 ("Prosecutors think intent can always be inferred from the evidence and that just isn't so.").

266. *See* United States v. Cochran, 109 F.3d 660, 668 (10th Cir. 1997) (noting that "in the absence of actual or potential harm, evidence independent of the alleged scheme must be adduced to show fraudulent intent towards the alleged victims").

267. *But see* Ezersky, *supra* note 7, at 1431 (arguing that the conduct prohibited by the mail and wire fraud statutes is "nothing more than an undisclosed breach of duty by anyone labeled a fiduciary").

268. Of course, there are arguments that could be made for why a conviction would be upheld in *Bronston* even today, and this Note does not exclude that possibility. Rather, in reliance on recent trends and an examination of recent cases and their facts, this Note suggests that an honest services conviction would be unlikely.

however, that the undisclosed profits that the defendant in *Bronston* kept from his partners did actual financial harm to those whom he owed a fiduciary duty—but a prosecution would have to prove that harm as an element of actual pecuniary fraud; there would be no honest services conviction.

CONCLUSION

Ultimately, courts may continue their search for a bright line test absent further word from Congress. They need not, however, continue towards such ends. Recent decisions, though purporting to embrace explicit limits on the scope of the intangible rights doctrine in the private sector, are more consistent and appropriate than courts themselves are willing to recognize. Bright line tests come dangerously close to circumventing the intent of Congress for a flexible application of the mail fraud statute, and each test carries with it more vague and arbitrary standards.

An examination of the facts of the cases illustrated in this Note demonstrates that prosecutorial discretion is being appropriately exercised and that the cases U.S. Attorneys are prosecuting are within the appropriate bounds of honest services fraud as intended by Congress; therefore, courts should abandon their search for decisive tests and continue to ground their analyses in the factors they already implicitly depend on, such as materiality, intended gain to the defendant, and reasonable foreseeability of harm. Courts weighed these factors appropriately depending on the type of case, and a body of case law has developed which provides adequate notice to those who engage in self-dealing that they may be subject to prosecution, whether or not they cause harm to an identifiable victim. The courts have "gotten it right" without even knowing it, and decisions such as *Rybicki I*, *Rybicki II* and *Handakas* threaten that very achievement.

Notes & Observations