CORRUPT INTENTIONS: BRIBERY, UNLAWFUL GRATUITY, AND HONEST-SERVICES FRAUD

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I
INTRODUCTION

This article advances the understanding of bribery and related offenses from an economic standpoint.[1] Economic theory holds that the legal system should impose criminal liability on a person who advances his goals by using force or artifice instead of a voluntary exchange. Force and artifice are inherently coercive behaviors, unresponsive to the market mechanisms that put exchange prices on what people want to achieve. Because market mechanisms cannot control such behaviors, the state should step in and impose criminal punishments on the perpetrators. These punishments should discourage future coercive behavior. Therefore, they ought to be high enough to offset the benefits that perpetrators expect to gain from acting coercively against other people's interests.[2]

Bribery and related offenses have a uniform structure: A public official receives something of value from a private person in exchange for acting or promising to act to the private person's benefit. Any such transaction divides between the parties some asset or opportunity belonging to the government. The private person derives profit from misappropriating or obliterating the government's interest and gives part of this profit to the public official. Any such transaction is necessarily coercive toward the government. For, as a consequence of the official's betrayal, the government suffers a deprivation of its interest, asset, or opportunity. Both parties to this transaction gain from bypassing the market. Each of them generates an off-market benefit not obtainable through voluntary exchange and the system of rules governing that exchange.[3] Presence of this two-sided off-market benefit separates bribery and

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1. For an outstanding analysis of bribery from a moral point of view, see Stuart P. Green, *What's Wrong with Bribery*, *in* DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW 143, 151–64 (R.A. Duff & Stuart P. Green eds., 2005) (using moral culpability criteria to explain elements of bribery offense).

2. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 273–78 (8th ed. 2011).

3. In this article, "market" and "voluntary exchange" have broad meanings. These concepts refer not only to business transactions, but also to people's social organization and functioning through

related offenses from noncriminal transactions and, in particular, from noncriminal—but still unethical—violations of the various conflict-of-interest rules.

This market-focused criterion helps identify evidence that conclusively establishes the mens rea and the actus reus for bribery and related offenses. This criterion also helps identify the proper scope of the honest-services fraud offense. In two precedential decisions, *Sun-Diamond*[4] and *Skilling*,[5] the Supreme Court has narrowed the government's ability to prosecute individuals for those offenses. In *Sun-Diamond*, it held that proof of bribery and unlawful gratuity incorporates the government's duty to identify the specific official act for which the bribe or gratuity was given.[6] In *Skilling*, the Court decided that presence of a bribe or a kickback payment is one of the elements of honest-services fraud under 18 U.S.C. § 1346.[7] This interpretation created an overlap between bribery and unlawful gratuity on the one hand, and honest-services fraud on the other.[8] By creating this overlap, the Court introduced the stringent requirement for establishing mens rea, set up in *Sun-Diamond*, into the definition of honest-services fraud.

These narrow interpretations of core corruption offenses have removed the threat of criminal responsibility from a wide variety of off-market transactions that benefit public officials and private individuals at the government's expense. By adopting these interpretations, the Court undercut Congress's anti-

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democratic institutions.

4. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398 (1999).

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

6. *Sun-Diamond*, 526 U.S. at 404–14.

7. *Skilling*, 130 S. Ct. at 2925–31.

8. The elements of bribery, on the one hand, and unlawful gratuity, on the other hand, are succinctly described by Justice Scalia in *Sun-Diamond*, 526 U.S. at 404:

> The first crime, described in § 201(b)(1) as to the giver, and § 201(b)(2) as to the recipient, is bribery, which requires a showing that something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient) with intent, inter alia, "to influence any official act" (giver) or in return for "being influenced in the performance of any official act" (recipient). The second crime, defined in § 201(c)(1)(A) as to the giver, and in § 201(c)(1)(B) as to the recipient, is illegal gratuity, which requires a showing that something of value was given, offered, or promised to a public official (as to the giver), or demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the recipient), "for or because of any official act performed or to be performed by such public official."

The key difference between these two crimes, in Justice Scalia's words, is as follows:

> Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act . . . . An illegal gratuity . . . may constitute merely a reward for some future act that the public official will take (and may already have determined to take), or for a past act that he has already taken.

Id. at 404–05.

The statutory prohibition of honest-services fraud is much broader than these two offences: it criminalizes and punishes any "scheme or artifice to deprive another of the intangible right of honest services." *See* 18 U.S.C. § 1346 (2006).

corruption policies and weakened the deterrence against corruption. Under my "two-sided off-market benefit" criterion for identifying criminal corruption, these interpretations are economically misguided and therefore wrong.

This article proceeds as follows. In Part II, I carry out an economic analysis of bribery and related offenses and identify their common characteristic: presence of an off-market benefit on both sides of the illicit transaction. In Parts III and IV, respectively, I use this analysis to demonstrate that the Supreme Court's precedential decisions in *Sun-Diamond* and *Skilling* are mistaken. A short conclusion follows.

II
THE ECONOMICS OF BRIBERY

The economic approach to law calls for an imposition of criminal liability upon people who act coercively, and only upon those people. As I indicated at the outset, a person acts coercively when he bypasses the market by using force or artifice, instead of a voluntary exchange, as a means for promoting his goals.[9] Market bypass is the main economic reason for holding a person liable criminally, rather than civilly, in cases in which he behaves in a socially harmful way. This reason works particularly well with bribery and related offenses because bribery is an economically driven, market-bypassing transaction by design.

Bribery encompasses three types of illicit deal: proprietary, bureaucratic, and letting-off.[10] Proprietary bribery features a government's agent who grants a governmental contract or franchise to a person (or firm) and receives money or its equivalent in return.[11] The briber bypasses the competition with other bidders and obtains from the agent a favorable off-market deal with the government. The agent thus helps the briber to steal from the government in exchange for money or its equivalent.

Bureaucratic bribery involves no theft. Instead, it expedites the briber's acquisition of an official permit, license, or document.[12] The briber can obtain the required permit, license, or document lawfully by following certain procedures or by waiting in the applicants' queue. The briber, however, chooses to act unlawfully: He pays the government's agent for the red tape's removal or for bypassing the queue.

In this scenario, no one may actually get hurt. The agent does not give the briber a permit, a license, or a document that the briber was not supposed to receive from the government. Law-abiding citizens queuing for the

9. *See* POSNER, *supra* note 2, at 273–78.

10. For an economic analysis of the first two types of bribery, see generally Andrei Shleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599 (1993). For an economic analysis of the third type of bribery, as contrasted with extortion, see generally Fahad Khalil et al., *Bribery Versus Extortion: Allowing the Lesser of Two Evils*, 41 RAND J. ECON. 179 (2010).

11. *See* Shleifer & Vishny, *supra* note 10, at 601–02.

12. *Id*.

government's permits, licenses, and documents endure no delays either (this will not always be the case: I make this assumption for the sake of clarity). Under the bureaucratic bribery scenario, the agent issues their permits, licenses, and documents properly and at a scheduled time. At the same time, he introduces a private improvement in the functioning of the government's agency by making it more productive. Ideally, of course, it is the government that should make such improvements, but the government does not know it can improve the agency's productivity (or does not care about improving the agency's work). The agent exploits the government's ignorance (or indifference) by introducing the improvement privately at the briber's expense, while capturing its economic value (the bribe).

The third and final variant of bribery is letting-off—a deal involving a law-enforcement agent who allows his briber to break the law and go unpunished (after paying the agent).[13] When the agent sabotages the government's enforcement effort, the government suffers a tangible deprivation. The briber's deal with the agent consequently becomes similar to proprietary bribery. The government's enforcement and deterrent capacity, however, will not always be eroded as a consequence of such a deal. Consider a government that rations its enforcement effort by requiring its agents to enforce the law against eighty percent of the violators. The agent collects bribes from twenty randomly chosen violators out of one hundred and lets them off, while meticulously enforcing the law against the remaining eighty violators. In this scenario, the government gets what it pays the agent for, while the agent delivers on his undertaking to the government. Moreover, twenty violators that the government was ready to let off completely are now paying a private "violation tax" to the agent. As a result, violators are better deterred overall than under the government's plan.

To illustrate, assume that the twenty bribers pay the agent $100 each, while each of the remaining eighty violators pays the government a $150 fine. The violators thus pay collectively $14,000 for their misdeeds, as opposed to the $12,000 that they would have paid under the government's plan. The collection of an additional $2000 from the violators shows that the government's enforcement method was suboptimal. Under perfect information, the government would have set the fine at $140 and required the agent to enforce the law against every violator. The government was unaware of this possible improvement because the agent did not reveal that he could be more productive in enforcing the law. Instead of revealing this information to the government, he improved the violators' deterrence privately in order to benefit himself. The agent's action thus constitutes a mirror image of bureaucratic bribery. In the bureaucratic bribery scenario, the agent is paid privately for improving the functioning of the government's agency. Here, he is paid privately for *not* making the required improvement.

Understanding these different forms of bribery is crucial for the economic

13. This type of bribery is discussed in Khalil et al., *supra* note 10, at 179–82 (focusing on bribery by enforcement officers, also capable of extorting payments from private citizens).

analysis of anti-corruption laws. This understanding can also facilitate normative inquiries into the requisite mens rea standards. Each form of bribery is an off-market contract incorporating the parties' motives and intentions. The contract does not state those motives and intentions publicly because they are unlawful and the parties consequently try to conceal them. Courts, however, can ascertain those motives and intentions by juxtaposing the parties' exchange against the market. When the exchange aligns with transactions available on the open market, it does not constitute bribery (nor is it normally intended to form a bribery deal). Conversely, when the exchange bypasses the market and yields off-market gains to both the payer and the official, the requisite intent to give and accept a bribe will be present and bribery will be established. The purpose of this test is to separate coercive behavior that should be criminalized from the market behavior that should not, and I will say more about it later in this article.

Bribery always generates an off-market gain for both parties at the government's expense. As a consequence of any such deal, the government suffers a proprietary deprivation or is denied its agent's good service (for which it both paid the agent and sacrificed the opportunity to hire a better agent). The government did not authorize any such deal. The briber and the agent therefore acted coercively, and hence criminally, against the government's interest. The economic value of the entitlement stolen from the government determines the off-market gain that the parties—the briber and the agent—split among themselves. This ill-gotten gain determines the total "quid pro quo" amount upon which courts should focus in adjudicating bribery cases. Courts should focus on this gain alone because transactions generating no off-market gains for both parties do not constitute bribery or unlawful gratuity.

Consider a government's agent who has an obligation to issue a passport to a citizen. The agent lets the citizen understand that he will issue the passport only if the citizen pays him $100. The citizen pays the agent $100 and receives the passport. Under this set of facts, the agent is guilty of extortion[14] while the citizen—the extortion's victim—is completely innocent. Neither party is guilty of bribery. The reason is simple: The government (unlike the extorted citizen) had suffered no coercive deprivation. The citizen received her passport from the government, but she was entitled to receive it from the beginning. Importantly, the citizen did not try to expedite the issuance of her passport by paying $100 to the agent. She paid the agent $100 to remove his threat not to issue the passport. The citizen consequently did not obtain any off-market advantage for herself. Her benefit from the deal with the agent—the passport—was available on the marketplace in which citizens openly deal with the

14. *See* Scheidler v. Nat'l Org. for Women, 537 U.S. 393, 402 (2003) (describing the common-law crime of extortion as "a property offense committed by a public official who took 'any money or thing of value' that was not due to him under the pretense that he was entitled to such property by virtue of his office," while adding that modern legislation, both state and federal, has expanded the definition of that crime to include acts by private individuals); *see also* 18 U.S.C. § 1951(b)(2) (2006) (the "Hobbs Act") ("The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.").

government. This marketplace is the passport agency and its rules, set up by the citizens through their democracy mechanism. Moreover, the citizen would *not* be guilty of attempted bribery even if she offered the agent $100 on the false belief that this is her only way to obtain the passport. Under this scenario, the citizen will be acting under an erroneous assumption that she is being extorted—a mistake that does not turn her into a briber. The citizen could only be guilty of bribery if she paid the agent $100 for expediting the passport's issuance.[15] This transaction would generate an off-market benefit for each party.

This analytical framework turns the mental-element requirement for bribery and related offenses into an issue of contract interpretation. Every bribery deal—proprietary, bureaucratic, and letting-off—incorporates an off-market exchange that the parties intend to accomplish. This exchange can be specified and unconditional: The briber may pay the official for a specific action or decision that promotes the briber's interest. The exchange can also be specified but conditional: The briber may pay the official for a favorable action (or decision) that the official will only take (or make) should an appropriate opportunity present itself. Finally, the exchange can be completely unspecified: The briber may pay the official for maintaining a favorable disposition or goodwill towards the briber. This disposition means that the official will, or might, help the briber at some point down the road, but only if an appropriate opportunity presents itself and without making any definite promise for help.

The first type of exchange replicates a regular contract, while the second has the structure of a conditional agreement. The third type of exchange follows the path of an underspecified relational contract.[16] Correspondingly, in the first type of exchange, the parties form an unconditional intent to give and accept a bribe, whereas in the second, the parties' intent to give and accept a bribe is conditional. The third type of exchange is different from the previous two in that it only sets up a general bonding relationship between the parties. Under a legitimate relational contract, this relationship requires parties to act in good faith and to mutually promote each other's interests in all situations not expressly regulated by the contract. Here, this relationship establishes favoritism: The briber pays the official to make him favorably disposed towards

15. The citizen also might be guilty of attempted bribery if she offered the agent $100 for the passport on the mistaken belief that the agent has the power to deny her application. Her bribery attempt would have been impossible, but likely punishable under the "objective act" test that courts use to separate factually impossible, and hence punishable, attempts from attempts that are legally impossible and not punishable. The citizen's objective act could have accomplished bribery if the circumstances of the case were as she believed them to be. *See* Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 537–42 (2008) (explaining the "objective act" test and attesting that several federal courts use it). *But see* People v. Jaffe, 78 N.E. 169, 170 (N.Y. 1906) (exonerating defendant who accepted an undercover police informant's proposal to buy stolen cloth as the cloth's owners allowed police to offer it for sale in a sting operation); R v. Taaffe, [1984] A.C. 539 (H.L.) (appeal taken from Eng.) (exonerating defendant who smuggled a package containing cannabis under the mistaken belief that he participates in an illegal importation of foreign currency into Great Britain).

16. *See generally* Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877 (2000).

the briber, and the official accepts the payment to create this disposition. The official's disposition is neither a promise nor an undertaking, but it does motivate the official to promote the briber's interests at the government's expense. Therefore, technically, the payment (or its equivalent) that the official receives from the briber is not a "bribe." For it does not induce the official to take any specific action in the briber's favor. The payment, however, turns the briber into the official's favorite and, therefore, constitutes an unlawful gratuity (or honest-services fraud[17]).

Conditional intent to commit a crime is generally as bad and as punishable as an unconditional one.[18] The mens rea accompanying regular and conditional bribery is therefore relatively easy to ascertain. When the payer and the official strike a mutually beneficial deal not available on the open market, their deal constitutes bribery (whether conditional or unconditional). The parties' exchange of the off-market benefits—the private benefit to the official and the governmental benefit to the payer—can never be accidental. Hence, it is intentional, and the court need not carry out any further investigation into the parties' motivations.

The same market analysis applies to non-token gratuities. When the gratuity the official receives from the payer does not fall within the scope of the regular market exchange, it establishes favoritism—a bond the official and the payer are not supposed to form. As in core bribery cases, the parties' exchange reveals their economic goals: The payer gives the official a pecuniary benefit to make the official favorably disposed towards his interests, and the official accepts the benefit—because he wants it—and forms the disposition that the payer expects him to form. This economic consequence cannot be accidental and, therefore, establishes the parties' intents. There is no reason to believe that payers and officials strike favoritism deals innocently without intending to create favoritism. Unlawful gratuity can thus be perceived an inchoate, or preparatory, variant of bribery—a smaller, less serious "sister offense."[19]

From an economic standpoint, this market-focused approach is superior to every other approach. The criminal law's mens rea requirement promotes two economic goals. First, it helps identify coercive transgressors who bypass the market with the help of force or artifice, instead of transacting with the relevant actors voluntarily.[20] Because a person cannot bypass the market accidentally, without being aware of his conduct's nature and likely consequences, economically minded scholars believe that criminal liability cannot be imposed upon people who acted without intent, knowledge, or awareness. Second, and equally important, the mens rea requirement reduces individuals' cost of

17. *See* 18 U.S.C. § 1346 (2006) (defining honest-services fraud as any "scheme or artifice to deprive another of the intangible right of honest services").

18. For general analysis of conditional intent, see Gideon Yaffe, *Conditional Intent and Mens Rea*, 10 LEGAL THEORY 273 (2004).

19. *See* United States v. Ganim, 510 F.3d 134, 152 (2d Cir. 2007) (contrasting unlawful gratuity and bribery while calling the former a "lesser included offense").

20. *See* POSNER, *supra* note 2, at 294–95.

obtaining information concerning the circumstances and probable consequences of their actions.[21] Because a person cannot be held criminally responsible for matters outside his knowledge, he need not investigate facts and possibilities of which he is not aware. The person's assurance that he can act upon his knowledge makes it easy and, consequently, relatively cheap for him to avoid criminal liability.[22] Removal of this assurance would result in a socially deleterious chilling effect: The person would find it difficult to satisfy the demands of criminal law, and the ensuing fear of punishment would motivate him to steer away from activities that might benefit society.

The market approach to mens rea for bribery promotes these goals. This approach gives courts a handy toolset for identifying bribery and its underlying motivations. Under this approach, any off-market exchange between the government's agent and a private person will constitute bribery when it yields both parties a benefit. The parties' revealed motivation—mutual enrichment at the government's expense—will establish their intent to bypass the market in every individual case. This motivation will suffice even when the parties' quid-pro-quo arrangement is not completely specified.

Adoption of this market-focused approach will exert no chilling effects on socially beneficial activities. Under this approach, the government's agents and the individuals they deal with will have a safe harbor—the open market, which they should never bypass. Aligning their transactions with the market will allow the parties to avoid criminal liability for bribery and related offenses. To secure the required alignment, public officials and the individuals they deal with only need to be familiar with the market within which they operate and with the market's rules.

This familiarity is easy to acquire and it will likely be present in virtually every case. Public officials and private-sector entrepreneurs know exactly when they carry out a regular business transaction and when they bypass the market by forming a mutually beneficial deal. These professionals are also well aware of the relevant contractual and other legal entitlements—both tangible and intangible—that they undertake to respect. The market benchmark is also robust enough to enable courts and prosecutors to distinguish between bribery (and related offenses) and legitimate business. This benchmark will also prompt courts to rely on the economic preferences manifested by relevant transactions and to steer away from "noise" (the parties' and other witnesses' reconstructive narratives).

As a concrete example, consider a law firm that provides a discounted legal service to a senior public official. The firm gives the official this discount in order to advance its reputation. Having the official in the firm's portfolio of clients communicates to potential clients that the firm does high quality work. For the firm, the market value of this signal is greater than the discount it gives

21. *See generally* Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 (1993).
22. *Id*. at 769–77.

the official. For his part, the official obtains the discount by taking advantage of his reputational value to the firm. This transaction may be ethically questionable. It might be unethical for a public official to cash his reputational value in this way. The focus here is on criminal law, however—not on ethics. Therefore, the ethical issue merits no further discussion. As far as criminal law is concerned, the exchange between the official and the firm squarely aligns with the market. Consequently, the "two-sided off-market benefit" criterion rules out the possibility of convicting one of the parties of bribery, unlawful gratuity, or honest-services fraud.[23]

Things could be different if the parties' exchange were to include an implicit understanding that the official will use his authority to promote the interests of the firm or any of its clients. Under this scenario, part of the discount the official receives from the firm—if not the entire discount amount—would constitute an off-market benefit. The firm's position as the holder of the official's express or implicit promise of help would constitute an off-market benefit as well. The parties' exchange would consequently qualify as a corruption offense: bribery, unlawful gratuity, or honest-services fraud—depending upon the nature of the official's promise of help and the strength of the nexus between that promise and the discount.

Arguably, prosecutors would find it difficult to differentiate between the two types of exchange because parties will always claim their exchange to be innocent. This projection is overstated. The prosecution would always be able to juxtapose the parties' exchange against the rates the relevant market has established for similar transactions.[24] This juxtaposition is more promising than reliance on the parties' and other witnesses' narratives. When the parties'

23. *See* Kathleen Clark, *Paying the Price for Heightened Ethics Scrutiny: Legal Defense Funds and Other Ways that Government Officials Pay Their Lawyers*, 50 STAN. L. REV. 65, 112–13 (1997) (criticizing the Justice Department's censure of the discounts law firms gave to public officials, and observing, "[f]irst, these donating lawyers may be motivated by a desire to work on interesting, high-profile cases that may garner them publicity. Second, they may see such work as within their pro bono mission—an obligation to do work in the public interest regardless of a client's ability to pay. Third, a law firm's decision to provide discounted legal services may be no different from the decision of a rental car agency or an airline to provide government employees with a discount on their regular rates") (internal footnotes omitted).

24. *See* United States v. Townsend, 630 F.3d 1003, 1011–12 (11th Cir. 2011) (relying on market to determine whether improved bail conditions obtained by defendant by bribing his supervising officer had a $5000 or greater value for purposes of the $5000 threshold that established federal jurisdiction); United States v. Kemp, 500 F.3d 257, 266–70 (3d Cir. 2007) (attesting that loans below market value received by public official from a bank constitute bribery and honest-services frauds); United States v. Marmolejo, 89 F.3d 1185, 1191–94 (5th Cir. 1996) (relying on market to determine, for purposes of the $5000 federal-jurisdiction threshold, the value of unauthorized conjugal visits with a prisoner's wife and mistress that the prisoner obtained by bribing a sheriff and his deputy); Klaczak v. Consol. Med. Transp., 458 F. Supp. 2d 622, 639–61 (N.D. Ill. 2006) (determining value of a kickback by reference to market value for ambulance transports); United States v. McLaren Reg'l Med. Ctr., 202 F. Supp. 2d 671, 674–78 (E.D. Mich. 2002) (determining value of kickbacks by reference to market rental value of real estate); United States v. Anderson, 85 F. Supp. 2d 1084, 1107 (D. Kan 1999) ("Only the difference between the fair market value and the proposed purchase price would be considered the solicitation of a bribe.").

exchange is off-market and when they have—or anticipate having—a business relationship besides the official's representation by the firm, the prosecution will find it easy to establish the presence of criminal corruption. Absent such evidence, charges of corruption will be unfounded.[25] Similarly, no prosecution for bribery should be initiated when the parties' transaction constitutes a voluntary market-based exchange.[26]

With this in mind, I now turn to discuss the Supreme Court's interpretations of three corruption offenses: bribery, unlawful gratuity, and honest-services fraud.

III

SUN-DIAMOND REVISITED

The Supreme Court began its precedential decision in *Sun-Diamond* by observing that the divine punishment for corruption is economically inefficient. "Talmudic sages"—wrote Justice Scalia for the unanimous court—

> believed that judges who accepted bribes would be punished by eventually losing all knowledge of the divine law, [while the] Federal Government, dealing with many public officials who are not judges, and with at least some judges for whom this sanction holds no terror, has constructed a framework of human laws . . . defining various sorts of impermissible gifts, and punishing those who give or receive them with administrative sanctions, fines, and incarceration.[27]

This observation created an anticipation that the Court would move on to fix the deterrence shortfall by giving more power to the human anticorruption laws. This anticipation was only momentary, however, as the Court quickly made it clear that it would *not* expand the scope of bribery and unlawful gratuity prohibitions. In fact, the Court's decision took the federal anti-bribery

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25. A point of disclosure: this example reflects the opinion I gave as a consultant in a bribery case.

26. Such prosecutions would also be unfounded in relation to corrupt markets where bribery functions as a social norm. In those markets, government agents are guilty of extortion, but private people who "bribe" those agents cannot be considered criminally corrupt because they buy themselves no advantage over other bribers. This point resonates with a story about a judge in a developing country who made the following announcement to the plaintiff and the defendant: "Because each of you paid me the same amount, I am going to decide this case according to law." For an American-law example that borderlines with the "everyone is doing it" defense, see United States v. Arthur, 544 F.2d 730, 735 (4th Cir. 1976). This decision discusses what then appeared to be a norm among bankers: using the bank's money to make political contributions in order to bond with the politicians. According to the court, such "goodwill" expenditures are not bribery when the donor merely aims to create a "favorable business climate." Specifically, the Fourth Circuit decided that

> the crucial distinction between 'goodwill' expenditures and bribery is, then, the existence or nonexistence of criminal intent that the benefit be received by the official as a *quid pro quo* for some official act, pattern of acts, or agreement to act favorably to the donor when necessary. . . . If 'influence' is given its broadest common meaning, it is clear that 'goodwill' gifts and favors to and entertainment of government officials are intended to influence the judgment of such officials. That is, such expenditures are made with the hope that the officials will be more likely to award government business to the donor if a favorable business climate is created than if such a climate is not established. But . . . this type of influence does not amount to bribery.

Id.

27. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 400 (1999).

statute, 18 U.S.C. § 201, in the opposite direction.

Facts upon which this decision was made are remarkable. The defendant, Sun-Diamond, was an agricultural trade association representing about 5000 farmers. These farmers were interested in the government's doing and not doing certain things related to their business. The farmers wanted the Department of Agriculture (DOA) to give them grants for promoting sales of farm commodities in foreign countries. They did not want the Environmental Protection Agency (EPA) to ban their cheap pesticide—methyl bromide. And they also did not want this agency to fund the search for the pesticide's substitutes. Correspondingly, they wanted the DOA to block the EPA's initiative.

Because both governmental departments—DOA and EPA—were supposed to promote public good that did not necessarily align with the farmers' interests, Sun-Diamond made a special effort to create the alignment. As part of this effort, it befriended the Agriculture Secretary, Mr. Michael Espy. The bonding between the two sides to this new friendship included gifts that Sun-Diamond gave to Mr. Espy, which he graciously accepted. These gifts included tickets to the 1993 U.S. Open Tennis Tournament in the amount of $2295; luggage worth $2427; meals worth $665; and, finally, a framed print and crystal bowl purchased at $524. The gifts' total cost was $5900 (in 1993). For his part, Mr. Espy did nothing to benefit the farmers represented by Sun-Diamond, nor did he give them any explicit or implied promise to help.

The government argued that this evidence established that Sun-Diamond gave Mr. Espy an unlawful gratuity and, thus, perpetrated a crime under section 201(c)(1)(A), a statute that prohibits giving "anything of value" to a public official "for or because of any official act performed or to be performed by such public official."[28] Sun-Diamond strenuously disagreed. Though admitting it gave the aforementioned gifts to Mr. Espy, who was at the time the Agriculture Secretary, and that the gifts were "of value," Sun-Diamond claimed it was not guilty of the alleged crime.

How come? According to Sun-Diamond, the reason was simple: It gave those gifts to Mr. Espy neither "for" nor "because" of any specific "official act" that he performed or was supposed to perform.

The District Court accepted the government's position that

> under the gratuity statute, it is not necessary for the indictment to allege a direct nexus between the value conferred to Secretary Espy by Sun-Diamond and an official act performed or to be performed by Secretary Espy. It is sufficient for the indictment to allege that Sun-Diamond provided things of value to Secretary Espy because of his position.[29]

After trial, the court gave the jury a similar instruction about the applicable law and the jury found Sun-Diamond guilty as charged.[30] The Court of Appeals

28. 18 U.S.C. § 201(c)(1)(A) (2006).

29. 941 F. Supp. 1262, 1265 (D.D.C. 1996).

30. *Sun-Diamond*, 526 U.S. at 403.

reversed this conviction and remanded the case for a new trial after finding that the District Court's instruction "invited the jury to convict on materially less evidence than the statute demands—evidence of gifts driven simply by Espy's official position."[31] The Court of Appeals, however, also rejected Sun-Diamond's claim that the government needs to prove that a gratuity was given "for or because of" a particular official act.[32] According to the Court of Appeals, the government will satisfy its burden by proving the giver's "intent to reward past favorable acts or to make future ones more likely."[33] Under this definition of the requisite mens rea, the government had enough evidence to move its case to the jury.

Justice Scalia, writing for the Supreme Court, disagreed with this ruling. According to him, the "official act" element is "pregnant with the requirement that some particular official act be identified and proved."[34] Otherwise, held Justice Scalia, section 201(c)(1)(A)

> would criminalize, for example, token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits [and a] high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school.[35]

For Justice Scalia, these patently unacceptable consequences call for interpreting the unlawful-gratuity prohibition narrowly.

Justice Scalia alluded to these consequences as a supplementary, rather than a main, reason for interpreting section 201(c)(1)(A) as he did. His main reasons relied on two canons of statutory interpretation.[36] First, criminal prohibitions should generally be given a narrow meaning that favors freedom over unfreedom.[37] Hence, it is up to Congress to adopt "a broadly prophylactic criminal prohibition upon gift giving" if it really prefers such a broad prohibition.[38] Second, to avoid overcriminalization and excessive punishment, criminal prohibitions should be understood as part of the legal system's regulatory mechanism as a whole.[39] From this perspective, "a narrow, rather than a sweeping, prohibition is more compatible with the fact that § 201(c)(1)(A) is merely one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials."[40] "[C]riminal statutes"—as Justice Scalia explained—"are merely the tip of the regulatory iceberg" that includes an

31. 138 F.3d 961, 968 (D.C. Cir. 1998).

32. *Id*.

33. *Id*. at 969.

34. *Sun-Diamond*, 526 U.S. at 406.

35. *Id*. at 406–07.

36. *Id*. at 408–09.

37. *See* Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2422–23 (2006) (describing rule of lenity).

38. *Sun-Diamond*, 526 U.S. at 408.

39. *Id*.

40. *Id*. at 409.

administrative prohibition for any "employee of the executive, legislative, or judicial branch [to] . . . accept anything of value from a person . . . whose interests may be substantially affected by the performance or nonperformance of the individual's official duties."[41] Based on these reasons, Justice Scalia concluded that, "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given."[42]

This decision suffers from a number of flaws. The first flaw is miscategorization. For a reason that Justice Scalia did not articulate, his decision brings the applicable evidentiary and substantive criminal law requirements under a single roof of section 201(c)(1)(A). This interpretive move is mystifying. Most criminal prohibitions, to use Justice Scalia's language, are *not* pregnant with evidentiary requirements, and section 201(c)(1)(A) does not appear to be exceptional. The provisions of this section do not say anything about evidence. They are strictly about substantive criminal law—specifically, the definition of the "unlawful gratuity" offense. Under this definition, a person commits the offense when he gives a public official "anything of value . . . for or because of *any* official act performed or to be performed by such public official."[43] How to prove that the person gave the official a gift "for or because of any official act performed or to be performed by" that official is a separate matter—one addressed by the law of evidence. Specifically, evidence law provides that the prosecution can prove a defendant's guilt by any admissible evidence that the jury finds credible "beyond a reasonable doubt."[44] There are crimes in relation to which the law sets some additional evidentiary requirements for convicting a person,[45] but section 201(c)(1)(A) is not one of them.

Furthermore, granted that writing a special evidentiary requirement into section 201(c)(1)(A) would somehow be a good idea, why require the government to prove unlawful-gratuity accusations by evidence that identifies "a link between [the gift] and a specific 'official act'"?[46] Why not follow the general evidence law that affords the government flexibility in proving defendants' guilt beyond a reasonable doubt? Specifically, why prefer direct evidence to circumstantial? As virtually all evidence specialists will confirm, circumstantial evidence is as good as direct evidence—among other things, because "circumstances cannot lie."[47]

41. *Id*. at 410 (citing 5 U.S.C. § 7353(a)(2) (2006)).

42. *Id*. at 414.

43. 18 U.S.C. § 201(c)(1)(A) (2006) (emphasis added). Although Congress did not italicize the word "any," doing so might have been a good idea.

44. *See* ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 172–83 (2005) (explaining the "proof beyond a reasonable doubt" requirement). This requirement is mandated by the Constitution. *See In re* Winship, 397 U.S. 358 (1970).

45. For examples, see STEIN, *supra* note 44, at 18–25.

46. *Sun-Diamond*, 526 U.S. at 414.

47. *See* BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE:

The principle "circumstances cannot lie" also applies to the economics of transactions. People sometimes lie about the nature of their transactions, but the economics underlying those transactions always reveal their true nature. The gift transaction between Sun-Diamond and Secretary Espy is no exception. This transaction had established a bonding relationship between the two parties—in simple terms, favoritism. This relationship followed the format of an under-specified relational agreement.[48] Sun-Diamond gave Mr. Espy gifts to make him favorably disposed toward the affiliated farmers' interests, and Mr. Espy accepted these gifts to create this disposition. This disposition included the Secretary's implicit, indefinite, and unspecified promise to help the farmers when it became possible and convenient. That this promise was implicit, indefinite, and unspecified does not make the promise inconsequential. The promise had economic value, and this value was far from trivial. Hence, the Secretary received Sun-Diamond's gifts "for or because of any official act" that he might perform in the future.[49]

Justice Scalia's decision defies this economic logic. This defiance is unjustified. It breaks away from another canonical principle, popularized by Justice Scalia's former colleague at the University of Chicago. As Milton Friedman famously observed, "There's no such thing as a free lunch."[50] By the same token, and contrary to Justice Scalia's decision, there are also no such things as free tickets to a U.S. Open Tennis Tournament, free luggage, free meals, and a free crystal bowl.[51] Application of the "off-market exchange" criterion easily verifies this observation (if it still requires verification). Under this criterion, an exchange between a private citizen and a public official constitutes bribery or unlawful gratuity whenever it yields both parties benefits not available on the market. The market, as we know it, does not offer for free any of the valuables Sun-Diamond gave to Secretary Espy, nor does it freely distribute favoritism agreements with the government's agents. Sun-Diamond's gifts induced Mr. Espy to help the affiliated farmers at society's expense. As such, they constituted an unlawful gratuity under section 201(c)(1)(A). Justice Scalia's concern about potential criminalization of token gifts is exaggerated. To the best of my knowledge, no person has ever been prosecuted for (let alone convicted of) corruption based on her giving or receiving a jersey, a T-shirt, a baseball cap, or other memorabilia. Similarly, no person has ever been

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HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 217 (1991) (attesting that the maxim "circumstances cannot lie" had become commonplace already in the Eighteenth Century).

48. Compare again the structure of this agreement with the features of relational contracts laid out in Macneil, *supra* note 16.

49. 18 U.S.C. § 201(c)(1)(A) (2006).

50. MILTON FRIEDMAN, THERE'S NO SUCH THING AS A FREE LUNCH (1977).

51. *Cf.* United States v. Williams, 7 F. Supp. 2d 40, 43 (D.D.C. 1998) (denying motion to dismiss indictment against lobbyist for Tyson Foods company, who gave Secretary Espy "seats to the 1993 Presidential inaugural gala, travel and lodging connected with a Tyson birthday party . . . travel, lodging and tickets to a National Football Conference playoff game . . . , a Tyson foundation scholarship for the Secretary's girlfriend, and, for the Acting Assistant Secretary of Agriculture, a $13 basketball ticket and a first-class upgrade coupon for an airplane flight").

prosecuted for providing a government's visitor lunch or dinner. (And, conversely, no public official has ever been prosecuted for eating lunch or dinner while visiting a private firm or institution.) American prosecutors, judges, and juries possess enough common sense and good will to avert such absurdities.

The off-market exchange criterion sets up an even better safety barrier against such absurd prosecutions. Virtually all memorabilia gifts are open-market transactions following a uniform pattern. The public official acquires no pecuniary benefit from receiving a memorabilia gift. And neither does the gift's giver acquire any business advantage for himself—besides the enhancement of visibility and reputation from the official's holding or wearing of the gift. This benefit may have substantial economic value, but it induces no official action on the part of the official and hence does not constitute a bribe or unlawful gratuity. More crucially, a memorabilia gift creates no exclusivity in the parties' relationship because the official can—and, in all likelihood, will—receive similar gifts from others. The gift, therefore, does not affect the official's evenhandedness, nor does it diminish other private actors' opportunities to successfully deal with the government.

Things become different when a memorabilia gift goes off market (and thus stops being a pure memorabilia gift). For example, if the chief of police were to receive from a baseball stadium owner Mark McGwire's seventieth home run ball,[52] he would likely be taking a bribe or unlawful gratuity. The reason is simple: Such memorabilia items are expensive, exclusive, and consequently are never given for free on the open market. By the same token, an IRS official will do well to decline a lunch invitation from an accounting firm after seeing Petrossian Kaluga caviar on the menu.[53]

IV
THE ECONOMIC ILLOGIC OF *SKILLING*

A. *McNally*'s Legacy

Sun-Diamond's nexus requirement excessively narrowed the scope of the "unlawful gratuity" prohibition. This narrow interpretation of section 201(c)(1)(A) is socially undesirable,[54] but the *Sun-Diamond* Justices had a different opinion. Based on that opinion, the Justices interpreted the definition of bribery—an offense more serious than unlawful gratuity[55]—by interposing a

52. *See* Jay Nolan, *Is a Home Run Baseball Worth Millions of Dollars?*, NAT'L EXAMINER, May 11, 2010, *available at* http://www.examiner.com/sports-memorabilia-in-national/is-a-home-run-baseball-worth-millions-of-dollars? (reporting auction purchase of Mark McGwire's seventieth and final home-run ball for $3,000,000).

53. *See* PETROSSIAN, http://www.petrossian.com/caviar-1-kaluga-caviar-605.html (last visited Nov. 17, 2011) (pricing 50g Kaluga caviar at $481).

54. *See* discussion, *supra* Part II.

55. For the definition of bribery as to the giver, see section 201(b)(1), and as to the recipient, see section 201(b)(2). Bribery is punishable by imprisonment for up to fifteen years, as well as by fine and

similar nexus requirement. Justice Scalia, writing on behalf of the unanimous Court, underscored that the key element of the bribery offense is quid pro quo: a "specific intent to give or receive something of value *in exchange* for an official act."[56] More precisely, as he went on to explain, "Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act."[57] Under general evidence law, the prosecution must establish the presence of this specific intent beyond a reasonable doubt.[58] Failure to do so will lead to the defendant's acquittal.[59]

The narrow scope of the two core corruption offenses has left a wide variety of corrupt activities underdeterred. Under *Sun-Diamond*, when a public official receives a gift, the gift will only be criminal if it was given or received as a reward for the official's specific action. Favoritism fueled by gifts falls outside the scope of criminal corruption, although it will normally violate one of the criminal or administrative rules prohibiting public officials from positioning themselves in a conflict of interests.[60] Conflicts of interests, however, are not punishable as severely as bribery and unlawful gratuity and are also not as stigmatizing as these two offenses.[61] Furthermore, in most instances, the only party responsible for such misconduct is the official who receives the gift, but not the gift's private giver.

McNally v. United States[62] gave the Supreme Court an early opportunity to eliminate the deterrence shortfall resulting from the narrow understanding of bribery and unlawful gratuity. In *McNally*, the Court took upon itself to delineate the scope of the federal mail-fraud statute, 18 U.S.C. § 1341, proscribing the use of mail to carry out "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[63] This broad prohibition could be interpreted as proscribing all forms of corruption in the public service falling outside the scope of core bribery offenses. Indeed, the attorneys who argued the case on behalf of the United States asked the Court to interpret section 1341 in this way.[64]

The set of facts upon which the Court decided the case was particularly suitable for that purpose. A senior public official in Kentucky was paid commissions (through companies he owned) for securing the payer's business as a provider of insurance services under the state's workman-compensation

various disqualifications. 18 U.S.C. § 201(b) (2006). For the definition of unlawful gratuity as to the giver, see section 201(c)(1)(A), and as to the recipient, see section 201(c)(1)(B). Unlawful gratuity is punishable by imprisonment for up to two years and a fine. *Id.* § 201(c).

56. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404–05 (1999).

57. *Id*. at 404.

58. *See* STEIN, *supra* note 44, at 172–83.

59. *Id*.

60. For a more or less comprehensive list of these rules, see *Sun-Diamond*, 526 U.S. at 409–11.

61. *See, e.g.*, 5 U.S.C. § 7353 (2006) and 5 C.F.R. § 2635.202 (2011) (categorizing gifts received by public officials under certain circumstances as ethical, rather than criminal, violations).

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

63. 18 U.S.C. § 1341 (2006).

64. *McNally*, 483 U.S. at 352.

program. Based on these facts, the official and his two accomplices were accused of devising a scheme to deprive Kentucky's citizens and government of their "intangible rights" to have the state's affairs conducted honestly.[65] This scheme yielded the parties a handsome profit. Yet, as the Court noted, the State did not suffer much as a result of this fraudulent scheme. It was deprived only of its intangible right to receive honest services from its official. And, as the Court clarified, no accusation was made that "in the absence of the alleged scheme the [State] would have paid a lower premium or secured better insurance."[66]

The Court's assumption of the scheme's "Pareto-superiority" was patently false. The insurer found it profitable to earn the premiums that appeared in its policies while paying the State's official $\$X$ to secure this transaction. Hence, in a face-to-face bargain with the State, the insurer would certainly have agreed to reduce the premiums by up to $\$X$. The State was, therefore, fraudulently deprived not only of its official's honest services, but also of the money—or some of the money—the official pocketed as a "commission." From an economic standpoint, this "commission" amounted to a theft. It did not come at the insurer's expense, but rather at the expense of the State. Importantly, this economic assessment is not confined to the facts of *McNally.* Rather, it will hold true in every case featuring an official's self-enrichment. Such self-enrichment schemes always come at the expense of the government the official is obligated to serve.

The assumption that the State suffered no pecuniary damage from the official's self-enrichment scheme made it easy for the Court to decide that the scheme is "not within the reach of § 1341."[67] Far from trivializing the State's intangible damage,[68] the Court held that the criminal prohibition of mail fraud does not guard against this type of harm.[69] According to the Court, if Congress really desired to protect the government from this type of harm, it should say so explicitly.[70]

B. *Skilling*

After thinking for about a year, Congress decided to speak explicitly: It enacted section 1346—a provision criminalizing any "scheme or artifice to deprive another of the intangible right of honest services."[71] This broad formulation makes section 1346 a supplement to the core bribery and unlawful gratuity offenses—a residual rule that penalizes corruptions not captured by

65. *Id.*

66. *Id*. at 360.

67. *Id*. at 361.

68. *Cf.* Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1836–46 (2011) (rationalizing criminal prohibitions of corruption as fending off harm to the integrity of political process and the body politic).

69. *McNally*, 483 U.S. at 359–61.

70. *Id*. at 359–60.

71. 18 U.S.C. § 1346 (2006).

those offenses' definitions. This residual applicability is what Congress attempted to accomplish.

Alas, this legislative attempt has failed. In *Skilling v. United States*,[72] the Supreme Court decided that section 1346 needed to undergo comprehensive redrafting, guided by the lenity rule.[73] Under this rule, when a criminal statute has two or more plausible meanings, courts should interpret it by adopting the meaning that favors the defendant's case.[74]

The lenity rule was not the only ground for the Court's decision. The Court also relied on the "void for vagueness" doctrine.[75] This constitutional doctrine invalidates criminal statutes that are open to multiple interpretations and consequently force people to guess what the law means to prohibit (while allowing the government to prosecute individuals almost at will).[76] Based on this doctrine, the Court made an assessment that the unedited definition of honest-services fraud is unconstitutionally vague.[77] This assessment prompted the Court to find out whether the new offense can be disambiguated instead of being voided. Based on this innovative[78] principle of "statutory survival," the Court used the lenity rule to narrow the scope of section 1346. Specifically, the Court interpreted the honest-services fraud offense as prohibiting bribery and kickback payments, and nothing else.[79] This interpretation rested on the Court's assumption that Congress's only goal in legislating section 1346 was to overturn *McNally*—a case in which the defendants managed to escape conviction notwithstanding the presence of a kickback payment.

This narrow interpretation of section 1346 prompted the Court to invalidate the convictions of three petitioners (in separate cases). The first petitioner was Enron's former CEO, Jeffrey Skilling, who participated in an elaborate scheme to prop up Enron's stock price while hiding its financial losses. The Court held that Skilling's participation in that scheme did not constitute honest-services fraud in and of itself. Skilling could only be convicted of that offense upon proof beyond a reasonable doubt that he received a bribe or a kickback payment for his part in the scheme.[80] The Court remanded Skilling's case for determination whether the honest-services fraud instruction of the jury was a harmless error.[81] The defendants in two other cases, Conrad Black and Bruce Weyhrauch, have

72. 130 S. Ct. 2896 (2010).

73. *Id*. at 2932–33.

74. *Id*. at 2933–34.

75. *Id*.

76. *Id*.

77. *Id.* at 2933–34.

78. Justice Scalia properly criticizes this innovation by attesting that "in transforming the prohibition of 'honest-services fraud' into a prohibition of 'bribery and kick-backs' [the Court] is wielding a power we long ago abjured: the power to define new federal crimes." *Id.* at 2935 (Scalia, J., concurring in part, concurring in the judgment).

79. *Id*. at 2933–35.

80. *Id*.

81. *Id*. at 2935.

been equally successful. The Court vacated their honest-services fraud convictions as well.[82]

The *Skilling* decision has created a setback for prosecutions of corruptions occurring in the public service. Such prosecutions can now only be successful against defendants who committed bribery or unlawful-gratuity offenses, as defined in *Sun-Diamond*.[83]

The aftermath of the *Skilling* decision was equally disappointing. Consider *United States v. Riley*,[84] a case in which the Third Circuit invalidated the conviction of Newark's former Mayor and his girlfriend. Evidence upon which the jury found the two defendants guilty of violating section 1346 demonstrated that the Mayor used his control over the city's redevelopment plan to secure the girlfriend's discounted acquisition of city-owned properties. The girlfriend had no experience in property development; and so, instead of developing the properties, she sold them at a profit.[85] The Third Circuit decided that this evidence did not warrant conviction under section 1346 because it did not establish that the Mayor received a kickback or a bribe.[86]

This example is by no means unique. In *United States v. Coniglio*,[87] the Third Circuit addressed the implications of the *Skilling* decision on the conviction of a former New Jersey state senator who had entered into a "consulting agreement" with a medical center. The agreement masked the center's undertaking to remunerate him for improper official actions that benefited the center financially. After a three-week trial, the court instructed the jury to find the defendant guilty of honest-services fraud if it determined that he took a bribe or, alternatively, that he acted as a senator under a concealed conflict of interests.[88] The Third Circuit decided that the "conflict of interests" instruction did not align with *Skilling* because it omitted the "bribe or kickback" element. This omission led jurors to form the wrong belief that the defendant's conflict of interests, without more, suffices for his conviction. The Third Circuit consequently had no choice but to overturn the conviction.[89]

82. Black v. United States, 130 S. Ct. 2963 (2010); Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (per curiam); *see also* HARVARD L. REV. ASS'N, *The Supreme Court—Leading Cases*, 124 HARV. L. REV. 179, 360–70 (2010) (discussing *Skilling*, *Black*, and *Weyhrauch* and explaining the outcome of these decisions as the Court's reaction to the prosecution's overuse of its power). According to the survey's authors, the prosecution in these cases charged conduct that only "debatably violate[d] the prohibiting statute." *Id.* at 360.

83. The honest-services fraud offense did not become completely redundant. *See Skilling*, 130 S. Ct. at 2934, n.45 ("Overlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example, generally applies only to federal public officials, so § 1346's application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished.").

84. 621 F.3d 312 (3d Cir. 2010).

85. *Id*. at 319, 328.

86. *Id*. at 339.

87. 417 Fed. App'x 146 (3d Cir. 2011).

88. *Id*. at 148.

89. *Id*. at 149–51.

The *Skilling* decision is flawed in a number of respects. First, section 1346 is not vague. This provision protects the right to honest services by criminalizing those who act fraudulently to deprive individuals of this right. Hence, in order to convict a person under this provision, the prosecution must establish the presence of a right to receive honest services and that right's scope. After establishing these elements, the prosecution must prove that the defendant fraudulently violated or procured the violation of the right. In the private sector, this right is determined by contract. Within the framework of public service, this right is determined by a combination of contract, regulatory provisions, and general public law. If there is a serious doubt as to the right's scope, or whether it existed in the first place, the court will have to acquit the defendant. The right to receive honest services does not differ in this regard from proprietary entitlements that criminal law protects against theft and other forms of embezzlement.

The honest-services fraud offense is, indeed, very general. But being general is different from being vague. There is no constitutional bar against broad criminal prohibitions, as opposed to prohibitions that have multiple meanings. Nor should there be such a bar: Oftentimes, broad criminal prohibitions are the best way to fend off crime. Consider, for example, conspiracy "to defraud the United States . . . in any manner or for any purpose."[90] This offense is very broad and sufficiently clear at the same time. There can be no doubt about this offense's constitutionality. As such, the broad definition of honest-services fraud, as designed by Congress, also aligns with the Constitution.

On the operational level, the "off market benefit" criterion makes the prohibition of honest-services fraud easy to implement. In *Skilling*, the key question under this criterion would be whether the conspiracy to prop up Enron's stock prices yielded an off-market benefit to any of the parties. The answer to this question is an unequivocal yes: The whole purpose of the Enron conspiracy was to allow the conspirators to generate profits that the market would have denied.[91]

In *McNally*, the presence of an off-market benefit was equally apparent. The insurer obtained a profitable contract with the state by bypassing market competition. This contract constituted an off-market benefit. The official who secured this contract and helped the insurer bypass the market received a commission. This commission amounted to an off-market benefit as well because the official would not have received it on the open market.

By the same logic, both the *Riley* and *Coniglio* cases featured an off-market benefit. The transactions that took place in these cases are not available on the open market. Consequently, parties to those transactions were guilty of honest-services fraud. Moreover, these actors were guilty of bribery as well because the

90. 18 U.S.C. § 371 (2006).

91. Ultimately, Skilling's convictions were upheld by the Fifth Circuit on remand, after the court decided that the honest-services fraud instruction the jurors had received was a "harmless error." United States v. Skilling, 638 F.3d 480, 488 (5th Cir. 2011).

off-market benefits they accrued through those transactions were two-sided.

V
CONCLUSION

My proposed criterion for identifying bribery and unlawful gratuity—accrual of an off-market benefit by both sides to the suspected deal—is preferable to the Supreme Court's "specific act" requirement. This criterion captures all variants of bribery without leaving off anything. Under this criterion, courts will abandon noisy signals, coming from the parties' and other witnesses' narratives, and will base their decisions on the economics of the suspected deal. When these economics reveal the presence of a two-sided off-market benefit, this benefit cannot be accidental. Under such circumstances, the parties clearly intend to give and receive a bribe or unlawful gratuity. On the other hand, absence of a two-sided off-market benefit will show that the parties' transaction involved no bribery or unlawful gratuity. For purposes of the honest-services fraud offense, the off-market benefit criterion will be very helpful as well. Under the definition of the offense, however, the off-market benefit can be accrued by *any* party to the fraudulent scheme. The prosecution, in other words, will only need to show that one of the parties fraudulently generated an off-market benefit for himself at the victim's expense. In a typical case, of course, this party will share the benefit with other participants in the fraudulent scheme.