BETRAYING HONEST SERVICES: THEORIES OF TRUST AND BETRAYAL APPLIED TO THE MAIL FRAUD STATUTE AND § 1346

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INTRODUCTION

On December 23, 2004 John G. Rowland, the former Governor of Connecticut, pled guilty to a crime that left many observers scratching their heads.[1] After suffering the double indignity of a federal investigation and an impeachment inquiry, Rowland resigned from office, but the U.S. Attorney in Connecticut continued his investigation of gratuities and kickbacks the former Governor had allegedly received.[2] In his Christmas Eve plea agreement, Rowland ended months of scandal by admitting a single federal felony: conspiracy to "deprive the State of Connecticut and its citizens of the intangible right to the honest services of its Governor."[3] His

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1. Robert D. McFadden, *Rowland Admits Felony in Office*, N.Y. TIMES, Dec. 24, 2004, at A1; Stan Simpson, *Rowland, Pragmatic as Ever, Blinks First*, THE HARTFORD COURANT, Dec. 24, 2004, at A9 ("[T]he feds gave Rowland a jump start [in thinking about his future] by agreeing to charge him with one count of 'conspiracy to commit honest services mail fraud and tax fraud.' Huh?").

2. *See* William Yardley, *Under Pressure, Rowland Resigns Governor's Post*, N.Y. TIMES, June 22, 2004, at A1.

3. Letter from John H. Durham, Acting U.S. Attorney for the Dist. of Conn., to William F. Dow III, Esq., Attorney to John G. Rowland 9 (Dec. 23, 2004) [hereinafter "Letter"] (confirming plea agreement), http://www.usdoj.gov/usao/ct/Documents/ROWLAND%20Plea%20Agreement.pdf.

receipt of gifts constituted an act of tax evasion and—to the confusion of many journalists—mail fraud.[4]

Rowland's crime, couched in the legalese of "intangible rights" and "honest services," punished his betrayal of the public trust. While there is little doubt that the former Governor committed numerous wrongs, the plea only admitted that Rowland breached a fiduciary duty to the citizens of Connecticut when he received gifts from state contractors. Coupled with Rowland's use of the mail, the gifts constituted a scheme to deprive citizens of their Governor's honest services. As a result, Rowland was guilty of committing a federal felony and was sentenced to a year and a day in prison.[5] The flexibility and ease of the mail fraud and honest services statutes provided the U.S. Attorney's office with a powerful stick with which to prosecute corrupt acts and offered John Rowland a tempting carrot that allowed him to plea to a vague, though highly relevant, indiscretion.

The mail fraud statute defines its crime via two elements: a deceptive scheme to defraud[6] and a mailing that serves to carry out that scheme.[7] Over time the mailing element has lost its salience.

4. *See, e.g.*, Simpson, *supra* note 1; *Rowland to Ask for Reduced Sentence*, THE PROVIDENCE SUNDAY J., Dec. 26, 2004, at C5 (describing honest services fraud as "a combination of mail and tax fraud").

5. William Yardley & Stacey Stowe, *A Contrite Rowland Gets a Year For Accepting $107,000 in Gifts*, N.Y. TIMES, Mar. 19, 2005, at A1.

6. For interesting contemporary studies on the differing standards of victim prudence and who the misrepresentation of the scheme could be expected to deceive, see Mark Zingale, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 COLUM. L. REV. 795 (1999); *RICO Report: Mail Fraud's Application to Victims Gullible or Skeptical, Dull or Bright*, THE CHAMPION, Apr. 1997, at 52.

7. The full text of the current version of 18 U.S.C. § 1341 reads:

> 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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such

If the defendant could have "reasonably foreseen" that the mailing would occur, his crime meets the requirements of the statute.[8] Courts have also expansively interpreted the "scheme to defraud" element. When Congress amended the statute in 1909,[9] it created what judges later interpreted as two different forms of fraud: 1) any scheme or artifice to defraud *or* 2) any scheme for obtaining money or property by means of false or fraudulent pretenses. By applying a disjunctive interpretation, lower courts included schemes to defraud another of "intangible rights" within the first form. During the 1970s this two-prong approach gained popularity, as courts recognized a fiduciary duty between public servants[10] and the citizenry.[11] This duty required government employees to provide "honest services," which the law identified as an intangible right owed to the people.[12] When a public employee's scheme betrayed that duty, and was coupled with a use of the mail, he committed honest services mail fraud.[13] In an outgrowth of this public sector

person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341 (Supp. II 2004).

8. Today, the mailing element is largely a jurisdictional requirement. *See* Schmuck v. United States, 489 U.S. 705, 715 (1989) (creating the current test that the mailing must be "part of the execution of the scheme as conceived by the perpetrator at the time"); *see also* United States v. Reid, 533 F.2d 1255, 1260 n.19 (D.C. Cir. 1976) (noting that the "in furtherance" requirement appears to only serve jurisdictional purposes); United States v. Sawyer, 85 F.3d 713, 723 n.5 (1st Cir. 1996) ("Some have observed . . . that the use of the mails or wires is merely a 'jurisdictional hook' . . . .").

9. *See infra* Section I.B.2.

10. Though public sector honest services fraud prosecutions often target elected officials, the law applies to any public servant. Some circuits have limited its application to public servants with discretionary decision-making power. *See* United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997). I interchange the words "official," "public servant" and "government employee."

11. For a more thorough statutory analysis, see Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 5–7 (1998); Gail Vasterling, ed., *Recent Developments in Corporate and White Collar Crime*, 68 WASH. U. L.Q. 779 (1990); 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, 496–502 (1993); *see also* Donald V. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 50–59 (1980) (analyzing § 1341 in great detail but without the insights of later developments).

12. Intangible rights are rights that are neither pecuniary nor property-based (e.g., civil rights, right to privacy, right to honest government). *See infra* Section I.C.2.

13. The theory is alternatively called "intangible rights theory," "honest services fraud," and "intangible rights to honest services fraud." In this Note, I will generally refer to it as "honest services fraud," but when analyzing how the courts integrated the honest services theory with the intangible rights theory, I will refer

application, courts also applied the honest services theory to business relationships, such as those between employers and employees.[14]

The federal government's use of honest services fraud peaked in the late 1970s and early 1980s. Then, in 1987, the Supreme Court surprised practitioners and scholars alike when it rejected the two-prong interpretation of § 1341 and invalidated the honest services fraud theory.[15] In reaction to this decision, Congress passed 18 U.S.C. § 1346, which stated, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[16] As a result, contemporary honest services fraud, while rooted in the two-prong analysis of § 1341, relies on § 1346. Although prosecutors have occasionally cited intangible rights unrelated to honest services and courts have applied the theory to private sector schemes,[17] the core of honest services fraud remains the prosecution of state and local public servants.

In the era of "new federalism," this national intervention in state affairs has caused some consternation among scholars.[18] Furthermore, the flexibility of honest services mail fraud has invited accusations of potential "void for vagueness" lawmaking.[19] In a compromise solution to these problems, George D. Brown proposed that a public official's state-defined duties delineate the pa-

to the combined doctrine as "intangible rights to honest services fraud" to avoid confusion.

14. *See infra* notes 152, 181. In contemporary honest services fraud jurisprudence, courts apply numerous requirements to private sector prosecutions that they do not apply in the public sector context.

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

16. 18 U.S.C. § 1346 (2000).

17. *See infra* notes 74, 152, 181.

18. *See generally, e.g.*, Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Corruption*, 10 PEPP. L. REV. 321 (1983); George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State and Local Officials for Political Corruption?*, 60 WASH. & LEE L. REV. 417 (2003) [hereinafter *New Federalism*]; George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 CORNELL L. REV. 225 (1997) [hereinafter *Post-*Lopez *Analysis*]; Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 171–78 (1994); Ralph E. Loomis, Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U. L. REV. 63 (1978).

19. *See generally, e.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Alex Hortis, Note, *Valuing Honest Services: The Common Law Evolution of Section 1346*, 74 N.Y.U. L. REV. 1099, 1110–15 (1999).

rameters of honest services under § 1346.[20] In *United States v. Brumley*, the Fifth Circuit adopted this interpretation, creating a circuit split with courts that refused to allow state regulations to define federal criminal law.[21]

Despite these divergent applications of the law, courts, legislators, and scholars all agree that honest services fraud prosecutions play an important role in maintaining the "public trust."[22] Yet these parties fail to focus on the law's unique effect of criminalizing betrayal. This Note takes up that challenge, analyzing the federal mail fraud statute (18 U.S.C. § 1341) and honest services fraud through the lens of trust and betrayal.[23] It shows how the mail fraud statute's foundation in nineteenth-century notions of morality made it a flexible law that could incorporate the theories of intangible rights and honest services.[24] When the public's relationship with its governing institutions changed, the law changed along with it, expanding federal jurisdiction to target a particular moral indiscretion in a particular arena.

In exploring the manner in which trust and the law interact, this Note also reveals the importance of trust in a democratic society. Scholars have shown how over-regulation can displace trust and have posited that there are normative cycles of trust and regulation. Therefore, while this Note defends the federal government's continued prosecution of abuses of the public trust due to the significant damage that betrayal can cause, it also endorses state-imposed duties to define "honest services." This is an ideal solution,

20. Brown, *Post-*Lopez *Analysis*, *supra* note 18, at 299.

21. United States v. Brumley, 116 F.3d 728, 734 (5th Cir. 1997); *see also* United States v. Woodward, 149 F.3d 46 (1st Cir. 1998) (upholding an honest services conviction without reference to underlying state violations); United States v. Sawyer, 239 F.3d 31, 47 (1st Cir. 2001) (claiming that the circuit has applied § 1341 without an underlying state law violation and citing *Woodward*).

22. For the purposes of this Note, the term "public trust" is interpreted and analyzed as the trust that citizens have in their government/government leaders. For this reason, it is similar to other forms of "thin trust" mentioned in this Note. *See infra* note 76.

23. Arguably, all anti-corruption statutes punish betrayals of trust. But other laws isolate the means of betrayal as the criminal act (e.g., accepting bribes, stealing, or presenting false financial statements). In contrast, the mail fraud statute provides prosecutors with a unique opportunity to punish the breach of trust itself. Though this Note focuses on the mail fraud statute, most of the observations contained also apply to the wire fraud statute, 18 U.S.C. § 1343 (Supp. II 2004).

24. Chief Justice Burger even wrote, "[w]hen a 'new' fraud develops—as constantly happens—the mail fraud statute becomes 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." United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, C.J., dissenting).

not only because it answers federalism and vagueness concerns, but also because these regulations are more reactive to local cycles of trust in government. Under this regime, federal intervention enforces local obligations and aligns prosecutors' incentives with local trust levels. The result is a more effective means of punishing betrayal and maintaining the public trust.

Part I of this Note examines the creation and early interpretation of the mail fraud statute. It also traces the evolution of the statute as it incorporated the theories of intangible rights and honest services. Part II looks at theories of trust in the law and considers the federal use of the mail fraud statute as a means of regulating trust relationships between citizens and local government. Part III examines the state of the law today, with circuit courts divided over whether local officials must betray a state-imposed duty in order to commit honest services fraud. Finally, this Note concludes by showing how trust theories endorse the aforementioned requirement of a state-imposed duty. An emphasis on trust, however, also allows for a broad interpretation of that duty. If betrayal is truly the root of the crime, schemes to defeat obligations created by both criminal and non-criminal regulation should support a conviction for honest services fraud.

I.
THE HISTORY OF MAIL FRAUD AND THE INTANGIBLE RIGHT TO HONEST SERVICES

A. Legislative Foundations

When Congress created what is now 18 U.S.C. § 1341 in 1877, the legislation was intentionally expansive. After several weaker efforts to criminalize certain types of mailings (e.g., obscene material, lotteries), Congress provided the Postal Service with a great deal of latitude in its efforts to prevent all forms of fraud that utilized the mail.[25] Passed as part of a recodification of the postal laws, the original version of § 1341 aimed to resolve growing concerns about mail fraud by making it illegal to "devise any scheme or artifice to defraud . . . by means of the post-office establishment of the United States."[26]

25. DOROTHY GANFIELD FOWLER, UNMAILABLE: CONGRESS AND THE POST OFFICE 56–58 (1977).

26. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (current version at 18 U.S.C. § 1341 (Supp. II. 2004)). The full text of section 301 read:

Jed Rakoff, in his comprehensive history of the statute, observes that it "was not unlike a host of federal legislation (both criminal and civil) enacted in the Reconstruction Period immediately following the Civil War, that extended federal authority to areas previously reserved to the states."[27] These new laws emanated from two Reconstruction-era trends: the growth of a national economy and a confident and dynamic sense of federal power.[28] In the case of mail fraud, Congressional efforts to prevent "corrupt" long distance communications—particularly those emanating from cities—corroborated the first trend. The broad sweep of the law reflected the second.[29]

> 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, or take or receive any therefrom, such person, so misusing the post-office establishment, 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.

For more on the early history of the statute, see W. Robert Gray, Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562, 567 (1980).

27. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 779 (1980).

28. *Id.* at 780 (citing W. DUNNING, RECONSTRUCTION, POLITICAL AND ECONOMIC 224–37 (1962); H. FAULKNER, AMERICAN ECONOMIC HISTORY 483–86, 516–17 (1960); J. FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 8–9, 146–49, 174–77 (1961)); Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 420 (1959). While Rakoff posits these historical trends as relevant to an interpretation of the mail fraud statute's intent, he also warns that "it seems unwise to rest much weight on this conclusion in the absence of more specific legislative history." Rakoff, *supra* note 27 at 782.

29. *See* Rakoff, *supra* note 27, at 780. This theory finds support in the few Congressional statements related to the bill. In 1870, Congressman Farnsworth of Illinois, the House sponsor of the recodification bill, explained that the anti-fraud additions were necessary "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purposes of deceiving and fleecing the innocent people in the country." Gray, *supra* note 26, at 568 (quoting CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870)).

As a result of these trends, the government caught a variety of scams that intentionally utilized the postal service.[30] Yet Rakoff suggests that the statute's emphasis on the use of the mail "protests too much."[31] Noting the conflict between Congress and the Supreme Court regarding the constitutionality of Reconstruction-era legislation,[32] he argues that the statute's language paid lip-service to the "abuse" of the postal service in order to make it less likely that the statute would be "struck down as an unconstitutional extension of federal jurisdiction over ordinary fraud."[33] As the United States became more interconnected, the federal government's regulation of mail was not an end to itself, but a means of preventing criminal schemes that took advantage of the new national economy.

B. Broadening the Statute: Moral Interpretations and Amendments

1. A Common Concern for Morality

In the mid-to-late nineteenth century, the manner in which courts interpreted the elements of mail fraud led to differing applications of the statute.[34] Yet the immorality of the defendant's act—

30. The schemes Congress targeted also indicated a concern for new types of criminal behavior. Criminal codes written for small agrarian communities could not meet the challenges posed by those who took advantage of services provided by a newly enlarged federal government. Goldstein, *supra* note 28, at 420–21. At the same time, new forms of travel and communication allowed criminals to perpetrate small swindles in different jurisdictions; while the aggregate damage was significant, each locality had little incentive to seek out the perpetrator. For more details on different forms of fraud at the inception of the statute, see Rakoff, *supra* note 27, at 797–98 (explaining the "green article" scheme and the "sawdust swindle"); Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 141 n.27 (1990) (describing a scheme in which the perpetrator advertised an engraving of George Washington for a small sum and sent back a postage stamp with Washington's image) (internal citation omitted).

31. Rakoff, *supra* note 27, at 785.

32. *Id.* at 786 n.65.

33. *Id.* at 785.

34. *Compare* Durland v. United States, 161 U.S. 306, 313–15 (1896) (applying a broad interpretation of the statute), *with* United States v. Clark, 121 F. 190, 190–91 (M.D. Pa. 1903) (applying a strict interpretation of the statute that focuses on the use of the mails to carry out a fraudulent purpose, rather than any goal to "improve [the country's] morals"). Numerous lower court cases during this period rejected the constrictions of common law and other criminal statutes in defining fraud. *See, e.g.*, United States v. Loring, 91 F. 881, 887 (N.D. Ill. 1884); United States v. Owens, 17 F. 72, 74 (E.D. Mo. 1883). In floor speeches, congressmen applied an inclusive definition of fraud that reflected a variety of concerns rather than particular illegal activities. *See* Gray, *supra* note 26, at 568 (claiming that the legislative history suggests that Congress "did not use the term 'fraud' in some new and technical way, but rather intended to prohibit schemes that were within the

rather than federalism, individual rights, or economics—diminished these divergent analyses, suggesting "a feeling that it was not so much state or federal law that was contravened by the mail-fraud swindlers, but moral law—the law of 'Thou shalt not steal.'"[35] In 1877, the statute overcame its first constitutional challenge when the Supreme Court held that Congress did not intend to interfere with individual rights, but rather aimed "to refuse its facilities for the distribution of matter deemed injurious to the public morals."[36] Fifteen years later, when the Court upheld the federal government's interest in regulating the mails, it broadened the statute even further. According to Chief Justice Fuller, "the power to establish post-offices and post-roads . . . was as a complete power," which included "the power to forbid the use of the mails in aid of the perpetration of crime or immorality."[37] Despite the jurisdictional hook of postal regulation, early interpretations of the mail fraud statute reveal a fixation on morality that often overshadowed concerns for postal integrity.

2. The Amendments: 1889 and 1909

In 1889 Congress amended the mail fraud statute in order to clarify what constituted a "scheme or artifice to defraud."[38] The act went to great lengths to define situations in which the law should apply, including a long list of specific offenses.[39] Though some

conventional usage of the term and involved use of the federal mails"). The statute's language also did not reflect contemporary common law conceptions of larceny, embezzlement, or cheat. Courtney Chetty Genco, *What Happened to* Durland*?: Mail Fraud, RICO, and Justifiable Reliance*, 68 NOTRE DAME L. REV. 333, 355–56 (1992).

35. Rakoff, *supra* note 27, at 801.

36. *Ex parte* Jackson, 96 U.S. 727, 736 (1877).

37. *In re* Rapier, 143 U.S. 110, 134 (1892).

38. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873.

39. Congress added that mail fraud could include:

> [A]ny scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle", or "counterfeit money fraud", or by dealing or pretending to deal in what is commonly called "green articles", "green coin", "bills", "paper goods", "spurious Treasury notes", "United States goods", "green cigars", or any other names or terms intended to be understood as relating to such counterfeit or spurious articles . . . .

Id.

judges saw this inventory as limiting the application of the statute, most found the new language inclusive enough to apply to most fraud-like schemes.[40] Meanwhile, the Supreme Court continued its trend toward broad construction in *Durland v. United States*.[41] Expanding the reach of the statute, the Court rejected the traditional interpretation of the common law crime of false pretenses,[42] and allowed a "scheme or artifice to defraud" to include "mere representations and promises as to the future."[43] The Court stated that "beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning."[44] Mail fraud, already loosened from the moorings of the "mailing in furtherance" requirement,[45] now provided near limitless flexibility to the broad constructionist.

In 1909, Congress amended the statute again, adding the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," to reflect *Durland*'s inclusion of misrepresentations regarding the future.[46] The

40. *See* Rakoff, *supra* note 27, at 809; *see also* Milby v. United States, 120 F. 1, 4 (6th Cir. 1903) (interpreting the amendment as extending the statute); Horman v. United States, 116 F. 350, 352 (6th Cir. 1902) (holding that the words "to defraud" are "not descriptive of the character of the artifice or scheme which has been devised, but rather of the wrongful purpose involved in devising the same . . . ."); *cf.* Streep v. United States, 160 U.S. 128, 132–33 (1895) (explaining that the 1889 amendment expanded culpable acts to include schemes to sell counterfeit money—even if those schemes were not "schemes to defraud"). *But cf.* Stockton v. United States, 205 F. 462, 467–68 (7th Cir. 1913) (reading *Streep* narrowly and refusing to extend the broad interpretation of the statute to include schemes to sell marked cards and loaded dice).

41. Durland v. United States, 161 U.S. 306 (1896).

42. The common law definition of false pretenses only criminalized misrepresentations regarding a past or existing fact, not misrepresentations or false promises regarding the future. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 19.7(b)(5) (4th ed. 2003); *see also* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 1.1.2 (1978) (discussing the history of common law fraud and false pretenses, and comparing it to other nations' requirements for misrepresentation).

43. *Durland*, 161 U.S. at 313; *see also* Arthur R. Pearce, *Theft by False Promises*, 101 U. PA. L . REV. 967, 978–80 (1953) (describing *Durland* as the "first, and perhaps the weightiest, rejection of the dogma").

44. *Durland*, 161 U.S. at 313. For a narrower reading of *Durland*, see Gray, *supra* note 26, at 579–80.

45. *See Durland*, 161 U.S. at 315 (allowing that the defendant need only *think* the letter may assist in carrying out the scheme); *see also* 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, 450–60 (1995) (analyzing courts' struggles with the mailing element of § 1341).

46. *See* Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130 (current version at 18 U.S.C. § 1341 (Supp. II 2004)); McNally v. United States, 483 U.S. 350,

new statute rephrased the language following "scheme to defraud," requiring that the perpetrator devise "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses . . . ."[47] At the time, Congress found little import in this new phrasing.[48] In later years, however, it would prove integral to the expansion of mail fraud in a manner that the Congress may or may not have foreseen when the statute became law.[49] The disjunctive "or" allowed courts to interpret the first clause—"any scheme or artifice to defraud"—to include schemes other than those "for obtaining money or property," such as efforts to deprive a victim of "intangible rights."

357–58 (1987). In the years that followed the 1909 amendment, the Court continued to reject Constitutional challenges while bolstering the legitimacy of mail fraud's broad application. In 1916 Justice Holmes went so far as to state, "Whatever the limits to its power, [Congress] may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not." Badders v. United States, 240 U.S. 391, 393 (1916). With regard to the "in furtherance" requirement, Holmes wrote that if the mailings were done for the purpose of executing the scheme, "there would be no ground for contending, if it were argued, that they were too remotely connected with the scheme for the law to deal with them." *Id.* at 394. *But cf.* Fasulo v. United States, 272 U.S. 620, 628 (1926) (refusing to extend the meaning of "to defraud" to include extortion). For a narrower reading of *Badders*, see Gray, *supra* note 26, at 580.

47. § 215, 35 Stat. at 1130 (emphasis added).

48. *See* 42 CONG. REC. 1026 (1908) (statement of Sen. Heyburn). While discussing the statute, Senator Heyburn only felt the need to explain a small change regarding the law's application to mailings made outside the United States, stating, "I do not think there is any other change, which is not obvious upon the face of the bill, that needs any further explanation." *Id.*

49. In addition to the *Durland*-inspired changes, the 1909 amendment altered the statute to allow for greater leniency in the connection between scheme and mailing. Where the previous law described mail fraud as a scheme "effected by either opening or intending to open correspondence or communication with any other person," the amendment only required that the perpetrator "shall, for the purpose of executing such scheme or artifice or attempting so to do, place . . . any letter" into the postal service. *Compare* § 301, 17 Stat. at 323, *with* § 215, 35 Stat. at 1130. The new language also allowed courts to eliminate any requirement that the defendant contemplated the use of the mails as a means of carrying out the scheme. *See* United States v. Young, 232 U.S. 155, 160–61 (1914); *Ex parte* King, 200 F. 622, 627–28 (N.D. Ga. 1912); United States v. Maxey, 200 F. 997, 1001–02 (E.D. Ark. 1912) (comparing both statutes to illustrate the relevant differences in language); *see also* Moohr, *supra* note 11, at 6 (claiming that expansive interpretations of the mailing element drained it of "criminal content").

C. The Development and Merger of Two Doctrines: "Intangible Rights" and "Honest Services"

1. Broadening Interpretations of "Fraud"

In the early decades of the twentieth century, judicial interpretations of several federal fraud statutes endorsed the "intangible rights" doctrine, holding that an act of fraud did not require a material loss.[50] The theory maintained that even when victims did not experience a pecuniary or property shortfall, those who defrauded them were unlawfully depriving the victims of a right. However, the initial applications of this theory to the mail fraud statute were arguably dicta; in most cases the defendants still realized some form of financial gain at the expense of the victims.[51]

Such was the case in *Shushan v. United States*,[52] which jurists and scholars often cite as the foundation for mail fraud's twin theories of intangible rights and honest services.[53] In *Shushan*, members of the Orleans Parish Levee Board conspired with bond businessmen to gain passage of a bond-refunding plan. The plan charged the Parish exorbitant fees pocketed by the conspirators.[54] Yet despite this pecuniary loss to the local government,[55] the Fifth Circuit explicated a theory that seemed to abandon such a requirement:

50. *See, e.g.*, Hammerschmidt v. United States, 265 U.S. 182, 188 (1924) (explaining that in the context of a law against defrauding the United States, "[t]o conspire to defraud" does not necessitate property or pecuniary loss "but only that [the government's] legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention"); United States v. Barnow, 239 U.S. 74, 79 (1915) (allowing that the crime of fraudulently impersonating a federal officer or employee to obtain something of value need not result in financial loss to the victim to maintain a criminal conviction); United States v. Plyler, 222 U.S. 15, 17 (1911) (holding that the government need not show financial or property loss to get a conviction against a defendant for defrauding the government by forging "vouchers" required for the civil service exam).

51. *Cf.* Gray, *supra* note 26, at 584–87.

52. Shushan v. United States, 117 F.2d 110 (5th Cir. 1941), *overruled on other grounds by* United States v. Cruz, 478 F.2d 408 (5th Cir. 1973).

53. W. Robert Gray makes a strong case that scholars and judges who claim *Shushan* as the foundation case for honest services fraud interpret it out of context. *See* Gray, *supra* note 26, at 585–86. I rely on much of his analysis to show that while *Shushan*'s language provided an important foundation for the role of trust in honest services fraud, the theory really came into being in the 1970s, when trust in the federal government was at its nadir.

54. *Shushan*, 117 F.2d at 114–15.

55. *Id.* at 115; *see also* Gray, *supra* note 26, at 585 (asserting that the Fifth Circuit had already established that the economic requirement of the statute had been met when it explained that corrupting a public official served as a scheme to defraud).

> A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public . . . . No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such an one must in the federal law be considered a scheme to defraud.[56]

In later years, judges would cite this language to support the premise that a defendant whose scheme leads to a loss of intangible rights is as culpable as one whose scheme causes financial damage.

The Fifth Circuit also incorporated an expansive version of the *Durland* holding, practically eliminating the need for any misrepresentation (future or otherwise).[57] Given the facts of *Shushan*, this passage, asserting that a "scheme to get money unfairly by obtaining and then betraying the confidence of another . . . would be a scheme to defraud though no lies were told," was also dictum.[58] But, like the court's commentary on the "sacred duties of a public official," the rhetoric of confidence and betrayal would later influence the emergence of honest services fraud.[59]

In the decades that followed, theories of trust, betrayal, and intangible rights faded from mail fraud jurisprudence. While courts occasionally cited *Shushan* to support holdings that resembled the doctrines of intangible rights and honest services,[60] only in

56. *Shushan*, 117 F.2d at 115.

57. *See* Gray, *supra* note 26, at 585–86.

58. *Shushan*, 117 F.2d at 115.

59. As if to foreshadow the widespread use of both theories, some contemporary lower courts recognized the power of these passages. Though the issue related to trust and betrayal in the private sector, the Massachusetts District Court quoted *Shushan*'s "betraying the confidence of another" theory and pointed out that:

> The normal relationship of employer and employee implies that the employee will be loyal and honest in all his action with or on behalf of his employer . . . . When one tampers with that relationship for the purpose of causing the employee to breach his duty he in effect is defrauding the employer of a lawful right. The actual deception that is practised is in the continued representation of the employee to the employer that he is honest and loyal to the employer's interest.

United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942).

60. *See* Parr v. United States, 363 U.S. 370, 398, 401 (1960) (Frankfurter, J., dissenting) (asserting that when fraud involves an "abuse of a position of public trust, closer analysis is required" and pointing out that fraud in the federal law extends well beyond the common law meaning of the word); Abbott v. United States, 239 F.2d 310, 314 (5th Cir. 1956) (describing a scheme that involved an employee making extra prints of valuable geophysical survey maps as acquiring the information on the maps through "stealthy, devious means of subverting the fidel-

the 1970s would prosecutors and judges truly reflect on *Shushan* and apply its theories to breaches of the public trust.

2. The Modern Development of Honest Services as an Intangible Right

In the 1970s, two important trends changed the federal government's approach to corruption: the Justice Department made public corruption a top priority[61] and prosecutors re-examined the twin doctrines of intangible rights and honest services. Combining the two theories, courts created the doctrine of honest services

ity of [the mapmaker's] trusted servant"); Epstein v. United States, 174 F.2d 754, 765–66 (6th Cir. 1949) (drawing a distinction between actual and constructive fraud and holding that the mail fraud statute only applied to actual frauds); United States v. Faser, 303 F. Supp. 380, 384 (E.D. La. 1969) (holding that the law of agency controls when a public servant receives bribes and does not give them to his principal, but announcing that the "thing out of which . . . the State was defrauded need not necessarily be that which can be measured in terms of money or property" and that when a person defrauds the state of the "loyal and faithful services of an employee" there is a violation of the mail fraud statute); *see also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 203 (1991) [hereinafter *Tort/Crime Distinction*] (explaining that when "prosecutors began to exploit the latent potential in the 'intangible rights' theory by prosecuting cases that truly involved only a deprivation of such a claimed right," it led to a "bizarre series of decisions").

61. *See* FRANK ANECHIARICO & JAMES B. JACOBS, THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE 103 (1996) ("Until the mid-1970s, the federal government played practically no role in investigating state and local corruption" but in 1975 President Ford "announced that the DOJ would make official corruption in state and local government a high priority"); JOSEPH B. TOMPKINS, JR., U.S. DEP'T OF JUSTICE, NATIONAL PRIORITIES FOR THE INVESTIGATION AND PROSECUTION OF WHITE COLLAR CRIME 15 (1980) (identifying state and local corruption as a law enforcement priority); Charles F. C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171, 1172 (1977) (citing U.S. NEWS & WORLD REP., Feb. 28, 1977, at 36, for the proposition that federal prosecutions of state and local officials increased five hundred percent in the preceding six years); *Mail Fraud: Hearing on H.R. 3089 and H.R. 3050 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 100th Cong. 41 (1988) [hereinafter *Hearing*] (statement of Robert G. Ulrich, U.S. Attorney, W.D. Mo.) (testifying that the Department of Justice made corruption one of its top four priorities seven years earlier and that the number of federal convictions for corruption increased fourfold between 1976 and 1986). *But cf.* Wayne Barrett, *Freedom to Steal: Why Politicians Never Go to Jail*, NEW YORK, Feb. 4, 1980, at 26 (reporting that the U.S. Attorney's Office in the Southern District of New York was not placing an appropriate emphasis on public corruption cases).

fraud, in which the denial of honest services provides both the illegal scheme and the loss for which the victim is defrauded.[62]

In 1974, the facts of *United States v. Isaacs*[63] provided the perfect scenario for the application of a theory merging intangible rights and honest services. Isaacs and his co-defendant, Governor Otto Kerner of Illinois, engaged in a scheme to favor a political supporter's horse racing enterprises in exchange for stock in the businesses. Neither the Governor nor Isaacs, the Director of the Department of Revenue, engaged in an actual misrepresentation,[64] and the state of Illinois experienced no loss during the period in question. In fact, state revenues from horse racing increased.[65]

Conceding that a fiduciary duty existed, the defendants asserted that with no tangible loss to the state, their breach of duty amounted to constructive fraud, which past cases had excluded from the mail fraud statute.[66] The Seventh Circuit, however, cited *Shushan* for the notion that a public official's corrupt activities could always serve as a scheme to defraud. Reasserting the notion that the government need not experience a pecuniary shortfall, but must only suffer the intangible loss of having its "official action and purpose"[67] defeated, the court found that the state's loss of its governor's loyal and honest services filled the "intangible loss" bill.[68]

62. *See* Morano, *supra* note 11, at 65–75 (outlining the distinctions between the Seventh Circuit's expansive readings of the mail fraud statute and the Eighth Circuit's more restricted interpretations during the 1970s).

63. United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974).

64. *Id.* at 1131–40.

65. *Id.* at 1139.

66. *Id.* at 1149. *See Epstein*, 174 F.2d at 765–66. In *Epstein*, the directors of two brewing companies failed to disclose their interests in companies with whom the breweries subcontracted to the financial benefit of the directors. In reversing the conviction, the court held that mail fraud could only apply to actual fraud not constructive fraud, defining constructive fraud as "a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Id.* at 766; *see also* John E. Gagliardi, *Back to the Future: Federal Mail and Wire Fraud Under 18 U.S.C. § 1346*, 68 WASH. L. REV. 901, 918 n.112 (explaining the difference between active and constructive fraud); John J. O'Connor, Note, McNally v. United States*: Intangible Rights Mail Fraud Declared A Dead Letter*, 37 CATH. U. L. REV. 851, 863 (1988) (asserting that the development of the "private fiduciary intangible rights doctrine" served to reject the defense of constructive fraud).

67. *Isaacs*, 493 F.2d at 1150 (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924).

68. *Id.* at 1150.

In *United States v. Mandel*,[69] a case with facts startlingly similar to *Isaacs*, the Fourth Circuit continued this analysis,[70] asserting "the fraud involved in the bribery of a public official lies in the fact that the public official is not exercising his independent judgment in passing on official matters . . . . A fraud is perpetrated upon the public to whom the official owes fiduciary duties, e.g., honest, faithful and disinterested service."[71] In other words, the failure to disclose a conflict of interest when there is a public duty represents a scheme to defraud. This fraudulent act then defines the very deprivation that the public suffers: the loss of the intangible right to honest government. A public official's betrayal of trust overcomes the need for both a tangible loss *and* an actual misrepresentation, providing the federal government with a powerful means of encouraging trustworthy behavior at all levels of government.[72]

After these precedent-setting cases, a "flood tide" of intangible rights prosecutions followed.[73] While some recognized intangible rights unrelated to honest services,[74] most continued the tradition of combining the two theories. A duty to provide honest services created the fiduciary relationship between defrauder and defraudee and served as the intangible loss suffered by the latter.

In this manner, mail fraud evolved from a means of preventing crimes that utilized the postal service into a statute of choice for criminalizing public betrayals. When a local official breached the public trust, regardless of whether his specific act was illegal, he often found that he had committed honest services fraud. These

69. United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979).

70. For examples of other contemporaneous cases that grappled with similar issues, see United States v. Brown, 540 F.2d 364, 375 (8th Cir. 1976) (holding that the defendant's failure to disclose his interest in city contracts, which he awarded to companies as a form of rental payments, "can only be characterized as a scheme or artifice to defraud the citizens of Saint Louis" of his disinterested conduct); United States v. Barrett, 505 F.2d 1091, 1103–05 (7th Cir. 1974) (holding defendant guilty of mail fraud for his failure to disclose his kickback scheme in violation of state law). *But cf.* United States v. McNeive, 536 F.2d 1245, 1251–52 (8th Cir. 1976) (holding that defendant's acceptance of small, unsolicited gratuities is not a violation of the mail fraud statute).

71. *Mandel*, 591 F.2d at 1362.

72. For the story of Governor Mandel and his role in Maryland political history, see BRADFORD JACOBS, THIMBLERIGGERS: THE LAW V. GOVERNOR MARVIN MANDEL (1984).

73. John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 432 (1998) [hereinafter *Modern Mail Fraud*].

74. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (public assistance as an intangible right); United States v. Louderman, 576 F.2d 1383, 1387 (9th Cir. 1978) (intangible right to privacy).

prosecutions created new standards and regulations to maintain trust at all levels of government. Yet the effectiveness of these efforts depended on more than getting convictions and "throwing the bums out." As the next section will show, trust plays an essential role in modern democratic society, but third-party efforts to regulate it can sometimes prove counterproductive.

II.
RELYING ON TRUST, PUNISHING BETRAYAL

Across disciplines, scholars have shown how complex societies need trust. Identified as "a holding word for a variety of phenomena that enable individuals to take risks in dealing with others, solve collective action problems, or act in ways that seem contrary to standard definitions of self-interest," trust performs numerous functions.[75] Though we often take it for granted, most of the institutions, norms, and relationship of our daily lives rely on trust.[76] For example, without trust there would be no money,[77] and numerous transactions would be much less efficient.[78] Simple interactions—from getting directions to purchasing goods and ser-

75. Margaret Levi, *A State of Trust*, *in* TRUST AND GOVERNANCE 78 (Valerie Braithwaite & Margaret Levi eds., 1998); *see also* Lawrence E. Mitchell, *The Importance of Being Trusted*, 81 B.U. L. REV. 591, 596 (2001) (discussing the recent increased interest in trust across scholarly fields). Larry E. Ribstein presents two different perspectives on what trust means. One view defines it as "a decision by one person to give power over his person or property to another in exchange for a return promise" regardless of what motivated the decision. The other sees trust as "the special sense of reliance on one who is *not* subject to costly constraints and does not take into account the risk of breach." Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 556 (2001). This Note subscribes to both perspectives as a form of trust, though some of the sources contained herein view the former type of trust as less valuable than the latter. For an analysis of differing perspectives on the meaning of trust, see Russell Hardin, *The Street-Level Epistemology of Trust*, 21 POL. & SOC'Y 505, 505–12 (1993).

76. This Note focuses on what scholars refer to as "thin trust." Distinguished from "thick trust" which is "embedded in personal relations," "thin trust" is more valuable "because it extends the radius of trust beyond the roster of people whom we can know personally." ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 136 (2000).

77. *See* JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 106, 186 (1990) (explaining how trust in transferable notes provided by merchants and banks led to the creation of paper currency).

78. *Id.* at 97–98, 194–95; *see also* Levi, *supra* note 75, at 84 (citing an economic study that speculated that a decline in trust between workers and management had increased transaction costs and reduced productivity in the U.S.); PUTNAM, *supra* note 76, at 288, 323–25 (showing how social capital within communities can lead to aggregate economic growth).

vices—would be all but impossible. For these reasons, trusting societies are more efficient than non-trusting societies; the latter not only suffer aggregate community losses but also forgo valuable social capital.[79]

Democratic governance, an essential ingredient in America's complex society, also relies on trust. Trust in the state affects its ability to govern; a lack of trust in government can lead to widespread antagonism and increased distrust within society at large.[80] In her study of the role of trust in governance, Margaret Levi argues that a trustworthy government is necessary for large-scale contingent consent. But the impact of trust does not stop there. Trust in the government "influences its capacity to generate interpersonal trust, and the amount of socially and economically productive cooperation in the society in turn affects the state's capacity to govern."[81] In the same vein, Robert Putnam utilizes empirical and anecdotal evidence to demonstrate a correlation between trusting communities and everything from the quality of education and healthcare to low crime and effective governance.[82]

Given the importance of trust, one might wonder why the law does not punish betrayal more harshly (or more frequently). The answer is two-fold. First, any third-party effort to enforce or maintain trust also runs the risk of displacing or eroding it. Second, our societal norms only view certain trust relationships as appropriate venues for the criminal law.

A. Regulation: Creating, Displacing, and Destroying Trust

Many systems and structures within society serve to foster trust.[83] Third-party institutions such as investment banks and me-

79. *See* Hardin, *supra* note 75, at 507; PUTNAM, *supra* note 76, at 19–21, 134–47 (2000) (defining social capital as "connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them," and illustrating how social capital creates a "principle of generalized reciprocity" that enhances efficiency).

80. Levi, *supra* note 75, at 87–88; *see also* Anthony Pagden, *The Destruction of Trust and its Economic Consequences in the Case of Eighteenth-century Naples*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS 127, 138 (Diego Gambetta ed., 1988) (explaining how Spanish rule in Naples destroyed trust within the society and "ruined the kingdom"); Hardin, *supra* note 75, at 523 ("Not being able to trust the state leads to not being able to trust other individuals") (internal citation omitted).

81. Levi, *supra* note 75, at 87.

82. *See generally* PUTNAM, *supra* note 76.

83. *See generally* COLEMAN, *supra* note 77, at 180–96 (explaining how trust functions in different systems and discussing the role of intermediaries and third parties); *see also* Jonathan Bendor & Dilip Mookherjee, *Norms, Third-Party Sanctions,*

dia outlets build (and destroy) public trust in individuals and organizations.[84] In corporate law, the rules of agency and fiduciary duty encourage trust between employers and employees. In some relationships, trust is arguably only possible because of the law. We trust parties to a contract not because the contract serves as a reminder of what was agreed upon, but because the law promises to enforce that reminder.[85] As such, the law serves as one of the most important third-party constraints on those who might otherwise betray the trust of others.[86]

Despite this cross-disciplinary belief in the importance of trust in society, there is some debate regarding the degree to which laws should regulate trust relationships. Scholars assert that regulations—in the form of incentives and penalties—encourage trust by constraining opportunities for betrayal and molding the regulated party's self-interest. Such a party can be counted on to act in a pre-

and Cooperation, 6 J.L. ECON. & ORG. 33, 35 (1990) (stating that governments both collect and disseminate information about group members' actions and enforce coercive penalties); Carol M. Rose, Lecture, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 536 (1995) [hereinafter *Lecture*] ("Third-party constraints are those imposed by outsiders who take enforcement upon themselves, even though they are not party to any relevant transaction and have no direct gains or losses from them") (internal citation omitted).

84. COLEMAN, *supra* note 77, at 181.

85. *See* Annette Baier, *Trust and Antitrust*, 96 ETHICS 251 (1986) (explaining that contracts "make it possible not merely for us to trust at will but to trust with minimal vulnerability"); *see also* Carol M. Rose, *Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa*, 44 FLA. L. REV. 295, 314 (1992) [hereinafter *Giving, Trading, Thieving, and Trusting*] (explaining how the state's enforcement of contract law allows people to make agreements with the knowledge that "Leviathan is there to make us carry through our deals for our own long-term good"). *But cf.* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1735, 1808 (2001) (arguing that in the corporate context, internal constraints maintain trust and cooperation independent of contractual obligations); Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 513–14 (2002) (identifying trust that relies on contract as a "lesser form of trust"); Rose, *Lecture*, *supra* note 83, at 536, 556 (identifying law as a third-party constraint but pointing out that Law and Society scholars believe "personal relations, informal sanctions, and group dynamics" do more to govern people's behavior than law).

86. The other two forms of constraint are first party constraints one places on oneself and second party constraints that form through relationships in which one party can retaliate for the betrayal of another. *See* Rose, *Lecture*, *supra* note 83, at 535–36 (citing Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67, 71–72 (1987)). Rose identifies the three factors supporting trust as character, retaliation, and punishment. *See id.* at 538–39; *see generally* Tamar Frankel & Wendy J. Gordon, *Symposium on Trust Relationships: Introduction*, 81 B.U. L. REV. 321 (2001) (summarizing different ways in which trust and law interact).

dictable, and therefore trusted, manner.[87] Recent scholarship, however, suggests that laws regulating trust can sometimes have the opposite result. Rather than encouraging trust, the regulation sends a signal that were it not for the law, the party being regulated should *not* be trusted.[88] One commentator even goes so far as to say that "[t]he existence of legal coercion means that one no longer can clearly demonstrate that he respects his promise regardless of self-interest, but rather can only show that he can be legally coerced into performing."[89] Even if it does not eliminate all grounds for trust, a legal constraint can undo some of the social and economic benefits that come from preexisting trust, leaving the relationships in question with *more* friction and new avenues for distrust.[90] These theories largely temper the conventional wisdom regarding laws designed to induce trust, with most scholars concluding that while these regulations *can* be counterproductive they still serve a trust-promoting function.[91] As a result, the debate focuses on the degree

87. *See* Rose, *Lecture*, *supra* note 83, at 556 (identifying laws and regulations as "reinforcer[s]" of trust); *see also* Hardin, *supra* note 75, at 523; Philip Pettit, *Republican Theory and Political Trust*, *in* TRUST AND GOVERNANCE, *supra* note 75, at 311; c*f.* John Braithwaite, *Institutionalizing Distrust, Enculturating Trust*, *in* TRUST AND GOVERNANCE, *supra* note 75, at 343–45.

88. *See* Ribstein, *supra* note 75, at 582–83 (arguing that regulations lead to coerced compliance and undermine trust by preventing an actor from demonstrating that "he respects his promise regardless of self-interest"); Hall, *supra* note 85, 512–15 (arguing that health care regulations send a signal that the industry cannot be trusted); Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 334 (2001) (asserting that regulatory incentives to achieve desirable behaviors "may well *undermine* the conditions of trust necessary to hold collective action problems in check"); *cf.* Levi, *supra* note 75, at 85 (positing that "states influence levels of socially productive interpersonal trust").

89. Ribstein, *supra* note 75, at 582.

90. *Id.* at 580–82 (arguing that regulations can interfere with disposition to trust). *But cf.* Blair & Stout, *supra* note 85, 1794 (hypothesizing that a concern for trust leads business actors to internalize corporate regulatory laws as norms).

91. *See* Blair & Stout, *supra* note 85, at 1797 (pointing out that lawsuits can both deter opportunism by creating a threat that certain behaviors will be punished and can send signals that others are violating laws); M. Gregg Bloche, *Trust and Betrayal in the Medical Marketplace*, 55 STAN. L. REV. 919, 947–49 (2002) (countering Hall's assertion that regulations can send an antitrust signal, and pointing out that such regulations could also be seen as "trust-promoting"); Kahan, *supra* note 88, at 345 (conceding that, like criminal incentives, the regulatory incentives of law "may sometimes reinforce rather than displace trust and reciprocity"); Levi, *supra* note 75, at 95 (explaining that the efforts of oversight institutions (such as regulators and the media) to expose corruption may erode confidence in government).

to which regulating in certain scenarios can help or hinder society's achieving optimal levels of trust.[92]

An illustration of these theories can be found in analyses of tax compliance. Citing a wealth of empirical evidence,[93] Dan M. Kahan has shown how trust between citizens prevents them from failing to pay taxes and free-riding off government services. Trusting that other citizens pay taxes, taxpayer A makes sure to pay his share.[94] But coercive tax compliance policies can erode this trust. If taxpayer A concludes that regulations are necessary because his fellow citizens are cheating in their payments, A is *less* inclined to pay and more inclined to evade.[95] While Kahan concedes that in some circumstances regulatory incentives can "reinforce rather than displace trust and reciprocity,"[96] the ideal solution for achieving greater compliance in the tax regime is "simply to advise citizens that the vast majority of taxpayers *are* in fact complying."[97]

Scholars have recently applied these conclusions to other regulatory regimes and situations, including the enforcement of contracts,[98] lawsuits for breaches of fiduciary duty in the corporate context,[99] and disclosure regulations in managed health care.[100] Regarding the latter, Mark A. Hall goes so far as to conclude that by mandating trustworthy behavior among HMOs and doctors, the law serves to "crowd out intrinsic motivations to be trustworthy and convey an attitude of distrust, which can have more global effects than

92. For an example of such a debate regarding the regulation of HMOs compare Hall, *supra* note 85, with Bloche, *supra* note 91.

93. Kahan conducts a meta-analysis using numerous empirical studies that show how trust dictates peoples' willingness to contribute to public goods and how "the introduction of material incentives" can diminish that trust. Kahan, *supra* note 88, at 335–40.

94. Kahan's explanation presupposes (based on social science evidence) that trust between group members, rather than punitive regulations, subverts collective action problems.

95. Kahan, *supra* note 88, at 341–42 (internal citations omitted); *see also* John T. Scholz, *Trust, Taxes, and Compliance*, *in* TRUST AND GOVERNANCE, *supra* note 75, at 135–38; Levi, *supra* note 75, at 95; *cf.* Braithwaite, *supra* note 87, at 347.

96. Kahan, *supra* note 88, at 345.

97. *Id.* at 342; *cf.* Levi, *supra* note 75, at 90–91 (extending the theory and claiming that one's trust that fellow citizens are bearing their fair share of the burden contributes to one's trust in the government that enacts policies that divide this burden). For a historical application of this theory see MARGARET LEVI, OF RULE AND REVENUE 158–69 (1988).

98. *See supra* note 85.

99. *See* Blair & Stout, *supra* note 85, at 1798.

100. *See* Hall, *supra* note 85, 514–15; Bloche, *supra* note 91, at 948 (criticizing Hall's use of data).

the trust-promoting impact of the regulated behavior."[101] While regulations can bolster trust, Hall argues that in some scenarios it might do more damage than good, interfering with normative trust levels.

In keeping with this analysis, Kahan posits that when productive trust is already present in a relationship, regulations supplant rather than reinforce trust. In other words, if a party is generally trusted, the law may displace that trust by disrupting pre-conceived expectations. In contrast, if the party is generally not trusted, the *only* effective means of building trust may be through material incentives.[102] In a similar manner, business scholars have used economic models to show that ethical standards are cyclical. Elevated ethical norms increase productivity but open the door "for cheaters who free-ride on the trust created by higher standards," while "periods of low ethical norms drive out all but the enterprises in which high standards can be assured . . . ."[103]

The same situation appears to apply with regard to trust. A culture with too much trust will create opportunities for corruption, driving down trust. In a similar manner, periods of distrust make trustworthy individuals and institutions all the more attractive, leading to a renewed emphasis on trust.[104] In the former environment legal remedies can drive down trust or reign in corruption. In the latter, the law can help renew trust, penetrating the norm of distrust. Discussing cycles of trust and distrust, Carol M. Rose points out that "insofar as legal remedies reinforce trust, they seem to work best when they work countercyclically. That is, legal remedies can play a certain balancing act with informal trust grounds by moderating cycles of trust and distrust that would otherwise occur."[105] Though Rose does not discuss the law's potential to displace trust, this normative cyclical theory complements Kahan's belief that when trust is at a low point the "advent of credible regu-

101. Hall, *supra* note 85, at 514. *Contra* Bloche, *supra* note 91, at 948 (challenging Hall's assumptions and asserting that "[m]andatory disclosure of incentives to doctors to limit treatment could just as easily be characterized as both autonomy-regarding and trust-promoting").

102. *Cf.* Kahan, *supra* note 88, at 345–46.

103. Rose, *Lecture*, *supra* note 83, at 554 (citing Thomas H. Noe & Michael J. Rebello, *The Dynamics of Business Ethics and Economic Activity*, 84 AM. ECON. REV. 531, 531 (1994)).

104. Rose, *Lecture*, *supra* note 83, at 554. An example of this can be seen in the recent corporate accounting improprieties and ensuing securities regulations. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in sections of 11, 15, 18, 28, and 29 U.S.C. (2004)).

105. Rose, *Lecture*, *supra* note 83, at 554 (internal citation omitted).

latory incentives" is best able to reinforce trust and help it to grow.[106] Based on these theories, laws that aim to increase trust among individuals and between individuals and institutions should try to react to these cycles of trust.

B. Trust and the Criminal Law

Most analyses of the law's interaction with trust focus on regulatory law and civil actions. Yet mail fraud is not alone in identifying some betrayals as criminal. Betrayal of country, whether through espionage or breach of security, generally results in a harsh criminal penalty.[107] Bigamy, quite possibly the most personal betrayal of trust, is defined as a felony in many states,[108] and con games, despite their contractual nature, are also criminal offenses.[109] Prosecutions for these betrayals aim not at restoring any victims to the status quo ante (as the civil law would), but at preventing betrayers from undermining trust within relationships and institutions. Espionage, scams, and bigamy are not treated as everyday breaches of trust but are instead deemed special forms of betrayal that can have ramifications outside of the relationship at hand. When these "super" breaches occur, the law serves as "a kind of backstop for more informal grounds of trust."[110]

106. Kahan, *supra* note 88, at 346.

107. *See* Maynard Anderson, *Introduction*, *in* CITIZEN ESPIONAGE: STUDIES IN TRUST AND BETRAYAL 2 (Theodore Sarbin et al. eds., 1994) (identifying and analyzing espionage as the breach of a trust conferred by the government on certain citizens).

108. *See* Rose, *Lecture*, *supra* note 83, at 543–44. Rose suggests that the law takes bigamy more seriously than adultery because "the consequences to the betrayed may be more severe." *Id.* at 543. Yet Rose concedes that many of the distinctions that define that severity are just as true for the spouse and family of an adulterer. A major distinction is that the bigamist has used a trusted institution, marriage, to add legitimacy to his otherwise fraudulent relationship. The breach not only undermines the betrayed party; it tarnishes a social and legal tradition as well. *Id.* at 543–44.

109. *See id.* at 549. The United States Sentencing Guidelines also recognize the role of betrayal of trust, adding two levels to crimes in which "the defendant abused a position of public or private trust." U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (2004).

110. Rose, *Lecture*, *supra* note 83, at 554. Rose points out that scholars in the Law and Society movement argue that legal third-party grounds for trust are not nearly as influential as first-party and second-party constraints. This leads to Rose's conclusion that the law is best viewed as a backstop or "reinforcer" for other forms of trust. *Id.* at 556. M. Gregg Bloche makes a similar point but concludes that the symbolic legal affirmation of norms "sends the message that a firm's participants *ought* to adopt them as preferences." Bloche, *supra* note 91, at 926–27.

Public corruption can also function as a super breach. Even more than average citizens, public servants, by the very nature of their employment, have committed to the "social contract." As a result, their breach tears at the social fabric in several places. Rose explains this phenomenon, describing public corruption as a special "species of betrayal":

> We may have trusted that President X was a good ruler and a good person (*character*); that we could vote X out of office if he failed us (*retaliation*); and that X would be constrained by concern for reputation, or by law, or by the enforcement of other third parties in surrounding institutions (*punishment*).[111]

Public corruption is also unique because of the government's role in our society. When a betrayal occurs within an institution that punishes and reinforces trust relationships, it "can have disastrous effects on the extent to which citizens trust government and trust each other."[112] A corrupt civil servant has betrayed both his employer and the citizenry that his employer represents. In turn, both the individual and the institution have betrayed the public.[113]

The resulting distrust, however, is not always bad. When it reflects a genuine failure of the state to "meet the requirements of trustworthiness," a lack of trust can lead to much needed reforms that rebuild the relationship between the people and the institutions that govern them.[114] For example, prominent events, such as Watergate and the collapse of Enron, have led to harsh punishments and large-scale reform. But these upheavals tend to be few and far between. In our contemporary legal system, acts of violence incur the worst punishments while acts of betrayal are resolved through the civil law's role in upholding contracts.[115]

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111. Rose, *Lecture*, *supra* note 83, at 557 (internal citation omitted).

112. Levi, *supra* note 75, at 88; *see also* Partha Dasgupta, *Trust as a Commodity*, *in* TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS, *supra* note 80, at 50 (pointing out that in order for a threat of punishment for breach of trust to be effective, "the enforcement agency itself must be *trustworthy*"); *cf.* Rose, *Lecture*, *supra* note 83, at 554–56 (asserting that government corruption is disruptive to an appropriate balance between formal and informal grounds for trust).

113. *See* Avner Ben-Ner & Louis Putterman, *Trusting and Trustworthiness*, 81 B.U. L. REV. 523, 534 (2001) (explaining how trust relationships between two individuals and an individual and an organization can differ).

114. *See* Levi, *supra* note 75, at 95–96.

115. *See* Rose, *Giving, Trading, Thieving, and Trusting*, *supra* note 85, at 314 (explaining how the state's enforcement of contract law allows people to trust enough to make agreements with the assurance that the gains from those agreements will be realized).

Medieval literature suggests that the aforementioned exceptions may have once been the rule. In *The Inferno*, those who suffer in the ninth and lowest circle of hell are all betrayers, their common sin the intentional deception of friends, family, or country.[116] In Dante's afterlife, such betrayals are the most serious crimes, worse than sins of passion and even acts of violence. Because deliberately breaching one's duty to another tears at the social fabric, *The Inferno* argues that these acts damage society in a far more significant way than other crimes.[117]

Only in relatively recent years have acts of fraud and other white-collar crimes received *any* criminal attention. In his study of *The Inferno*, Paul Chevigny argues that the current reversal of Dante's framework is the result of western society's near veneration of self-interest and ambition. While medieval Christian conceptions of culpability maintain their imprint on modern criminal theory, Chevigny asserts that the recently acknowledged importance of trust in the law has been slow to enter the criminal field.[118] If he is correct, honest services mail fraud may be one law that is ahead of the curve. Like the crimes of Dante's ninth circle, it is not concerned with means, impact, or tangible harm; it calculates culpability based on the breach of trust itself.

C. The Federal Regulation of Local Betrayal: Theories of Trust and the Mail Fraud Statute

If, as Chevigny writes, "the heart of the reason that betrayals of trust are not taken more seriously as crimes" is society's general acceptance of self-seeking behavior,[119] public corruption crimes may have warranted the exceptional attention they received during the 1970s.[120] Given the "sacred duties" of a public official,[121] govern-

116. *See* DANTE ALIGHIERI, INFERNO 537–90 (Robert Hollander & Jean Hollander trans., Doubleday 2000) (containing cantos XXXII–XXXIV).

117. Paul G. Chevigny, *From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime*, 26 LAW & SOC. INQUIRY 787, 788 (2001).

118. *Id.* at 791; *see also* Mitchell, *supra* note 75, at 596 (explaining that, in recent years, the concept of trust has become an important scholarly topic in a variety of fields).

119. Chevigny, *supra* note 117, at 810.

120. This attention also expressed society's attitude toward the federal government in the mid-to-late-1970s. *See* John C. Coffee, Jr., *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, 163 n.201 (1981) [hereinafter *From Tort to Crime*] ("[I]t is neither random coincidence nor a matter of judicial oversight that both [the mail and wire fraud] statutes have been reinterpreted to reach political corruption. Rather, judicial acceptance of that result in all likelihood reflects a broad social and political consensus, which preceded but was later intensified by

ment employees are expected to eschew self-seeking behavior because their service is defined by the public interest, not their own selfish goals.[122] As a result, when officials "step over the line and betray the interests of others to advance their own interests," the act is definitely *not* a mere exaggeration of "what is otherwise a virtue."[123] Even if there is no damage to society beyond the breach of trust, public betrayals are regarded as criminal because there is still an injury to the body politic.[124]

Yet traditionally, civil laws regulate trust relationships, even when they involve a fiduciary duty.[125] At the height of prosecutors' use of honest services fraud in the early 1980s, John Coffee wrote frequently about the courts' creative applications of § 1341, pointing out the disturbing ramifications of making fiduciary breaches into criminal fraud.[126] Though he did not discuss the role of trust and betrayal, Coffee's comments reflected a concern for how the new use of the mail fraud statute would affect societal interactions.[127] He recognized that "unintended and low visibility consequences can result when the process of evolution [of statutes] brings the threat of the criminal law to bear on sensitive relationships."[128] While courts, legislators, and prosecutors embraced the

the Watergate conspiracy, concerning the gravity of offenses involving institutional corruption."); M. Kent Jennings, *Political Trust and the Roots of Devolution*, *in* TRUST AND GOVERNANCE, *supra* note 75, at 236.

121. Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941). *See supra* notes 52–56 and accompanying text.

122. Often, however, the two converge, as when an official needs to serve the public interest in order to get reelected.

123. Chevigny, *supra* note 117, at 812.

124. *See* John Kleinig, *Crime and the Concept of Harm*, 15 AM. PHIL. Q. 27, 36 (Jan. 1978); *cf.* Chevigny, *supra* note 117, at 811–12 (claiming that betrayals are often the most economically damaging crimes, while also injuring values "of utmost importance to society").

125. 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, 1878–79 (1992) [hereinafter *Paradigms Lost*]; *cf.* Coffee, *From Tort to Crime*, *supra* note 120, at 117–19; Peter R. Ezersky, Note, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach*, 94 YALE L.J. 1427, 1436–40 (1985) (explaining how mail fraud's criminal use of fiduciary duty differs from the corporate law's civil treatment of the subject and asserting that the purpose of fiduciary law makes it ill-suited for enforcement with criminal sanctions).

126. Coffee, *From Tort to Crime*, *supra* note 120, at 127–28, 149–59 (expressing concerns that relate to the criminalization of public and private fiduciary breaches).

127. 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, 8 (1983) [hereinafter *Metastasis*].

128. *Id.* at 9.

third-party enforcement possibilities of honest services fraud, they failed to recognize the different ways in which such trust regulation could play out and the incentives that would drive the expansion of the statute. If regulations can also displace trust, lawmakers must be careful to create laws that will serve as the aforementioned backstop, rather than lead to an inappropriate erosion of communal norms.[129] In other words, they must be certain that the cycles of trust and regulation are functioning efficiently.

There are few better case studies for the cyclical theory of trust and its countercylical regulation than the national government's actions in the 1970s. With citizen trust and confidence in the federal government in descent, Washington took numerous steps to bolster the public's confidence in its work.[130] The Justice Department made public corruption one of its top priorities and opened the Public Integrity Section, an office exclusively charged with prosecuting public corruption.[131] Meanwhile, on the non-criminal front, the Ethics in Government Act and other legislative and bureaucratic reforms aimed to improve ethical norms and reinvigorate trust in government.[132]

The new use of mail fraud to reach the denial of the citizenry's "intangible rights to honest government"[133] also served as a strong indicator of a countercycle of regulation. Specifically, honest services fraud prosecutions could create regulations by attacking behaviors that, standing alone, may or may not have been criminal. In the context of mail fraud such behaviors became felonious "schemes to defraud," defining a new type of illegal conduct. Yet

129. *See* MARGARET LEVI, CONSENT, DISSENT, AND PATRIOTISM 23 (1997) [hereinafter CONSENT, DISSENT] (explaining how more information about government can actually undermine its credibility and effectiveness).

130. *See* Jennings, *supra* note 120, at 218 (discussing the "massive decline" in the public's trust in the federal government during the 1960s); *see also* ROBERT N. ROBERTS & MARION T. DOSS, JR., FROM WATERGATE TO WHITEWATER: THE PUBLIC INTEGRITY WAR 117–23 (1997) (claiming that Americans were angry about the influence of special interests but even angrier at the perceived inefficiency and waste of a bloated government).

131. *See* ROBERTS & DOSS, *supra* note 130, at 89 (stating the purpose and responsibilities of the Public Integrity Section); Kenneth W. Starr, *Symposium Summation*, 51 HASTINGS L.J. 785, 787 (2000) (explaining how Watergate indirectly led to the creation of the Public Integrity Section).

132. ROBERTS & DOSS, *supra* note 130, at 121 ("Provisions for the appointment of independent counsels, a new Office of Government Ethics and public financial disclosure all reflected progressive beliefs that improved ethics management would have a positive impact on public trust in government.").

133. Before the passage of § 1346, the intangible right to honest services in the public sector was also referred to as an intangible right to honest government.

despite the possible need to counteract the public's decreasing trust in the national government,[134] the vast majority of prosecutions did not target federal actors.[135] *Isaacs*, *Mandel*, and other similar cases reflected an effort to create "backstops" against corruption in state capitals and county seats, rather than in Washington.[136]

This scenario introduces numerous federalism issues that, while beyond the scope of this Note, underline the unique nature of this form of regulation. The national government's action affects not only public trust and esteem for local actors; it also affects the way in which those actors trust each other, the institutions in which they serve, and the management of those institutions.[137] The regulations could bolster trust: knowing that national regulations exist may cause the public to trust regional governments more because such entities now have a *greater* incentive to eliminate institutional corruption; it is better to keep the "housecleaning" local than be shamed by an intervening body.[138] Officials could also internalize the regulations as norms, which could only increase public

134. Survey data show that the assumption that state and local governments suffered from more corruption than national institutions experienced a sharp reversal in the wake of Watergate. *See* Jennings, *supra* note 120, at 231.

135. *Cf.* Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 717 (2000) [hereinafter *Comparing the Scope*] (asserting that "virtually all of the reported cases brought under the intangible rights/honest services theory of mail and wire fraud involve corrupt state and local officials"); Reid Weingarten, *Volcano of Change*, 51 HASTINGS L.J. 693, 693, 696 (2000) ("Watergate created a volcano of change in public corruption . . . . The meat and potatoes of public corruption since Watergate have been cases against state and local officials. I don't know what the numbers are, but I bet that close to 90% of the successful prosecutions in this area since Watergate have involved the 'feds' going after state and local officials"); Williams, *supra* note 30, at 145 (claiming that "federal law enforcement officers have disproportionately targeted state and local officials for abusing public office," often charging them with mail fraud) (internal citation omitted).

136. It is noteworthy that in a 1979 survey of agencies involved in the investigation and/or prosecution of white collar crime, state and local corruption was "one of the most frequently identified white collar problem areas." TOMPKINS, *supra* note 61, at 15. Likewise, in a 1980 survey regarding white collar crime, FBI field officers identified as a priority "[c]orruption of state and local officials . . ." more than any other priority/problem area. *Id.* at 13.

137. *See* Kahan, *supra* note 88, at 342; *see also* ANECHIARICO & JACOBS, *supra* note 61, at 174 ("illuminating the incompatibility and tension between the anticorruption project and governmental efficiency").

138. *See supra* note 85 (listing articles that show the trust-promoting or "backstop" potential of trust regulation).

trust.[139] Alternatively, regulations could erode the public trust, leading to a decrease in the benefits and efficiencies that trust provides.[140] In the realm of honest services, this drawback is experienced individually *and* institutionally. Local bureaucrats are unable to clearly convince citizens that they are motivated by the public interest alone, as the specter of the "feds" could be what truly prevents self-interested behavior.[141] Meanwhile, regulations may lead citizens to regard their state and local institutions as less competent because they require oversight.[142]

Honest services fraud also provides the federal government with an opportunity to grandstand as the exterminator of corruption, without considering these possible harms.[143] In the words of George D. Brown, to what degree does the law "put the federal government in the position of choosing when to ride in on a white

139. *See* Blair & Stout, *supra* note 85, at 1794–97 (hypothesizing that a concern for trust leads business actors to internalize corporate regulatory laws as norms).

140. *See supra* notes 83–106 and accompanying text; *see also* LEVI, CONSENT, DISSENT, *supra* note 129, at 26–27 ("Estimates of government trustworthiness and the likely behavior of other citizens derive from a combination of personal observations and information provided by acquaintances, media, and organizations."); Ribstein, *supra* note 75, at 580.

141. *See* Hall, *supra* note 85, at 515 ("The critical distinction [among voluntarily adopted trust creating measures] . . . is whether a measure is undertaken at the institution's initiative or instead is imposed externally. If externally imposed, the measure is more likely to be seen as signaling distrust and the institution is more likely to resist it or to comply only to the extent of realistic enforcement. Also, an external safeguard shifts the focus of trust to the external authority and so diminishes trust in the institution"); *see also* Ribstein, *supra* note 75, at 582.

Arguably, the public is often unaware of the breadth of specific federal regulations. However, when federal actors enforce the regulations in a public manner, the citizenry cannot help but be aware of the national government's role in monitoring local bureaucracy.

142. This analysis does not include the possible ramifications of upsetting the federal-state balance on criminal justice issues. *See* Williams, *supra* note 30, at 154.

143. Arguably, this also allows the federal government to regain trust in its own institutions. Some studies show that in the aftermath of Watergate the federal government never regained the public's trust, though this does not necessarily indicate that its action in pursuing local public corruption did not stave off continued decline or allow for some renewed trust. *See* Jennings, *supra* note 120, at 218; ROBERTS & DOSS, *supra* note 130, at xix ("Yet the successes of the good-government reform movement have done very little to restore public trust in government."). In *Consent, Dissent, and Patriotism*, Margaret Levi points out that a state may unintentionally reveal widespread citizen noncompliance "as a side effect of its efforts to demonstrate its enforcement power." LEVI, CONSENT, DISSENT, *supra* note 129, at 27. In this case, the federal government has an incentive to demonstrate its enforcement power, but little concern for revealing (or creating the appearance of) local government corruption.

horse and take credit for 'cleaning up' an egregious governmental situation, while the normal discontent and grousing about incompetent or marginally corrupt state and local officials is not directed at the national government"?[144] This problem is present on a smaller scale at each U.S. Attorney's office, where, according to Coffee, "the value structure surrounding the federal prosecutor maximizes these opportunities to pursue individual self-interest."[145] Public officials often seek credibility and trust by attacking one another's indiscretions,[146] but the problem is magnified when one party has the power to prosecute.[147] In a culture in which "careerist motives may encourage the individual prosecutor to stalk the 'big kill,'" the versatility of the mail fraud statute can criminalize actions that might be better disciplined through other proceedings.[148]

It should be no surprise then, that at the height of the use of the intangible rights doctrine to prosecute honest services mail fraud,[149] complaints abounded that the national government's new interest in local corruption often defied the limited purposes of federal criminal law.[150] Scholars complained that U.S. Attorneys, instead of intervening in particular circumstances, were overriding the discretion of state and local authorities, often for their own political gain.[151] In this manner, honest services prosecutions bol-

144. Brown, *New Federalism*, *supra* note 18, at 445–46.

145. Coffee, *Metastasis*, *supra* note 127, at 22. Coffee does, however, concede that superiors check some of these incentives. *Id.*

146. Robert N. Roberts and Marion T. Doss, Jr. make a case that Watergate "touched off a period of unmitigated public ethics carnage" and increased the casualties in an already growing public integrity war among political factions. ROBERTS & DOSS, *supra* note 130, at xv.

147. *Cf.* Loomis, *supra* note 18, at 77–79 (discussing the dangers of "activist" federal prosecutors). At least one scholar asserts that the U.S. Attorney's prosecution of Governor Kerner was politically motivated. *See* ROBERTS & DOSS, *supra* note 130, at 56–57, 90–91; Williams, *supra* note 30, at 148.

148. Coffee, *Metastasis*, *supra* note 127, at 21–22; *see also* Daniel Hurson, *Limiting the Federal Mail Fraud Statute—A Legislative Approach*, 20 AM. CRIM. L. REV. 423, 432–33 (1983) (discussing how prosecutors investigate and then seek a statute with which to indict, often developing cases against public officials because, in part, they are attracted to high profile targets).

149. *See* Coffee, *Modern Mail Fraud*, *supra* note 73, at 432 (identifying *Margiotta* as the "high water mark" in public sector honest services fraud prosecution).

150. *See* Baxter, *supra* note 18, at 336–43; Loomis, *supra* note 18, at 68–72. While discretion concerns exist for all applications of the criminal law to local officials, as already shown, the versatility of mail fraud allows for a lower standard and punishment for betrayal of the public trust rather than a breach of another specific criminal statute.

151. Baxter, *supra* note 18, at 339–40; *cf.* Thomas M. DiBiagio, *Politics and the Criminal Process: Federal Public Corruption Prosecutions of Popular Public Officials Under*

stered the credibility of the regulating authority, but risked eroding trust in the regulated institution.[152] Therefore, the essential question was when it would be appropriate for the federal government to intervene in local affairs. Scholars and practitioners struggled with this issue in the context of both the criminal law generally and honest services fraud specifically. But despite constant references to "the public trust," no analyses studied when federal intervention would most likely serve to improve trust and when it would potentially serve to make government less trusted and less effective.

III.
PUNISHING PUBLIC BETRAYAL AND BOLSTERING PUBLIC TRUST

A. Justifications for Federal Intervention to Protect the Public Trust

Before, during, and after the height of honest services fraud prosecutions, lawyers tried to identify criminal situations that justi-

the Honest Services Component of the Mail and Wire Fraud Statutes, 105 DICK. L. REV. 57, 63 (2000) ("Many [prosecutors] are political actors who are more attentive to their own interests than those of the institutions they serve."); Coffee, *Metastasis*, *supra* note 127, at 21–22.

152. With the erosion of trust in nongovernmental institutions it was only a matter of time before the honest services theory expanded beyond the public sector. In *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), the Second Circuit reversed its policy of limiting honest services fraud to schemes within government, holding that that an attorney breaches his duty "to act with the utmost good faith and loyalty" to his firm's clients when he fails to disclose his conflicting services to other clients. Coffee, *From Tort to Crime*, *supra* note 120, at 131–32 (quoting the *Bronston* jury charge); Coffee, *Tort/Crime Distinction*, *supra* note 60, at 203 (explaining that in the early 1980s, the Second Circuit "overrode" Judge Friendly's suggestion that intangible rights only applied in public sector schemes). For more on *Bronston* see Coffee, *Modern Mail Fraud*, *supra* note 73, at 432–35; Carrie A. Tendler, Note, *An Indictment of Bright Line Tests for Honest Services Mail Fraud*, 72 FORDHAM L. REV. 2729, 2735–36 (2004). The distinction between private citizens and public officials also eroded. In *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), the Second Circuit expanded the notion of a public official to include the Chairman of the Republican Committee of Nassau County and the Town of Hempstead. Under Margiotta's political leadership the town and county continued a tradition of siphoning kickbacks from government contractors to political allies. Despite not holding public office, the court found that someone who "participates substantially in the operation of government owes a fiduciary duty to the general citizenry not to deprive it of certain intangible political rights." 688 F.2d at 121. The two-pronged test to determine fiduciary status would look at (1) whether others relied upon the individual "because of a special relationship in the government" and (2) whether the person has de facto control over governmental decisions. 688 F.2d at 122. For more on *Margiotta* see Coffee, *Modern Mail Fraud*, *supra* note 73, at 435–36; Moohr, *supra* note 18, at 165–66 (1994); Jeffries, *supra* note 19, at 234–42.

fied federal intervention. Among the situations Louis B. Schwartz listed in his 1948 article on federal criminal jurisdiction were "[w]hen the states are unable or unwilling to act . . . when, although the particular jurisdictional feature [on which federal intervention relies] is incidental, another substantial federal interest is protected by the assertion of federal power," and "when it would be inefficient administration to refer to state authorities a complicated case investigated and developed on the theory of federal prosecution."[153] In recent years, scholars and judges have sharpened these criteria to justify federal intervention for the specific purpose of eradicating local corruption. Focusing on the capabilities of local district attorney offices, the "ripple effect[s]" of corruption, and local governments as "points of entry for office seekers within the American democratic system," scholars have made a case for a federal interest in prosecuting these local crimes.[154] Furthermore, if a climate of "systemic and pervasive corruption" infects the very branches of local government that investigate and prosecute the law, it leaves the national government as the only party to regulate.[155] Even if the problem is isolated, those in favor of federal intervention often point out the lack of resources and political disincentives at the state and county level.[156] All too often state offi-

153. L. B. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion*, 13 LAW & CONTEMP. PROBS. 64, 73 (1948).

154. Brown, *Post-*Lopez *Analysis*, *supra* note 18, at 243; *see also* Baxter, *supra* note 18, at 356–59 (listing the 1971 National Commission for the Reform of Federal Criminal Laws' guidelines for the when federal officials should assert criminal jurisdiction); Ruff, *supra* note 61, at 1213 ("A rational policy governing federal intervention in cases of local corruption should be founded on an appropriate balancing of three factors: the capacity of the federal prosecutor to manage both the investigation and prosecution effectively; the capacity of the local prosecutor, with or without federal assistance, to do so; and the adverse social consequences that would flow from the failure of both to take action").

155. Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 HASTINGS L.J. 1277, 1296 (1995) [hereinafter *Reporter's Draft*] (containing Judge Stanley Marcus's lists of potential criteria for federalization of criminal law).

156. *See* Baxter, *supra* note 18, at 340–41 ("Federal prosecutions of corrupt local officials who are not involved in law enforcement are often justified by the argument that local enforcement officials are unwilling to prosecute such defendants themselves . . . . Efficient prosecution of local corruption frequently requires the use of highly specialized investigatory techniques which the Federal Bureau of Investigation and United States Attorneys (USA's) are better equipped to employ.") (internal citations and footnotes omitted); Michael W. Carey et al., *Federal Prosecutions of State and Local Public Officials: The Obstacles to Punishing Breaches of the Public Trust and a Proposal for Reform, Part One*, 94 W. VA. L. REV. 301, 304–10 (1992) (explaining institutional structures that hinder local institutions in their efforts to pursue public corruption); Ruff, *supra* note 61, at 1209–10 (outlining issues re-

cials have neither the will nor the wherewithal to pursue widespread corruption.

While these theories support federal efforts to prosecute local corruption, they do not necessarily justify what one judge referred to as the "freeswinging club of mail fraud."[157] Other federal statutes that criminalized particular acts also flourished during this period,[158] but prosecutors frequently applied the intangible rights/honest services theory to local corruption instead of a more specific law.[159] As the use of § 1341 reached its apex, it appeared that it had far exceeded the original Congressional purpose. The broad nature of the statute initially led courts to award *jurisdiction* based on moral concerns. Now, however, the federal government was able to apply the law to moral infractions alone. Yet despite the inherent message of trust and honesty embedded in the caselaw, commentators did not cite the damage of betrayal as a justification for intervention.

As § 1341 expanded into a massive broom that could sweep up all forms of impropriety, scholars (and not a few judges) expressed a general sense of frustration and disbelief at the law's ready application. With regard to both private and public sector cases, com-

lated to the resource disparities between federal and local organizations); Williams, *supra* note 30, at 155 (claiming that the primary justification for federal prosecution of local public corruption "is that state officials are less inclined to investigate their 'own' people and more likely to accept a lower standard of conduct from political colleagues that they would not tolerate from others").

157. United States v. Margiotta, 688 F.2d 108, 143 (2d Cir. 1982) (Winters, J., dissenting).

158. Other statutes, however, are not as flexible or easy to apply to local corruption. Section 201 criminalizes the payment of bribes or illegal gratuities, but only applies to federal officials. Beale, *Comparing the Scope*, *supra* note 135, at 701–04. The Hobbs Act (18 U.S.C. § 1951 (2000)) provides federal jurisdiction over local corruption, but only if an act of extortion could affect interstate commerce and involves a quid pro quo exchange. *See id.* at 706–08, 710. The federal program bribery statute makes it a crime for a local government official to "to (1) embezzle, steal, or obtain by fraud $5,000 or more from the state or local government, or (2) 'corruptly' accept or give 'anything of value' in connection with any business or transaction worth $ 5,000 or more to that state or local government" if that government receives more than $10,000 in federal assistance in one year. Paul Salvatoriello, Note, *The Practical Necessity of Federal Intervention Versus the Ideal of Federalism: An Expansive View of Section 666 in the Prosecution of State and Local Corruption*, 89 GEO. L.J. 2393, 2394-95 (2001) (quoting 18 U.S.C. § 666 (2000)); *see also* Carey, *supra* note 156, at 324–33 (containing an overview of federal corruption statutes).

159. *See* Beale, *Comparing the Scope*, *supra* note 135, at 717 (asserting that "virtually all of the reported cases brought under the intangible rights/honest services theory of mail and wire fraud involve corrupt state and local officials").

plaints included: a lack of congressional intent to include intangible harms in § 1341;[160] the statute's vagueness,[161] the danger of making civil harms into criminal acts through the construction of fiduciary duties[162] and violations of federalism,[163] separation of powers doctrine,[164] procedural due process, and substantive due process.[165] The Supreme Court would soon echo these arguments; in 1987 it temporarily ended the application of "intangible right to honest services" in *McNally v. United States*.[166]

B. McNally and 18 U.S.C. § 1346: The Rejection and Rebirth of the Intangible Right to Honest Services Doctrine

In 1987 the Supreme Court's holding in *McNally* rejected the disjunctive interpretation of § 1341 and, in doing so, eliminated any justification for the inclusion of intangible rights in the mail fraud statute.[167] According to the Court, the history of the statute, including the 1909 amendment, did not indicate that Congress was departing from the common understanding of fraud as affecting property or monetary rights.[168] While the Court conceded that the language of § 1341 could be interpreted to support the disjunctive interpretation, it chose not to "construe the statute in a manner that leaves the outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."[169] Accordingly, if Congress

160. *See* Gray, *supra* note 26, at 572.

161. *See* Williams, *supra* note 30, at 151–53.

162. *See* Coffee, *From Tort to Crime*, *supra* note 120, at 127–28; Coffee, *Paradigms Lost*, *supra* note 125, at 1878–79; *see generally* Ezersky, *supra* note 125 (arguing that the use of the criminal law to police corporate fiduciaries is inconsistent with the purpose of fiduciary obligations and the criminal law).

163. *See generally* Loomis, *supra* note 18 (analyzing the use of the federal mail fraud statute to prosecute state and local corruption and recommending judicial intervention to narrow the scope of federal prosecutions); *see also* Moohr, *supra* note 18, at 171–78.

164. *See* Moohr, *supra* note 18, at 178–79.

165. *See* Morano, *supra* note 11, at 76–81; *see also* Steven B. Duke, Commentary, *Legality in the Second Circuit*, 49 BROOK. L. REV. 911, 924–31 (1983) (criticizing *Margiotta*). *Contra* Stacy Jaye Kanter, *Mail Fraud and the De Facto Public Official: The Second Circuit Protects Citizens' Rights to Honest Government*, 49 BROOK. L. REV. 933 (1983).

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

167. The facts of *McNally* contain a conspiracy almost identical to that in *Margiotta*, only at the state level. *See supra* note 152.

168. *McNally*, 483 U.S. at 358–59.

169. *Id.* at 360.

desired this result, the Court insisted it "must speak more clearly than it has."[170]

Congress responded swiftly to this invitation.[171] In 1988 the House Sub-Committee on Criminal Justice held a hearing on proposed Congressional responses to *McNally*. Acting Assistant Attorney General John C. Keeney reminded the Sub-Committee that the prosecution of public corruption cases had "been one of the Department's highest priorities since the mid-1970s," and outlined several reasons that the problem demanded a "federal solution."[172] Among his concerns about multi-jurisdictional cases, corrupt local law enforcers, and inadequate investigative mechanisms at the state level, Keeney asserted the Department's belief that "political cor-

170. *Id*. at 360. Justice Stevens, joined in part by Justice O'Connor, dissented from the decision claiming there was no reason "to upset the settled, sensible construction that the federal courts have consistently endorsed." *Id.* at 368 (Stevens, J., dissenting). Stevens also predicted both the Congressional and judicial response to *McNally*, writing, "[i]n the long run, it is not clear how grave the ramifications of today's decision will be. Congress can, of course, negate it by amending the statute. Even without congressional action, prosecutions of corrupt officials who use the mails to further their schemes may continue since it will frequently be possible to prove some loss of money or property." *Id.* at 377.

In 1988 law journals published numerous Comments on *McNally* including: Craig M. Bradley, *Foreword: Mail Fraud After* McNally *and* Carpenter: *The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573 (1988); Paul W. Barnett, Note, McNally v. United States: *Mail Fraud—The Procrustean Bed Couldn't Stretch This One*, 48 LA. L. REV. 723 (1988); Jeffrey J. Dean & Doye E. Green, Jr., Note, 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 (1988); Donna Metcalfe Ducey, Note, McNally v. United States: *The Demise of the Intangible Rights Doctrine*, 66 N.C. L. REV. 1035 (1988).

171. There was also a judicial reaction to *McNally*. Just six months later in *Carpenter v. Unites States*, 484 U.S. 19 (1987), the Court distinguished between intangible rights and intangible property, reinstating a narrower version of the intangible rights theory that separated it from the honest services doctrine. A unique case, *Carpenter* involved a scheme among stockbrokers and a *Wall Street Journal* reporter. The conspiracy called for the brokers to utilize information the reporter planned to include in his influential "Heard on the Street" column, before its publication increased the value of certain stocks. *Id*. at 22–23. Distinguishing *McNally*, the Court held that the betrayal extended beyond the newspaper's "contractual right to [the reporter's] honest and faithful service." *Id.* at 25. The confidential information, despite its intangible nature, was still a form of *property* protected by the mail fraud statute. For a thorough analysis of *Carpenter* see John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988).

172. *Hearing*, *supra* note 61, at 15–16 (1988) (statement of John C. Keeney, Acting Assistant Att'y Gen., Criminal Division). For information on other legislative proposals, see Donna M. Maus, *License Procurement and the Federal Mail Fraud Statute*, 58 U. CHI. L. REV. 1125, 1129 (1991).

ruption is so inimical to maintaining public trust and confidence in our democracy that a federal commitment to its eradication by all reasonable means is both justified and necessary."[173] Assistant U.S. Attorney Robert G. Ulrich seconded this notion, pointing out the difficulty in calculating "the harm done to the very fabric of our form of government—the loss of confidence in our public officials, and in the democratic process itself."[174] A few months later, Congressman John Conyers harkened back to the Federalist Papers, quoting Hamilton's concerns that "persons elevated from the mass of the community by the suffrages of their fellow-citizens . . . may find compensations for betraying their trust . . . ." and claiming that the framers were "quite concerned with the 'intangibles' of government."[175]

Contained in the Anti-Drug Abuse Act of 1988, Congress's eventual answer to *McNally* placed 18 U.S.C. § 1346 into the criminal code.[176] The new section simply defined a "scheme or artifice to defraud" to include efforts to "deprive another of the intangible right of honest services."[177] Explaining its significance, House and Senate members both noted that the legislation aimed to overturn *McNally* and restore the honest services interpretation of the mail fraud statute.[178]

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173. *Hearing*, *supra* note 61, at 17 (statement of John C. Keeney, Acting Assistant Att'y Gen., Criminal Division).

174. *Id.* at 40–41 (statement of Robert G. Ulrich, United States Attorney, W.D. Mo.). Ulrich also quoted Edmund Burke's statement that "Among a people generally corrupt, liberty cannot long exist." *Id.* at 41.

175. 133 CONG. REC. H10656-01 (1987) (statement of Rep. Conyers). Representative Conyers cited the founders to support the argument that the Guarantee Clause justified federal intervention to prevent local corruption. The idea came from an influential law review article. *See generally* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367 (1989). Congressmen and witnesses occasionally discussed private sector applications of the law. These discussions, however, were corollary to the discussion of a need to prevent public corruption. Former Assistant Attorney General (and later Governor) William Weld said it best, explaining that the prosecution of public officials "is where the passion of the Federal prosecutors beats strongest." *Hearing*, *supra* note 61, at 62 (statement of William F. Weld, Esq.).

176. Pub. L No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2000)). For background on other legislative proposals, see Maus, *supra* note 172, at 1129; *Hearing*, *supra* note 61, at 2–6.

177. The full text of 18 U.S.C. § 1346 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."

178. 134 CONG REC. H1125 (1988) (statement of Representative Conyers: "This amendment restores the mail fraud provision to where that provision was before the McNally decision"); 134 CONG. REC. S17376 (1988) (statement of Sena-

C. Applications of § 1346: The Requirement of a State-Imposed Duty

Despite the seemingly clear aims of § 1346, not all courts have interpreted the statute as completely returning § 1341 to its pre-*McNally* condition.[179] At the same time, the reintroduction of the "intangible right to honest services" has inspired a renewal of the pre-*McNally* criticisms of § 1341.[180] The new statute requires a specific focus on the meaning of the "right to honest services," leading courts to interpret § 1346 in ways that make trust and betrayal all the more significant.[181]

In the First Circuit, one fact pattern set precedent in two separate prosecutions. In *United States v. Sawyer*,[182] the defendant was a lobbyist for the insurance industry who provided gifts to State Representative Woodward, who chaired the Joint Committee on Insur-

tor Biden: "This section overturns the decision in *McNally v. United States* . . . . The intent is to reinstate all of the pre-*McNally* caselaw . . . ."). Although Congress's primary concern was public corruption, the legislation left the door open for continued private sector honest services fraud prosecutions.

179. Behrens, *supra* note 11, at 516–17; Maus, *supra* note 172, at 1130; *see also supra* note 74 (listing cases in which prosecutors pursued deprivations of intangible rights independent of the honest services theory).

180. *See* Beale, *Comparing the Scope*, *supra* note 135, at 700 ("[A]t its outer limits the 'honest services' branch of the mail and wire fraud statutes has the potential to give federal prosecutors authority to prosecute state and local officials for conduct that might warrant discipline or removal from office but is a highly questionable basis for a federal prosecution"); DiBiagio, *supra* note 151, at 75 ("Section 1346 is not a precisely-targeted prohibition . . . . As a consequence the statute has the latent potential to apply to almost any misconduct by a public official that can be viewed as a breach of 'public trust.'"); *see also supra* notes 160–65 and accompanying text (explaining numerous criticisms of the intangible rights doctrine).

181. Almost all jurisdictions draw some distinction between public and private sector honest services fraud. In private sector cases, circuit splits have generally concerned the materiality of the concealed or misrepresented information and the "reasonable foreseeability" of harm to the deceived party. The Second Circuit has applied a "materiality test" that examines whether an employee's misinformation or omission "would naturally tend to lead or is capable of leading a reasonable employer to change its conduct." United States v. Rybicki, 354 F.3d 124, 145 (2d. Cir. 2003). In contrast, the Fourth and Sixth Circuits have subscribed to a "reasonably foreseeable [economic] harm test" holding that the government "must 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." United States v. Vinyard, 266 F.3d 320, 327 (4th Cir. 2001) (internal citation omitted); *see also* United States v. Frost, 125 F.3d 346, 368–69 (6th Cir. 1997); *see generally* Paul M. Kessimian, Note, *Business Fiduciary Relationships and Honest Services Fraud: A Defense of the Statute*, 2004 COLUM. BUS. L. REV. 197, 217–22 (2004) (analyzing the circuit split over the "materiality" and "reasonable foreseeability" tests); Tendler, *supra* note 152 (outlining the different limitations circuits apply to § 1346 in the private sector context).

182. United States v. Sawyer, 85 F.3d 713 (1st Cir. 1996).

ance. Since Sawyer did not in fact owe a duty to the public, the prosecution pursued a theory that he "engaged in conduct intended to *cause* state legislators to violate their duty . . . ."[183] When Woodward failed to disclose the gifts and gratuities, he breached his affirmative duty to the public. Yet despite the fact that Woodward violated a state law, the court insisted that "proof of a state law violation is not necessary for conviction of honest services fraud."[184] Two years later when the First Circuit heard Woodward's appeal in the corresponding case, it reiterated this position in upholding the former legislator's conviction.[185]

In contrast, the Fifth Circuit has defined the deprivation of honest services as a failure to perform a duty owed under state law. According to the Circuit's *en banc* opinion in *United States v. Brumley*,[186] this standard prevents federal courts and prosecutors from having "the power to define the range and quality of services a state employer may choose to demand of its employees."[187] The court found "nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees."[188]

Concerns regarding clarity and federalism influenced both of these divergent interpretations. While the Fifth Circuit enforced a state duty requirement in order to avoid "tax[ing] separation of powers and erod[ing] our federalist structure," the *Sawyer* court did not require a state violation out of a fear that such a focus would distract juries from the federal element of honest services fraud and lead them to believe that "any violation of a state law or regulation concerning lobbying . . . amounts to honest services fraud."[189] As

183. *Id.* at 725 (emphasis added).

184. *Id.* at 732 (quoting United States v. Silvano, 812 F.2d 754, 758 (1st Cir. 1987)).

185. United States v. Woodward, 149 F.3d 46 (1st Cir. 1998); *see also* United States v. Sawyer, 239 F.3d 31, 47 (1st Cir. 2001) (claiming that the circuit has applied § 1341 without an underlying state law violation, citing *Woodward*).

186. United States v. Brumley, 116 F.3d 728 (5th Cir. 1997).

187. *Id.* at 734.

188. *Id.* It is important to note that this standard does not mean that every violation of a state law serves as honest services fraud. A defendant must know that his actions "were something less than in the best interest of the employer . . . ." Mere violation of a state statute, or even the knowing violation of a law "that prohibits only appearances of corruption," is not enough. Only a betrayal of the state's trust, clearly vested, could lead to a prosecution for intangible rights to honest services fraud. *Id.*

189. *Brumley*, 116 F.3d at 734; *Sawyer*, 239 F.3d at 43 (citation omitted). Ironically, despite their divergent standards, decisions in the *Brumley* and *Sawyer* cases

such, the underlying violation requirement arguably preserves and endangers the discreteness of state and federal laws. The Fifth Circuit's holding may establish a more transparent rule for which actions constitute honest services fraud, but it also undermines prosecutions if the jurisdiction does not impose the necessary duty. In contrast, the First Circuit's decision may contain a malleable definition of what constitutes a violation of § 1341, but it also prevents minor state infractions, even those committed knowingly, from becoming federal felonies.

Across the remaining circuits, decisions fall along the spectrum from requiring a violation of a state law to strongly asserting that no state duty is necessary.[190] In the realm of federalism and vagueness—two of the more significant concerns related to honest services mail fraud—each interpretation has benefits and drawbacks, though all provide some structure to the open-ended language of § 1346.[191]

D. State Laws to Define Honest Services: A Means of Achieving Appropriate Trust Regulation

Honest services fraud should aim to punish those who breach the public trust, but in order to best achieve this end other courts should follow the Fifth Circuit's lead in its interpretation of § 1346. Reliance on an underlying state obligation reduces the risk of overregulation and a concomitant decrease in the public's trust in its government. Meanwhile, state-defined regulations are the most appropriate form of countercycle, moderating the extremes of trust and distrust in Rose's cyclical theory.

In the First Circuit, when a U.S. Attorney prosecutes a local official without an underlying failure to perform state-imposed du-

cite to each other for the notion that state standards should not be the means of defining honest services fraud. *Id.*

190. For example, the Third Circuit has not decided whether an underlying state violation is always necessary, but has held that when a public official conceals a financial interest in violation of state law and takes discretionary action that he knows will benefit that interest, he has deprived the public of his honest services. United States v. Panarella, Jr., 277 F.3d 678, 691 (3d Cir. 2002). The Fourth Circuit has held that a scheme to defraud need not violate a state law to establish a violation of § 1341. United States v. Bryan, 58 F.3d 933, 940 n.1 (4th Cir. 1995). The Eleventh Circuit has held that when a government official decides how to proceed based on personal interests rather than her constituents' best interest, she has defrauded the public of her honest services. United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997).

191. For a thorough analysis of the "common law" interpretation of § 1346 as applied to public officials, see generally Hortis, *supra* note 19.

ties, the intervention imposes a *new* duty. In other words, the case forces similarly situated officials—and the state institution—to internalize federal interests in the form of a regulation. In certain circumstances this internalization will be beneficial. However, if the reason for honest services fraud is to maintain the public trust, allowing prosecutors to proceed without an underlying state violation risks over-regulation of state and local government. While it may seem appropriate for Washington to set standards of good government, when applied through national policies driven by prosecutorial incentives the outcome could be an unjustified decrease in the public's trust in its local officials and institutions.[192]

In contrast, enforcement of a state-imposed requirement minimizes the risk of needless regulations and unnecessary displacement of trust. In the Fifth Circuit, the state decides when its officials require regulation in order to internalize a particular interest. As a result of the state-imposed obligation, trust in public employees may increase or erode. At the same time, similar shifts may occur in the public's perception of the state government. In both cases, however, the state has caused these shifts because employees purportedly needed regulations in order to act in the required manner. If these same employees then scheme to betray the law, national intervention reinforces pre-existing obligations, punishing the betrayal of a duty to serve the public. Regardless of a prosecutor's motivations, the federal government's actions against local public servants still internalize state interests. The underlying state law not only eliminates the "tension inherent in federal criminalization of conduct by state officials," it also channels third-party trust regulation.[193]

Furthermore, the *Brumley* rule allows the institution most reactive to Rose's cycles of trust to define the degree of necessary regulation. Based on the cyclical theory, whether the imposition of the duty bolsters or destroys the public trust, it can serve as a part of the

192. *See supra* notes 83–106 and accompanying text. Even if the primary purpose of honest services fraud is deterring corrupt activities, regulation of trust may be counterproductive. As with taxpayers, trust in their colleagues, not penalties, may prevent local officials from betraying the public trust for their own self-interest. To paraphrase Kahan, the best way to prevent public officials from engaging in self-dealing behavior may be to simply advise them that the vast majority of public officials *are* in fact only acting in a public-interested manner. *See supra* notes 96–97 and accompanying text; Kahan, *supra* note 88, at 342; *see also* ANECHIARICO & JACOBS, *supra* note 61, at 174 (arguing that "anticorruption ideals and institutions have become a major obstacle to reforming bureaucracy or replacing it with a different model of public administration").

193. *Brumley*, 116 F.3d at 735.

normative countercycle.[194] For example, when a climate of too much trust allows for corruption, a state's failure to regulate will lead to a decrease in trust. This situation will eventually induce local leaders to create laws in an effort to regain the public's approval, reinforcing remaining trust and moderating cycles of trust and distrust.[195] Meanwhile, when trust levels are appropriate, the state has an incentive not to over-regulate, lest it risk devaluing or displacing the social capital in the current relationship. By encouraging state officials to set the regulations and allowing federal officials to enforce them, the Fifth Circuit's holding supports this countercycle. In the right circumstances, the *Brumley* rule provides a solution that deals with federalism, vagueness, *and* trust concerns.

In contrast, under the First Circuit's holding, federal prosecutors can determine how the state regulates the trust motivations of its employees. U.S. Attorneys, however, have few incentives to react to cycles of trust and distrust. Besides the political motivations inherent in prosecutorial work,[196] cases target particular crimes, not systemic problems.[197] As a result, without an underlying duty enacted by the state, federal prosecutions risk displacing a trusting relationship by forcing the local government to incorporate counterproductive regulations that are out of sync with the countercycle.[198] In the aftermath, state leaders may struggle to re-

194. *See supra* notes 83–106 and accompanying text.

195. Or, in the alternative, it will induce the public to vote for reform. *See* ANECHIARICO & JACOBS, *supra* note 61, at 95.

196. *See supra* notes 143–52 and accompanying text.

197. There are, of course, exceptions to both of these rules. Federal prosecutors can be influenced by local public opinion—particularly if they are considering running for office within the jurisdiction. One commentator has suggested that "a series of targeted § 1346 prosecutions of large-scale corruption might yield better results than expensive, and often ineffective, monitoring and corruption controls." *See* Hortis, *supra* note 19, at 1117.

198. For example, as already shown, the increase in public corruption prosecutions in the 1970s occurred during a period in which trust in the federal government decreased but trust in local and state institutions remained stable. Yet federal prosecutors still focused on corruption at the local rather than national level.

Current guidelines for the prosecution of honest services fraud read:

> 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.

THE DEPARTMENT OF JUSTICE MANUAL § 9-43.100, at 9-287 (2d. ed. Supp. 2005-3).

affirm public confidence in themselves, their offices, and their institutions, as the federal intervention has disrupted an otherwise appropriate level of public trust.[199]

Some courts have criticized *Brumley* for unnecessarily constraining the definition of honest services fraud;[200] others have struggled to decide whether the mail fraud statute is "intended merely to back up state criminal law by denying criminals the use of a federal instrumentality (the postal service) to assist them in committing crimes" or, rather, "is . . . aimed at any fraud that is accomplished through the use of the postal service."[201] While the history of honest services fraud does not support the former explanation, it also does not condone the latter. Section 1346 does not target just "any" fraud, and as a result *Brumley* provides the necessary definition of honest services. Other commentators may fear that a lack of state obligation will lead to under-enforcement,[202] though there is no reason to believe that state actors will be any less effective in creating ethical regulations than prosecutors, who, in any case, are forced to define "honest services" in a piecemeal fashion. In rare cases, the Fifth Circuit's interpretation may allow a public official to engage in questionable activities that neither an underlying state obligation nor a more direct federal anti-fraud statute will curtail. But when this occurs, policymakers, rather than federal prosecu-

199. From 2000 to 2004, the number of public corruption cases pursued by federal authorities is said to have increased by approximately fifteen percent, with one Justice Department official claiming that the increase "reflects the high priority placed on public corruption cases rather than a sudden spike in the number of dishonest politicians." Lolita C. Baldor, *Feds Take Aim at Government Corruption*, A.P. WIRE, Dec. 24, 2004 ("But the steady slide of high-profile public officials into ethical and criminal scandals risks fostering increasing distrust of government leaders"); *see also* REP. TO CONG. ON THE ACTIVITIES AND OPERATIONS OF THE PUB. INTEGRITY SECTION FOR 2002 at 37–38 (containing data on public officials indicted, convicted, and awaiting trial from 1983–2002), *available at* http://www.usdoj.gov/criminal/pin/AR_Final_2002.pdf.

200. *See* Castro v. United States, 248 F. Supp. 2d 1170, 1189 (S.D. Fla. 2003) (rejecting *Brumley*'s requirement of an underlying state violation interpretation of § 1346, citing *United States v. Lopez-Lukis*, 102 F.3d 1164, 1164 (11th Cir. 1997)); United States v. Triumph Capital Group, Inc., 260 F. Supp. 2d 444, 461–62 (D. Conn. 2002) (rejecting the defendant's *Brumley* argument because "the court agrees with the reasoning of other circuits that the theft of honest services element of a mail or wire fraud prosecution does not need to be grounded in state law").

201. United States v. Martin, 195 F.3d 961, 967 (7th Cir. 1999).

202. *See, e.g.*, Coffee, *Modern Mail Fraud*, *supra* note 73, at 460 (discussing the diminished relevance of state law violations in the context of public fiduciary cases). *But cf.* Hortis, *supra* note 19, at 1119–20 (commenting on the potential advantages of state-defined duties as guidelines).

tors, should fill the emergent gap in a manner that appropriately reinforces trust in government.

On a practical note, state regulations also provide a sense of clarity unavailable in malleable notions of fiduciary duty.[203] These laws set a standard for what trust the defendant has breached, but do not risk condoning public betrayals if resource problems or institutional politics prevent local prosecutors from pursuing corruption. Meanwhile, if maintaining the public trust is truly a goal of honest services fraud prosecutions, the First Circuit's concerns that small crimes—or even non-criminal regulations—will become bases for federal felonies distracts from the real issue. A betrayal of trust is damaging regardless of the gravity of the underlying duty. If the offender breaches his obligation, as part of a scheme to defraud which utilizes the mail, federal intervention can and should lead to criminal punishment.[204] The underlying violation merely defines the trust—it is the scheme to betray that trust that is criminal.[205]

CONCLUSION

Most studies of honest services fraud focus on federalism, vagueness, or the application of criminal penalties to punish civil infractions. This Note provides an alterative analysis. Without disparaging or rejoicing in the use of honest services fraud, it shows that the law is essentially a criminalization of betrayal. As a result, it comes with numerous ramifications that occur whenever a relationship of trust is subject to regulation.

U.S. Attorneys should be aware of these ramifications, if only because they affect the relationship between the public and its government. But these issues should not stop the "feds" from pursuing public corruption at the local level. The history of honest services fraud reveals that despite possible problems in application, there are numerous benefits to the law. Removing honest services fraud from the prosecutor's arsenal would overstate its potential damage

203. Even the First Circuit conceded that careful jury instructions could clarify the elements of the federal violation to prevent confusion regarding the underlying state infraction. United States v. Sawyer, 85 F.3d 713, 731–32 (1st Cir. 1996).

204. These elements of federal mail fraud, particularly the scheme, are obviously essential to distinguish between a state misdemeanor and a federal felony. To prevent the jury from slipping into the misunderstanding that any violation of state laws automatically amounts to a federal crime, jury instructions must be clear. *See id.*

205. One scholar recently proposed a theory analogous to the Fifth Circuit's, but requiring conduct that amounts to a federal corruption offense—bribery, conflict of interest, illegal gratuity, or extortion. *See* DiBiagio, *supra* note 151, at 75–91.

to trust relationships and understate the relevance of betrayal in our society. Scholars may be right: as betrayals become more familiar, a "reluctance to trust others" will follow.[206] Considering the important role of trust in society, this is too great a risk.

Yet while the federal government cannot allow corrupt practices to destroy trust in local leadership, it should also be mindful of the manner in which it prosecutes honest services fraud. If § 1346 is concerned with maintaining trust in government, the *Brumley* standard is preferable to the First Circuit's analysis because it decreases the risk of over-regulation, internalizes the state's interests in its regulation of trust, and allows the body most reactive to cycles of trust in local government to set standards. A wider application of the *Brumley* rule would force U.S. Attorneys and Justice Department policymakers to consider how honest services fraud charges will impact local government and its relationship with citizens. While in many cases the public will appreciate federal intervention, the ramifications will last much longer than the headlines. Ideally, if a prosecution for honest services fraud erodes public trust, it will only erode misplaced trust. In the alternative, the law risks destroying the public's trust in governing institutions and society at large.

206. Chevigny, *supra* note 117, at 812.