2. FRAUD

> To one who marveled what should be the reason that acts and statutes are continually made at every Parliament without intermission, and without end, a wise man made a good and short answer, both which are well composed in verse. 'If you ask why there are so many laws, the answer is that fraud ever increases on this earth.' – Lord Coke, *Twyne's Case*, 76 Eng. Rep. 809 (K.B.) (1601)

Crimes of deception give rise to most of the investigations pursued, and offenses charged, in the field of corporate crime. Fraud is thus the most important legal concept to understand to develop a firm grasp of the "substantive" criminal law that applies in corporate crime practice. Fraud's conceptual structure, and often its doctrinal particulars, lie at the core of business crimes in sectors ranging from securities dealing to health care services to consumer product manufacturing.

Fraud is both intuitive—rooted in the basic concept of deception—and endlessly complex—turning heavily on contextual particulars. The truth in the modern world is that deceptive statements and conduct are sometimes expected and permissible—think about used car sales, many kinds of negotiations, poker, or campaign promises—and sometimes forbidden—consider doctors and lawyers talking to patients and clients, securities brokers dealing with customers, and corporate executives speaking to shareholders.

Conceptually, fraud is a general problem with common features. Doctrinally, it varies somewhat with statutory particulars. This chapter will move from the concept to the doctrine, introducing fraud primarily through the broad, flexible, and frequently deployed federal mail and wire fraud statutes. The objective of this chapter is that students leave it with the ability to read the facts of the next scandal about deception in a business setting and form an opinion about whether the conduct amounted to criminal fraud.

The chapter is organized as follows: Part A introduces the concept of fraud through three examples. Part B deals briefly with (1) the jurisdictional component of the federal mail and wire fraud statutes and (2) the essential element of "materiality" in the crime of fraud. Part C focuses on the central matter of defining impermissible deception under the mail and wire fraud statutes. Part D explores the question of what kinds of interests might count as "property" in a mail or wire fraud prosecution. Part E covers the law of "honest services" mail and wire fraud—a concept that broadened the potential reach of these statutes, but that the Supreme Court has curtailed.

A. The Concept of Fraud

Before taking up the particulars of statutes and doctrine, it will help to develop an idea of the basic concept of fraud. What is fraud, and what isn't? Consider the three examples

that follow. What do these examples tell us about what is involved in the social concept of fraud, both generally and particularly in financial markets? To work towards answering this question, pay at least as much attention to the facts in these examples as what is said about the law.

Note that the first case is a *civil lawsuit*, not a criminal prosecution. The court's discussion of fraud is nonetheless useful. To generalize, civil fraud claims differ from the crime of fraud mostly on two dimensions: (1) mens rea (more is required for criminal liability, of course), and (2) burden of proof (a preponderance of the evidence versus beyond a reasonable doubt). Additionally, civil fraud plaintiffs must prove damages because they seek to recover money. Prosecutors do not have to prove damages and, as elsewhere in criminal law, attempt and conspiracy are available theories even when a fraud does not come to fruition or succeed.

GOMEZ-JIMENEZ v. NEW YORK LAW SCHOOL, 103 A.D.3d 13 (N.Y. Sup. Ct. App. Div. 2012)

ACOSTA, J.

This appeal involves the propriety of the disclosures of postgraduate employment and salary data by defendant New York Law School to prospective students during the period August 11, 2005 to the present. Plaintiffs allege that the disclosures caused them to enroll in school to obtain, at a very high price, a law degree that proved less valuable in the marketplace than they were led to expect. We hold that defendant's disclosures, though unquestionably incomplete, were not false or misleading. We thus affirm the dismissal of the complaint.

Plaintiffs are graduates of the law school who attended the school between 2004 and 2011. They assert, individually and on behalf of all others similarly situated, a claim for deceptive acts and practices in violation of General Business Law § 349 and claims for common-law fraud and negligent misrepresentation. These claims are based on allegations that the employment and salary information published by defendant during the relevant time period concealed, or failed to disclose, that the employment data included temporary and part-time positions and that the reported mean salaries were calculated based on the salary information submitted by a deliberately small, specifically selected, subset of graduates. In addition, plaintiffs allege that defendant enhanced its numbers by, among other things, hiring unemployed graduates as short-term research assistants so that they could be classified as employed. Plaintiffs assert that defendant engaged in this fraud to increase its class size and use the high tuition demanded of its students to lavish perks and exorbitant salaries on its administration and large faculty. The complaint seeks damages and equitable relief, including the refund and reimbursement of plaintiffs' tuition.

Defendant moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), arguing, among other things, that its employment reports were not materially misleading because they (1) complied with the then applicable disclosure rules of the American Bar Association (ABA); (2) made no representation or implication that they included only full-time, permanent employment that required or preferred a law degree; and (3) explicitly revealed that the reported salary ranges were based on a small sample of graduates. . . .

To state a cause of action for fraudulent misrepresentation, "a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Mandarin Trading Ltd. v. Wildenstein*. "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so" *P.T. Bank Cent. Asia, N.Y. Branch v. ABN AMRO Bank N.V*. "In addition, in any action based upon fraud, the circumstances constituting the wrong shall be stated in detail." *Id*. (citing CPLR 3016 [b]). To state a cause of action for negligent misrepresentation, in turn, the plaintiff must allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" *Mandarin Trading*.

Plaintiffs argue that they stated causes of action for common law fraud and negligent misrepresentation based on their allegations that defendant knowingly published misrepresentations about its graduates' employment rates and salaries, and fraudulently concealed the fact that the employment rates included temporary, part-time, voluntary or non-JD-required/preferred employment. However, . . . the employment and salary data disclosed by defendant was not actually false (even if it was incomplete). Thus, the fraud claim fails insofar as it is based on fraudulent misrepresentations. *See Pappas v. Harrow Stores*; *see also MacDonald v. Thomas M. Cooley Law Sch.* (dismissing a lawsuit against a law school on the grounds that plaintiff's "subjective misunderstanding of information that is not objectively false or misleading cannot mean that [defendant] has committed the tort of [fraud]"). Furthermore, because plaintiffs have not alleged any special relationship or fiduciary obligation requiring a duty of full and complete disclosure from defendant to its prospective students, we dismiss plaintiff's claim to the extent that it is based on fraudulent and negligent misrepresentation.

We are not unsympathetic to plaintiffs' concerns. We recognize that students may be susceptible to misrepresentations by law schools. As such, "[t]his Court does not necessarily agree [with Supreme Court] that [all] college graduates are particularly sophisticated in making career or business decisions" *MacDonald*. As a result, prospective students can make decisions to yoke themselves and their spouses and/or their children to a crushing burden of student loan debt, sometimes because the schools have made less than complete representations giving the impression that a full-time job is easily obtainable, when, in fact, it is not.

Given this reality, it is important to remember that the practice of law is a noble profession that takes pride in its high ethical standards. Indeed, in order to join and continue to enjoy the privilege of being an active member of the legal profession, every prospective and active member of the profession is called upon to demonstrate candor and honesty in their practice. This requirement is not a trivial one. For the profession to continue to ensure that its members remain candid and honest public servants, all segments of the profession must work in concert to instill the importance of those values. "In the last analysis, the law is what the lawyers are. And the law and lawyers are what the law schools make them." Defendant and its peers owe prospective students more than just barebones compliance with their legal obligations. Defendant and its peers are educational not-for-profit institutions. They should be dedicated to advancing the public welfare. In that vein, defendant and its peers have at least an ethical obligation of absolute candor to their prospective students.

Accordingly, the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered March 21, 2012, which granted defendant New York Law School's motion to dismiss the complaint, should be affirmed, without costs.

The next case further explores the question of what makes a particular business practice fraudulent or not. The case also includes a very useful explanation of futures trading which is, in its essence, similar to many of the securities derivative trading activities you will read about throughout these materials. The explanation here introduces the concepts involved in derivatives trading.

UNITED STATES v. DIAL, 757 F.2d 163 (7th Cir. 1985)

POSNER, Circuit Judge:

Donald Dial and Horace Salmon were found guilty by a jury of mail and wire fraud (18 U.S.C. §§ 1341 and 1343) in connection with the trading of silver futures on the Chicago Board of Trade. Dial was sentenced to 18 months in prison to be followed by 5 years on probation, and was fined $16,000. Salmon was sentenced to 5 years on probation with 30 days of this period to be spent in work release (meaning that he will work during the day but sleep in jail), and was fined $15,000 and ordered to do 500 hours of community service.

The main argument of the appeals is that the conduct in which the defendants engaged was not fraudulent. To understand this argument you must know something about commodity futures. . . . A futures contract is a contract for the sale of a commodity at a future date; but unlike a forward contract, which it otherwise resembles, a futures contract rarely results in actual delivery of the commodity. Suppose that today, a day in March, the price of silver for delivery in June is $4 an ounce, but you think the price will go up to $5 by the time June rolls around. You would then buy June silver at $4. The person on the other side of the contract, the seller, presumably thinks differently—that the price in June will be $4 or lower. You are "long" on the contract; you expect the

price to rise. He is "short"; he expects it to fall. As the months go by, the price of June silver will change as more and more information becomes available on the likely demand and supply of silver in June. Suppose in May the price hits $5 and you want to take your profit. All you have to do is sell the contract for $5; you don't have to worry about ending up with a pile of silver to dispose of. Nor need the person who sold you the silver for $4, and who probably never had any silver, have to worry about getting some and delivering it in June to the person to whom you sold your contract. All he has to do in order to take his loss and get out of the market is buy (at $5) the same amount of June silver that he had agreed to sell; the two contracts cancel, and he is out of the market.

What we have described is speculation but not, as the defendants contend, gambling. Commodity futures trading serves a social function other than to gratify the taste for taking risks—two other social functions in fact. It increases the amount of information that the actual consumers of the commodity (mainly, in the case of silver, manufacturers of film, electronics, and jewelry) have about future price trends, by creating incentives for investors and their advisers to study and forecast demand and supply conditions in the commodity. And it enables the risk-averse to hedge against future uncertainties. Suppose a jewelry manufacturer knows that it will need a certain amount of silver in June and is worried that the price might be very high by then. By buying June silver futures at $4 it can place a ceiling on what the silver will cost it (sellers can hedge similarly, by selling futures). Suppose that by June the price has risen to $5. When the manufacturer buys silver then, it will have to pay $5; but by selling its futures contract (to someone who had gone short on June silver) just before delivery is due, for $5, which is to say at a profit of $1, the manufacturer ends up paying a net of only $4 for the silver. The manufacturer could have hedged by means of a forward instead of a futures contract, that is, by signing a contract with a silver company for delivery in June at $4. But then it would have to locate and negotiate with a particular seller in advance, rather than wait till June when it will actually want the silver and buy then at the current price ($5). Since futures contracts are standard contracts—for example, the Chicago Board of Trade's silver futures contract in the period relevant to this case was a contract for 5,000 troy ounces of silver of a specified grade and quality—there is no negotiation over terms; and since the transaction is guaranteed by the clearing members of the exchange, *see Bernstein v. Lind-Waldock & Co.*, the buyer does not have to worry about whom he is dealing with.

Traders on a commodity futures exchange will, however, want some assurance that there are no people in the market who have preferential access to information. If there are known to be such people, the other traders will tend to leave the exchange for other exchanges that do not have such people—and several commodity exchanges besides the Board of Trade offer trading in silver futures contracts. If trading is "rigged" on all commodity futures exchanges, there will be less commodity futures trading, period, and the social benefits of such trading, outlined above, will be reduced. The greatest danger of preferential access comes from the brokers, who often trade on their own account as well as for their customers. Brokers have more information than any of their customers because they know all their customers' orders. Suppose a customer directs his broker to

buy a large number of silver futures contracts. The broker knows that when he puts this order in for execution the price will rise, and he can make it rise further if he waits to execute the order until he can combine it with other buy orders from his customers into a "block" order that will be perceived in the market as a big surge in silver demand. If, hoping to profit from this knowledge, the broker buys silver futures on his own account just before putting in the block order and then sells at the higher price that the block order generates, he will hurt his customers. His purchase (if substantial) will have caused the market price to rise just before the block order went in, and thus the price that his customers pay will be higher than otherwise; and his sale will cause the price to fall, and thus reduce the value of his customers' contracts. So if "trading ahead"—as the practice of a broker's putting in his own orders for execution ahead of his customers' orders is called—became widespread, customers would realize that the market was rigged against them. And trading ahead serves no social function at all. The broker obtains a profit from information that he has not invested in producing but that comes to him automatically in his capacity as a broker. It is like a lawyer's discovering that his client is about to make a takeover bid for another company and rushing out and buying some of that company's stock before the bid is made public.

Against this background we consider the facts as the jury could reasonably have found them in the government's favor. Dial, an experienced silver trader, was the manager of a branch office of the Clayton Brokerage Company. Salmon was the company's president. In 1978 Dial was looking for a very large investor to make a multi-million dollar purchase of silver futures through Clayton Brokerage. In preparation for the appearance of such an investor Salmon arranged for Dial to control a trading account at Clayton Brokerage in the name of Multi-Projects (Cayman), Ltd., a Cayman Islands corporation. An "equity raiser" named Kirst located on Dial's behalf the putative grand investor in the person of Nasrullah Khan, who said he represented a group of investors organized as the International Monetary Corporation (IMC). While negotiations between Khan and Dial's son were proceeding, Dial began buying silver futures for the Multi-Projects account. But he put up no cash or cash equivalent for these purchases. To understand the significance of this omission, recall that a futures contract commits each of the contracting parties to buy or sell the underlying commodity at a date in the future at whatever the market price then is. Since the brokerage house (here, Clayton Brokerage) is responsible for the undertakings in its customers' futures contracts, it wants to be sure that each customer has the financial wherewithal to make good on his obligation under his futures contract should the price move in the opposite direction from his expectations. To this end, the brokerage house requires each of its customers to put up "margin"—cash or a cash equivalent such as a Treasury bill—as a guarantee of solvency. The required margin is a (small) percentage of the contract price and fluctuates as the price fluctuates.

Brokerage houses naturally keep very close tabs on their margin accounts, insisting that as the price of the futures contracts bought on margin fluctuates the buyer increase his margin (if necessary—it will be necessary for the long if the market price of the futures contract falls, and for the short if the price rises) so that the brokerage house will always

have a cushion under its guarantee of its customers' transactions. Therefore when Dial bought silver futures for the Multi-Projects account without putting up any cash or cash equivalent—bought a lot of silver futures, 200 in all, worth $5 million—Clayton Brokerage Company's computer department notified its margin department that margin calls amounting to $100,000 should be issued to Multi-Projects, and they were. But Salmon instructed the director of the computer department to delete the Multi-Projects account from its computer programs and as a result the margin calls (which were never met) stopped.

On the weekend of November 10, 1978, at a time when Dial's personal trading account was in a perilous position (he had put up $1 million in Treasury bills against margin calls and all but $6,000 had been debited to meet them), negotiations with Khan were successfully concluded and Kirst was dispatched to London to pick up IMC's check for $25 million. On the same weekend Dial engaged in intensive solicitation of his regular customers to create a block order for silver futures to put in for execution on Monday, November 13. Kirst as directed deposited IMC's check—drawn on the Oxford International Bank in the Turks and Caicos Islands, and not certified—on Monday morning in Clayton Brokerage Company's account in a Chicago bank. Between 8:43 a.m. and 12:15 p.m. Salmon transmitted to the floor of the Board of Trade an order to buy 12 February (1979) silver futures contracts, and Dial transmitted orders on behalf of Multi-Projects, himself, his son, and Kirst and other associates, including two secretaries, for a total of 262 February futures. During this period the price of February silver fluctuated between $5.83 and $5.86 an ounce. At 12:40 p.m. Dial put in the block order, which was to buy 583 February futures, at higher prices—between $5.88 and $5.90. At 12:59 (two minutes after having bought 2,000 December futures for IMC), Dial bought 1,192 February futures for IMC at $5.92. Later that afternoon Salmon sold 10 of his 12 February futures at $5.91, seven cents more than he had bought them for that morning. The price kept on rising as the afternoon wore on, until it reached its limit—a 20 cent rise from the opening price. (Exchanges impose daily limits on price fluctuations; no trading is allowed at prices outside of the limits.)

At some point during the day, Dial and Salmon learned that Khan's check had not been certified. Yet Dial, authorized by Salmon, continued in the following days to buy silver futures heavily for IMC's account, even as it became increasingly likely from communications with the Oxford Bank that the check would never clear. On November 28 Dial decided the price of silver was now too high. He placed an order to sell 200 February silver futures contracts for the Multi-Projects account at $6.13. He had again assembled a block order (also to sell) from his customers, which he placed ten minutes after the Multi-Projects order and which was executed at lower prices than all but eight of the Multi-Projects contracts. The IMC check never did clear, and eventually the account was liquidated—at a profit. However, we were told at argument that in subsequent silver trading Dial was wiped out.

The surge of buy orders on November 13 caught the attention of Board of Trade officials and the Commodity Futures Trading Commission. Only 1,587 February silver futures

contracts had been traded on the most recent trading day, November 10; 4,756 were traded on November 13. The closing price for February silver futures on the Board of Trade on November 13 had been 13 cents higher than the closing price on the New York Commodity Exchange, where a similar futures contract is traded—an unusual discrepancy between such close substitutes. The Board and the Commission began an investigation of Clayton Brokerage Company's trading of the IMC account. Dial and Salmon lied (under oath) a number of times in the course of this investigation—Dial saying for example that he had not learned that IMC's check was not certified until the week of November 28 (and later admitting that he had known this on November 13), Salmon for example denying his interest in Multi-Projects.

The question for decision is whether the conduct we have described amounts to a fraud; if so, the defendants are guilty of federal wire and mail fraud, as there is no dispute that the telephone and the mails were used extensively. Although stiff federal criminal penalties for commodity dealers who defraud or attempt to defraud their customers were added to the Commodity Futures Trading Act on October 1, 1978, see 7 U.S.C. §§ 6b(A), 13(b), about six weeks before the defendants' scheme fructified in the trading on November 13, 1978, the defendants were not charged under these sections (they were, however, charged with and acquitted of filing a false report under another section), perhaps because the ambiguous wording of section 6b, on which *see* 1 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 4.6(452) (1984), makes it an uncertain vehicle for a criminal prosecution.

The defendants do not argue that the Commodity Futures Trading Act supersedes the federal mail or wire fraud statutes, and are wise not to make the argument. *See e.g.*, *United States v. Brien*. But they emphasize that none of the defendants' customers, or the defendants' employer, Clayton Brokerage Company, lost money as a result of their acts and that there is no statute, regulations, or Board of Trade rule that specifically forbids insider trading in commodity futures (as in securities), or block trading, or trading ahead (other than by floor brokers—the brokers who actually execute the trades on the floor of the exchange—which the defendants were not). Rule 150(b) of the Board of Trade, forbidding "trad[ing] systematically against the orders or position of his customers," may implicitly forbid trading ahead by any broker; but the only specific rule the defendants violated was the Board of Trade's Rule 210, which requires that accounts be margined. Neither the Multi-Projects account nor the IMC account was margined—the latter not only because IMC's check was no good but because margin must be in cash or a cash equivalent, such as a certified check.

But we think there was a scheme to defraud in a rather classic sense, which is obscured only because commodity futures trading is an arcane business—though not to these defendants. Fraud in the common law sense of deceit is committed by deliberately misleading another by words, by acts, or, in some instances—notably where there is a fiduciary relationship, which creates a duty to disclose all material facts—by silence. *See* Prosser and Keeton on the Law of Torts §§ 105–06 (5th ed. 1984). Liability is narrower for nondisclosure than for active misrepresentation, since the former

sometimes serves a social purpose; for example, someone who bought land from another thinking that it had oil under it would not be required to disclose the fact to the owner, because society wants to encourage people to find out the true value of things, and it does this by allowing them to profit from their knowledge. But if someone asks you to break a $10 bill, and you give him two $1 bills instead of two $5's because you know he cannot read and won't know the difference, that is fraud. Even more clearly is it fraud to fail to "level" with one to whom one owes fiduciary duties. The essence of a fiduciary relationship is that the fiduciary agrees to act as his principal's alter ego rather than to assume the standard arm's length stance of traders in a market. Hence the principal is not armed with the usual wariness that one has in dealing with strangers; he trusts the fiduciary to deal with him as frankly as he would deal with himself—he has bought candor.

As a broker, and therefore, the defendants concede (as they must, *see, e.g.*, *Marchese v. Shearson Hayden Stone, Inc.*), a fiduciary of his customers, Dial, when he solicited his customers to participate in block orders, implicitly represented to them that he would try to get the best possible price. He could have gotten a better price by putting their orders in ahead of the orders he placed for his own accounts and those of his friends. In trading ahead of his customers without telling them what he was doing, he was misleading them for his own profit, and conduct of this type has long been considered fraudulent. *See SEC v. Capital Gains Research Bureau, Inc*. . . .

It is true that the Board of Trade has no express rule against trading ahead of a customer (other than by a floor broker) and that there is no other specific prohibition (relevant to this case) of insider trading on commodity futures exchanges. But it is apparent that such a practice, when done without disclosure to the customer, is both contrary to a broker's fiduciary obligations and harmful to commodity futures trading, because it means that a person wanting to engage in such trading can trade only through an agent who has a conflict of interest.

The federal mail and wire fraud statutes have often been used to plug loopholes in statutes prohibiting specific frauds, a pertinent example being the application of the mail fraud statute to insider trading in securities before the promulgation of the SEC's Rule 10b–5. Although some scholars question the appropriateness of prohibiting insider trading by corporate officers, pointing out for example that (at least if short selling by insiders is prohibited) it gives officers a greater incentive to take risks that may benefit the shareholders, we would be surprised to find anyone saying a good word for insider trading by a broker; the only information he exploits is his knowledge of his customers' intentions.

The fraud was not only Dial's, but Salmon's, who was Dial's boss, knew what was going on, furthered the scheme by arranging for Dial to use the Multi-Projects account, and profited personally from the fraud along with Dial (indeed, more directly than Dial, who did not sell silver on his own account, as Salmon did, on November 13). Dial and Salmon not only defrauded their own customers; they also defrauded the people from whom they

bought silver futures contracts, and their employer, the Clayton Brokerage Company, by trading, without margin, the Multi-Projects and IMC accounts. Trading without margin gives a misleading signal, because a signal not backed by any cash. If you had no assets at all, and could buy futures contracts at will (say $25 million worth), you could have a powerful influence on futures prices. Yet you might be totally irresponsible and incompetent in forecasting such prices, and might therefore reduce the accuracy of the market as a device for forecasting price; for you would lack the stimulus to sober reflection that comes from having to put one's money where one's mouth is. Trading without margin also shifts risk from the trader to the broker, in this case from Dial and Salmon to their employer, the Clayton Brokerage Company, which would have had to make good any losses on the Multi-Projects and IMC accounts. This risk was not disclosed to Clayton Brokerage any more than trading ahead was disclosed to the defendants' customers or the lack of cash backing for the enormous buying by Multi-Projects and IMC was disclosed to those who sold futures contracts to the defendants and their associates. Far from disclosing what they were doing, Dial and Salmon actively concealed it by using an account with an uninformative name (Multi-Projects) and by Salmon's ordering the deletion of the Multi-Projects account from Clayton Brokerage Company's computer records. The defendants' failure to disclose to their employer what was going on was the breach of the defendants' fiduciary duty as employees. Although they owed no similar duty to people on the other side of their silver futures transactions, their trading an unmargined account was an active misrepresentation and hence actionable even without a breach of fiduciary duty.

It is true that no one "lost money," because silver prices were rising for reasons other than the defendants' unmargined trading. If that trading had been the only thing jacking up the price, the price would have collapsed when the IMC account was liquidated—and it did not; between November 1978 and February 1980, the average monthly price of silver rose to $38.27 per ounce. But the analysis is incomplete. The defendants' customers did lose money—the additional profit they would have made if the defendants had placed their customers' orders ahead of rather than behind their own orders. And Clayton was subjected to the risk of having to make good what might have been $25 million in trading losses in the IMC account. The risk did not materialize, but just as it is embezzlement if an employee takes money from his employer and replaces it before it is missed, so it is fraud to impose an enormous risk of loss on one's employer through deliberate misrepresentation even if the risk does not materialize. Finally, the defendants confused the market by signaling the presence of big buyers who had not in fact put up any money (IMC and Multi-Projects); and to undermine the confidence on which successful futures trading depends is to harm the exchanges, and the society at large. The evidence that the defendants' misrepresentations were deliberate was overwhelming, beginning with the establishment of an offshore trading operation in an uninformative name; continuing with the timing of the defendants' purchases for their own and their friends' accounts ahead of the block order and the IMC orders, all carefully orchestrated over the preceding weekend; culminating in the defendants' repeated lies to the investigating authorities; and including the violation of the margin requirements

(Rule 210 of the Board of Trade) and the concealment of the defendants' interests in the Multi-Projects account. It is inessential whether the defendants also violated Rule 150(b).

Concern has been expressed with the possible abuse of the mail and wire fraud statutes to punish criminally any departure from the highest ethical standards. When the broad language of the statutes ("Whoever, having devised or intending to devise any scheme or artifice to defraud. . . ."), which punishes the scheme to defraud rather than the completed fraud itself, is read by the light of the broad concept of fraud that has evolved in civil cases and the precept that the mail and wire fraud statutes are not confined to common law fraud, concern naturally arises that the criminal law will be used to hold businessmen to the maximum, rather than minimum, standards of ethical behavior. It is not allayed by such popular formulations of the test for mail or wire fraud as the Fifth Circuit's in *Gregory v. United States*, which continues to be repeated with approval, *see, e.g.*, *United States v. Bohonus*: fraud is whatever is not a "reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." Courts have been more concerned with making sure that no fraud escapes punishment than with drawing a bright line between fraudulent, and merely sharp, business practices, even though the universality of telephone service has brought virtually the whole commercial world within the reach of the wire-fraud statute. But we need not explore the outer bounds of mail and wire fraud in this case. The defendants' elaborate efforts at concealment provide powerful evidence of their own consciousness of wrongdoing, making it unnecessary for us to decide whether the same conduct, done without active efforts at concealment, would have been criminal.

UNITED STATES v. FINNERTY, **533 F.3d 143 (2d Cir. 2008)**

DENNIS JACOBS, Chief Judge:

In this securities fraud case, the government appeals from a judgment of acquittal entered by the district judge following a jury's guilty verdict. Defendant–Appellee David Finnerty was a specialist at the New York Stock Exchange ("NYSE") who engaged in the practice of "interpositioning"—the arbitrage of the gap between customers' orders to buy and sell stock—to the benefit of his firm's account and (via compensation) himself. The sole issue on appeal is whether the government proved that Finnerty's conduct was deceptive.

This case is one of several arising from an investigation into the practices of specialists on the NYSE trading floor. The NYSE operates as an auction market with specialists fielding competing bids and offers for stock in the 2,800 listed companies. We recently described the role of the specialist firms as follows:

> Each security listed for trading on the NYSE is assigned to a particular [specialist] Firm. To execute purchases and sales of a particular security, buyers and sellers must present their bids to buy and offers to

> sell to the specific Specialist Firm assigned to that security. The primary method of trading on the Exchange occurs through the NYSE's Super Designated Order Turnaround System, which transmits orders to buy and sell to the Specialist Firm electronically. The orders appear on a special electronic workstation often referred to as the "display book." Each Specialist Firm has a computerized "display book" at its trading post that permits the Firm to execute orders for the market.

In addition to executing trades for NYSE customers, specialists trade for the "proprietary" or "principal" account of their own firm.

In 2002, the NYSE opened an investigation into improper trading by specialists. The investigation focused on two practices: "interpositioning" and "trading ahead." A specialist engages in interpositioning when he "prevent[s] the normal agency trade between matching public orders and instead interpose[s]" himself "between the matching orders in order to generate profits" for the principal account-in other words, when the specialist acts as an arbitrager by taking a profit on the spread between the bid price and the ask price of customers' orders. A specialist trades ahead when he trades for his own "account before undertaking trades for public investors." These practices implicate two NYSE rules.

NYSE Rule 104 allows for a proprietary trade when it is "reasonably necessary to permit [a] specialist to maintain a fair and orderly market," and otherwise prohibits "such dealings." NYSE Rule 92(a) prohibits a proprietary trade when the specialist "has knowledge of any particular unexecuted customer's order to buy (sell) such security which could be executed at the same price."

In 2006, Finnerty was charged with three counts of securities fraud. The superseding indictment alleged that while he was employed by Fleet Specialists, Inc. between 1999 and 2003, Finnerty "caused approximately 26,300 instances of interpositioning, resulting in illegal profits to his dealer account of approximately $4,500,000, and approximately 15,000 instances of trading ahead, resulting in approximately $5,000,000 in customer harm." The indictment charged that Finnerty thus engaged in a fraudulent and deceptive course of conduct, in violation of 15 U.S.C. §§ 78j(b) and 78ff and 17 C.F.R. § 240.10b–5. . . .

At trial, the government narrowed its case. It did not undertake to prove trading ahead; it focused exclusively on interpositioning. It did not try to prove that Finnerty owed a fiduciary duty to public customers. . . .

The government called three former NYSE clerks, who testified that Finnerty directed them to execute interpositioning trades for the principal account ahead of (and to the detriment of) existing public orders. One of the clerks, Philip Finale, testified that just before he was scheduled to testify before the NYSE investigation, Finnerty pulled him aside and whispered: "don't say anything to incriminate [me], because it's going to incriminate [you] also."

The government displayed graphics showing the sequence of keystrokes that compose an interpositioning trade. An NYSE managing director testified about the computer codes used to generate "exception reports," which identify instances of interpositioning and trading ahead. Several summary charts of that data showed 26,283 instances of interpositioning trades under Finnerty's watch. In 95% of those instances, Fleet's principal account profited—yielding a total of $4.5 million.

Joseph DiPrisco, who served as Fleet's CFO during the relevant period, testified that individual "profitability" was one factor that determined a specialist's bonus. Fleet generally paid a specialist 15 to 20% of his profits.

Finally, the government introduced into evidence Finnerty's testimony before the NYSE, in which Finnerty admitted that he and his clerks could trade for the principal account only when necessary to maintain a fair and orderly market, and only when the public customers subsequently received the same or a better price than the principal account received.

Finnerty called Dr. Patrick Conroy, who testified that Finnerty's 26,283 alleged acts of interpositioning represented only .94% of the total trades executed by Finnerty during the relevant time period. . . .

Section 10(b) of the 1934 Act prohibits the use of any "manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities. "The language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception." *Santa Fe Indus. Inc. v. Green*. The government has abandoned on appeal any claim of market manipulation. So the question is, what did Finnerty say or do that was deceptive?

The government admits that Finnerty made no misstatement. The government told the jury that the "real issue" in the case was "whether David Finnerty directed" the interpositioning trades and whether he did it "intentionally and with the intent to defraud." This was, in essence, a theory of non-verbal deceptive conduct.

"Conduct itself can be deceptive," and so liability under § 10(b) or Rule 10b–5 does not require "a specific oral or written statement." *Stoneridge Inv. Partners, LLC v. Scientific–Atlanta*. Broad as the concept of "deception" may be, it irreducibly entails some act that gives the victim a false impression. "Theft not accomplished by deception (*e.g.,* physically taking and carrying away another's property) is not fraud absent a fiduciary duty." *In re Refco Capital Markets, Ltd. Brokerage Customer Sec. Litig*.

The government has identified no way in which Finnerty communicated anything to his customers, let alone anything false. Rather, viewing the evidence in the light most favorable to the government, the government undertook to prove no more than garden variety conversion. As the government put it during summation, "David Finnerty stole from his public customers tens of times a day, sometimes over a hundred times in one day . . ." The government later analogized Finnerty's conduct to a bank teller who

> takes in hundreds of deposits a day and he gives out hundreds of withdrawals, and just once, once every day takes he takes one of those deposits, instead of putting it in the till, he puts it in his pocket. He committed a crime probably less than 1 percent of the time in that example, but does that make it right to steal? Of course it doesn't.

Like a thieving bank teller, the government argued, Finnerty had the motive and the means to profit from interpositioning. But there is no evidence that Finnerty conveyed an impression that was misleading, whether or not it could have a bearing on a victim's investment decision in connection with a security. We need not decide whether some form of communication by the defendant is always required to prove deception (although that is the template of virtually every case). To impose securities fraud liability here, absent proof that Finnerty conveyed a misleading impression to customers, would pose "a risk that the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees." *Stoneridge*. . . .

The evidence shows (in the words of the government's brief) that "Finnerty, while holding himself out as a specialist obligated to follow NYSE rules and refrain from interpositioning, interpositioned on a massive scale under the guise of maintaining a fair and orderly market." Accordingly, the government argues, a reasonable jury could find that at least some customers were aware of the NYSE rules, would have expected Finnerty to comply with the rules, and were therefore deceived when Finnerty violated them. The government relies on the following chain of premises and inferences: (1) brokerage houses are "members" of the NYSE; (2) as members, brokerage houses know about (and are subject to) the NYSE rules against interpositioning; (3) brokerage houses were customers of Finnerty; so (4) Finnerty's violation of the NYSE rules deceived the brokerage houses. In essence, the government seeks to impose criminal liability based on a background assumption of compliance with NYSE rules. . . .

Some customers may have understood that the NYSE rules prohibit specialists from interpositioning, and that the rules amount to an assurance (by somebody) that interpositioning will not occur. As a consequence, some customers may have expected that Finnerty would not engage in the practice. But unless their understanding was based on a statement or conduct by Finnerty, he did not commit a primary violation of § 10(b)—the only offense with which he was charged. . . .

Taking a slightly different tack, the government argues that Finnerty's scheme was "self-evidently deceptive" because he had "two critical advantages" over his customers: he could see all pending orders to buy and sell a particular stock, and he determined the price ultimately paid.

It may be that Finnerty unfairly profited from superior information. But "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)." *Chiarella v. United States*. And characterizing Finnerty's conduct as "self-evidently deceptive" is conclusory; there must be some proof of manipulation or a false statement, breach of a

duty to disclose, or deceptive communicative conduct. "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud." .

The government points to evidence showing Finnerty's consciousness of guilt: (1) Finnerty testified before the NYSE that he traded ahead of customers only when the public received the same or a better price than his principal account did (testimony that was countered by the government's demonstrative chart, which showed that the customer was disadvantaged 95% of the time); (2) clerk Philip Finale testified that Finnerty pressured him to lie about being instructed to execute interpositioning trades; and (3) shortly after Finnerty learned about the NYSE investigation, his rate of interpositioning declined almost to zero.

Viewed in the light most favorable to the government, this evidence shows that Finnerty knew he had violated an NYSE rule, and tried to cover it up. But violation of an NYSE rule does not establish securities fraud in the civil context, let alone in a criminal prosecution. Finnerty may have known that interpositioning was wrong within the context of his employment, and that it put him at risk professionally; but an awareness of peril, a guilty conscience or an impulse to cover one's tracks does not bespeak criminally fraudulent conduct within the context of the securities laws. . . .

Problem 2-1

(a) What is Judge Posner's point in the final sentence of his opinion in *Dial*? How does the point relate to his theory of when nondisclosure of facts may constitute fraud?

(b) Was *Dial* correctly decided? *Finnerty*? Can the two opinions be reconciled or is this a sort of circuit split (though, technically, one case involved the wire fraud statute and the other the securities fraud statutes)?

Problem 2-2

Should the following be called fraud? Explain.

(a) An antique dealer is invited to tea at the house of an elderly woman who attends his church. In the living room, he spots a desk he knows is worth a great deal of money. He says, "I just adore that cute little desk." She says, "I wish I could get it out of here. I keep banging into it." He offers her $100 for the desk, which she accepts. He sells the desk later that day to a professional auctioneer for $10,000.

(b) A parent with young children tells a spouse that she needs to go back to the office for a few hours and cannot help with the kids that evening. On the way, she stops at a bar and stays for a couple of hours, enjoying beers and a basketball game.

(c) Accounting rules say that companies should maintain "reserve" accounts for large expected liabilities, such as litigation costs. As reported in its disclosures to its shareholders, PharmCo establishes a $500 million reserve account, representing its "best estimate" of how much it will cost to litigate a wave of products liability lawsuits relating to a drug that caused unanticipated side effects. Six months later, PharmCo reduces the reserve account to $200 million because it needs an additional $300 million in earnings in order to reach its earnings-per-share goal for the quarter. The week before, outside counsel had told the PharmCo General Counsel that "the litigation is going somewhat better than we expected."

As a final entrée into the concepts underlying criminal fraud, the following case is about the meaning of cheating and dishonesty in English law, not the law of fraud itself. But this English court's discussion of cheating in gambling provides much insight into the problem of how to determine whether deception in a particular context is wrongful. The case involved a contract dispute turning on a criminal law definition. The unusual factual setting is both vivid and illustrative. (The opinion, while heavily edited here, is still long—British judges sometimes appear to believe they are paid by the page.)

IVEY v. GENTING CASINOS (UK) LTD, [2017] UKSC 67 (UK Supreme Court 2017)

LORD HUGHES:

This case, in which a professional gambler sues a casino for winnings at Punto Banco Baccarat, raises questions about (1) the meaning of the concept of cheating at gambling, (2) the relevance to it of dishonesty, and (3) the proper test for dishonesty if such is an essential element of cheating.

Over two days in August 2012 Mr. Ivey, the claimant in this case, deployed a highly specialist technique called edge-sorting which had the effect of greatly improving his

chances of winning. He had the help of another professional gambler, Cheung Yin Sun ("Ms. Sun"). First they set up the conditions which enabled him to win. Then, later that evening and the following day, over the course of some hours, he won approximately £7.7m. The casino declined to pay, taking the view that what he had done amounted to cheating. His case is that it was not cheating, but deployment of a perfectly legitimate advantage. . . .

Punto Banco is a variant of Baccarat. It is not normally, to any extent, a game of skill. Six or eight decks or, in English nomenclature, packs of 52 cards are dealt from a shoe, face down by a croupier. Because the cards are delivered one by one from the shoe, she has only to extract them; no deviation is permitted in their sequence. She places them face down in two positions on the table in front of her, marked "player", the "Punto" in the name, and "Banker", "Banco". Those descriptions label the positions marked on the table; there need be no person as "player" and ordinarily there is not. She slides the cards from the shoe, face down, one card to player, one to banker; a second to player and a second to banker. . . .

The basic object of the game is to achieve, on one of the two positions, a combination of two or three cards which, when added together, is nearer to 9 in total than the combination on the other position. Aces to 9 count at face value, 10 to King inclusive count as nothing. Any pair or trio of cards adding up to more than 10 requires 10 to be deducted before arriving at the counting total. Thus 4 plus 5 equals 9, but 6 plus 5 (which equals 11) counts as only 1.

Punters (of whom there need only be one) play the house. They bet before any card is dealt and can bet on either the player or banker position. The cards are revealed by the croupier after a full hand (or "coup"), usually of four cards, two to each position, has been dealt. . . . The different odds mean that the casino, or house, enjoys a small advantage, taken over all the play. That is standard and well known to all; casinos publish the percentage "house edge" which they operate. In Punto Banco at Crockfords it was 1.24% if player wins and 1.06% if banker wins.

A pack of 52 playing cards is manufactured so as to present a uniform appearance on the back and a unique appearance on the face. . . . In casino games in which the orientation of the back of the card may matter, cards are used which are in principle indistinguishable whichever way round they are when presented in a shoe. . . .

"Edge-sorting" becomes possible when the manufacturing process causes tiny differences to appear on the edges of the cards so that, for example, the edge of one long side is marginally different from the edge of the other. Some cards printed by Angel Co Ltd for the Genting Group (which owns Crockfords) have this characteristic, apparently within the narrow tolerances specified for manufacture. The pattern is not precisely symmetrical on the back of the cards. The machine which cuts the card leaves very slightly more of the pattern, a white circle broken by two curved lines, visible on one long edge than on the other. The difference is sub-millimetric, but the pattern is, to that very limited extent, closer to one long edge of the card than it is to the other. Before a

card is dealt from a shoe, it sits face down at the bottom of the shoe, displaying one of its two long edges. It is possible for a sharp-eyed person sitting close to the shoe to see which long edge it is.

Being able thus to see which long edge is displayed is by itself of no help to the gambler. All the cards have the same tiny difference between their right and left long edges, so knowing which edge is displayed tells the gambler nothing about the value of the next card in the shoe. The information becomes significant only if things can be so arranged that the cards which the gambler is most interested in are all presented with long edge type A facing the table, whilst all the less interesting cards present long edge type B. Then the gambler knows which kind of card is next out of the shoe.

In Punto Banco cards with a face value of 7, 8 and 9 are high value cards. If one such card is dealt to player or to banker, it will give that position a better chance of winning than the other. Thus a punter who knows that when the first card dealt (always to the "player" position) is a 7, 8 or 9, he will know that it is more likely than not that player will win. If he knows that the card is not a 7, 8 or 9, he will know that it is more likely than not that banker will win. Such knowledge, it is agreed, will give the punter a long-term edge of about 6.5% over the house if played perfectly accurately.

What is therefore necessary for edge-sorting to work is for the cards in the shoe to be sorted so that all the 7s, 8s and 9s display edge type A, whilst the rest display edge type B. That means rotating the high value cards so that they display edge type A. If the punter were to touch the cards, the invariable practice at most casinos, including at Crockfords, would be that those cards would not be used again. The only person who touches the cards is the croupier. So what had to happen was to get the cards sorted (i.e. differentially rotated) by type A and type B by the croupier and then to get them re-used in the next shoe, now distinctively sorted.

For edge-sorting to work at Crockfords it is therefore essential that the croupier is persuaded to rotate the relevant cards without her realising why she is being asked to do so. Casinos routinely play on quirky and superstitious behaviour by punters. It is in the casino's interests that punters should believe, erroneously, that a lucky charm or practice will improve their chance of winning and so modify or defeat the house edge. Consequently a wide variety of requests by punters, particularly those willing to wager large sums on games which they must, if they play long enough, lose in the long run, are accommodated by casinos without demur or surprise.

All of the games of Punto Banco played by the claimant and Ms. Sun on 20 and 21 August 2012 were captured on CCTV, mostly with contemporaneous audio recording as well. The moment at which they persuaded the croupier, Kathy Yau, to rotate the cards was at 9 pm on 20 August. The video shows it and the words spoken have been transcribed. Before then, the claimant and Ms. Sun had played part of four shoes, the first two plain backed, and the second two Angel cards but with no asymmetry on the back.

The claimant is a high stakes gambler. He began, by his standards, modestly: bets placed on those four shoes ranged from £4,000 to £75,000 per coup. He was losing. At 8.56 pm he requested a new shoe of cards. A new shoe was produced. The cards were blue Angel cards with the rounded pattern described on the back. At 8.57 the claimant asked Jeremy Hillier, the senior croupier overseeing the game: "If I win, can I say I want the same cards again?" to which Mr. Hillier replied he could, "because [he was] not bending them". The claimant had in fact avoided touching the cards from either the first or second shoe onwards.

The croupier, Kathy Yau, then put the cards face down in blocks on the table to make the cut, as is conventional. She cut the cards so as to exclude about one deck from play. The claimant asked about the cut: "Why so big?" Ms. Sun said: "They don't cut the seven cards", a reference to the traditional cut of 7 cards from the end. Ms. Yau asked if he wanted her to cut 7 cards, to which he replied "yes", he wanted to play 90 hands, slightly more than the maximum likely to be possible with an eight-deck shoe with a seven-card cut. She complied, after checking with the supervisor on duty in the room. That had the effect of maximising the number of coups which would be possible with those packs, and of exposing the maximum number of cards to the sorting (rotation) process.

Ms. Yau then dealt the first coup. After the bet was made, and all the cards then dealt, the next stage was for the croupier to turn the cards face up to reveal whether Player or Banker had won. Ms. Sun then asked Ms. Yau in Cantonese to do it, in other words to turn the cards over so that the face showed, slowly. Ms. Yau said "yes." Ms. Sun then asked her again in Cantonese to turn the cards in a particular and differential way as they were being exposed and before they were put on the pile of used cards. "If I say it is good, you turn it this way, good, yes? Um, no good." (A slightly different sounding um). Ms. Yau did not immediately understand what was required. She asked, "so you want me to leave it?" To which Ms. Sun replied, "change, yeah, yeah, change luck." Ms. Yau: "what do you mean?" Ms. Sun gestured how to turn it. "Turn it this way." Ms. Yau: "what, just open it? Yeah." Ms. Sun: "um," signifying good in Cantonese.

The claimant then chipped in, "yeah, change the luck, that's good. Anything to change the luck, it is okay with me." Ms. Sun reiterated her request in Cantonese, "If I say it is not good, you turn it this way. If it is good, turn it this way, okay?" To which Ms. Yau said "okay." When she turned over the cards of the second coup, Ms. Sun said of four of them, "good," and of one, "not good," in Cantonese. Ms. Yau did as requested. What she was being asked to do, and did, was to turn the cards which Ms. Sun called as "good" end to end, and the "not good" cards side to side. In consequence, the long edge of the "not good" card was oriented in a different way from the long edge of the "good" cards. The judge found that she had been "wholly ignorant" of the significance of what she was doing, card by card, at the call of Ms. Sun.

This procedure was followed for each of the next 79 coups dealt from this shoe. The maximum amount staked by the claimant on the coups towards the end of the shoe

reached £100,000. Self-evidently, at no time during the play of this shoe did he derive any advantage from the rotation of the cards requested by Ms. Sun because that rotation occurred at the end, not at the beginning, of each coup. This was all preparation.

At 10.03 pm, when the shoe was exhausted, the claimant said that he had won with that deck (i.e. shoe), and that he would keep it. The senior croupier, who had brought in a new collection of cards, was told by the claimant he did not want them, as he "had won £40,000 with that deck"; that was agreed to. The original cards were reused. The defendant has not been able to calculate retrospectively whether that assertion of winnings to that point was true.

Before the shoe was reused it had to be reshuffled. The claimant had earlier asked Ms. Yau's predecessor as croupier for a shuffling machine to shuffle the cards. The cards were reshuffled by a machine. For a punter using the edge-sorting technique this ensured that the shuffle would be effected without rotating any of the cards unless the croupier did so before they were put into the machine. Ms. Yau did not do so. Manual shuffling would have carried a much higher risk of re-rotation as it was done.

Play with the reshuffled shoe recommenced at 10.12 pm and continued until Ms. Yau went for a half hour break at 10.31 pm. The claimant did not play during her break but resumed when she returned until 3.57 am on 21 August. Ms. Yau was the croupier throughout. The claimant's stake increased to £95,000 and then to £149,000 per coup. He won approximately £2m.

The accuracy of his bets on player increased sharply. In the first two shoes in which Angel cards were used, those without an asymmetric pattern on the back, he placed respectively 11 bets and then 1 bet on player and a 7, 8 or 9 only occurred once in that 12 times. On the shoe in which the edge-sorting was done in the manner described, he placed 23 bets on player of which eight were 7s, 8s or 9s. On the succeeding shoes, those at least that were completed on that night, shoes four to eight, the record was as follows. Shoe four, 23 accurate bets out of 27; shoe five, 22 accurate bets out of 25; shoe six, 20 accurate bets out of 26; shoe 7, 23 accurate bets out of 30; shoe 8, 17 accurate bets out of 19. A similar but slightly less pronounced pattern occurred on the following day.

At the end of play on the early morning of the 21st the claimant asked if he could keep the same shoe, which he referred to as a deck, if he returned on the following day. He was told he could. Ms. Yau returned to duty at 2 pm on 21 August. The claimant resumed play with the same cards at 3 pm and played until 6.41 pm. His average stake was never less than £149,000. For the last three shoes it was £150,000, the maximum that he was allowed to bet each time. In the middle of play of the last shoe, the senior croupier told the claimant that the shoe would be replaced when it was exhausted. When it was, the claimant and Ms Sun left. By then he had won just over £7.7m.

Crockfords' practice after a large win such as this is to conduct an ex post facto investigation to work out how it occurred. After quite lengthy review of the CCTV

footage and examination of the cards, the investigators succeeded in spotting what had been done. Nobody at Crockfords had heard of edge-sorting before.

Nine days after the play, on 30 August, the claimant spoke to Mr. Pearce, Managing Director of the London casinos of Genting UK, who told him that Crockfords would not be paying his winnings because the game had been compromised. The claimant said he had not touched the cards, but did not state that which at the trial he freely admitted, that he had used edge-sorting. Arrangements were made to refund his deposited stake, £1m, on 31 August. . . .

Section 42 [of the Gambling Act 2005] is in the following terms: (1) A person commits an offence if he - (a) cheats at gambling, or (b) does anything for the purpose of enabling or assisting another person to cheat at gambling. (2) For the purposes of subsection (1) it is immaterial whether a person who cheats- (a) improves his chances of winning anything, or (b) wins anything. . . .

It has been common ground throughout this litigation that the (now in principle enforceable) contract for betting into which these parties entered is subject to an implied term that neither of them will cheat. . . .

The section leaves open what is and what is not cheating, as is inevitable given the extraordinary range of activities to which the concept may apply. Plainly, what is cheating in one form of game may be legitimate competition in another. . . .

To the extent that defrauding someone may take the form of depriving him of something which is his, or to which he might otherwise be entitled, it is plain, and wholly unsurprising, that a criminal offence of defrauding must contain in addition an element which demonstrates that the means adopted are illegitimate and wrong. Otherwise much perfectly proper business competition would be at risk of being labelled fraud, since such competition frequently involves strategies to divert business from A to B. Hence it is entirely unsurprising that conspiracy to defraud was held to require in addition the proof of dishonest means. Dishonesty, in this context, supplies the essential element of illegitimacy and wrongfulness. . . .

Although the great majority of cheating will involve something which the ordinary person (or juror) would describe as dishonest, this is not invariably so. When, as it often will, the cheating involves deception of the other party, it will usually be easy to describe what was done as dishonest. . . . The runner who trips up one of his opponents is unquestionably cheating, but it is doubtful that such misbehaviour would ordinarily attract the epithet “dishonest.”. . .

Conversely, there may be situations in which there is deception of the other player but what is done does not amount to cheating. The so-called “three card trick,” much practised upon travellers on Victorian and Edwardian trains especially to and from racecourses, commonly involved a deception of the target traveller by a group of associates pretending to be unconnected to one another. The idea was to lure the target

into playing the game. But once he was ensnared, the game was often played genuinely; the target lost not because of any cheating but because the shuffler of the cards had sufficient speed of hand to deceive the eye. No doubt other exponents of the three card trick had less genuine methods, such as a fourth (concealed) card, which would indeed be cheating. Sometimes the game admits of a level of legitimate deception. The unorthodox lead or discard at bridge is designed to give the opponent a misleading impression of one's hand, but it is part of the game and not cheating. Pretending to be stupid at the poker table, so that one's opponent does not take one seriously, and takes risks which he otherwise might not, may or may not be another example.

These far from sophisticated examples demonstrate the inevitable truth that there will be room for debate at the fringes as to what does and does not constitute cheating. To label an activity "advantage play," as Mr. Ivey and others did, is of no help at all. It asks, rather than answers, the question whether it is legitimate or cheating. It would be very unwise to attempt a definition of cheating. No doubt its essentials normally involve a deliberate (and not an accidental) act designed to gain an advantage in the play which is objectively improper, given the nature, parameters and rules (formal or informal) of the game under examination. The question in the present case, however, does not depend on the near impossible task of formulating a definition of cheating, but on whether cheating necessarily requires dishonesty as one of its legal elements. . . .

The judge's conclusion, that Mr. Ivey's actions amounted to cheating, is unassailable. It is an essential element of Punto Banco that the game is one of pure chance, with cards delivered entirely at random and unknowable by the punters or the house. What Mr. Ivey did was to stage a carefully planned and executed sting. The key factor was the arranging of the several packs of cards in the shoe, differentially sorted so that this particular punter did know whether the next card was a high value or low value one. If he had surreptitiously gained access to the shoe and re-arranged the cards physically himself, no one would begin to doubt that he was cheating. He accomplished exactly the same result through the unwitting but directed actions of the croupier, tricking her into thinking that what she did was irrelevant. As soon as the decision to change the cards was announced, thus restoring the game to the matter of chance which it is supposed to be, he first covered his tracks by asking for cards to be rotated at random, and then abandoned play.

It may be that it would not be cheating if a player spotted that some cards had a detectably different back from others, and took advantage of that observation, but Mr. Ivey did much more than observe; he took positive steps to fix the deck. That, in a game which depends on random delivery of unknown cards, is inevitably cheating.

Although the judge did not think it necessary to make a finding on the topic, and it is unnecessary to the resolution of this appeal, it would also seem that the facts which he found amounted in any event to a deception of the croupier. Certainly, the judge found that pretending to be superstitious did not *by itself* cross the line from legitimate play to cheating, comparing it to the skilled poker player who pretends to be a fool. He also

found, contrary to one of Crockfords' submissions, that what occurred did not amount to such deception as altogether to negate the existence of any contract for the game. But that was not a finding that there was no deception at all, and on the facts found there clearly was deception of the croupier into doing something which appeared innocuous or irrelevant, but was in fact highly significant and enabled Mr. Ivey to win when he should not have done. . . .

A significant refinement to the test for dishonesty was introduced by *R v. Ghosh* [1982] QB 1053. Since then, in criminal cases, the judge has been required to direct the jury, if the point arises, to apply a two-stage test. Firstly, it must ask whether in its judgment the conduct complained of was dishonest by the lay objective standards of ordinary reasonable and honest people. If the answer is no, that disposes of the case in favour of the defendant. But if the answer is yes, it must ask, secondly, whether the defendant must have realised that ordinary honest people would so regard his behaviour, and he is to be convicted only if the answer to that second question is yes. . . .

The principal objection to the second leg of the *Ghosh* test is that the less the defendant's standards conform to what society in general expects, the less likely he is to be held criminally responsible for his behaviour. It is true that *Ghosh* attempted to reconcile what it regarded as the dichotomy between a "subjective" and an "objective" approach by a mixed test. The court addressed the present objection in this way, at p 1064:

> "There remains the objection that to adopt a subjective test is to abandon all standards but that of the accused himself, and to bring about a state of affairs in which 'Robin Hood would be no robber': *R v. Greenstein*. This objection misunderstands the nature of the subjective test. It is no defence for a man to say 'I knew that what I was doing is generally regarded as dishonest; but I do not regard it as dishonest myself. Therefore I am not guilty'. What he is however entitled to say is 'I did not know that anybody would regard what I was doing as dishonest'. He may not be believed; just as he may not be believed if he sets up 'a claim of right' under section 2(1) of the Theft Act 1968, or asserts that he believed in the truth of a misrepresentation under section 15 of the Act of 1968. But if he is believed, or raises a real doubt about the matter, the jury cannot be sure that he was dishonest."

And a little later the court added that upon the test which it was setting:

> "In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider

> themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest."

Even if this were correct, it would still mean that the defendant who thinks that stealing from a bookmaker is not dishonest is entitled to be acquitted. It is no answer to say that he will be convicted if he realised that ordinary honest people would think that stealing from a bookmaker is dishonest, for by definition he does not realise this. Moreover, the court's proposition was not correct, because it is not in the least unusual for the accused not to share the standards which ordinary honest people set for society as a whole. The acquisitive offender may, it is true, be the cheerful character who frankly acknowledges that he is a crook, but very often he is not, but, rather, justifies his behaviour to himself. Just as convincing himself is frequently the stock in trade of the confidence trickster, so the capacity of all of us to persuade ourselves that what we do is excusable knows few bounds. It cannot by any means be assumed that the appropriators of animals from laboratories, to whom the court referred in *Ghosh*, know that ordinary people would consider their actions to be dishonest; it is just as likely that they are so convinced, however perversely, of the justification for what they do that they persuade themselves that no one could call it dishonest. There is no reason why the law should excuse those who make a mistake about what contemporary standards of honesty are, whether in the context of insurance claims, high finance, market manipulation or tax evasion. The law does not, in principle, excuse those whose standards are criminal by the benchmarks set by society, nor ought it to do so. On the contrary, it is an important, even crucial, function of the criminal law to determine what is criminal and what is not; its purpose is to set the standards of behaviour which are acceptable. As it was put in *Smith's Law of Theft* 9th ed (2007), para 2.296: ". . . the second limb allows the accused to escape liability where he has made a mistake of fact as to the contemporary standards of honesty. But why should that be an excuse?"

It is plain that in *Ghosh* the court concluded that its compromise second leg test was necessary in order to preserve the principle that criminal responsibility for dishonesty must depend on the actual state of mind of the defendant. It asked the question whether "dishonestly", where that word appears in the Theft Act, was intended to characterise a course of conduct or to describe a state of mind. The court gave the following example, which was clearly central to its reasoning:

> "Take for example a man who comes from a country where public transport is free. On his first day here he travels on a bus. He gets off without paying. He never had any intention of paying. His mind is clearly honest; but his conduct, judged objectively by what he has done, is dishonest. It seems to us that in using the word 'dishonestly' in the Theft Act 1968, Parliament cannot have intended to catch dishonest conduct in that sense, that is to say conduct to which no moral obloquy could possibly attach."

But the man in this example would inevitably escape conviction by the application of the (objective) first leg of the *Ghosh* test. That is because, in order to determine the honesty or otherwise of a person's conduct, one must ask what he knew or believed about the facts affecting the area of activity in which he was engaging. In order to decide whether this visitor was dishonest by the standards of ordinary people, it would be necessary to establish his own actual state of knowledge of how public transport works. Because he genuinely believes that public transport is free, there is nothing objectively dishonest about his not paying on the bus. The same would be true of a child who did not know the rules, or of a person who had innocently misread the bus pass sent to him and did not realise that it did not operate until after 10.00 in the morning.

The answer to the court's question is that "dishonestly", where it appears, is indeed intended to characterise what the defendant did, but in characterising it one must first ascertain his actual state of mind as to the facts in which he did it. It was not correct to postulate that the conventional objective test of dishonesty involves judging only the actions and not the state of knowledge or belief as to the facts in which they were performed. What is objectively judged is the standard of behaviour, given any known actual state of mind of the actor as to the facts. . . .

These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law and that directions based upon it ought no longer to be given. . . . When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.

Therefore in the present case, if, contrary to the conclusions arrived at above, there were in cheating at gambling an additional legal element of dishonesty, it would be satisfied by the application of the test as set out above. The judge did not get to the question of dishonesty and did not need to do so. But it is a fallacy to suggest that his finding that Mr. Ivey was truthful when he said that *he* did not regard what he did as cheating amounted to a finding that his behaviour was honest. It was not. It was a finding that he was, in that respect, truthful. Truthfulness is indeed one characteristic of honesty, and untruthfulness is often a powerful indicator of dishonesty, but a dishonest person may sometimes be truthful about his dishonest opinions, as indeed was the defendant in *Gilks*. For the same reasons which show that Mr. Ivey's conduct was, contrary to his own opinion, cheating, the better view would be, if the question arose, that his conduct was, contrary to his own opinion, also dishonest.

Problem 2-3

How does the problem of what constitutes "cheating" in *Ivey*, and especially the English law concept of "dishonesty," help our understanding of the law of fraud might work in the U.S.? How do these ideas in *Ivey* relate to Judge Posner's idea in the last sentence of his opinion in *Dial*?

B. Mail and Wire Fraud: Jurisdiction and Materiality

Most practitioners of federal criminal law will agree that the mail and wire fraud statutes are the broadest, most flexible, and most commonly employed tools in prosecuting white collar crime in federal court. First, consider the text of the statutes. Do the normal criminal law drill and figure out their elements. Where is the actus reus? Where is the mens rea? What attendant circumstances must be proved in addition? Is there more than one theory on which a prosecutor can proceed under these statutes? How do the jurisdictional provisions appear to work?

18 U.S.C. § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, 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. . . .

18 U.S.C. § 1343. Fraud by wire, radio, or television

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

1. Jurisdiction

As you can see, the mail and wire fraud statutes are written with fairly broad jurisdictional elements. Just how far do these provisions reach? The following case provides the framework for litigating questions of jurisdiction in mail and wire fraud.

SCHMUCK v. UNITED STATES, 489 U.S. 705 (1989)

Justice BLACKMUN delivered the opinion of the Court.

In August 1983, petitioner Wayne T. Schmuck, a used-car distributor . . . was indicted on 12 counts of mail fraud, in violation of 18 U.S.C. §§ 1341 and 1342.

The alleged fraud was a common and straightforward one. Schmuck purchased used cars, rolled back their odometers, and then sold the automobiles to Wisconsin retail dealers for prices artificially inflated because of the low-mileage readings. These unwitting car dealers, relying on the altered odometer figures, then resold the cars to customers, who in turn paid prices reflecting Schmuck's fraud. To complete the resale of each automobile, the dealer who purchased it from Schmuck would submit a title-application form to the Wisconsin Department of Transportation on behalf of his retail customer. The receipt of a Wisconsin title was a prerequisite for completing the resale; without it, the dealer could not transfer title to the customer and the customer could not obtain Wisconsin tags. The submission of the title-application form supplied the mailing element of each of the alleged mail frauds.

Before trial, Schmuck moved to dismiss the indictment on the ground that the mailings at issue-the submissions of the title-application forms by the automobile dealers-were not in furtherance of the fraudulent scheme and, thus, did not satisfy the mailing element of the crime of mail fraud. . . .

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*. To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. . . . It is sufficient for the mailing to be "incident to an essential part of the scheme," or "a step in [the] plot." . . .

Schmuck . . . argues that mail fraud can be predicated only on a mailing that affirmatively assists the perpetrator in carrying out his fraudulent scheme. The mailing element of the offense, he contends, cannot be satisfied by a mailing, such as those at issue here, that is routine and innocent in and of itself, and that, far from furthering the execution of the fraud, occurs after the fraud has come to fruition, is merely tangentially related to the fraud, and is counterproductive in that it creates a "paper trail" from which the fraud may be discovered. We disagree both with this characterization of the mailings in the present case and with this description of the applicable law. . . .

We begin by considering the scope of Schmuck's fraudulent scheme. Schmuck was charged with devising and executing a scheme to defraud Wisconsin retail automobile customers who based their decisions to purchase certain automobiles at least in part on the low-mileage readings provided by the tampered odometers. This was a fairly large-scale operation. Evidence at trial indicated that Schmuck had employed a man known only as "Fred" to turn back the odometers on about 150 different cars. Schmuck then

marketed these cars to a number of dealers, several of whom he dealt with on a consistent basis over a period of about 15 years. . . . Thus, Schmuck's was not a "one-shot" operation in which he sold a single car to an isolated dealer. His was an ongoing fraudulent venture. A rational jury could have concluded that the success of Schmuck's venture depended upon his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers.

Under these circumstances, we believe that a rational jury could have found that the title-registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until the retail dealers resold the cars and effected transfers of title. Schmuck's scheme would have come to an abrupt halt if the dealers either had lost faith in Schmuck or had not been able to resell the cars obtained from him. These resales and Schmuck's relationships with the retail dealers naturally depended on the successful passage of title among the various parties. Thus, although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme. As noted earlier, a mailing that is "incident to an essential part of the scheme," *Pereira*, satisfies the mailing element of the mail fraud offense. The mailings here fit this description. . . .

Once the full flavor of Schmuck's scheme is appreciated, the critical distinctions between this case and the three cases in which this Court has delimited the reach of the mail fraud statute—*Kann*, *Parr*, and *Maze*—are readily apparent. The defendants in *Kann* were corporate officers and directors accused of setting up a dummy corporation through which to divert profits into their own pockets. As part of this fraudulent scheme, the defendants caused the corporation to issue two checks payable to them. The defendants cashed these checks at local banks, which then mailed the checks to the drawee banks for collection. This Court held that the mailing of the cashed checks to the drawee banks could not supply the mailing element of the mail fraud charges. The defendants' fraudulent scheme had reached fruition. "It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank."

In *Parr*, several defendants were charged, *inter alia*, with having fraudulently obtained gasoline and a variety of other products and services through the unauthorized use of a credit card issued to the school district which employed them. The mailing element of the mail fraud charges in *Parr* was purportedly satisfied when the oil company which issued the credit card mailed invoices to the school district for payment, and when the district mailed payment in the form of a check. Relying on *Kann*, this Court held that these mailings were not in execution of the scheme as required by the statute because it was immaterial to the defendants how the oil company went about collecting its payment.

Later, in *Maze*, the defendant allegedly stole his roommate's credit card, headed south on a winter jaunt, and obtained food and lodging at motels along the route by placing the charges on the stolen card. The mailing element of the mail fraud charge was supplied by the fact that the defendant knew that each motel proprietor would mail an invoice to the bank that had issued the credit card, which in turn would mail a bill to the card owner for payment. The Court found that these mailings could not support mail fraud charges because the defendant's scheme had reached fruition when he checked out of each motel. The success of his scheme in no way depended on the mailings; they merely determined which of his victims would ultimately bear the loss. . . .

The title-registration mailings at issue here served a function different from the mailings in *Kann*, *Parr*, and *Maze.* The intrabank mailings in *Kann* and the credit card invoice mailings in *Parr* and *Maze* involved little more than post-fraud accounting among the potential victims of the various schemes, and the long-term success of the fraud did not turn on which of the potential victims bore the ultimate loss. Here, in contrast, [t]he mailing of the title-registration forms was an essential step in the successful passage of title to the retail purchasers. Moreover, a failure of this passage of title would have jeopardized Schmuck's relationship of trust and goodwill with the retail dealers upon whose unwitting cooperation his scheme depended. Schmuck's reliance on our prior cases limiting the reach of the mail fraud statute is simply misplaced.

To the extent that Schmuck would draw from these previous cases a general rule that routine mailings that are innocent in themselves cannot supply the mailing element of the mail fraud offense, he misapprehends this Court's precedents. In *Parr* the Court specifically acknowledged that "innocent" mailings—ones that contain no false information—may supply the mailing element. In other cases, the Court has found the elements of mail fraud to be satisfied where the mailings have been routine.

We also reject Schmuck's contention that mailings that someday may contribute to the uncovering of a fraudulent scheme cannot supply the mailing element of the mail fraud offense. The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud. The mail fraud statute includes no guarantee that the use of the mails for the purpose of executing a fraudulent scheme will be risk free. Those who use the mails to defraud proceed at their peril.

Justice SCALIA, with whom Justice BRENNAN, Justice MARSHALL, and Justice O'CONNOR join, dissenting.

The purpose of the mail fraud statute is "to prevent the post office from being used to carry [fraudulent schemes] into effect." *Durland v. United States*. The law does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook, but reaches only "those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*. In other words, it is mail fraud, not mail

and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur-nor even by one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the fraud. . . .

For though the Government chose to charge a defrauding of retail customers (to whom the innocent dealers resold the cars), it is obvious that, regardless of who the ultimate victim of the fraud may have been, the fraud was complete with respect to each car when petitioner pocketed the dealer's money. As far as each particular transaction was concerned, it was as inconsequential to him whether the dealer resold the car as it was inconsequential to the defendant in *Maze* whether the defrauded merchant ever forwarded the charges to the credit card company. . . .

And I think it particularly significant that in *Kann* the Government proposed a theory *identical* to that which the Court today uses. Since the scheme was ongoing, the Government urged, the fact that the mailing of the two checks had occurred after the defendants had pocketed the fraudulently obtained cash made no difference. "[T]he defendants expected to receive further bonuses and profits," and therefore "the clearing of these checks in the ordinary course was essential to [the scheme's] further prosecution." The dissenters in *Kann* agreed. "[T]his," they said, "was not the last step in the fraudulent scheme. It was a continuing venture. Smooth clearances of the checks were essential lest these intermediate dividends be interrupted and the conspirators be called upon to disgorge." The Court rejected this argument, concluding that "the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it." I think the mailing of the title application forms equivalently incidental here. . . .

2. Materiality

Materiality is one of those multi-purpose legal concepts, like reasonableness or duty, that are important to understand because they arise in so many areas of law. Materiality's application varies with legal context, of course, but the central concept is a universal one in law. After you read the cases in this section, see if you can articulate the concept of materiality as a general legal concept in the form of a single sentence or phrase.

NEDER v. UNITED STATES, 527 U.S. 1 (1999)

Chief Justice REHNQUIST delivered the opinion of the Court.

In the mid-1980's, petitioner Ellis E. Neder, Jr., an attorney and real estate developer in Jacksonville, Florida, engaged in a number of real estate transactions financed by fraudulently obtained bank loans. Between 1984 and 1986, Neder purchased 12 parcels of land using shell corporations set up by his attorneys and then immediately resold the land at much higher prices to limited partnerships that he controlled. Using inflated appraisals, Neder secured bank loans that typically amounted to 70% to 75% of the inflated resale price of the land. In so doing, he concealed from lenders that he controlled the shell corporations, that he had purchased the land at prices substantially lower than

the inflated resale prices, and that the limited partnerships had not made substantial down payments as represented. In several cases, Neder agreed to sign affidavits falsely stating that he had no relationship to the shell corporations and that he was not sharing in the profits from the inflated land sales. By keeping for himself the amount by which the loan proceeds exceeded the original purchase price of the land, Neder was able to obtain more than $7 million. . . .

We . . . granted certiorari in this case to decide whether materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud (18 U.S.C. § 1341), wire fraud (§ 1343), and bank fraud (§ 1344) statutes. The Court of Appeals concluded that the failure to submit materiality to the jury was not error because the fraud statutes do not require that a "scheme to defraud" employ *material* falsehoods. We disagree.

Under the framework set forth in *United States v. Wells*, we first look to the text of the statutes at issue to discern whether they require a showing of materiality. In this case, we need not dwell long on the text because, as the parties agree, none of the fraud statutes defines the phrase "scheme or artifice to defraud," or even mentions materiality. Although the mail fraud and wire fraud statutes contain different jurisdictional elements (§ 1341 requires use of the mails while § 1343 requires use of interstate wire facilities), they both prohibit, in pertinent part, "any scheme or artifice to defraud" or to obtain money or property "by means of false or fraudulent pretenses, representations, or promises." The bank fraud statute, which was modeled on the mail and wire fraud statutes, similarly prohibits any "scheme or artifice to defraud a financial institution" or to obtain any property of a financial institution "by false or fraudulent pretenses, representations, or promises." Thus, based solely on a "natural reading of the full text," materiality would not be an element of the fraud statutes.

That does not end our inquiry, however, because in interpreting statutory language there is a necessary second step. It is a well-established rule of construction that "'[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'". . . Neder contends that "defraud" is just such a term, and that Congress implicitly incorporated its common-law meaning, including its requirement of materiality, into the statutes at issue.

The Government does not dispute that both at the time of the mail fraud statute's original enactment in 1872, and later when Congress enacted the wire fraud and bank fraud statutes, actionable "fraud" had a well-settled meaning at common law. Nor does it dispute that the well-settled meaning of "fraud" required a misrepresentation or concealment of *material* fact. Indeed, as the sources we are aware of demonstrate, the common law could not have conceived of "fraud" without proof of materiality. *See BMW of North America, Inc. v. Gore*. Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes. On the contrary, we must *presume* that Congress

intended to incorporate materiality "'unless the statute otherwise dictates.'" *Nationwide Mut. Ins*. . . .

In one sense, the Government is correct that the fraud statutes did not incorporate *all* the elements of common-law fraud. . . . By prohibiting the "scheme to defraud," rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted. But while the language of the fraud statutes is incompatible with these requirements, the Government has failed to show that this language is inconsistent with a materiality requirement. Accordingly, we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes.

UNITED STATES v. BOGUCKI, 2019 WL 1024959 (N.D. Cal. 2019)

CHARLES R. BREYER, United States District Judge:

Defendant is charged with one count of conspiracy to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. § 1349, and six counts of wire fraud affecting a financial institution, in violation of 18 U.S.C. §§ 1343 and 2, and associated forfeiture allegations. [The defendant Robert Bogucki was the head of Barclays' foreign currency exchange trading desk in New York. The government alleged that he committed fraud in connection with his negotiation of the unwinding of a deal in options for British currency (pounds sterling) with the Hewlett Packard corporation (HP), which acquired a large position in pounds to complete its purchase of a British company. The core of the government's theory was that Bogucki caused Barclays to trade ahead of HP's planned unwind transaction in the market for pounds, in order to profit Barclays' own positions in that market.]

The parties agree that the charge[] of wire fraud affecting a financial institution requires the Government to prove five elements. First, the defendant must have knowingly participated in, devised, or intended to devise a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or omitted facts; second, the statements made or facts omitted as part of the scheme were material; third, the defendant acted with the intent to defraud, that is, the intent to deceive or cheat; fourth, the defendant used, or caused to be used, an interstate or foreign wire communication to carry out or attempt to carry out an essential part of the scheme; fifth, the scheme affected a financial institution.

The parties stipulated prior to trial that the alleged scheme affected a financial institution. Nor is there any dispute that the alleged scheme involved the use of an interstate wire communication. The parties do dispute the other elements of Defendant's wire fraud and conspiracy to commit wire fraud charges. Specifically, Defendant has argued that there is insufficient evidence to permit a reasonable jury to find that the Government has met its burden on the first, second, or third elements. . . . The Court is primarily concerned with the Defendant's argument that the government has not satisfied the second element

of wire fraud, which requires the Government to prove that the statements Defendant made [to HP] were "material.". . .

Here, there are two pieces of evidence that are crucial to understand the context in which the allegedly materially false statements that Defendant provided to HP occurred: an International Swaps Dealers Association agreement between HP and Barclays, also known as an "ISDA," and the generally-understood industry practice of "pre-positioning."

The ISDA between HP and Barclays expressly stated that both HP and Barclays entered into "each Transaction as principal (and not as agent or in another capacity, fiduciary or otherwise)." It further stated that:

> This agreement and each transaction have been entered into by each party in reliance only upon its judgment in order to accomplish legitimate business needs. Neither party holds itself out as advising, or any of its employees or agents as having any authority to advise, the other party as to whether or not it should enter into this agreement or any transaction. Neither party is receiving any compensation from the other party for providing advice in respect of this agreement or any transaction, and any such advice provided to such other party will not form the primary basis for the investment decision of such other party.

Put simply, the ISDA establishes that the backdrop of the unwind was that HP and Barclays were engaged as principals at opposite sides of an arms-length transaction.

In his testimony, Zac Nesper, an HP employee who during the relevant period was the manager of HP's foreign exchange team and was the primary point of contact between HP and Barclays, reinforced this understanding. He agreed that the ISDA was the "master agreement" governing transactions between HP and Barclays. Nesper also stated that he was aware that the ISDA governed HP's relationship with Barclays in 2011 when the events at issue in this trial occurred. Most relevantly, he confirmed that the ISDA "accurately describe[d] [his] own thinking about [his] relationship with Barclays when it came to the unwind," stating that he "was making [his] own decision about what was best for HP." Indeed, Nesper acknowledged that he "bluffed" or was "BS-ing" Barclays during the parties' interactions—that is, he was not entirely truthful with Barclays—about the prices Nesper was seeing from other banks. He also indicated that he understood some of what Barclays told him to be "posturing," rather than entirely honest.

The ISDA, HP's corresponding understanding of the relationship between HP and Barclays and HP's own dishonesty are not the only background conditions in place at the time that are necessary to understand whether Defendant's allegedly false statements were capable of influencing an entity in HP's position to part with money or property. As the Ninth Circuit has instructed, the "standards generally applied in the lending industry at the time" are relevant to the materiality inquiry. *Green*.

Here, the Government's expert testified that banks like Barclays engage in "pre-positioning," also known as "hedging," wherein the bank changes its position prior to taking on an asset. Such "pre-positioning" could "[p]otentially" mean that "the bank would act in advance of a transaction," that is, "place trades in advance of that transaction." Indeed, Barclays' compliance manual expressly distinguishes between impermissible "frontrunning" and permissible "bona fide hedges." That compliance goes on to state that "[p]ositions may be established that are bona fide hedges (opposite side of the market) of either proprietary positions or the risk that is assumed or agree to be assumed in facilitating the execution of a related transaction." The parties agree that there are no rules or regulations, beyond banks' internal policies and any agreement that may be formed between two particular parties, that regulate pre-positioning, pre-hedging, or front-running of the type at issue here. So, even assuming that FX options trading falls within the gambit of conduct prohibited by the rule against frontrunning—and the Government has offered no evidence for its intent-based reading of "bona fide," there are undisputedly some types of pre-positioning that are permitted.

All of this matters because someone in Nesper's position would evaluate the statements Bogucki made to him against this backdrop. And so the statements the Government argues satisfy the materiality element must also be evaluated in this context. The Court must thus determine whether, taking the facts in the light most favorable to the Government, a reasonable jury could conclude beyond a reasonable doubt that the statements the Government alleges were false or misleading would have been objectively capable of influencing someone in Nesper's position to part with money or property. . . .

Viewing the evidence in the light most favorable to the Government, there is simply no evidence in the record that, in the context of an arms-length transaction in which the parties bluffed and "BS-[ed]" each other, operated as principals, looked out for their own interests, and understood the other party to be "posturing," rather than providing strictly true information, someone in HP's position could, objectively, be induced by the statements in this case to part with money or property.

Nor does Nesper's subjective belief alter this conclusion. As the Government has repeatedly pointed out to the Court . . . the standard for materiality is objective. Whether Nesper or HP were gullible, guileless, naïve, or actually took Defendant to be representing that Barclays would not take action that undermined the value of HP's options, in light of the relationship of the parties, the agreement governing their interactions, industry practice, HP's own dishonesty, and Nesper's expectations as to Barclays' dishonesty, no reasonable jury could conclude beyond a reasonable doubt that it was objectively reasonable for HP to be influenced by the statements the Government has identified. . . .

A touchstone of our criminal law is that no person "shall be held criminally responsible for conduct which he could not reasonably [have] understand to be proscribed." *United States v. Lanier*. Here, the Government has pursued a criminal prosecution on the basis

of conduct that violated no clear rule or regulation, was not prohibited by the agreements between the parties, and indeed was consistent with the parties' understanding of the arms-length relationship in which they operated. The Court cannot permit this case to go to the jury on such a basis.

C. Mail and Wire Fraud: Deception

As many cases in this chapter illustrate, the federal courts give fairly standard recitations of the elements of mail and wire fraud. Unfortunately, because fraud is such a malleable and contextual concept, those "black letter" statements don't get you far enough, at least not in any debatable case. Setting aside the statutes for the moment, we might say—with refinement to follow—that a viable criminal fraud claim has to fulfill something like the following working definition (my words, not those of the statutes or the courts):

(1) some deception (attempted or completed, by misrepresentation, conduct, or nondisclosure)

(2) about a material matter

(3) with the intent to deceive

(4) and with the object of obtaining something (what we might call the "corpus" or "object" of the fraud)

(5) from an identifiable victim (or class of victims)

With that framework in mind, let's start looking at what principles might limit the exceedingly broad law of criminal fraud. It has been hard for the federal courts to fashion workable sub-doctrine to limit the scope of the mail and wire fraud statutes. What might explain the courts' difficulty? (Consider, in this connection, the English court's discussion of cheating and dishonesty in *Ivey*.)

Two things are going on in the next case. First, the facts allow further exploration of the concept of materiality. Why shouldn't lies used to "get a foot in the door" be eligible to count as fraud? Second, the appellate court is grasping for concepts that might limit the mail fraud statute. What's the limiting concept here? Does it work? Does the more recent Second Circuit case that follows *Regent Office Supply* help explain further the function of this limiting concept?

UNITED STATES v. REGENT OFFICE SUPPLY CO., 421 F.2d 1174 (2d Cir. 1970)

MOORE, Circuit Judge:

The appellants are in the business of selling stationery supplies through salesmen (called 'agents') who solicit orders for their merchandise by telephone. . . . Accordingly they stipulated in writing that their agents 'secured sales' by making false representations to potential customers that:

(a) the agent had been referred to the customer by a friend of the customer.

(b) the agent had been referred to customer firms by officers of such firms.

(c) the agent was a doctor, or other professional person, who had stationery to be disposed of.

(d) stationery of friends of the agent had to be disposed of because of a death and that the customer would help to relieve this difficult situation by purchasing it. . .

For its defense, the accused corporations called the president of Regent, Harold Hartwig, who testified that the firms sell well-known, nationally advertised brands of stationery, such as Swingline staples, Faber pencils, Perma-Write pens, etc., and some paper to large users among which are corporations such as Goodyear, General Electric and Rexall; that many of these customers provide a large volume of reorder business; that the Regent-Oxford enterprise has over 20,000 customers; that sales are made exclusively through their customers' purchasing agents; that the false representations listed in the stipulation were made as a preliminary part of the salesmen's solicitation; that price and quality of the merchandise are always discussed honestly; that the price offered has been lower than the purchasing agent is or was paying at the time of the solicitation; that the goods could be returned if found to be unsatisfactory; and that when a complaint is made an additional discount is offered to induce the customer to keep the goods.

Cross-examination elicited that visits to the Regent-Oxford offices had been made by the Better Business Bureau and by a Post Office Inspector; that the 'lies' were to 'get by' secretaries on the telephone and to get 'the purchasing agent to listen to our agent'; and that for business reasons various fictitious names were used both for their companies in different localities and for individuals. . . .

The important substantive question on this appeal is: Does solicitation of a purchase by means of false representations not directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain, constitute a 'scheme to defraud' or 'obtaining money by false pretenses' within the prohibition of 18 U.S.C. § 1341? We hold that, as here presented, it does not and the convictions should be reversed. We do not, however, condone the deceitfulness such business practices represent nor do we approve the cynical view advanced in defendants' rhetorical flourishes that such blatant dishonesty should be encouraged by reason of its 'social utility' and 'social necessity . . . in keeping with the most praiseworthy standards of business morality and worthy competitive enterprise.' We do not find the practices defended by counsel to be 'innocuous' or conduct 'which at worst may evoke in the breast of the perfectionistic moral idealist a sense of reproach towards the imperfections of man's soul during the mortal span.' On the contrary, we find these 'white lies' repugnant to 'standards of business morality.' Nevertheless, the facts as stipulated in the case before us do not, in our view, constitute a scheme to defraud or to obtain money by false pretenses punishable under section 1341. But this is not to say that we could not, on different facts or more specific proof, arrive at a different conclusion. . . .

It is generally stated that there are two elements to the offense of mail fraud: use of the mails and a scheme to defraud. Since only a 'scheme to defraud' and not actual fraud is required for conviction, we have said that 'it is not essential that the Government allege or prove that purchasers were in fact defrauded. . . .' But this does not mean that the government can escape the burden of showing that some actual harm or injury was contemplated by the schemer. Proof that someone was actually defrauded is unnecessary simply because the critical element in a 'scheme to defraud' is 'fraudulent intent,' . . . and therefore the accused need not have succeeded in his scheme to be guilty of the crime. . . . But the purpose of the scheme 'must be to injure, which doubtless may be inferred when the scheme has such effect as a necessary result of carrying it out.' *Horman v. United States*.

The government has offered no direct proof that any customer was actually defrauded by the Regent-Oxford selling campaign. Instead it offers a stipulation which shows that false representations were made, and that they were made by defendants' agents with knowledge of their falsehood. As a result of the transactions of which the untrue statements were a part, money and property changed hands. With no further proof, the government urges upon us the inference that customers were induced to part with their money because of the false representations, and that such calculated inducement amounted to fraud in the terminology of section 1341. The defendants helped the government over the difficult hurdle of proving that the false representations were 'reasonably calculated' to induce purchasing agents of 'ordinary prudence,' to buy their wares by admitting in writing that the representations were made to secure sales. On this stipulation an intent to deceive, and even to induce, may have been shown; but this does not, without more, constitute the 'fraudulent intent' required by the statute.

If there is no proof that the defendants expected to get 'something for nothing,' *Harrison v. United States*, or that they intended to get more for their merchandise than it was worth to the average customer, it is difficult to see any intent to injure or to defraud in the defendants' falsehoods. Instead of offering proof of some tangible injury to the objects of the Regent-Oxford promotion, the government argues in the negative that 'it is not essential (to) prove that purchasers were in fact defrauded,' and therefore that 'pecuniary loss' need not be shown for fraud to exist. It may be true, as Judge Learned Hand stated in *United States v. Rowe*, that:

> . . . (a) man is none the less cheated out of his property, when he is induced to part with it by fraud, because he gets a quid pro quo of equal value. It may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost his chance to bargain with the facts before him.

Nevertheless, neither the Rowe case nor the language quoted will support the conclusion that no definable harm need be contemplated by the accused to find him guilty of mail fraud. For that is what the government is arguing: that these false representations, in the

context of a commercial transaction, are per se fraudulent despite the absence of any proof of actual injury to any customer. . . .

[W]e have found no case in which an intent to deceive has been equated with an 'intent to defraud' where the deceit did not go to the nature of the bargain itself. Where the false representations are directed to the quality, adequacy or price of the goods themselves, the fraudulent intent is apparent because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain. In closer cases, where the representations do not mislead as to the quality, adequacy of inherent worth of the goods themselves, fraud in the bargaining may be inferable from facts indicating a discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver. In either instance, the intent of the schemer is to injure another to his own advantage by withholding or misrepresenting material facts. Although proof that the injury was accomplished is not required to convict under 1341, we believe the statute does require evidence from which it may be inferred that some actual injury to the victim, however slight, is a reasonably probable result of the deceitful representations if they are successful. . . .

The government asks us to infer some injury from the mere fact of the falseness of the representations and their connection with a commercial transaction. On the evidence before us, consisting principally of the stipulated falsehoods and the testimony of the defendants' president, we conclude that the defendants intended to deceive their customers but they did not intend to defraud them, because the falsity of their representations was not shown to be capable of affecting the customer's understanding of the bargain nor of influencing his assessment of the value of the bargain to him, and thus no injury was shown to flow from the deception. . . .

UNITED STATES v. JABAR, 19 F.4th 66 (2d Cir. 2021)

WALKER JR., Circuit Judge:

The United States appeals from a post-verdict judgment of acquittal entered by the District Court for the Western District of New York (Lawrence J. Vilardo, *J.*) with respect to the convictions of defendants Steve S. Jabar and Deborah Bowers for wire fraud, in violation of 18 U.S.C. § 1343, and conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371. The government argues that a reasonable jury could infer that the defendants had an intent to defraud the United Nations (UN) when they diverted for personal use more than $65,000 of grant money awarded to their non-profit organization. Viewing the evidence in the light most favorable to the government, we conclude that there was sufficient evidence for the jury to convict on the wire fraud and related counts. . . .

This case arises from defendants' personal use of grant money that the UN awarded to their non-profit organization, Opportunities for Kids International, Inc. (OKI). Jabar and Bowers applied for and obtained a grant in the amount of $500,000 ($150,000 of which

was later withheld) for the sole purpose of establishing a radio station in Iraq dedicated to women's programming. Instead, the defendants siphoned off more than $65,000 of the grant to pay personal debts, bills, and taxes. . . .

The elements of wire fraud are: "(1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the wires to further the scheme." *United States v. Binday*; *see* 18 U.S.C. § 1343. Conspiracy to commit wire fraud requires merely the agreement between defendants to engage in the foregoing and an overt act by one of the conspirators in furtherance of the conspiracy. 18 U.S.C. § 371.

"Essential to a scheme to defraud is fraudulent intent." *D'Amato*. Fraudulent intent may be inferred "[w]hen the 'necessary result' of the actor's scheme is to injure others." *Id.* (quoting *United States v. Regent Office Supply Co.*). Intent may also be proven "through circumstantial evidence, including by showing that defendant made misrepresentations to the victim(s) with knowledge that the statements were false." *Guadagna*. Because an intent to deceive alone is insufficient to sustain a wire fraud conviction, "[m]isrepresentations amounting only to a deceit . . . must be coupled with a contemplated harm to the victim." *United States v. Starr*. "Such harm is apparent where there exists a discrepancy between benefits reasonably anticipated because of the misleading representations and the actual benefits which the defendant delivered, or intended to deliver." Proof of actual injury to the victim is not required because the scheme need not have been successful or completed. *United States v. Dinome*.

Comparing two of our previous decisions clarifies that the misrepresentations must be central, not just collateral, to the bargain between the defendant and the victim. In *United States v. Starr*, owners of a bulk mailing company schemed to conceal higher rate mailings from customers in lower rate bulk mailings without paying the additional postage to the postal service or refunding their customers' excess postage payments. Defendants "represented that funds deposited with them would be used only to pay for their customers' postage fees," but upon defrauding the postal service, defendants sent fraudulent receipts to their customers and appropriated the remainder of the funds for their own use. We concluded that because the customers' mail was delivered on time to the correct location, whatever harm there was did not "affect the very nature of the bargain itself." At most, the government's evidence showed defendants' intent to deceive or induce customers into the transaction but not a fraudulent intent.

In *United States v. Schwartz*, the defendants schemed to purchase U.S.-manufactured military equipment for their international clients. One producer, Litton Industries, "expressly demanded assurances" that its devices would not be exported unlawfully, including that: the condition be incorporated into the sales agreement, the defendants disclose the customer's identity, and the customer obtain the requisite export certificates. Rather than comply, the defendants fed Litton false information and fabricated documents to secure the purchase. On appeal, we concluded that evidence of the defendants' deceitful acts supported a finding of fraudulent intent and thus upheld the wire fraud convictions. We distinguished these facts from the false representations in

Starr, which "did not cause any discrepancy between benefits reasonably anticipated and actual benefits received" and, therefore, "did not go to an essential element of the bargain." The scheme in *Starr* "only defeated [defendants'] customers' expectation that the money they paid to the defendants would be fully used to pay for postage, an expectation *that was not the basis of the bargain*." To the contrary, the defendants' misrepresentations in *Schwartz* were not "simply fraudulent inducements," but went to an essential element of the bargain: the *lawful* export of military equipment. The defendants made "*explicit* promises . . . in response to Litton's demands" and evidence showed that the deceived party "would not have sold its product" to defendants if they "had not been able to guarantee these conditions." Therefore, even though it received payment, Litton was deprived of "the right to define the terms for the sale of its property" and "good will because equipment [that] Litton, a government contractor, sold was exported illegally." The wire fraud statute captured these non-pecuniary harms. . . .

The district court ultimately concluded that the evidence was insufficient to prove that the defendants had the intent to defraud the UN because ultimately, they built "$350,000 worth of a radio station." In reaching this decision, the district court rejected the notion that a reasonable jury could find Jabar and Bowers's use of grant funds for personal expenses was itself a harm to the UN. We do not agree that the evidence compels a finding that the benefit of the bargain to UNIFEM was confined to a brick-and-mortar radio station. The evidence was sufficient for the jury to determine reasonably that OKI's representation in the Cooperation Agreement that it would spend the grant funds pursuant to UNIFEM's specifications was equally essential to the issuance of the grant.

The Cooperation Agreement required compliance with numerous spending provisions that controlled OKI's use of the $500,000. OKI agreed to "utilize the funds . . . provided by UNIFEM in strict accordance with the Project Document." Although the government failed to offer the Project Document and Project Budget into evidence, a reasonable jury could rely on other evidence that *was* offered to infer that a restriction on the use of grant funds was part of the basis of the bargain. The defendants' own budget proposal, received in evidence, unsurprisingly stated that every dollar of the grant proceeds would be allocated to a VOW-related expense. And a UNIFEM official testified that the agency as a matter of course demands assurances from grant recipients that they will devote the awarded money exclusively towards the project. The Cooperation Agreement also required that Jabar and Bowers return to UNIFEM any funds not spent on the project. UNIFEM mandated the return of all unused funds precisely because the proper use and management of funds was central to the bargain. . . .

In sum, the government's theory at trial was that the construction of the radio station was only part of the bargain and that it served to conceal defendants' fraudulent acts with respect to the rest of the bargain—OKI's agreement to spend the entirety of the grant exclusively pursuant to the terms of the Cooperation Agreement. To the extent defendants insisted that the contractual bargain was confined to building the radio station, the jury was free to reject that claim based on its assessment of the weight of the evidence and reasonable inferences it could draw from that evidence. . . .

What should we do with "intent to injure"? The Second Circuit's use of intent to injure or harm as a limiting device in application of the mail and wire fraud statutes can be confusing. Much of the confusion involves the relationship between this requirement and the elements of materiality and intent to defraud. The *Regent Office* court related the requirement to fraudulent intent, but the element also seems to function in an overlapping way with the requirement of materiality. It thus remains unclear whether the "intent to injure" requirement is really adding anything to the elements of mail/wire fraud, and whether it does any limiting work. Moreover, federal courts have not uniformly stated that the elements of mail and wire fraud include proof of "intent to injure (harm)," and have said that this element does not apply to some other quite similar fraud statutes. For example, in *Shaw v. United States*, 137 S. Ct. 462 (2016), the Supreme Court held that the federal bank fraud statute, 18 U.S.C. § 1344, includes no such requirement. The *Shaw* Court said, "We have found no case from this Court interpreting the bank fraud statute as requiring that the victim bank ultimately suffer financial harm, or that the defendant intend that the victim bank suffer such harm."

Perhaps it is most helpful to focus on the Second Circuit and other courts' discussions of, so to speak, what "the bargain really was" in these cases. After all, the court does not really mean that the fraud perpetrator must want the victim to suffer harm—the fraudster is interested in profit, not spite. *See United States v. Miller*, 953 F.3d 1095, 1101–03 (9th Cir. 2020) (Rakoff, J., sitting by designation) (explaining the distinction as between (1) a mere intent to deceive and (2) an intent to deceive the victim coupled with an intent to cheat the victim out of something). Several circuits have said that proof of an intent to injure is not required even under the mail and wire fraud statutes. *See*, *e.g.*, *United States v. Kenrick*, 221 F.3d 19, 27–29 (1st Cir. 2000); *United States v. Segal*, 644 F.3d 364, 367 (7th Cir. 2011); *United States v. Welch*, 327 F.3d 1081, 1104 (10th Cir. 2003); *see also* Joseph Lanuti, *Mail and Wire Fraud*, 56 AM. CRIM. L. REV. 1151, 1155 (2019). *But see United States v. Greenlaw*, 84 F.4th 325 (5th Cir. 2023) (in reviewing convictions for wire and securities fraud under 18 U.S.C. §§ 1343 and 1348, stating that proof of "intent to defraud" under those statutes requires proof of both intent to deceive and "intent to cheat," that is, intent to deprive the victim of money or property).

The Supreme Court has provided some clarity in the following recent wire fraud decision, although the Court focused here on the issues of "fraud in the inducement" and loss (or intended loss) not "intent to injure" per se.

KOUSISIS v. UNITED STATES, 145 S. Ct. 1382 (2025)

Justice BARRETT delivered the opinion of the Court.

Stamatios Kousisis and the industrial-painting company he helped manage, Alpha Painting and Construction Co., secured two government contracts for painting projects

in Philadelphia. Both contracts required the participation of a disadvantaged business—and in its bids for the projects, Alpha represented to the Pennsylvania Department of Transportation (PennDOT) that it would obtain its materials from a qualifying supplier. See 49 C.F.R. §§ 26.21(a), 26.5 (2024). This promise turned out to be an empty one: In addition to using the supplier solely as a pass-through entity, Alpha and Kousisis submitted multiple false certifications to cover up their scheme. So although Alpha's paint work met expectations, its adherence to the disadvantaged-business requirement did not.

The Government charged Alpha and Kousisis with wire fraud, asserting that they had fraudulently induced PennDOT to award them the painting contracts. Under the fraudulent-inducement theory, a defendant commits federal fraud whenever he uses a material misstatement to trick a victim into a contract that requires handing over her money or property—regardless of whether the fraudster, who often provides something in return, seeks to cause the victim *net* pecuniary loss. We must decide whether this theory is consistent with § 1343, which reaches only those schemes that target traditional money or property interests. *See Ciminelli v. United States.* It is, so we affirm.

When two Philadelphia landmarks, the Girard Point Bridge and the 30th Street Station, fell into disrepair, PennDOT began soliciting bids for their restoration. Kousisis, Alpha's project manager, submitted a bid for each project. His bidding proved successful: With respect to the Girard Point project, PennDOT awarded a $70.3 million contract to a joint venture comprising Alpha and two other companies. And with respect to the 30th Street project, Alpha and another company (again operating as a joint venture) secured a $15 million subcontract, which represented nearly a third of the $50.8 million total winning bid.

Federal grants from the U. S. Department of Transportation (DOT) accounted for a large portion of the funding for each project. As a result, both the State and Federal Governments had a say in how the projects were completed. Relevant here, DOT requires that grant recipients like PennDOT establish and "actively implemen[t]" a disadvantaged-business program. 49 C.F.R. §§ 26.21, 26.39(c). A "[d]isadvantaged [b]usiness [e]nterprise," according to DOT, is "a for-profit small business" that is majority owned and controlled by "one or more individuals who are both socially and economically disadvantaged." Because DOT aspires to devote at least 10 percent of federal grant funding to such businesses, grant recipients must set "overall goal[s]" for disadvantaged-business participation in their "DOT-assisted contracts."

Consistent with this rule, PennDOT required that bidders for the Girard Point and 30th Street projects commit to subcontracting a percentage of the total contract amount—six and seven percent, respectively—to a disadvantaged business. Failing to comply with this requirement would constitute "a material breach" and could "result in [contract] termination." Accordingly, as part of the bidding process, Kousisis represented that Alpha would acquire approximately $6.4 million in painting supplies from Markias, Inc., a prequalified disadvantaged business.

This was a lie. As later memorialized in a commitment letter, Alpha and Kousisis concocted a scheme in which Markias would function as a mere "pass-through" entity. The scheme operated as follows: Kousisis arranged for Alpha's actual paint suppliers, with whom he negotiated directly, to "generate purchase orders . . . billed to Markias." When Markias received an invoice, it tacked on a few-percent fee and then forwarded the inflated invoice to Kousisis. He, in turn, issued two checks: one paid Markias for its mark up, and the other covered the actual cost of the supplies. In short, Markias was no more than a paper pusher, funneling checks and invoices to and from Alpha's actual suppliers. Not only did this arrangement contradict Kousisis's prior representations, it also contravened DOT's rule that a contributing disadvantaged business must "perfor[m] a commercially useful function."

Kousisis's scheme initially went undetected. As the projects progressed, he falsely reported qualifying payments to Markias. PennDOT, satisfied with Alpha's paint and repair work, paid it accordingly. By the time the last coat of paint had dried, Alpha had turned a gross profit of over $20 million. And Markias, for its "pass-through" services, had pocketed a total of about $170,000.

Once the deception came to light, a grand jury indicted Alpha and Kousisis for wire fraud and conspiracy to commit the same. After a trial, the jury found them guilty of three counts of wire fraud and one count of conspiracy. . . .

To convict Alpha and Kousisis, the Government needed to prove that they used the wires to execute a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. Despite the use of the disjunctive "or," we have declined to interpret § 1343 as establishing alternative pathways to a conviction. Instead, reading the two clauses together, we have held that "the money-or-property requirement of the latter phrase" operates as a limitation on the former. *McNally v. United States.* A defendant commits federal wire fraud, in other words, only if he both "'engaged in deception'" and had "'money or property'" as "'an object'" of his fraud. *Ciminelli*. . . .

[From the mail and wire fraud precedents], Alpha and Kousisis attempt to glean another [rule]: A federal fraud conviction cannot stand, they argue, unless the defendant sought to hurt the victim's bottom line. Yet the theory under which petitioners were prosecuted—what they call the fraudulent-inducement theory—is devoid of an economic-loss requirement. As both parties describe it, the theory supports liability for federal fraud anytime a defendant "'us[es] falsehoods to induce a victim to enter into a transaction.'" In these situations, the defendant need not—and given the reciprocal nature of most transactions, often will not—aim to inflict economic loss. Because Alpha and Kousisis did not aim to do so here, they contend that their convictions are invalid.

We are not convinced. The fraudulent-inducement theory is consistent with both the text of the wire fraud statute and our precedent interpreting it. We therefore reject petitioners' proposed economic-loss requirement.

Start with the statute. To be guilty of wire fraud, a defendant must (1) "devis[e]" or "inten[d] to devise" a scheme (2) to "obtai[n] money or property" (3) "by means of false or fraudulent pretenses, representations, or promises." The prototypical fraudulent-inducement scheme plainly satisfies each of these statutory elements. Under the theory, a defendant (1) "devise[s]" a "scheme" (2) to induce the victim into a contract to "obtai[n]" her "money or property" (3) "by means of false or fraudulent pretenses." No matter how long we stare at it, the broad, generic language of § 1343 leaves us struggling to see any basis for excluding a fraudulent-inducement scheme.

Take the facts of this very case. By using Markias as a pass-through entity, petitioners "devised" a "scheme" to obtain contracts through feigned compliance with PennDOT's disadvantaged-business requirement. goal? To "obtai[n] money" (tens of millions of dollars) from PennDOT. And how? By making a number of "false or fraudulent . . . representations"—first about their plans to obtain paint supplies from Markias and later about having done exactly that. Section 1343 requires nothing more.

Alpha and Kousisis's contrary view rests on the premise that a scheme cannot constitute wire fraud if, as here, the defendant provides something—be it money, property, or services—of equal value in return. But the statute says otherwise. To "obtain" something means "to gain or attain possession" of it, usually "by some planned action or method." Webster's Third International Dictionary 1559 (2002). A thing is no less "obtained" simply because something *else* is simultaneously given in return. An art collector who acquires a rare sculpture can rightfully say that she "obtained" it, notwithstanding the six-figure price tag. And because the meaning of "obtain" does not turn on the value of the exchanged items, the art collector can still say that she "obtained" the sculpture even if it was not objectively worth the price she paid.

In short, the wire fraud statute is agnostic about economic loss. The statute does not so much as mention loss, let alone require it. Instead, a defendant violates § 1343 by scheming to "obtain" the victim's "money or property," regardless of whether he seeks to leave the victim economically worse off. A conviction premised on a fraudulent inducement thus comports with § 1343. . . .

At common law, "fraud" was a term with expansive reach. Rather than settle on a single form of liability, courts recognized at least three, and the particular elements and remedies turned on the nature of the plaintiff 's alleged injury.

To appreciate how the three forms differed, it may help to consider a variation of the facts here. Imagine that PennDOT discovered petitioners' scheme soon after Alpha and Kousisis had begun work on the Girard Point and 30th Street projects. In such a circumstance, law and equity provided at least three avenues for relief: PennDOT could (1) seek to rescind the contracts; (2) refer the matter for indictment under the crime of false pretenses; or (3) bring a tort action against the fraudsters for the damages incurred.

If PennDOT had wanted to rescind the fraud-infected contracts, most courts would historically have permitted it to do so even without a showing of economic loss. To

obtain a rescission, PennDOT would have needed to establish only that it had "received property of a different character or condition than [it] was promised" ("although of equal value") or, more relevant here, that the transaction had "prove[d] to be less advantageous than as represented" ("although there [was] no actual loss"). W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 110, p. 766 (5th ed. 1984) (Prosser & Keeton). Put differently, many courts would have awarded the equitable remedy of rescission simply because Alpha and Kousisis had tricked PennDOT into a bargain materially different from the one they had promised. . . .

The same no-loss-required rule applied with equal force to the crime of false pretenses. As many courts held, the crime "was complete when the property was fraudulently obtained.". . . Thus, if someone purchased "a picture upon the assertion untruly made that it was from the brush of some distinguished painter," the fact that "the picture was of value" would not relieve the seller of "the criminality of the false pretense." *Bartlett v. State*, 28 Ohio St. 669, 672 (1876). . . .

The Maine Supreme Court's decision in *State v. Mills* is illustrative. [A] horse owner represented to a potential buyer that the horse "was called the Charley," even though "he knew that it was not the horse called by that name." Persuaded, the buyer exchanged his "colt and five dollars in money" for the horse. But as the buyer soon learned, the horse was not "the Charley," though the seller claimed that it "was as good a horse" and "of equal or greater value" than the colt and money. The court, overruling the defendant's objections to the guilty verdict, explained that the facts constituted "a case literally within" the false-pretenses statute. Obtaining a conviction on false pretenses required proving simply "that one of the pretences [*sic*] was false, and that the injured party was induced thereby to part with his property." . . .

As the cases and treatises discussed above confirm, it was the deception-induced deprivation of property—not economic loss—that common-law courts generally deemed injurious. . . .

[C]ases involving deceit are largely inapposite to the question presented here. Courts required economic loss not because it was inherent to the common-law understanding of fraud, but because a tort action for deceit "sound[ed] in damage" and thus was designed to compensate a plaintiff for her economic loss. . . .

To summarize, then, common-law courts did not uniformly condition an action sounding in fraud on the plaintiff's ability to prove economic loss. More specifically, if the action was one for rescission or a prosecution for false pretenses, the plaintiff's required "injury" ordinarily need not be financial. That sounds the death knell for Alpha and Kousisis's reliance on the common law. . . .

[A]t the right level of specificity, *anything* can be described as "unique" or "different from" something else. After all, "animal," "horse," "sound horse," and "the horse called the Charley" are all accurate descriptions of the bargained-for property in *Mills.* Only the most specific of those descriptions, "the horse called the Charley," distinguishes the

property promised from the property received, yet the court still had no trouble labeling the case as one of "false pretence [*sic*], fraudulently made."

Tellingly, Alpha and Kousisis identify no source of authority that supports treating uniqueness as some kind of exception to the no-loss-required rule. That is probably because the common law has long embraced a different standard—namely, materiality—as the principled basis for distinguishing everyday misstatements from actionable fraud. . . . [A]s we explained in *Universal Health Services*, a misrepresentation is material if a reasonable person would attach importance to it in deciding how to proceed, or if the defendant knew (or should have known) that the recipient would likely deem it important. . . .

Petitioners insist that our precedent forecloses the fraudulent-inducement theory, but they are wrong: We have twice *rejected* the argument that a fraud conviction depends on economic loss. We did so first in *Carpenter v. United States*, a case in which the defendants had repeatedly leaked the contents of a newspaper's investment column. Although the scheme did not cause the newspaper "monetary loss," it was sufficient, we held, that the newspaper "ha[d] been deprived of its right to exclusive use" of its proprietary information. Then, in *Shaw v. United States*, we affirmed a conviction under the bank fraud statute even though "no bank involved in the scheme" had "suffered any monetary loss." The statute, we explained, "demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." . . . .

No matter the underlying theory of fraud, § 1343 requires that "money or property" have been an object of the fraudster's scheme. So if the scheme is one to alter the exercise of regulatory power—say, by tricking the Government into handing over a gaming license—the fraudulent-inducement theory has no role to play. *Cleveland*. But if, as here, the fraudster seeks to induce the Government into a transfer of its money or property, that loss is sufficient to sustain a fraud conviction. The loss is not, as petitioners argue, a mere "incidental byproduct" of a scheme to manipulate the exercise of regulatory power. *Kelly*. If anything, the inverse is typically true: In the mine run of fraudulent-inducement schemes, undermining the Government's regulatory interests is merely "an incidental (even if foreseen) byproduct" of obtaining its money or property. Here, for example, Alpha and Kousisis had money in mind. Nothing suggests that they concocted their scheme with the goal of thwarting PennDOT's disadvantaged-business initiative. Such a result was downstream of their "object" to line their pockets. . . .

[T]he fraudulent-inducement theory is not a "repackag[ing]" of the right-to-control theory. In *Ciminelli*, we rejected the latter theory, which maintains that the term "'property' in § 1343" includes "'the right to control the use of one's assets.'" According to this strained definition of "property," a defendant violates § 1343 simply by "schem[ing] to deprive a victim of potentially valuable economic information necessary to make discretionary economic decisions." Such a scheme, we held, does not implicate any "traditional property interes[t]."

Unlike the right-to-control theory, fraudulent inducement does not treat "mere information as the protected interest." Rather, it protects money and property. And nothing we said in *Ciminelli* is at odds with our holding here. Although the Government urged us to affirm Ciminelli's conviction on an alternative ground—namely, the fraudulent-inducement theory—we declined to do so because it would have required us "to assume not only the function of a court of first view, but also of a jury." We did not discuss, much less reject, the fraudulent-inducement theory. . . .

We will return shortly to the Court's important decisions in *Carpenter*, *Kelly*, and *Ciminelli*, all discussed in Kousisis. But first, the next case, dealing with the line between fraud and permissible deception in negotiations, is an example of a federal circuit court seeking limitations on the breadth of criminal fraud liability. How would you state the limitation on fraud liability that underlies the Seventh Circuit's reversal of convictions in this case?

UNITED STATES v. WEIMERT, 819 F.3d 351 (7th Cir. 2016)

HAMILTON, Circuit Judge:

In the midst of the 2008–09 financial crisis, a Wisconsin bank called AnchorBank was struggling to stay above water. Under pressure to find cash to pay its own lenders, the bank's president told vice president David Weimert to try to sell the bank's share in a commercial real estate development in Texas. Weimert, who is the defendant and appellant in this criminal wire fraud case, successfully arranged a sale that exceeded the bank's target price by about one third. The deal also relieved the bank of a liability of twice the sale price.

Given the version of the facts we must accept for this appeal, however, Weimert saw an opportunity to insert himself into the deal personally. He persuaded two potential buyers that he would be a useful partner for them. Both buyers included in their offer letters a term having Weimert buy a minority interest in the property. The bank agreed. It also agreed to pay Weimert an unusual bonus to enable him to buy the minority interest. We must also assume that the successful buyer, at least, would have been willing to go forward without Weimert as a partner, and that Weimert deliberately misled his board and bank officials to believe that the successful buyer would not close the deal if he were not included as a minority partner. The government prosecuted Weimert for wire fraud on the theory that his actions added up to a scheme to obtain money or property by fraud, and the jury convicted him on five of six counts of wire fraud under 18 U.S.C. § 1343.

We reverse and order judgment of acquittal. Federal wire fraud is an expansive tool, but as best we can tell, no previous case at the appellate level has treated as criminal a person's lack of candor about the negotiating positions of parties to a business deal. In commercial negotiations, it is not unusual for parties to conceal from others their true goals, values, priorities, or reserve prices in a proposed transaction. When we look

closely at the evidence, the only ways in which Weimert misled anyone concerned such negotiating positions. He led the successful buyer to believe the seller wanted him to have a piece of the deal. He led the seller to believe the buyer insisted he have a piece of the deal. All the actual terms of the deal, however, were fully disclosed and subject to negotiation. There is no evidence that Weimert misled anyone about any material facts or about promises of future actions. While one can understand the bank's later decision to fire Weimert when the deception about negotiating positions came to light, his actions did not add up to federal wire fraud. Weimert is entitled to judgment of acquittal. We order his prompt release from federal prison, on the stated terms of supervised release in his sentence, pending issuance of our mandate. . . .

Before giving a detailed account of the evidence, we explain the legal standards we apply. The wire fraud statute prohibits schemes to defraud or to obtain money or property by means of "false or fraudulent pretenses, representations, or promises" if interstate wire or electronic communications are used to execute the scheme. 18 U.S.C. § 1343. To convict a person under § 1343, the government must prove that he "(1) was involved in a scheme to defraud; (2) had an intent to defraud; and (3) used the wires in furtherance of that scheme." *United States v. Faruki* (quoting *Durham*).

To prove a scheme to defraud, the government must show that Weimert made a material false statement, misrepresentation, or promise, or concealed a material fact. *United States v. Powell*; *see also Neder v. United States* (holding "materiality of falsehood" is an element of federal mail and wire fraud statutes). Intent to defraud requires proof that the defendant acted willfully "with the specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." *Faruki* (quoting *United States v. Howard*).

Like its cousin mail fraud, the wire fraud statute has been interpreted to reach a broad range of activity. Courts have taken an expansive approach to what counts as a material misrepresentation or concealment in a scheme to defraud. As we will see, it is possible to put together broad language from courts' opinions on several different points so as to stretch the reach of the mail and wire fraud statutes far beyond where they should go.

First, for example, materiality has been defined in broad and general terms as having a tendency to influence or to be capable of influencing the decision-maker.

Second, the concept of a misrepresentation is also broad, reaching not only false statements of fact but also misleading half-truths and knowingly false promises. It can also include the omission or concealment of material information, even absent an affirmative duty to disclose, if the omission was intended to induce a false belief and action to the advantage of the schemer and the disadvantage of the victim.

Third, wire fraud does not require the false statement to be made directly to the victim of the scheme. Deception of someone else can suffice if it carries out the scheme.

Fourth, it is no defense that the intended victim of wire fraud was too trusting and gullible or, on the other hand, was too smart or sophisticated to be taken in by the deception.

These and other expansive glosses on the mail and wire fraud statutes have led to their liberal use by federal prosecutors. As one future federal judge put it during his tenure as a prosecutor, these statutes are "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. (1980). Mail and wire fraud statutes "have long provided prosecutors with a means by which to salvage a modest, but dubious, victory from investigations that essentially proved unfruitful." John C. Coffee, Jr. & Charles K. Whitehead, *The Federalization of Fraud: Mail and Wire Fraud Statutes*, in White Collar Crime: Business and Regulatory Offenses § 9.05 (1990). . . .

This case presents a test of how far the mail and wire fraud statutes reach when parties negotiate a substantial commercial transaction that involves, as almost all will, the use of the mails or interstate wire communications. Some deceptions in commercial negotiations certainly can support a mail or wire fraud prosecution. A party may not misrepresent material facts about an asset during a negotiation to sell it. For example, a seller or his agent may not falsely tell potential buyers or investors that a piece of property has no history of environmental problems if soil and groundwater contamination on the property was discovered the year before. The buyer would be led to purchase a property worth far less than she was led to believe, given the looming remediation costs. Similarly, a company may not inform a potential investor that it expects patent protection for its key intellectual property if its patent application was recently rejected as barred by prior art. The investor would be led to believe that he was investing in a valuable asset that was actually worthless. The misrepresentations materially alter one party's understanding of the subject of the deal. . . .

From strands of case law, it is true, one can piece together a mail or wire fraud case based on such deception about negotiating positions. To track the specific rules we discussed above: First, information about a party's negotiating position is surely material in the sense that it is capable of influencing another party's decisions. Second, actionable deception can include false statements of fact, misleading half-truths, deceptive omissions, and false promises of future action. All of these descriptions may fit deceptions about negotiating positions, at least if a negotiator's present state of mind is treated as a fact. Third, the false statement may be made to someone other than the owner or holder of the money or property targeted by the scheme. And fourth, it is no defense that the intended victim either trusted the defendant too much or was too savvy to be fooled.

But Congress could not have meant to criminalize deceptive misstatements or omissions about a buyer's or seller's negotiating positions. *See United States v. Coffman* ("it would not do to criminalize business conduct that is customary rather than exceptional and is relatively harmless"). Buyers and sellers negotiate prices and other terms. To state the

obvious, they will often try to mislead the other party about the prices and terms they are willing to accept. Such deceptions are not criminal.

To take a simple example based on price, suppose a seller is willing to accept $28,000 for a new car listed for sale at $32,000. A buyer is actually willing to pay $32,000, but he first offers $28,000. When that offer is rejected and the seller demands $32,000, the buyer responds: "I won't pay more than $29,000." The seller replies: "I'll take $31,000 but not a penny less." After another round of offers and demands, each one falsely labeled "my final offer," the parties ultimately agree on a price of $30,000. Each side has gained from deliberately false misrepresentations about its negotiating position. Each has affected the other side's decisions. If the transaction involves interstate wires, has each committed wire fraud, each defrauding the other of $2,000? Of course not. But *why* not?

The government's answer at oral argument was the absence of "intent to defraud." That answer begs the question. How do we recognize "intent to defraud" if a party has gained a better deal by misleading the other party about its negotiating position? If a party's negotiation position is material for purposes of the mail and wire fraud statutes, each has obtained a financial gain by deliberately misleading the other.

The better answer is that negotiating parties, and certainly the sophisticated businessmen in this case, do not expect complete candor about negotiating positions, as distinct from facts and promises of future behavior. Deception about negotiating positions—about reserve prices and other terms and their relative importance—should not be considered material for purposes of mail and wire fraud statutes. . . .

About February 16, Weimert asked Richard Petershack, an outside lawyer for IDI, to draft a proposed "template" letter of intent for potential buyers of the Chandler Creek interest. Petershack testified that Weimert told him to use $8.5 million as the purchase price, with financing of $6.5 million available through AnchorBank. Weimert also told Petershack to include a term that Weimert said buyers were requiring: that Weimert himself "stay in the deal because of my institutional knowledge of the project." Petershack also testified that Weimert told him that IDI had agreed to compensate him for his efforts in "facilitating the deal and finding potential investors" by paying him a fee of four percent of the purchase price. On this record, we must assume that Weimert was lying to Petershack at that time about the buyers requiring that he participate and IDI agreeing to the four percent fee. . . .

On February 22, 2009, Weimert called Kalka and his investment partner. Both Weimert and the partner agreed that Weimert's involvement as a buyer would be beneficial; Weimert knew the property and had worked with the Burkes for several years. (Kalka's testimony was unclear as to whether his partner or Weimert first proposed that Weimert participate as a buyer.) In a follow-up email to Weimert, Kalka later confirmed "it is imperative that you David Weimert be involved personally in the Chandler Creek transaction." Weimert's involvement needed to be "economic" to assure Kalka of

Weimert's services in overseeing the investment. Kalka wrote that Weimert "might show this," presumably the email, "to your Board to make sure that this is happening."

The following day, February 23, Weimert sent the IDI board of directors a memorandum on the Chandler Creek negotiations. He summarized key points from his conversations with Kalka and his partner. Kalka was to serve as a "stalking horse" in the investment and had ample funds to make the investment. In exchange, Kalka would receive $75,000 as a break-up fee if his offer was not selected. Finally, Weimert added: "It is imperative that Mr. Weimert be involved economically to assure his management—and investment liaison involvement in perpetuity while Mr. Kalka and or his investors are involved." Weimert went on to note as a "bottom line . . . [that] Kalka will not do this without me being a Manager of the Investment and Liaison to his Group and the Burke's. . . ." As best we can tell from the record, this statement to the board about Kalka and his partner was true. . . .

By late February 2009, then, Weimert had secured two offers that exceeded Timmerman's target price for Chandler Creek by at least $2 million. But both offers also posed what all IDI directors and other bank officials recognized as a conflict of interest: Weimert was both a buyer and an officer of the seller. Weimert submitted both letters of intent to the IDI board of directors along with two memoranda that were central to the government's case.

The first, called "A Personal Note," was a short summary of the evolution of the deal. Weimert wrote falsely that he had "had no intention of being involved in this Project." But the deal had evolved, he said, so that "The Kalka's Group required [Weimert's involvement], . . . and Bill Burke actually felt that [Weimert] would continue to 'Add a Positive Dimension' to the Management of Chandler Creek." In addition to describing his involvement falsely as "inadvertent," Weimert said he needed to participate to close the deal.

Weimert's second document, called "Evolution of This Deal," also reported on his negotiations with Kalka and the Burkes. As part of the Kalka offer, Kalka had "insisted" that Weimert "run this investment" and "have money in the deal so 'I don't run away.'" As for the Burkes, Weimert falsely told the board that they continued to "be especially focused on my continued involvement." Weimert concluded by recommending selling to The Burke Group. Although it was offering a lower purchase price, the Burke deal would also release IDI from its potential $15 million liability to Bank of America on the Chandler Creek mortgage. . . .

[An] attorney advised the board that Weimert's involvement was not illegal. He asked the board two questions: first, whether the transaction could be completed without Weimert's involvement; and second, whether the transaction was necessary and in the best interest of the company. The board members said they understood that Weimert "had to be involved or the Burkes were not going to be a purchaser," and that the deal was good for the company, especially with the need to raise cash to make the looming payment due to U.S. Bank at the end of March. The attorney advised the board to waive

the conflict and go forward with the sale. On this advice, the board waived the conflict, accepted The Burke Group's purchase offer, and approved the four percent fee for Weimert in the amount of $311,000. . . .

All terms of the transaction, including Weimert's participation as a buyer, were disclosed to all interested parties. The government's evidence of deception—all of it—addressed not material facts or promises but rather parties' negotiating positions, which are not material for purposes of mail and wire fraud. . . .

IDI was not misled as to the nature of the asset it was selling or the consideration it received. . . . At bottom, even the centerpiece of the government's case—Weimert falsely told the IDI board and Omanchinski that the Burkes required his participation—amounted to no more and no less than a false prediction about how the Burkes would respond to a counteroffer to exclude Weimert's participation. In other words, it was deception about a party's negotiating position. Weimert's false story about who had first come up with the idea to have him participate would have been material only for what it signaled about how important his participation was to the parties. In other words, it was important only in predicting how various parties were likely to respond to a counteroffer proposing to reduce or eliminate his role. . . .

The government's strongest argument is that Weimert's actions amounted to a scheme to defraud IDI because, even if an outsider might be permitted to mislead it about negotiating positions, Weimert could not do so about his own role in the transaction. Based on the testimony of IDI directors, we must assume that they trusted Weimert on all aspects of the Chandler Creek deal, including what he told them about the buyer insisting that he participate in the deal. . . .

Since Weimert had such a substantial financial interest in the deal that was disclosed to the board, it is helpful to view the role of Weimert's fiduciary duty as if this were a transaction involving Weimert's own compensation. If Weimert's role as a corporate officer with fiduciary duties were to play a decisive role here, it would be because he would have owed a duty to the corporation to be completely honest regarding the Chandler Creek sale, including how his participation in the deal came about and what he knew about how the Burkes were likely to have responded to a counteroffer excluding Weimert. So, to the extent that fiduciary standards are relevant to this criminal case, the best guidance concerns the extent of a corporate officer's fiduciary duty toward the corporation in negotiating his own compensation. . . .

Taken literally, such a broad fiduciary duty could require a corporate officer negotiating with the corporation about his own compensation to reveal the weaknesses in his own negotiating position as part of his duty of good faith. He might be required, for example, to disclose that he would be willing to take less compensation than he is asking for. And under that reasoning, Weimert would have been obliged to tell the directors that the Burkes probably would have been willing to go forward with the purchase even without his participation. That is not the law with corporate fiduciary duties or with other

fiduciary duties, however, or at the very least it is not so clearly the law as to support a criminal conviction. . . .

FLAUM, Circuit Judge, dissenting.

I respectfully disagree with the analysis and conclusion of the majority. At the outset, I do not believe that the scenario presented in this case can be viewed as an arms-length, three-party transaction. Weimert, as president of IDI, was acting on behalf of IDI in negotiating the deal. Unlike a situation involving three independent parties, in the transaction at hand, the IDI board had every reason to expect that Weimert would fairly and honestly represent its interests. The record does not reflect an expectation at the start of negotiations that Weimert would be entitled to equity or any sort of bonus arising out of the Chandler Creek deal. Thus, I cannot accept the majority's conclusion that this situation amounts to hard bargaining among disinterested parties, and that the IDI board received what it agreed to and expected in the Chandler Creek sale. In fact, IDI likely would have received a higher purchase price had Weimert not taken a bite out of the deal. IDI received roughly 96 percent, rather than 100 percent, of the purchase price due to Weimert's creation of equity for himself.

I also do not agree that this case is similar to a routine negotiation among buyers and sellers in which the parties benefit from deliberately false misrepresentations about their negotiating positions. Such situations, which the majority contends are customary and relatively harmless, entail actual arms-length transactions among independent parties. By contrast, Weimert, the president of IDI, was not at arms-length with the IDI board. Moreover, in the typical negotiation involving a buyer and seller, the parties are aware that they are solely bargaining with one another; in the case at hand, the IDI board had no reason to believe that it was also negotiating with Weimert, in addition to the potential buyers.

Although the final contract terms were disclosed when the IDI board considered and approved the deal, the evidence suggests that the IDI board only approved the deal because Weimert represented that it would not get done without his involvement. All of the board members later testified that they would not have voted to waive the conflict of interest and pay Weimert's fee if they had known that the Burkes did not require his involvement. This evidence undermines the notion that the IDI board simply agreed to the terms that were in plain view and received what it expected. Rather, the deal the board approved was based on misrepresentations by its own representative and the board would not have approved the deal if it had known the truth. Further, I find the majority's assertion that the final contract terms were "in fact discussed and negotiated by the interested parties" to be an incomplete portrayal of the facts, since the only parties to negotiate the letter of intent that the IDI board approved were Weimert, as IDI's representative, and the Burkes. Although the final contract terms were slightly different than those initially approved by the board, that letter of intent formed the basis for a transaction in which the parties assumed and ultimately mandated Weimert's participation.

If one focuses on Weimert's misrepresentations to the IDI board while he was supposedly acting on its behalf, the materiality inquiry is different than the majority proffers. Even if Weimert's statements to Kalka and the Burkes—parties at arms-length—were closer to puffery, Weimert's deception of the IDI board and his ABCW/AnchorBank supervisors was more insidious than mere bluffing. Furthermore, even assuming Weimert's participation was a non-core term of the deal, IDI was misled as to the amount it could receive for the property as well as Weimert's interest in seeing the deal completed. Weimert's misrepresentations induced the IDI board to approve the deal and were, therefore, material to the board's decision. . . .

D. Mail and Wire Fraud: Property

Next, we explore the part of criminal fraud law that deals with the thing the perpetrator is after, what we might call the "corpus" or "object" of the fraud. As you will see, that thing can range from clearly tangible property (like cash) to things that are less tangible (like intellectual property rights). The next series of cases deals, in different ways, with the general question of what kinds of property—or perhaps better, property *rights*—count as valid objects of fraud under the mail and wire fraud statutes. This aspect of mail and wire fraud law is in flux due to the Supreme Court recently moving to limit the statutes' coverage.

The first case involves a matter of insider trading. Here is an important note to refer back to when Chapter 4 takes up insider trading law in earnest: This case was decided before the Supreme Court, in *United States v. O'Hagan*, validated the "misappropriation" theory of insider trading (the Court split 4-4 on the insider trading question in this case and that part of the discussion has been omitted here). When reviewing the course materials later, take note of how the government was able to win this case on a mail fraud theory instead of the misappropriation theory of insider trading that you will read about in Chapter 4.

CARPENTER v. UNITED STATES, 484 U.S. 19 (1987)

Justice WHITE delivered the opinion of the Court.

In 1981, [Foster] Winans became a reporter for the Wall Street Journal (the Journal) and in the summer of 1982 became one of the two writers of a daily column, "Heard on the Street." That column discussed selected stocks or groups of stocks, giving positive and negative information about those stocks and taking "a point of view with respect to investment in the stocks that it reviews." Winans regularly interviewed corporate executives to put together interesting perspectives on the stocks that would be highlighted in upcoming columns. . . . Because of the "Heard" column's perceived quality and integrity, it had the potential of affecting the price of the stocks which it examined. The District Court concluded on the basis of testimony presented at trial that the "Heard" column "does have an impact on the market, difficult though it may be to quantify in any particular case."

The official policy and practice at the Journal was that prior to publication, the contents of the column were the Journal's confidential information. Despite the rule, with which Winans was familiar, he entered into a scheme in October 1983 with Peter Brant and petitioner Felis, both connected with the Kidder Peabody brokerage firm in New York City, to give them advance information as to the timing and contents of the "Heard" column. This permitted Brant and Felis and another conspirator, David Clark, a client of Brant, to buy or sell based on the probable impact of the column on the market. Profits were to be shared. The conspirators agreed that the scheme would not affect the journalistic purity of the "Heard" column. . . . Over a 4-month period, the brokers made prepublication trades on the basis of information given them by Winans about the contents of some 27 "Heard" columns. . . .

In affirming the mail and wire fraud convictions, the Court of Appeals ruled that Winans had fraudulently misappropriated "property" within the meaning of the mail and wire fraud statutes and that its revelation had harmed the Journal. It was held as well that the use of the mail and wire services had a sufficient nexus with the scheme to satisfy §§ 1341 and 1343. The petition for certiorari challenged these conclusions. . . .

We held in *McNally* that the mail fraud statute does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government," and that the statute is "limited in scope to the protection of property rights." Petitioners argue that the Journal's interest in prepublication confidentiality for the "Heard" columns is no more than an intangible consideration outside the reach of § 1341. . . . This is not a case like *McNally*, however. The Journal, as Winans' employer, was defrauded of much more than its contractual right to his honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute, which "had its origin in the desire to protect individual property rights." *McNally*. Here, the object of the scheme was to take the Journal's confidential business information-the publication schedule and contents of the "Heard" column-and its intangible nature does not make it any less "property" protected by the mail and wire fraud statutes. *McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.

Both courts below expressly referred to the Journal's interest in the confidentiality of the contents and timing of the "Heard" column as a property right and we agree with that conclusion. Confidential business information has long been recognized as property. . . . The Journal had a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the "Heard" column.

Petitioners' arguments that they did not interfere with the Journal's use of the information or did not publicize it and deprive the Journal of the first public use of it . . . miss the point. The confidential information was generated from the business, and the business had a right to decide how to use it prior to disclosing it to the public. Petitioners cannot successfully contend . . . that a scheme to defraud requires a monetary loss, such as giving the information to a competitor; it is sufficient that the Journal has been deprived of its right to exclusive use of the information, for exclusivity is an

important aspect of confidential business information and most private property for that matter.

We cannot accept petitioners' further argument that Winans' conduct in revealing prepublication information was no more than a violation of workplace rules and did not amount to fraudulent activity that is proscribed by the mail fraud statute. Sections 1341 and 1343 reach any scheme to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises. . . . The concept of "fraud" includes the act of embezzlement, which is "'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.'" *Grin v. Shine*.

The District Court found that Winans' undertaking at the Journal was not to reveal prepublication information about his column, [but] we noted the similar prohibitions of the common law, that "even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment." As the New York courts have recognized: "It is well established, as a general proposition, that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom."

We have little trouble in holding that the conspiracy here to trade on the Journal's confidential information is not outside the reach of the mail and wire fraud statutes, provided the other elements of the offenses are satisfied. The Journal's business information that it intended to be kept confidential was its property; the declaration to that effect in the employee manual merely removed any doubts on that score and made the finding of specific intent to defraud that much easier. . . .

UNITED STATES v. CHASTAIN, 2025 WL 2165839 (2d Cir. July 31, 2025)

MENASHI, Circuit Judge:

Nathaniel Chastain appeals his judgment of conviction for wire fraud in violation of 18 U.S.C. § 1343 . . . . A jury found Chastain guilty . . . based on trades he made while employed at OpenSea, an online marketplace for non-fungible tokens ("NFTs"). As head of product, Chastain selected the NFTs that the company would feature in a section of its website. When an NFT was featured, its value increased. Chastain would purchase an NFT before it was featured and sell it afterward for a profit. He made about $57,000.

The district court instructed the jury that Chastain's decision about which NFT to feature was OpenSea's property even if that information lacked commercial value to OpenSea. It further explained that the jury could find that Chastain engaged in a scheme to defraud if he "conducted himself in a manner that departed from traditional notions of fundamental honesty and fair play in the general and business life of society."

Chastain argues that the instructions were erroneous because the jury could have convicted Chastain of fraud based on unethical business dealings even if he did not intrude on anything resembling a traditional property interest of OpenSea. We agree. . .

OpenSea is an online marketplace for buying and selling NFTs. An NFT is a "unique digital artifact" that "can be bought and sold on the blockchain." OpenSea itself does not buy or sell any NFTs that are traded on its platform. Instead, the company collects a fee of two-and-a-half percent for each transaction on the platform. In 2021, OpenSea added a section to its website that would promote user interest by highlighting specific NFTs. When an NFT was featured, the publicity typically led its price to increase. OpenSea did not receive payments from the creators of NFTs featured on the website. Nor did OpenSea engage in any trades of featured NFTs. Instead, for each transaction involving a featured NFT, OpenSea received its standard fee of two-and-a-half percent.

Chastain was the first head of product at OpenSea. In that role, he was "responsible for evaluating current and new features, to figure out how well they were doing." He obtained "feedback" and conducted "user interviews" about the features, and he considered "new changes" that could "improve the site. He would help organize engineers to work on these projects and designers." He also selected the NFTs that the website would feature.

Chastain purchased approximately fifteen NFTs that were then featured on the website. Chastain generally purchased and sold the featured NFTs using anonymous accounts. For each trade, he transferred cryptocurrency from his personal account into an anonymous account that he used to purchase the NFT. The anonymous account would sell the NFT after it was featured, and Chastain transferred the proceeds back into his personal account. He made about $57,000.

Chastain did not always use anonymous accounts. On August 2, 2021, an OpenSea user noticed that Chastain had used his personal account to purchase an NFT before it was featured. The user posted to Twitter that it "[l]ooks like Nate from OS had the jump on everyone else," adding an emoji of two eyeballs. Chastain responded to the post that he "just wanted to secure one of these [NFTs] before they all disappeared tbh." At this point, no one at OpenSea told Chastain to stop purchasing featured NFTs.

On September 14, 2021, another OpenSea user posted about Chastain's trading, this time tagging OpenSea:

> Hey @opensea why does it appear @natechastain has a few secret wallets that appears to buy your front page drops before they are listed, then sells them shortly after the front-page-hype spike for profits, and then tumbles them back to his main wallet ... ?

The next day, OpenSea asked Chastain to resign. . . .

Chastain argued that the NFT information was not property as a matter of law because (1) it had no commercial value to OpenSea and (2) the company did not take steps to protect its confidentiality. . . .

When instructing the jury about the property element of wire fraud, the district court said:

> A company's confidential business information is a type of property. Information is confidential business information if it was acquired or created by a business for a business purpose, and the business both considered and treated that information in a way that maintained the company's exclusive right to that information . . . . Factors you may consider in determining whether OpenSea treated the information at issue as confidential include, but are not limited to: Written company policies and agreements, employee training, measures the employer has taken to guard the information's secrecy, the extent to which the information is known outside the employer's place of business, and the ways in which other employees may access and use the information. You may also consider whether the information had economic value to the employer, *but the government is not required to prove that the information had such value.*

(emphasis added). The district court rejected Chastain's argument that the jury should be instructed that information is property under the wire fraud statute "only if it is . . . confidential business information (which must be treated as such) *and has inherent value to the purported victim*." (emphasis added).

For the scheme-to-defraud element of wire fraud, the district court instructed the jury:

> Fraud is a general term that includes all efforts and means that an individual may devise to deprive another of money or property by trick, deception, swindle, or overreaching. In order to establish a scheme to defraud, the government need not show that the defendant made a misrepresentation. You may find the existence of a scheme to defraud if you find that the conduct of the defendant was deceptive or if you find that the defendant conducted himself in a manner that departed from traditional notions of fundamental honesty and fair play in the general and business life of society.

The district court disagreed with Chastain that it was "critically important to include a robust willfulness charge because without it the government could convict Mr. Chastain [of] wire fraud based solely on unethical workplace behavior." . . .

We agree with Chastain that confidential business information must have commercial value to a company to qualify as its property under the wire fraud statute. The district court erred by instructing the jury that it could find Chastain guilty of wire fraud even if it found that he misappropriated information that lacked commercial value to OpenSea. The district court further erred by instructing the jury that it could find Chastain guilty

if it found his conduct to have departed from "fundamental honesty and fair play in the general and business life of society.". . .

The Supreme Court has explained that the phrase "money or property" encompasses "property rights" that are both "tangible" and "intangible." *Carpenter.* In either form, however, "the wire fraud statute reaches only traditional property interests." *Ciminelli.* . . .

Like confidential business information, trade secrets are intangible and kept confidential but receive legal protection. A trade secret has commercial value. To be sure, we have said that "[i]nformation may qualify as confidential under *Carpenter* even if it does not constitute a trade secret." *Mahaffy*. But while *Carpenter* "does not require that *all* confidential information must be of the same nature to be considered 'property,'" to merit that designation it must be that "it 'has long been recognized as property.'" *Grossman.* Information that lacks commercial value has not been so recognized. "The general rule has been that ideas or information are not subject to legal protection." *Pearson.* But when "information is gathered and arranged at some cost and sold as a commodity on the market, it is properly protected as property," and when "ideas are formulated with labor and inventive genius, as in the case of literary works or scientific researches, they are protected." *Id.* The characteristic feature of information and ideas protected as property is that "they constitute instruments of fair and effective commercial competition," so "those who develop them may gather their fruits under the protection of the law." *Id.* Information cannot qualify as a traditional property interest if its holder has no economic interest in its exclusive use or in otherwise keeping the information confidential. . . .

The district court instructed the jury that the government did not need to show that OpenSea had a commercial interest in the featured NFT information as long as the information was "acquired or created by [OpenSea] for a business purpose" and OpenSea "both considered and treated that information in a way that maintained the company's exclusive right to that information." That instruction allowed the jury to return a guilty verdict for wire fraud based on the misappropriation of the company's "exclusive right" to use information that had no economic implications for the company. . . .

The district court instructed the jury that it could find Chastain to have committed wire fraud if (1) he "conducted himself in a manner that departed from traditional notions of fundamental honesty and fair play in the general and business life of society," and (2) used information his employer kept confidential even if "the government [did not] prove that the information had [economic] value" to the employer. Given these instructions, the jury could have returned a guilty verdict based on a determination that it was dishonest for Chastain to trade on the featured NFT information even if that information was tangential to OpenSea's business and its misuse could not have affected the company's economic interests.

In other words, the instructions allowed the jury to convict based the government's "view of[ ] integrity" in business conduct rather than the misappropriation of "property rights only." *Ciminelli.*

If the wire fraud statute criminalized conduct that merely departed from traditional notions of fundamental honesty and fair play, "almost any deceptive act could be criminal." *Ciminelli. . . .*

JOSÉ A. CABRANES, Circuit Judge, concurring in part and dissenting in part:

. . . I respectfully depart from the conclusion that the District Court's jury instructions were erroneous. To the contrary, the instructions in question both provided the jury with "the correct legal standard" and "adequately inform[ed] the jury on the law."[2] Accordingly, I would affirm the District Court's judgment of conviction for wire fraud and money laundering.

My colleagues begin by holding that the District Court's instruction on the property element of wire fraud was in error. In the process, they devise a new requirement that must be satisfied before confidential business information can be deemed property under 18 U.S.C. § 1343: a separate showing by the Government that the information possesses commercial value. This novel addition to our law ignores unambiguous and binding Second Circuit and Supreme Court precedents which hold that confidential business information, standing alone and without any separate showing of commercial value, is properly considered property for the purposes of the wire fraud statute.

In *Carpenter v. United States*, the Supreme Court held:

> Petitioners cannot successfully contend based on *Associated Press* that a scheme to defraud requires a monetary loss, such as giving the information to a competitor; *it is sufficient* that the [Wall Street] Journal has been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter.

This holding has dual significance. First, it establishes a sufficient condition—the company's possession of a right to the information's exclusive use—that, if satisfied, qualifies an identifiable item of confidential business information as property under 18 U.S.C. § 1343. Indeed, the Court's holding in *Carpenter* places beyond cavil the basic rule that a company's exclusive right to confidential business information is the be-all and end-all for determining whether that information is property under the federal wire fraud statute. An evaluation of that information's commercial value is beside the point. Relevant to the instant case, the *Carpenter* Court's rule was fully captured in the District Court's entirely proper jury instruction.

Second, *Carpenter* grounds that sufficient condition in a "traditional property interest." It observes that exclusivity is an important aspect of not only "confidential business information," but also "most private property." Accordingly, the sufficient condition recognized in *Carpenter* (1987) satisfies the Supreme Court's more recent holding in

Ciminelli v. United States (2023) that "the wire fraud statute reaches only traditional property interests." The *Ciminelli* Court itself went so far as to cite *Carpenter* to support the proposition that, to constitute property under 18 U.S.C. § 1343, an interest must have "'long been recognized as property' when the wire fraud statute was enacted." Guided by these teachings, I see no basis in the law to conclude that *Carpenter*'s holding is inapplicable in light of *Ciminelli*'s "traditional property interest" language, or to bootstrap a new requirement onto *Carpenter*'s holding that the *Ciminelli* Court itself did not come close to speculating upon when it invoked *Carpenter*. . . .

Nor was there error in the District Court's instruction that the jury could "find the existence of a scheme to defraud if [it] find[s] that the conduct of the defendant was deceptive or if [it] find[s] that the defendant conducted himself in a manner that departed from traditional notions of fundamental honesty and fair play in the general and business life of society." We have consistently defined fraud in substantially similar terms. Moreover, we have recognized that jury instructions are to be "taken as a whole." The challenged instruction came shortly after the District Court's charge that the jury was required to find "that there was a scheme or artifice to defraud OpenSea of its property." We are not here dealing with an instruction classifying "a federal, common-law fiduciary duty." Rather, this instruction concerns the federal statutory crime of misappropriating property. Indeed, the District Court immediately followed up the jury instruction in question by stating: "As is pertinent here, the alleged scheme to defraud is fraudulently embezzling or fraudulently misappropriating property belonging to another." Taken as a whole, this is clearly an appropriate jury instruction that is free of error.

Government functions and powers as the objects of fraud? In *Cleveland v. United States*, 531 U.S. 12 (2000), the defendants deceived the state of Louisiana in applications for licenses to operate video poker machines. The Supreme Court held that such a state license cannot constitute property for purposes of the mail and wire fraud statutes. The Court reasoned that licenses have value to applicants, but they are not property in the hands of the state (the alleged victim in *Cleveland*) because they involve only a power to regulate, not a property-like interest or right. The Court was also concerned about the potential federalism implications of allowing federal prosecutors to use the mail and wire fraud statutes to respond to misconduct in people's dealings with state and local authorities. The next two cases are part of a recent and broader effort by the Court to articulate the limits of federal prosecutors' ability to use the mail and wire fraud statutes to attack corruption within government based on creative theories of what can constitute property.

KELLY v. UNITED STATES, 140 S. Ct. 1565 (2020)

KAGAN, J., delivered the opinion of the Court.

For four days in September 2013, traffic ground to a halt in Fort Lee, New Jersey. The cause was an unannounced realignment of 12 toll lanes leading to the George

Washington Bridge, an entryway into Manhattan administered by the Port Authority of New York and New Jersey. For decades, three of those access lanes had been reserved during morning rush hour for commuters coming from the streets of Fort Lee. But on these four days—with predictable consequences—only a single lane was set aside. The public officials who ordered that change claimed they were reducing the number of dedicated lanes to conduct a traffic study. In fact, they did so for a political reason—to punish the mayor of Fort Lee for refusing to support the New Jersey Governor's reelection bid.

Exposure of their behavior led to the criminal convictions we review here. The Government charged the responsible officials under the federal statutes prohibiting wire fraud and fraud on a federally funded program or entity. *See* 18 U. S. C. §§ 1343, 666(a)(1)(A). Both those laws target fraudulent schemes for obtaining property. *See* § 1343 (barring fraudulent schemes "for obtaining money or property"); § 666(a)(1)(A) (making it a crime to "obtain[] by fraud . . . property"). The jury convicted the defendants, and the lower courts upheld the verdicts.

The question presented is whether the defendants committed property fraud. The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud statutes at issue do not criminalize all such conduct. Under settled precedent, the officials could violate those laws only if an object of their dishonesty was to obtain the Port Authority's money or property. The Government contends it was, because the officials sought both to "commandeer" the Bridge's access lanes and to divert the wage labor of the Port Authority employees used in that effort. We disagree. The realignment of the toll lanes was an exercise of regulatory power—something this Court has already held fails to meet the statutes' property requirement. And the employees' labor was just the incidental cost of that regulation, rather than itself an object of the officials' scheme. We therefore reverse the convictions.

The setting of this case is the George Washington Bridge. Running between Fort Lee and Manhattan, it is the busiest motor-vehicle bridge in the world. Twelve lanes with tollbooths feed onto the Bridge's upper level from the Fort Lee side. Decades ago, the then-Governor of New Jersey committed to a set allocation of those lanes for the morning commute. And (save for the four days soon described) his plan has lasted to this day. Under the arrangement, nine of the lanes carry traffic coming from nearby highways. The three remaining lanes, designated by a long line of traffic cones laid down each morning, serve only cars coming from Fort Lee.

The case's cast of characters are public officials who worked at or with the Port Authority and had political ties to New Jersey's then-Governor Chris Christie. The Port Authority is a bi-state agency that manages bridges, tunnels, airports, and other transportation facilities in New York and New Jersey. At the time relevant here, William Baroni was its Deputy Executive Director, an appointee of Governor Christie and the highest ranking New Jersey official in the agency. Together with the Executive Director (a New York appointee), he oversaw "all aspects of the Port Authority's business,"

including operation of the George Washington Bridge. David Wildstein (who became the Government's star witness) functioned as Baroni's chief of staff. And Bridget Anne Kelly was a Deputy Chief of Staff to Governor Christie with special responsibility for managing his relations with local officials. She often worked hand-in-hand with Baroni and Wildstein to deploy the Port Authority's resources in ways that would encourage mayors and other local figures to support the Governor.

The fateful lane change arose out of one mayor's resistance to such blandishments. In 2013, Governor Christie was up for reelection, and he wanted to notch a large, bipartisan victory as he ramped up for a presidential campaign. On his behalf, Kelly avidly courted Democratic mayors for their endorsements—among them, Mark Sokolich of Fort Lee. As a result, that town received some valuable benefits from the Port Authority, including an expensive shuttle-bus service. But that summer, Mayor Sokolich informed Kelly's office that he would not back the Governor's campaign. A frustrated Kelly reached out to Wildstein for ideas on how to respond. He suggested that getting rid of the dedicated Fort Lee lanes on the Bridge's toll plaza would cause rush-hour traffic to back up onto local streets, leading to gridlock there. Kelly agreed to the idea in an admirably concise e-mail: "Time for some traffic problems in Fort Lee." In a later phone conversation, Kelly confirmed to Wildstein that she wanted to "creat[e] a traffic jam that would punish" Mayor Sokolich and "send him a message." And after Wildstein relayed those communications, Baroni gave the needed sign-off.

To complete the scheme, Wildstein then devised "a cover story"—that the lane change was part of a traffic study, intended to assess whether to retain the dedicated Fort Lee lanes in the future. Wildstein, Baroni, and Kelly all agreed to use that "public policy" justification when speaking with the media, local officials, and the Port Authority's own employees. And to give their story credibility, Wildstein in fact told the Port Authority's engineers to collect "some numbers on how[] far back the traffic was delayed." That inquiry bore little resemblance to the Port Authority's usual traffic studies. According to one engineer's trial testimony, the Port Authority never closes lanes to study traffic patterns, because "computer-generated model[ing]" can itself predict the effect of such actions. And the information that the Port Authority's engineers collected on this singular occasion was mostly "not useful" and "discarded." Nor did Wildstein or Baroni show any interest in the data. They never asked to review what the engineers had found; indeed, they learned of the results only weeks later, after a journalist filed a public-records request. So although the engineers spent valuable time assessing the lane change, their work was to no practical effect.

Baroni, Wildstein, and Kelly also agreed to incur another cost—for extra toll collectors—in pursuit of their object. Wildstein's initial thought was to eliminate all three dedicated lanes by not laying down any traffic cones, thus turning the whole toll plaza into a free-for-all. But the Port Authority's chief engineer told him that without the cones "there would be a substantial risk of sideswipe crashes" involving cars coming into the area from different directions. So Wildstein went back to Baroni and Kelly and got their approval to keep one lane reserved for Fort Lee traffic. That solution, though,

raised another complication. Ordinarily, if a toll collector on a Fort Lee lane has to take a break, he closes his booth, and drivers use one of the other two lanes. Under the one-lane plan, of course, that would be impossible. So the Bridge manager told Wildstein that to make the scheme work, "an extra toll collector" would always have to be "on call" to relieve the regular collector when he went on break. Once again, Wildstein took the news to Baroni and Kelly. Baroni thought it was "funny," remarking that "only at the Port Authority would [you] have to pay a toll collector to just sit there and wait." Still, he and Kelly gave the okay.

The plan was now ready, and on September 9 it went into effect. Without advance notice and on the (traffic-heavy) first day of school, Port Authority employees placed traffic cones two lanes further to the right than usual, restricting cars from Fort Lee to a single lane. Almost immediately, the town's streets came to a standstill. According to the Fort Lee Chief of Police, the traffic rivaled that of 9/11, when the George Washington Bridge had shut down. School buses stood in place for hours. An ambulance struggled to reach the victim of a heart attack; police had trouble responding to a report of a missing child. Mayor Sokolich tried to reach Baroni, leaving a message that the call was about an "urgent matter of public safety." Yet Baroni failed to return that call or any other: He had agreed with Wildstein and Kelly that they should all maintain "radio silence." A text from the Mayor to Baroni about the locked-in school buses—also unanswered—went around the horn to Wildstein and Kelly. The last replied: "Is it wrong that I am smiling?" The three merrily kept the lane realignment in place for another three days. It ended only when the Port Authority's Executive Director found out what had happened and reversed what he called their "abusive decision." (e-mail of Patrick Foye). . . .

The Government in this case needed to prove *property* fraud. The federal wire fraud statute makes it a crime to effect (with use of the wires) "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. Construing that disjunctive language as a unitary whole, this Court has held that "the money-or-property requirement of the latter phrase" also limits the former. *McNally v. United States*. The wire fraud statute thus prohibits only deceptive "schemes to deprive [the victim of] money or property." Similarly, the federal-program fraud statute bars "obtain[ing] by fraud" the "property" (including money) of a federally funded program or entity like the Port Authority. § 666(a)(1)(A). So under either provision, the Government had to show not only that Baroni and Kelly engaged in deception, but that an "object of the[ir] fraud [was] 'property.'" *Cleveland v. United States*.

That requirement, this Court has made clear, prevents these statutes from criminalizing all acts of dishonesty by state and local officials. . . .

According to the Government's theory of the case, Baroni and Kelly "used a lie about a fictional traffic study" to achieve their goal of reallocating the Bridge's toll lanes. The Government accepts that the lie itself—*i.e.*, that the lane change was part of a traffic study, rather than political payback—could not get the prosecution all the way home. As

the Government recognizes, the deceit must also have had the "object" of obtaining the Port Authority's money or property. The scheme met that requirement, the Government argues, in two ways. First, the Government claims that Baroni and Kelly sought to "commandeer[]" part of the Bridge itself—to "take control" of its "physical lanes." Second, the Government asserts that the two defendants aimed to deprive the Port Authority of the costs of compensating the traffic engineers and back-up toll collectors who performed work relating to the lane realignment. On either theory, the Government insists, Baroni's and Kelly's scheme targeted "a 'species of valuable right [or] interest' that constitutes 'property' under the fraud statutes."

We cannot agree. As we explain below, the Government could not have proved—on either of its theories, though for different reasons—that Baroni's and Kelly's scheme was "directed at the [Port Authority's] property." Baroni and Kelly indeed "plotted to reduce [Fort Lee's] lanes." But that realignment was a quintessential exercise of regulatory power. And this Court has already held that a scheme to alter such a regulatory choice is not one to appropriate the government's property. *See Cleveland*. By contrast, a scheme to usurp a public employee's paid time is one to take the government's property. But Baroni's and Kelly's plan never had that as an object. The use of Port Authority employees was incidental to—the mere cost of implementing—the sought-after regulation of the Bridge's toll lanes. . . .

Contrary to the Government's view, the two defendants did not "commandeer" the Bridge's access lanes (supposing that word bears its normal meaning). They (of course) did not walk away with the lanes; nor did they take the lanes from the Government by converting them to a non-public use. Rather, Baroni and Kelly regulated use of the lanes, as officials responsible for roadways so often do—allocating lanes as between different groups of drivers. To borrow *Cleveland*'s words, Baroni and Kelly exercised the regulatory rights of "allocation, exclusion, and control"—deciding that drivers from Fort Lee should get two fewer lanes while drivers from nearby highways should get two more. They did so, according to all the Government's evidence, for bad reasons; and they did so by resorting to lies. But still, *what* they did was alter a regulatory decision about the toll plaza's use—in effect, about which drivers had a "license" to use which lanes. And under *Cleveland*, that run-of-the-mine exercise of regulatory power cannot count as the taking of property.

A government's right to its employees' time and labor, by contrast, can undergird a property fraud prosecution. Suppose that a mayor uses deception to get "on-the-clock city workers" to renovate his daughter's new home. *United States v. Pabey*. Or imagine that a city parks commissioner induces his employees into doing gardening work for political contributors. *See United States v. Delano*. As both defendants agree, the cost of those employees' services would qualify as an economic loss to a city, sufficient to meet the federal fraud statutes' property requirement. No less than if the official took cash out of the city's bank account would he have deprived the city of a "valuable entitlement." *Pasquantino*.

But that property must play more than some bit part in a scheme: It must be an "object of the fraud." Or put differently, a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.[8] In the home-and-garden examples cited above, that constraint raised no problem: The entire point of the fraudsters' plans was to obtain the employees' services. But now consider the difficulty if the prosecution in *Cleveland* had raised a similar employee-labor argument. As the Government noted at oral argument here, the fraud on Louisiana's licensing system doubtless imposed costs calculable in employee time: If nothing else, some state worker had to process each of the fraudster's falsified applications. But still, the Government acknowledged, those costs were "[i]ncidental." The object of the scheme was never to get the employees' labor: It was to get gaming licenses. So the labor costs could not sustain the conviction for property fraud.

This case is no different. The time and labor of Port Authority employees were just the implementation costs of the defendants' scheme to reallocate the Bridge's access lanes. Or said another way, the labor costs were an incidental (even if foreseen) byproduct of Baroni's and Kelly's regulatory object. Neither defendant sought to obtain the services that the employees provided. The back-up toll collectors—whom Baroni joked would just "sit there and wait"—did nothing he or Kelly thought useful. Indeed, those workers came onto the scene only because the Port Authority's chief engineer managed to restore one of Fort Lee's lanes to reduce the risk of traffic accidents. In the defendants' original plan, which scrapped all reserved lanes, there was no reason for extra toll collectors. And similarly, Baroni and Kelly did not hope to obtain the data that the traffic engineers spent their time collecting. By the Government's own account, the traffic study the defendants used for a cover story was a "sham," and they never asked to see its results. Maybe, as the Government contends, all of this work was "needed" to realize the final plan—"to accomplish what [Baroni and Kelly] were trying to do with the [B]ridge." Even if so, it would make no difference. Every regulatory decision (think again of *Cleveland*) requires the use of some employee labor. But that does not mean every scheme to alter a regulation has that labor as its object. Baroni's and Kelly's plan aimed to impede access from Fort Lee to the George Washington Bridge. The cost of the employee hours spent on implementing that plan was its incidental byproduct.

To rule otherwise would undercut this Court's oft-repeated instruction: Federal prosecutors may not use property fraud statutes to "set[] standards of disclosure and good government for local and state officials." *McNally*. Much of governance involves (as it did here) regulatory choice. If U.S. Attorneys could prosecute as property fraud every lie a state or local official tells in making such a decision, the result would be—as

[8] Without that rule, as Judge Easterbrook has elaborated, even a practical joke could be a federal felony. *See United States v. Walters*, 997 F.2d 1219, 1224 (CA7 1993). His example goes: "A [e-mails] B an invitation to a surprise party for their mutual friend C. B drives his car to the place named in the invitation," thus expending the cost of gasoline. *Ibid*. "But there is no party; the address is a vacant lot; B is the butt of a joke." *Ibid*. Wire fraud? No. And for the reason Judge Easterbrook gave: "[T]he victim's loss must be an objective of the [deceitful] scheme rather than a byproduct of it." *Id.* at 1226.

Cleveland recognized—"a sweeping expansion of federal criminal jurisdiction." And if those prosecutors could end-run *Cleveland* just by pointing to the regulation's incidental costs, the same ballooning of federal power would follow. In effect, the Federal Government could use the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking. The property fraud statutes do not countenance that outcome. . . .

CIMINELLI v. UNITED STATES, 143 S. Ct. 1121 (2023)

Justice THOMAS delivered the opinion of the Court.

In this case, we must decide whether the Second Circuit's longstanding "right to control" theory of fraud describes a valid basis for liability under the federal wire fraud statute, which criminalizes the use of interstate wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. Under the right-to-control theory, a defendant is guilty of wire fraud if he schemes to deprive the victim of "potentially valuable economic information" "necessary to make discretionary economic decisions." *United States v. Percoco*. Petitioner Louis Ciminelli was charged with, tried for, and convicted of wire fraud under this theory. And the Second Circuit affirmed his convictions on that same basis.

Because "potentially valuable economic information" "necessary to make discretionary economic decisions" is not a traditional property interest, we now hold that the right-to-control theory is not a valid basis for liability under § 1343. Accordingly, we reverse the Second Circuit's judgment.

This case begins with then-New York Governor Andrew Cuomo's "Buffalo Billion" initiative. On its face, the initiative was administered through Fort Schuyler Management Corporation, a nonprofit affiliated with the State University of New York (SUNY) and the SUNY Research Foundation. It aimed to invest $1 billion in development projects in upstate New York. Later investigations, however, uncovered a wide-ranging scheme that involved several of former Governor Cuomo's associates, most notably Alain Kaloyeros and Todd Howe. Kaloyeros was a member of Fort Schuyler's board of directors and was in charge of developing project proposals for Buffalo Billion; Howe was a lobbyist who had deep ties to the Cuomo administration. Each month, Kaloyeros paid Howe $25,000 in state funds to ensure that the Cuomo administration gave Kaloyeros a prominent position in Buffalo Billion.

Ciminelli had a similar arrangement. His construction company, LPCiminelli, paid Howe $100,000 to $180,000 each year to help it obtain state-funded jobs. In 2013, Howe and Kaloyeros devised a scheme whereby Kaloyeros would tailor Fort Schuyler's bid process to smooth the way for LPCiminelli to receive major Buffalo Billion contracts. First, on Kaloyeros' suggestion, Fort Schuyler established a process for selecting "preferred developers" that would be given the first opportunity to negotiate with Fort Schuyler for specific projects. Then, Kaloyeros, Howe, and Ciminelli jointly developed

a set of requests for proposal (RFPs) that treated unique aspects of LPCiminelli as qualifications for preferred-developer status. Those RFPs effectively guaranteed that LPCiminelli would be (and was) selected as a preferred developer for the Buffalo projects. With that status in hand, LPCiminelli secured the marquee $750 million "Riverbend project" in Buffalo. . . .

Consistent with the right-to-control theory, the District Court instructed the jury that the term "property" in § 1343 "includes intangible interests such as the right to control the use of one's assets." The jury could thus find that the defendants harmed Fort Schuyler's right to control its assets if Fort Schuyler was "deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets." The District Court further defined "economically valuable information" as "information that affects the victim's assessment of the benefits or burdens of a transaction, or relates to the quality of goods or services received or the economic risks of the transaction." The jury found Ciminelli guilty of wire fraud and conspiracy to commit wire fraud and the District Court sentenced him to 28 months' imprisonment followed by 2 years' supervised release. . . .

The wire fraud statute criminalizes "scheme[s] or artifice[s] to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." § 1343. Although the statute is phrased in the disjunctive, we have consistently understood the "money or property" requirement to limit the "scheme or artifice to defraud" element because the "common understanding" of the words "to defraud" when the statute was enacted referred "to wronging one in his property rights." . . . Accordingly, the Government must prove not only that wire fraud defendants "engaged in deception," but also that money or property was "an object of their fraud." *Kelly*. . . .

As developed by the Second Circuit, the theory holds that, "[s]ince a defining feature of most property is the right to control the asset in question," "the property interests protected by the wire fraud statute include the interest of a victim in controlling his or her own assets." *United States v. Lebedev*. Thus, a "cognizable harm occurs where the defendant's scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States v. Binday*.

The right-to-control theory cannot be squared with the text of the federal fraud statutes, which are "limited in scope to the protection of property rights." *McNally*. The so-called "right to control" is not an interest that had "long been recognized as property" when the wire fraud statute was enacted. *Carpenter v. United States*. Significantly, when the Second Circuit first recognized the right-to-control theory in 1991—decades after the wire fraud statute was enacted and over a century after the mail fraud statute was enacted—it could cite no authority that established "potentially valuable economic information" as a traditionally recognized property interest. See *Wallach*. And, the Second Circuit has not since attempted to ground the right-to-control theory in

traditional property notions. We have consistently rejected such federal fraud theories that "stray from traditional concepts of property." *Cleveland*. For its part, the Government—despite relying upon the right-to-control theory for decades, including in this very case—now concedes that if "the right to make informed decisions about the disposition of one's assets, without more, were treated as the sort of 'property' giving rise to wire fraud, it would risk expanding the federal fraud statutes beyond property fraud as defined at common law and as Congress would have understood it." Thus, even the Government now agrees that the Second Circuit's right-to-control theory is unmoored from the federal fraud statutes' text. . . .

Finally, the right-to-control theory vastly expands federal jurisdiction without statutory authorization. Because the theory treats mere information as the protected interest, almost any deceptive act could be criminal. See, *e.g.*, *United States v. Viloski* (affirming right-to-control conviction based on an employee's undisclosed conflict of interest). The theory thus makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat contradiction with our caution that, "[a]bsent [a] clear statement by Congress," courts should "not read the mail [and wire] fraud statute[s] to place under federal superintendence a vast array of conduct traditionally policed by the States." *Cleveland*. And, as it did below, the Second Circuit has employed the theory to affirm federal convictions regulating the ethics (or lack thereof) of state employees and contractors—despite our admonition that "[f]ederal prosecutors may not use property fraud statutes to set standards of disclosure and good government for state and local officials." *Kelly* (alterations omitted). The right-to-control theory thus criminalizes traditionally civil matters and federalizes traditionally state matters.

In sum, the wire fraud statute reaches only traditional property interests. The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. Accordingly, the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes. . . .

The broader question for corporate and white collar from, of course, is how the Court's decisions in public corruption cases such as *Kelly* and *Ciminelli* might affect prosecutions beyond government contexts. The next case provides one example, in a vivid and high-profile series of prosecutions, of how lower courts are reacting to claims that prosecutors' theories of fraud have been curtailed by the Supreme Court's recent decisions.

UNITED STATES v. MCGLASHAN, 78 F.4th 1 (1st Cir. 2023)

HOWARD, Circuit Judge.

In this appeal involving the scope of the federal wire fraud statute, 18 U.S.C. § 1343, defendant-appellant William McGlashan, Jr., argues in part that the indictment against him should have been dismissed for aiming at a property interest that was not the object of his fraud. We, however, conclude that the relevant property alleged in the indictment

was indeed an object of his fraud, and McGlashan's other arguments either are superfluous to our decision or have been waived. We therefore affirm the judgment of the district court. . . .

Along with fourteen other parents, McGlashan was named as a defendant in an indictment that resulted from "Operation Varsity Blues" (the "Operation"), an investigation into alleged fraudulent schemes designed to secure the defendants' children's admission to elite universities throughout the United States. As is most relevant to this appeal, McGlashan's involvement in the scheme charged in this case boils down to paying $50,000 to have an ACT proctor change his son's test answers in order to increase his son's ACT score.

The ACT exam is a "standardized test that is widely used as part of the college admissions process in the United States," and is run by ACT, Inc. ("ACT"), an Iowa-based nonprofit organization. As noted in the indictment, "[m]ost selective colleges and universities in the United States require prospective students to submit standardized test scores . . . as part of their application packages," and these "scores are a material part of the admissions process." The ACT exam is administered by proctors who the indictment alleges "are agents of ACT[, Inc.][,] . . . [who] owe a duty of honest services to th[at] organization[ ]." Before administering the exam, the proctors "must typically certify" that they will abide by the ACT Administration Manual and "ensure that 'the test materials are kept secure and confidential, used [by each] examinee only, and returned to ACT immediately after testing.'" The exam is "typically administered to large groups of students on specified dates and under strict time limits," but "students with certain learning or other disabilities may qualify for testing accommodations, . . . and, in such circumstances, may take the test alone, under the supervision of a test administrator retained by ACT, Inc. . . ."

The indictment alleges that McGlashan agreed in fall 2017 to direct $50,000 to a nonprofit corporation founded by William "Rick" Singer—the principal organizer of the schemes implicated in the Operation—as a "purported donation" in exchange for Singer arranging for a test proctor who would correct his son's exam answers. Singer instructed McGlashan to send a "Request for Arranged Testing" form to ACT, so that McGlashan's son would take the exam at a school in West Hollywood, California, rather than at his own high school. Having McGlashan's son take the ACT exam at the West Hollywood school was crucial to the plan, since it is alleged that Singer "bribed" Igor Dvorskiy—the director of the school and "a compensated standardized test administrator for ACT, Inc."—to allow a proctor to correct McGlashan's son's test answers. Singer did so by "caus[ing]" the same nonprofit to which McGlashan had directed the $50,000 to pay both Dvorskiy and the proctor for their role in "facilitating [the] cheating."

All went to plan, at least initially. McGlashan's son took the ACT exam at the West Hollywood school on December 9, 2017, and the test proctor duly corrected his answers thereafter. Dvorskiy sent the exam materials to ACT's Iowa headquarters several days later via Federal Express. Singer then paid Dvorskiy $40,000 and the proctor $35,000

through the above-mentioned nonprofit later that month for their respective services "for McGlashan's son and other students." After his son's ACT score was released in early January, McGlashan texted Singer that "[y]ou have a very relieved and motivated young man! Very grateful." The score was ultimately sent to several colleges—including Northeastern University, located in Massachusetts—on October 24, 2018. . . .

McGlashan contends that the indictment did not adequately allege a scheme to defraud ACT of its standardized tests. Relying on *Kelly*, he submits that the exam was a "mere implementation cost" of his scheme, and not an "object of the fraud." . . .

McGlashan urges us to find that obtaining the ACT score was the sole object of his scheme, to the exclusion of the ACT exam itself. He points to the indictment's allegation that one of the "principal purposes" of the scheme was "securing the admission of the defendants' children to selective colleges using fraudulently obtained test scores" to support his claim. In his view, much like the extra toll collectors and engineers' time and labor in Kelly, gaining access to the ACT test was "'needed' to realize the final plan" but ultimately a mere "implementation cost[ ]" of the scheme. He posits that he "was indifferent to obtaining the ACT exam as such," and points out that his son could have simply accessed the test at his high school.

We find McGlashan's arguments unpersuasive, and agree with the government that they "suffer[ ] from two fundamental flaws." First, as the Second Circuit has concluded, "[d]efendants may have . . . multiple objectives, but property need only be 'an object' of their scheme, not the sole or primary goal." *United States v. Gatto* (quoting *Kelly*). Second, and perhaps more importantly, McGlashan's arguments also inappropriately downplay the *Kelly* Court's emphasis on what the defendant "sought" in differentiating objects of the fraud from "incidental byproduct[s]" or mere "implementation costs[.]"

Mindful of these precepts, and employing the same holistic analysis that the Supreme Court used in *Kelly* (as McGlashan concedes) to parse the objects of his scheme, we are left with little doubt that the indictment adequately alleges that the ACT test was an object of the fraud. The indictment provides ample evidence to support the proposition that McGlashan actively sought to obtain the ACT test in the way Singer had devised, and not just the scores. To that end, the $50,000 that he spent for the scheme covered not only the cost of increasing the test score, but—just as crucially—the cost of ensuring that the right proctor (namely, one who would be willing to facilitate the cheating) would both administer and then access the exam materials themselves. It was that need that underpinned the payment to Singer—indeed, the indictment points to the fact that the invoice that Singer's accountant emailed McGlashan for the $50,000 explicitly said it was "[r]egarding [the West Hollywood Testing Center][.]" Had the "entire point" of the scheme been merely to increase his son's test scores, McGlashan could have, for example, simply paid Singer to forge a score report or even hack the ACT website to change the report. Such a plan might not have even required McGlashan's son to take the exam.

But McGlashan's plan proved much more intricate than merely tampering with the scores. Rather, the "entire point" of the plan—the "alternative strategy," as the indictment notes McGlashan told "a counselor at his son's high school"—was to pay for a proctor to access the exam materials in order to change McGlashan's son's test answers, which in turn would increase his son's test score. This scenario is easily distinguishable from the traffic study in Kelly, which the Court explicitly noted was "a cover story" meant to provide a pretext for the political retribution behind the lane closures, or the extra toll collectors, who one of the defendants "joked would just 'sit there and wait.'" Here, by contrast, obtaining the ACT exam in the manner Singer had devised was not pretextual, but rather was a core service for which McGlashan paid tens of thousands of dollars. McGlashan was thus far from indifferent toward obtaining the test itself; as alleged in the indictment, doing so was not "some bit part in [the] scheme" at which he did not aim. . . .

Here is another colorful case involving fraud in the higher education industry that deals with theories of what can count as property for purposes of the mail and wire fraud statutes.

UNITED STATES v. PORAT, 76 F.4th 213 (3d Cir. 2023)

CHUNG, Circuit Judge.

Moshe Porat, the former Dean of the Fox School of Business at Temple University ("Fox"), appeals his convictions for conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371, and wire fraud, in violation of 18 U.S.C. § 1343. . . .

Porat was convicted for his scheme to raise Fox's "rankings" in U.S. News and World Report ("U.S. News"), a publication that rates colleges and graduate schools, including business schools. The government offered evidence that, while some have criticized these rankings as poor measures of a school's quality, many people rely on them to compare business schools. These include applicants, students, alumni, donors, employers, faculty, and the schools themselves.

Porat was Fox's Dean from 1996 to 2018. During his time at Fox, he was "almost obsessed with rankings." Sometime in the early 2000s, Porat created a committee that met regularly to consider the data that Fox would provide for use by U.S. News in formulating rankings. It also studied the rankings and strategized ways by which Fox could improve its rankings. Over time, Porat came to work most closely on rankings with two Fox employees, Isaac Gottlieb and Marjorie O'Neill. Porat eventually eliminated the committee and consolidated responsibility for Fox's survey submissions in O'Neill, who reported directly to him. After that, Porat continued to confer with both Gottlieb and O'Neill on rankings strategy.

At some point, Porat's efforts to raise Fox's rankings crossed the line from strategy to falsification. Evidence at trial showed that Fox may have submitted false data to rankings

publications as early as 2010. By 2014, having reverse-engineered the methodology behind the U.S. News rankings, Porat, Gottlieb, and O'Neill used falsifications to manipulate Fox's rankings—in particular, the rankings for its Online MBA ("OMBA") and Part-Time MBA ("PMBA") programs. To better Fox's OMBA ranking, they falsely stated that 100 percent of Fox's OMBA students had taken the Graduate Management Admission Test ("GMAT"), when the actual number was much lower. They also misreported data on offers of admission, student debt, and average undergraduate grade point average. To better Fox's PMBA ranking, they combined data for Fox's PMBA program with data for its OMBA and Executive MBA ("EMBA") programs to overstate the PMBA students' average work experience and the percentage of Fox's MBA students who were PMBA students. As with the OMBA program, they also falsely reported that 100 percent of Fox's PMBA students had taken the GMAT.

Partly because of these deceptions, Fox's OMBA program rose from its U.S. News rank of Number Nine in 2014 to Number One in 2015—a position that it held for four straight years. Fox's PMBA ranking climbed steadily over three years from Number Fifty-Three in 2014 to Number Seven in 2017.

Porat viewed Fox's high rankings as a key way to market Fox to students and to thus generate more tuition money. One Fox administrator testified that Porat believed Fox needed "good rankings and to publicize good rankings for enrollment." In a book manuscript, Porat boasted about Fox's OMBA ranking as Number One and wrote that "enhancing the school's image" is "the single most important factor in assuring continuous demand from the students, the parents, and employees." And with Porat's knowledge and involvement, Fox aggressively marketed its false high rankings. Fox advertised its deceptively obtained rankings on its website, on social media, and on billboards and signs. Porat also sent or approved emails touting Fox's false rankings to students, student recruiters, and donors. Porat also represented to students that Fox's high rankings would bring them continuing—and even increasing—benefits. In a 2017 speech, Porat told graduating Fox students, "I often say that your diploma is like a share of stock in an enterprise . . . in which you remain shareholder long after you have graduated." He further said that "many leading publications"—including "U.S. News"—"rank our programs among the best in the world and they agree that our stock indeed has been appreciating in value." During a 2017 "champagne toast" held to celebrate the rankings, Porat posed for a photo with students in front of a banner that read "YOUR STOCK IS SOARING." Fox printed the banner and arranged the photo to use it for "PR."

The advertising worked. At trial, former students testified that they chose Fox because of its rankings. One former student testified that he "decid[ed] to go with Temple University because of [its] Number 1 ranking." He further explained that he chose Fox because he knew that "people look at [rankings]," and that "once [he] graduat[ed]," he wanted to have "been a part of" a program that "was ranked Number 1." After learning that Fox's rankings were inflated, he regretted not choosing a school that would have given him the "same piece of paper" at a much lower cost. Another former student

testified that he believed employers hire students from schools with the best "brand" and that Fox's highly ranked brand would help him "compete in the marketplace." Ultimately, Fox's Number One ranking "was the only factor in [his] decision making" in choosing Fox over another school. Enrollment numbers corroborate that Fox's falsely inflated ranking influenced students' enrollment decisions. Between the 2014–2015 and 2017–2018 academic years, enrollment in Fox's OMBA and PMBA programs spiked from 133 students to 336 students and 88 students to 194 students, respectively. The increased enrollment was tremendously lucrative. The government estimated that Fox gained nearly $40 million in tuition from the additional students who enrolled during this period (2014–2018).

As the money poured in, Porat's team discussed how to keep the rankings high and make even more money. In a January 2015 email to Porat, Gottlieb emphasized Fox's need to maintain its high rankings, cautioning that just as "being number one can potentially add over 1–200 students a year" and bring corresponding "financial value" to Fox, so could "moving down" in the rankings "result in financial losses associated with a reduction of the 100+ students." Porat responded, "Good stuff." In September 2015, Gottlieb copied Porat on an email about rankings for another Fox program, its Global MBA ("GMBA"). Gottlieb noted that Fox's "OMBA and PMBA doubled in intake numbers when we had a striking increase in ranking," and estimated that increasing Fox's GMBA ranking would produce "a profit of over $700,000 a year."

Then, in early 2018, Porat's scheme was exposed. On January 9, 2018, an article discussing Fox's repeated Number One ranking highlighted Fox's self-reported 100-percent GMAT figure. That figure raised an "enormous red flag" among other Fox administrators who knew that it was false. Nonetheless, and despite warnings from administrators that they should not proceed, Porat pushed ahead with a celebratory toast, saying "we're going." At the toast, Porat lauded Fox's OMBA ranking. The next day, Fox administrators decided to disclose the false GMAT data to U.S. News. Yet even then, Porat continued to publicize the rankings. On January 22, 2018, he sent an email to his "Porat 100," a VIP list that included Fox donors and potential donors, with the subject line "#1 Online MBA and #2 Online BBA in the nation AGAIN!" Two days later, on January 24, 2018, U.S. News announced that Fox's "misreported data resulted in the school's numerical rank being higher than it otherwise would have been," and that "[b]ecause of the discrepancies," it would move Fox's OMBA program to the "Unranked" category. Fox then withdrew its other programs, including its PMBA program, from consideration in U.S. News' rankings for that year.

The exposure was a disaster for Fox's rankings. When U.S. News resumed ranking Fox, it placed both Fox's OMBA and PMBA programs in forty-first place. And as Fox's rankings fell, its enrollment did as well. Fox's OMBA enrollment plummeted from its high of 336 students in the 2017–2018 academic year to 144 in 2018–2019, and 106 the year after. Fox's PMBA enrollment dropped in each of the three years after the deception came to light, from its high of 194 students to 145, 117, and 89. . . .

Porat argues that he did not deprive his victims of money, and makes two arguments in support. First, Porat argues that students were deprived only of rankings, and "rankings are not property." But Porat was not convicted on the theory that he deprived students of rankings; he was convicted for depriving them of tuition money. The Indictment charged that Porat used deception to "attract[ ] more students to apply to Fox, matriculate at Fox, and pay tuition to Fox." The District Court instructed the jury that to convict Porat, it must find that he engaged in a scheme to defraud Fox "applicants, students, or donors of money," and Porat did not object to the basic contours of this instruction. By convicting Porat, the jury necessarily found that he sought to defraud his victims of money. The jury's finding was reasonable, given evidence that Porat employed a scheme to "add . . . students" and thereby, their tuition, producing "financial value" through materially false representations of Fox's rankings. Thus, despite Porat's attempt to redirect focus to the rankings, money was an object of his scheme.

Second, Porat argues that even if he did aim to take money from his victims, he still did not deprive them of money or property, because they received the "essential benefit of the bargain," an education. Porat further argues that the rankings, as intangible considerations, cannot legally be an essential part of the bargain because there is no "independent property interest in the U.S. News rankings." Relying on cases from other circuits, Porat contends that there was no fraud here because the victims received a Fox education, which was the "full benefit of their bargain" or "exactly what they paid for." *Id*. (first quoting *United States v. Binday*, abrogated by *Ciminelli*; and then quoting *United States v. Takhalov*). But the cases Porat relies upon do not stand for the proposition that the value of a bargain cannot include intangible considerations; rather, they suggest that a victim is only "deprived" of property when the false representation affects the very nature or value of the bargain. See, e.g., *United States v. Guertin* (fraud occurs when "defendant lies about the nature of the bargain itself" (quoting *Takhalov*); *Binday* ("[W]e have upheld convictions for mail and wire fraud where the deceit affected the victim's economic calculus or the benefits and burdens of the agreement.").

Moreover . . . the evidence at trial reflected that the nature of the bargain between Fox and the students included not only the actual education afforded them, but also the current value of a highly ranked program, and even the future value of Fox's MBA degrees. To be sure, it is commonly understood and fully expected that a school's ranking, and the current and future value of a particular school's degree, may fluctuate over time in the normal course, e.g., with changes in a school's administration, faculty, and student body, as well as changes in the overall marketplace. But it is not commonly understood or expected that a ranking will soar or plummet as a result of deceit or misrepresentation. While Porat asserts that the bargain only encompassed an exchange of tuition for education, the jury was free to come to a different conclusion, especially in light of the fact that Porat neither requested a jury instruction on this theory, nor argued it to the jury. In addition, and as set forth above, the evidence indicated that Fox's falsely inflated rankings impacted students' valuation of the bargain, impacting their assessment of a Fox education's worth and their assessment of the future yield of a Fox MBA, and causing many more students to enroll at Fox. Accordingly, we conclude that a rational

jury could find beyond a reasonable doubt that the students did not receive the full benefit of their bargain, and—in the language from the cases Porat cites—that Porat's false ranking representations affected their "economic calculus," and that he "lie[d] about the nature of the bargain itself." . . .

Problem 2-4

(a) Having read the materials in the preceding section, how would you articulate what prosecutors must prove about the "object" of a defendant's deceptive scheme in order to succeed under the mail and wire fraud statutes?

(b) If you were a justice of the Supreme Court reviewing the circuit court decisions in *McGlashan* and *Porat*, with the idea of voting to reverse both rulings, what might be your arguments that each case was wrongly decided?

E. Mail and Wire Fraud: Honest Services Fraud

What if the "corpus" of the fraud is not property or even property rights or control, but something even less tangible like legal rights? This problem tends to arise in triangular relationships. In a basic fraud, A deceives B to get B to give A something of value. We might call that a two-party or linear fraud. But sometimes, A will deceive B to get C to give A something of value (and C may well be in on the plan with A). B has not given A anything of value, but B has still been cheated by A. We might call this a triangular fraud.

For example, suppose Anna is Burt's and Cathy's teacher. Cathy pays Anna to give Burt a lower grade so that Cathy's grade will end up being the highest in the class. Anna and Cathy conceal this from Burt so that Burt will have no basis to seek recourse or to have Anna sanctioned by the school.

If criminal fraud always required a scheme to deprive of tangible property, there would be no way to hold Anna liable for defrauding (essentially, cheating) Burt because Anna did not deprive Burt of any property: Anna and Cathy have schemed to deprive Burt of Burt's right to Anna's honest grading as Burt's teacher. (Unless we try to construct a strained theory about Burt having a property right in fair grading in exchange for having paid tuition to the school, but that could be difficult for a prosecutor to sell, especially given the recent Supreme Court's recent rulings in the preceding section.)

There are many examples like this: a disloyal and conflicted lawyer harming one client's interests for the benefit of another client; an elected official favoring one bidder over another in the awarding of a contract; a corporate officer steering the company to certain deals that benefit insiders, violating duties of loyalty to the company's shareholders; and so on.

Starting in the 1950s, the federal courts developed a theory to cover these "triangle" cases, holding in a series of rulings that the mail and wire fraud statutes covered not just

schemes to defraud individuals of property but also schemes to defraud others of "the right to the honest services [of people they have hired, voted for, etc.]." In the example above, teacher Anna has deprived student Burt of his right to the honest services of teacher Anna—a right that comes, arguably, along with the nature of the contractual relationships among the school, the teachers, and the students.

In *McNally v. United States*, 483 U.S. 350 (1987), the Supreme Court held that the text of the mail and wire fraud statutes (which you read at the outset of this chapter) covered no such thing. The very next year, Congress said, "Yes it did" (or, at least, "now it does") by enacting the following statute:

> **18 U.S.C. § 1346. Definition of "scheme or artifice to defraud"**
>
> 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.

Congress's new statute—as clear an example as you will see of a statute designed to reinstitute overruled case law—left unaddressed the difficulties with the "honest services" theory of mail and wire fraud. Even as the courts had been constructing that theory under the statutes, they (or some judges at least) were raising worries about the vagueness and potential overbreadth of the theory of defrauding a person of an "intangible right."

In the case below, the Supreme Court finally addressed those worries, by narrowing the scope of Congress's anti-*McNally* statute. (The defendant Jeffrey Skilling, former CEO of Enron—who will be discussed in Chapter 3—won here but lost on remand because there was plenty of evidence against him of securities fraud too, so the problem with the mail and wire fraud theory in his case didn't turn out to matter to his conviction and sentence.)

To recap, the sequence goes like this: (1) Congress enacts the mail and wire fraud statutes; (2) the federal courts, over decades, interpret them as covering the honest services theory of fraud; (3) the Supreme Court holds in *McNally* that the statutes don't cover that theory; (4) Congress enacts 18 U.S.C. § 1346, which states that deprivations of honest services are included within mail and wire fraud; (5) the Supreme Court, in the *Skilling* decision below, narrows the meaning of honest services fraud in order, it says, to save 18 U.S.C. § 1346 from constitutional difficulty.

SKILLING v. UNITED STATES, 561 U.S. 358 (2010)

Justice GINSBURG delivered the opinion of the Court.

In 2001, Enron Corporation, then the seventh highest-revenue-grossing company in America, crashed into bankruptcy. We consider in this opinion . . . questions arising from the prosecution of Jeffrey Skilling, a longtime Enron executive, for crimes committed before the corporation's collapse.

Founded in 1985, Enron Corporation grew from its headquarters in Houston, Texas, into one of the world's leading energy companies. Skilling launched his career there in 1990 when Kenneth Lay, the company's founder, hired him to head an Enron subsidiary. Skilling steadily rose through the corporation's ranks, serving as president and chief operating officer, and then, beginning in February 2001, as chief executive officer. Six months later, on August 14, 2001, Skilling resigned from Enron.

Less than four months after Skilling's departure, Enron spiraled into bankruptcy. The company's stock, which had traded at $90 per share in August 2000, plummeted to pennies per share in late 2001. Attempting to comprehend what caused the corporation's collapse, the U.S. Department of Justice formed an Enron Task Force, comprising prosecutors and FBI agents from around the Nation. The Government's investigation uncovered an elaborate conspiracy to prop up Enron's short-run stock prices by overstating the company's financial well-being. In the years following Enron's bankruptcy, the Government prosecuted dozens of Enron employees who participated in the scheme. In time, the Government worked its way up the corporation's chain of command: On July 7, 2004, a grand jury indicted Skilling, Lay, and Richard Causey, Enron's former chief accounting officer.

These three defendants, the indictment alleged,

> "engaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, . . . about the true performance of Enron's businesses by: (a) manipulating Enron's publicly reported financial results; and (b) making public statements and representations about Enron's financial performance and results that were false and misleading."

Skilling and his co-conspirators, the indictment continued, "enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige."

Count 1 of the indictment charged Skilling with conspiracy to commit securities and wire fraud; in particular, it alleged that Skilling had sought to "depriv[e] Enron and its shareholders of the intangible right of [his] honest services." The indictment further charged Skilling with more than 25 substantive counts of securities fraud, wire fraud, making false representations to Enron's auditors, and insider trading. . . .

We . . . consider whether Skilling's conspiracy conviction was premised on an improper theory of honest-services wire fraud. The honest-services statute, § 1346, Skilling maintains, is unconstitutionally vague. Alternatively, he contends that his conduct does not fall within the statute's compass.

To place Skilling's constitutional challenge in context, we first review the origin and subsequent application of the honest-services doctrine.

Enacted in 1872, the original mail-fraud provision, the predecessor of the modern-day mail- and wire-fraud laws, proscribed, without further elaboration, use of the mails to advance "any scheme or artifice to defraud." *See McNally v. United States*. In 1909, Congress amended the statute to prohibit, as it does today, "any scheme or artifice to defraud, *or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises*." § 1341. Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term "scheme or artifice to defraud" to include deprivations not only of money or property, but also of intangible rights.

In an opinion credited with first presenting the intangible-rights theory, *Shushan v. United States*, the Fifth Circuit reviewed the mail-fraud prosecution of a public official who allegedly accepted bribes from entrepreneurs in exchange for urging city action beneficial to the bribe payers. "It is not true that because the [city] was to make and did make a saving by the operations there could not have been an intent to defraud," the Court of Appeals maintained. "A scheme to get a public contract on more favorable terms than would likely be got otherwise by bribing a public official," the court observed, "would not only be a plan to commit the crime of bribery, but would also be a scheme to defraud the public."

The Fifth Circuit's opinion in *Shushan* stimulated the development of an "honest-services" doctrine. Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss. Even if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services."

"Most often these cases . . . involved bribery of public officials," *United States v. Bohonus*, but courts also recognized private-sector honest-services fraud. In perhaps the earliest application of the theory to private actors, a District Court, reviewing a bribery scheme, explained:

> "When one tampers with [the employer-employee] relationship for the purpose of causing the employee to breach his duty [to his employer,] 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 interests." *United States v. Procter & Gamble Co*.

Over time, "[a]n increasing number of courts" recognized that "a recreant employee"—public or private—"c[ould] be prosecuted under [the mail-fraud statute] if he breache[d]

his allegiance to his employer by accepting bribes or kickbacks in the course of his employment," *United States v. McNeive*; by 1982, all Courts of Appeals had embraced the honest-services theory of fraud.

In 1987, this Court, in *McNally v. United States*, stopped the development of the intangible-rights doctrine in its tracks. *McNally* involved a state officer who, in selecting Kentucky's insurance agent, arranged to procure a share of the agent's commissions via kickbacks paid to companies the official partially controlled. The prosecutor did not charge that, "in the absence of the alleged scheme[,] the Commonwealth would have paid a lower premium or secured better insurance." Instead, the prosecutor maintained that the kickback scheme "defraud [ed] the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly."

We held that the scheme did not qualify as mail fraud. "Rather than constru[ing] the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," we read the statute "as limited in scope to the protection of property rights." "If Congress desires to go further," we stated, "it must speak more clearly."

Congress responded swiftly. The following year, it enacted a new statute "specifically to cover one of the 'intangible rights' that lower courts had protected . . . prior to *McNally:* 'the intangible right of honest services.'" *Cleveland v. United States*. In full, the honest-services statute stated:

> "For the purposes of th[e] chapter [of the United States Code that prohibits, *inter alia*, mail fraud, § 1341, and wire fraud, § 1343], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." § 1346.

Congress, Skilling charges, reacted quickly but not clearly: He asserts that § 1346 is unconstitutionally vague.

According to Skilling, § 1346 meets neither of the two due process essentials. First, the phrase "the intangible right of honest services," he contends, does not adequately define what behavior it bars. Second, he alleges, § 1346's "standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections," thereby "facilitat[ing] opportunistic and arbitrary prosecutions.". . .

In urging invalidation of § 1346, Skilling swims against our case law's current, which requires us, if we can, to construe, not condemn, Congress' enactments.

We agree that § 1346 should be construed rather than invalidated. First, we look to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase "the intangible right of honest services." Second, to preserve what Congress certainly intended the statute to cover, we pare that body of precedent down to its core: In the main, the pre-*McNally* cases involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been

deceived. Confined to these paramount applications, § 1346 presents no vagueness problem.

There is no doubt that Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Court of Appeals' decisions before *McNally* derailed the intangible-rights theory of fraud. . . .

> "The definite article 'the' suggests that 'intangible right of honest services' had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing mail- and wire-fraud schemes to deprive others of *that* 'intangible right of honest services,' which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be. . . ." *United States v. Rybicki*.

In parsing the Courts of Appeals decisions, we acknowledge that Skilling's vagueness challenge has force, for honest-services decisions preceding *McNally* were not models of clarity or consistency. While the honest-services cases preceding *McNally* dominantly and consistently applied the fraud statute to bribery and kickback schemes—schemes that were the basis of most honest-services prosecutions—there was considerable disarray over the statute's application to conduct outside that core category. In light of this disarray, Skilling urges us, as he urged the Fifth Circuit, to invalidate the statute *in toto*. . . .

It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction. . . .

Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine's solid core: The "vast majority" of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes. . . . Indeed, the *McNally* case itself, which spurred Congress to enact § 1346, presented a paradigmatic kickback fact pattern. . . .

In view of this history, there is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks. Reading the statute to proscribe a wider range of offensive conduct, we acknowledge, would raise the due process concerns underlying the vagueness doctrine. To preserve the statute without transgressing constitutional limitations, we now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.

The Government urges us to go further by locating within § 1346's compass another category of proscribed conduct: "undisclosed self-dealing by a public official or private employee—*i.e.,* the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." "[T]he theory of liability in *McNally* itself was nondisclosure

of a conflicting financial interest," the Government observes, and "Congress clearly intended to revive th[at] nondisclosure theory." Moreover, "[a]lthough not as numerous as the bribery and kickback cases," the Government asserts, "the pre-*McNally* cases involving undisclosed self-dealing were abundant. . . ."

Although the Courts of Appeals upheld honest-services convictions for "some schemes of non-disclosure and concealment of material information," *Mandel*, they reached no consensus on which schemes qualified. In light of the relative infrequency of conflict-of-interest prosecutions in comparison to bribery and kickback charges, and the intercircuit inconsistencies they produced, we conclude that a reasonable limiting construction of § 1346 must exclude this amorphous category of cases. . . .

In sum, our construction of § 1346 "establish[es] a uniform national standard, define[s] honest services with clarity, reach[es] only seriously culpable conduct, and accomplish[es] Congress's goal of 'overruling' *McNally*." "If Congress desires to go further," we reiterate, "it must speak more clearly than it has. . . ."

It remains to determine whether Skilling's conduct violated § 1346. Skilling's honest-services prosecution, the Government concedes, was not "prototypical." The Government charged Skilling with conspiring to defraud Enron's shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price. It was the Government's theory at trial that Skilling "profited from the fraudulent scheme . . . through the receipt of salary and bonuses, . . . and through the sale of approximately $200 million in Enron stock, which netted him $89 million."

The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party in exchange for making these misrepresentations. . . . It is therefore clear that, as we read § 1346, Skilling did not commit honest-services fraud. . . .

Justice SCALIA, with whom Justice THOMAS joins, and with whom Justice KENNEDY joins except as to Part III, concurring in part and concurring in the judgment.

In my view, the specification in 18 U.S.C. § 1346 that "scheme or artifice to defraud" in the mail-fraud and wire-fraud statutes includes "a scheme or artifice to deprive another of the intangible right of honest services," is vague, and therefore violates the Due Process Clause of the Fifth Amendment. The Court strikes a pose of judicial humility in proclaiming that our task is "not to destroy the Act . . . but to construe it." But in transforming the prohibition of "honest-services fraud" into a prohibition of "bribery and kick-backs" it is wielding a power we long ago abjured: the power to define new federal crime. . . .

I agree that Congress used the novel phrase to adopt the lower-court case law that had been disapproved by *McNally*—what the Court calls "the pre-*McNally* honest-services doctrine." The problem is that that doctrine provides no "ascertainable standard of guilt," and certainly is not limited to "bribes or kickbacks . . . ."

The *Skilling* decision left work for the courts. In the bigger picture, the question is the extent to which prosecutors will be able to refashion what used to be honest services fraud cases as property fraud cases, using creative theories about property, as attempted in *Kelly*. Meanwhile, in honest services fraud prosecutions, several questions persist:

(1) what is a bribe for purposes of section 1346?

(2) what is a kickback for purposes of section 1346?

(3) given that a fiduciary relationship is required, what kind(s) of relationships qualify?

The following cases indicate how this unfolding story is developing in the federal courts of appeals. Note that it has always been the case that the honest services theory covers both "public" (political corruption) and "private" (business) cases. *Skilling* affects both kinds of cases. But the decision undoubtedly cut back more on what prosecutors can do with the statute in the private context—or at least it will force them back to the drawing board for new theories to cover corporate frauds with the mail and wire fraud statutes.

It is predictable that circuit splits will develop on these and other issues. The following cases are a sample, not a survey. In an introduction to the field, you should expect to understand the current issues under the statute, not know what each of the circuits has said about them. The latter is a matter for legal research.

The first case nicely combines analysis of both whether a "property fraud" theory works and whether, alternatively, an "honest service fraud" theory works. It arose, again in the context of the "Varsity Blues" scandal.

1. "Bribe"

UNITED STATES v. ABDELAZIZ, 68 F.4th 1 (1st Cir. 2023)

LYNCH, Circuit Judge.

The convictions underlying this appeal arise from a government criminal prosecution of alleged misconduct related to college admissions. The government alleged that Rick Singer—a college admissions consultant—and his clients engaged in various forms of bribery and fraud to help secure those clients' children's admission to competitive universities. Singer, who pleaded guilty in a separate case to multiple charges and cooperated with the government's investigation, is not a defendant here, and his culpability is well established.

The defendants-appellants in this case are two parents, Gamal Abdelaziz and John Wilson, who hired Singer. Both men agreed with Singer to make payments purportedly to university accounts in exchange for university employees' securing their children's admission as athletic recruits—a path to admission Singer referred to as the "side door." Their defense at trial and on appeal is that they believed Singer's services and the side door to be legitimate and that they acted in good faith.

The government . . . alleged that Abdelaziz and Wilson conspired with other parents to commit two types of mail and wire fraud: honest services fraud, by using their payments to deprive the universities of the honest services of their employees, and property fraud, by depriving the universities of property in the form of "admissions slots." . . .

[Abdelaziz and Wilson] contend that payments to university accounts cannot . . . constitute honest services fraud because the payments were intended for accounts owned by the universities—the alleged victims of the scheme. They argue that the property fraud theory is invalid because admissions slots are not property, or, in the alternative, that their convictions must be vacated because the district court erred by instructing the jury that admissions slots are property as a matter of law. . . .

We . . . hold that the government's honest services theory is invalid as a matter of law under the Supreme Court's decision in *Skilling v. United States*, and that, on the arguments offered by the government, the district court erred in instructing the jury that admissions slots constitute property. Accordingly, we vacate the defendants' mail and wire fraud convictions. . . .

It is undisputed that Abdelaziz agreed with Singer in approximately June 2017 to pursue side-door admission to USC for his daughter. Abdelaziz maintains that he believed this option to be at least tacitly approved by the school and to entail "preferential admissions treatment to students like [Abdelaziz's daughter] who could assist athletic teams as practice players or team managers and whose parents donated to the athletic department." At the time, Abdelaziz's daughter had not played competitive basketball in over a year; she had played for her school's junior varsity team until January or February 2016 but had stopped playing after failing to make the varsity team. A USC admissions officer testified that Abdelaziz's daughter was also not an academically competitive applicant outside the athletic recruitment process.

On July 16, 2017, Singer sent Abdelaziz an email with the subject line "For Me to complete USC athletic profile" that requested information about Abdelaziz's daughter's scholastic and athletic accomplishments, including "If they play the sport-Basketball," "Accolades if they have them," and "Action Picture." Abdelaziz forwarded the email to his wife, but the record does not otherwise show any response. Eleven days later, Singer emailed Abdelaziz again to request "an action photo or two of [Abdelaziz's daughter] playing basketball." Abdelaziz responded: "Got it." He then sent Singer five photos of high school girls' basketball games, four of which—as Abdelaziz represents in his brief and the government does not dispute—contained his daughter, and one of which did not. The file names for the photos used generic letters and numbers (for example, "DSC_0007.JPG") and differed only in the numbers. Singer responded: "We will use this one." His email identified the chosen photo—the one that did not contain Abdelaziz's daughter—only by the file name.

Singer instructed one of his associates to prepare the profile. The associate did so; the result included the photo Singer had selected and various basketball statistics and accolades that the associate invented and that Abdelaziz's daughter had not earned.

Singer sent this profile to Abdelaziz in early August, together with a message from his associate: "Let me know if you want me to add any other awards to her profile or if you think that is enough." . . .

Singer then sent the profile to an administrator in the USC Athletics Department who had agreed with Singer to facilitate Abdelaziz's daughter's side-door admission. That administrator added additional falsehoods to the profile—including a photo of a different girl. This version of the profile became the basis for the profile presented to "Subco," a subcommittee of USC admissions officers responsible for overseeing admission of athletic recruits. Based on this profile, Subco considered and approved Abdelaziz's daughter's admission on October 5, 2017.

On October 10, the same athletics administrator who revised Abdelaziz's daughter's profile sent Singer a letter from the Dean of Admissions conditionally admitting Abdelaziz's daughter as a recruited athlete, pending her submission of a full application packet and other administrative tasks. Singer emailed this letter to Abdelaziz the same day.

In early November, Abdelaziz forwarded the letter to a Singer employee, together with an email that stated: "[Singer] asked that we work with you to complete USC's application . . . " Abdelaziz later exchanged emails with this employee, Singer, and another Singer associate about his daughter's application. In these emails, Singer noted that it was important for the application to discuss "basketball as a passion [sic]." Abdelaziz later "reminde[d]" the others of this "direction" when it came time to edit his daughter's application essays.

In early January 2018, Abdelaziz's daughter sent Abdelaziz and the Singer employee an application essay in which she described "[t]he basketball court [as her] art studio" and wrote: "Whether I am playing alone or in a pickup game with friends or in front of a crowd of two hundred people at school, I feel an enormous release from my everyday life when I am on the court." Abdelaziz responded in the same email thread that he had "read [his daughter's] essays," and opined that "overall [they were] . . . good." His daughter had not played on the school basketball team for nearly two years at the time. The Singer employee submitted Abdelaziz's daughter's USC application the following day.

Abdelaziz and the government agree that Abdelaziz's daughter was formally admitted in March 2018, although they do not cite any exact date in the record.

On March 16, 2018, a foundation run by Singer sent Abdelaziz an invoice for $300,000, purportedly for a "[p]rivate [c]ontribution." Abdelaziz wired that sum to the foundation ten days later. Where that money ultimately went is unclear from the record, but an FBI agent testified that Singer's "general pitch [to parents] was that [a side-door payment] was a donation to a program," and government counsel acknowledged at trial that Singer told Abdelaziz the payment would go to a university account. The government does not

argue on appeal that the jury could have found that Abdelaziz intended the payment to go to any USC employee personally.

Abdelaziz's daughter enrolled at USC in fall 2018. She never played for or otherwise associated with the women's basketball team.

In September 2018, the FBI approached Singer, and he agreed to cooperate with the government's investigation of his clients and university insiders. As part of this cooperation agreement, Singer made various recorded calls at the government's direction.

The government cites two such calls involving Abdelaziz. The first occurred on October 25, 2018. During the call, Singer told Abdelaziz that his foundation was being audited and that the IRS had "asked . . . about" Abdelaziz's payment. Singer further stated that he was "not going to tell the IRS anything about the fact that your $300,000 . . . was paid to . . . [an athletics administrator] at USC to get [Abdelaziz's daughter] into school even though she wasn't a legitimate basketball player at that level." Abdelaziz responded: "OK." Singer asked: "You're OK with that, right?" Abdelaziz answered: "Of course." A moment later, he added:

> No, I—I mean, I—you know, I mean . . . my intention was to, uh, donate the money to the foundation and, uh, what—you know, and then from there obviously, uh—I don't think—Uh, do they have the intention of reaching out to the people that sent those payments?

Singer said he did not know and that he "wanted to make sure our stories are correct." He told Abdelaziz that he was "going to essentially say that [the] $300,000 payment . . . was made to our foundation to help underserved kids," and "wanted to make sure [Abdelaziz was] OK with that." Abdelaziz replied: "I am."

In the same exchange, Singer told Abdelaziz that the USC athletics administrator with whom Singer had arranged the side door had called Singer to say that she "loved" the profile created for Abdelaziz's daughter and that "going forward, anybody who isn't a real basketball player that's a female, [she] want[ed] [Singer] to use that profile." Abdelaziz responded: "I love it."

The second call took place on January 3, 2019. Singer told Abdelaziz that the same athletics administrator had called him to "give [him] a heads up" that the Admissions Department had "asked . . . why [Abdelaziz's daughter] did not show up for Women's Basketball in the fall," and that the administrator had "told them that [Abdelaziz's daughter] had an injury." Abdelaziz asked whether the Admissions Department would ask his daughter about the situation and whether he needed to "prepare her." Singer stated that they would not contact Abdelaziz's daughter and that he had "wanted [Abdelaziz] to know what" the administrator had told the Admissions Department. Abdelaziz responded: "I will answer the same, uh, should they call me."

Wilson engaged Singer's services to facilitate side-door admission for his children on multiple occasions between 2013 and 2019: first for his son, and then, years later, for his twin daughters.

Beginning in spring 2013, Wilson worked with Singer to secure his son's admission to USC through the side door as a purported water polo recruit. Singer explained to Wilson by email that the USC men's water polo coach was "giving [him] 1 boys slot," available on a "first come first [sic]" basis. In response to Wilson's asking when payment was due, Singer responded: "No payment of money till [sic] [the USC men's water polo coach] gets a verbal and written [sic] from admissions . . . ."

Wilson's son did play high school water polo, but his high school coach testified that he was not a player of the level ordinarily recruited by USC, a noted water polo powerhouse. In emails sent at the time, Wilson expressed doubts about whether his son would fit in on the team, asking Singer whether "it w[ould] be known that [his son was] a bench warming candidate" and whether his son would "be so weak as to be a clear misfit at practice," and stating that "[o]bviously his [son's] skill level m[ight] be below the other freshmen" and that he "want[ed] to be sure [his son would] not [be] a lepper [sic]." Singer responded that "the commitment is to be on the roster[,] not attend all practices[;] . . . he will have to attend drug tests and other mandatory functions for 1 year [but then can] walk away/ frankly after the 1st semester he can move on."

In August 2013, Singer noted in an email to Wilson that the water polo coach needed "a player profile so he [could] add [Wilson's son] to his recruit list and present him to admissions in October," and that Singer had the necessary materials to create the profile. Wilson responded: "Great - let me know when [you] have verified [you] have it all completed and into [sic] [the water polo coach]." In October, Singer updated Wilson: "[The water polo coach] has [Wilson's son's] stuff and asked me to embellish his profile more, which I am doing." A few days later, Singer emailed the profile to Wilson. It misrepresented several aspects of Wilson's son's athletic qualifications — for instance, by erroneously describing him as a captain of his high school team and listing implausibly fast swim times. Wilson's counsel argued both at trial and on appeal that the government did not prove Wilson was aware of the falsehoods in the profile. Wilson's counsel emphasized that an FBI agent whose testimony the government used to introduce the email containing the profile acknowledged that he was not aware of emails or other evidence showing Wilson read or responded to Singer's message, and that the profile listed the wrong home address and used Wilson's son's SAT scores rather than his more impressive ACT scores, which Wilson purportedly would have wanted included.

An assistant water polo coach at USC relied on this profile to prepare the athletic profile used by Subco to consider whether to admit Wilson's son.

Subco considered and approved Wilson's son's admission on February 28, 2014, relying in part on the falsified athletic profile.

The day after Subco approved his son's admission, Wilson emailed Singer to "[t]hank[ ] [him] again for making this happen." He asked about "the options for the payment" and requested an invoice "for consulting or whatever from [Singer's business] so that [Wilson could] pay it from [his private equity firm's] corporate account." After some further discussion of payment mechanics, Wilson's firm wired $220,000 to a combination of Singer, his business, and his foundation on April 7, 2014. The government does not contend that any USC employee personally received a portion of this payment. Singer passed $100,000 along to the USC men's water polo team and, so far as the record shows, retained the other $120,000.

Wilson's son quit the water polo team after his first semester at USC.

Several years later, in September 2018, Wilson called Singer about the possibility of helping Wilson's twin daughters, then juniors in high school, with their college applications. The government recorded this call, which took place before Singer began cooperating with the government, without the participants' knowledge. Singer explained that for Wilson's daughters to gain admission to the highly competitive schools they were interested in "on their own" would require "essentially perfect grades" and excellent standardized test scores, but added that "if you said you wanted to . . . go through a different door you c[ould] do that." Wilson inquired about "the other door," asking if it was "like . . . water polo and [a] donation," and Singer explained the price and availability of admission through the side door at various universities. Singer informed Wilson that side-door admission to Stanford or Harvard would cost "a minimum of [$]1.2 million," since a coach would have to "giv[e] up his spot" to a purported recruit who is "not a good enough athlete[ ] to compete," but would provide a "done deal. Just like with [Wilson's son]." Singer explained that the sport "d[id]n't matter," saying he "would make them a sailor or something." Wilson laughed in response. Wilson observed that they were discussing "big numbers," since "there's so many people that want to do th[is]," and asked if "there [was] any way to make [the payments] tax deductible as like donations to the school." Singer stated that payments would be deductible as contributions to his foundation.

Wilson and Singer continued to discuss the use of the side door for Wilson's daughters after Singer began cooperating with the government. From this point on, Singer's references to university insiders willing to facilitate side-door admission were part of a ruse created by investigators.

In a September 29 call, Wilson confirmed that, while his daughters remained undecided on what schools they wanted to attend, he was "interested about the side door and that stuff" and asked what schools and sports were available. Singer assured him that the side door "is gonna . . . happen where you want it to happen," and that crew or sailing might be potential sports options. Wilson asked: "[W]hat if they're not really that good?" Singer responded: "[A]t the end of the day . . . I may be able to go to the sailing coach and say, 'Hey, this family's willing to make the contributions. . . . [The child] may not be up to the level you are, but . . . you're gonna get a benefit, and the family's gonna get

[a] benefit.'" Wilson also asked how the payment would work. Singer stated that "the money [went] into [his] foundation," and that he would then "split the money potentially to the coach or other . . . parties that are at that school that need the money[.] . . . Or it may go right to the coach, . . . depend[ing] on the school."

In October, Wilson called Singer to discuss "making some donations now, whatever—how that can work." Singer stated that he worked with "a bunch of schools," including Harvard and Stanford, on a "first come, first served" basis, and that, "if [he] were to get a deposit . . . [of] like half a million dollars in the bank," they could "figure out where [Wilson's daughters] wanna go" later. "[H]aving the money already, in advance, [would] make[ ] it much easier" because coaches "don't want to give up a spot" unless "the family guarantee[s] . . . that they're gonna ante up and they're gonna make a payment." Wilson asked whether his daughters "actually ha[d] to do th[e] sport" or whether "[t]hey could just go in and . . . be like . . . the scorekeeper[,] . . . water girl[,] . . . [or] manager." Singer confirmed that they could be "[m]anager[s] or whatever you want to call 'em," and that Wilson's daughters were "athletic and . . . big" enough that he could "sell to anybody that they're athletic enough to be able to take 'em and there'll be no question." Singer further assured Wilson that, if he used the side door, admission would be "a done deal." Wilson requested that Singer send him wiring information, and confirmed with Singer that if he sent "[h]alf a million" he would be "locked in for 2." Wilson's private equity firm wired $500,000 to Singer's foundation two days later at Wilson's direction.

Later that month, Singer told Wilson that he had spoken with Stanford's sailing coach, that the coach was willing to "guarantee[ ] a spot for next year," and that Wilson could "have first dibs" if Singer sent the coach the "[$]500,000 that [Wilson] wired into [Singer's] account to secure the spot for one of [Wilson's] girls." Singer also mentioned that he had "asked [the coach] for a second spot in sailing and [the coach] said he c[ould]n't do that because he ha[d] to actually recruit some real sailors so that Stanford d[id]n't . . . catch on." Wilson laughed and said "[r]ight." Wilson asked for more time for his daughters to decide where they wanted to go, and inquired whether there was "any news on the Harvard side." Singer promised to get back to him.

On November 29, Singer informed Wilson that they had "got a spot if . . . [Wilson's daughter] want[ed] to go to Harvard." He claimed that "the senior women's administrator at Harvard [was] going to give [Wilson's daughter] a spot," in exchange for which Wilson would "have to give . . . her . . . $500,000" through Singer's foundation to "fund the senior women's administrator." He added: "I've already paid [the Stanford sailing coach] the [$]500 [thousand] and now we'll give the senior women's administrator [$]500 [thousand] . . . . [Y]our total's going to be [$]1.5 [million]. [$]250 [thousand] will come in the spring for Stanford and [$]250 [thousand] for Harvard in the spring and we'll . . . be done." Wilson responded: "OK, great." When Wilson asked what sport his daughter would need to play, Singer answered: "[The Harvard administrator will] figure it out. . . . [I]t doesn't matter the sport at this point. She will . . . just get her in through . . . athletics in one of the sports but it won't matter." Singer also noted that Wilson's other daughter "w[ould]n't have to sail but we're going to put her through

sailing" at Stanford. Wilson responded that "sailing is actually a logical thing. She could be even the mascot, whatever, but she knows sailing." He confirmed that the plan "sound[ed] fantastic" and was "great news." Wilson's private equity firm wired a further $500,000 to Singer's foundation on December 11, again at Wilson's direction.

As with Abdelaziz, the government acknowledged at trial that Singer "told the parents," including Wilson, "that the money would go to the athletic program at the schools." On appeal, it does not argue that the jury could have found that Wilson intended any of his payments to go to insiders' personal accounts, rather than to university-owned accounts related to the insiders' positions. . . .

The defendants contend that their payments to the universities, the parties whose interests were purportedly betrayed by their agents, cannot constitute bribes under *Skilling*'s interpretation of § 1346. There is no charge of kickbacks in the indictment.

In response, the government relies on *Skilling*'s statement that its narrow construction of § 1346's "prohibition on bribes . . . draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes. See, e.g., 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2) . . . ." The government relies on this language to argue that § 1346 effectively incorporates a version of § 666, such that—borrowing the language of § 666—§ 1346 covers "[w]hoever . . . corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of [a principal]." 18 U.S.C. § 666.

Although the question is a close one, we conclude that the government's reliance on this single statement in *Skilling* is misplaced. The government's reading is, for several reasons, impossible to reconcile with Skilling's language and its core holding that § 1346 covers only "the bribe-and-kickback core of the pre-*McNally* case law." The government has not identified any pre-*McNally* case involving a purported bribe paid to the victim of an alleged bribery scheme. Further, the statutes in force while courts developed the pre-*McNally* case law defining "bribery" do not support the conclusion that payments to the purportedly betrayed party constitute "bribes" as that term is traditionally understood or used in *Skilling*. Nor is there any support for that view in other legal sources defining "bribery." Rather than interpreting the language the government cites to override these considerations, we understand it instead to constrain the honest services doctrine's sweep. And this understanding that *Skilling*'s reference to other statutes does not mean that § 1346 is coextensive with these other statutes draws additional support from the facts that those statutes define offenses broader than traditional bribery and that those statutes may vary from each other in their coverage. . . .

Independently of honest services fraud, the government argues that we should affirm the defendants' mail and wire fraud convictions on the distinct property fraud theory. . . .

The asserted "property" that the government argues was obtained here is "admissions slots." Indeed, the district court instructed the jury that, "[f]or purposes of the mail and wire fraud statutes, admission[s] slots are the property of the [u]niversities.". . .

We reject the government's argument that admissions slots at any university always qualify as property for purposes of the mail and wire fraud statutes. The government's categorical argument fails, for example, to recognize even the well-known variations in types of admissions slots offered at the university level; for instance, early admission, rolling admission, conditional admission, waiting-list admission, and deferred admission. Nor does the government's categorical approach account for the fact that admissions occur at all levels of education, from nursery school through postgraduate studies, and involve millions of students and parents. We reject, too, the defendants' equally categorical contention to the contrary and so reject their argument that their property-based convictions under these statutes must be reversed on the ground that the government did not prove that property was involved in the commission of those offenses because "admissions slots" cannot be property.

But we do agree with the defendants' more limited fallback argument that the jury instruction erred in stating, based on the arguments and record in this case, that "admission[s] slots are the property of the [u]niversities." We see no basis for concluding that such a categorical statement is invariably true of any admissions slot, and the government has not identified any basis in the record that would indicate that the instruction could be upheld on the ground that there was evidence that the admissions slots in question in the charged offenses in this case qualified as property as a matter of law.

We emphasize the narrowness of our holding: We do not hold that admissions slots cannot ever be property. Nor do we hold that the jury instruction given by the district court could never be appropriate. The resolution of these questions will require much more detail, both legal and factual, on the nature of the purported property interest at issue. . . .

The defendants characterize admissions slots as mere "offer[s] to engage in a transaction: The college is offering to provide educational services to a student in exchange for tuition payments." However, the defendants do not address the complexities that would arise were there to be evidence that a particular admissions slot is more than a mere offer to transact. The same complexities which undercut the government's argument undercut this argument by the defense. . . .

We recognize that our analysis leaves considerable uncertainty as to how district courts should apply the mail and wire fraud statutes' property requirement in cases involving admission to educational institutions. There are sound reasons to be prudent and cautious about criminalizing conduct, even unethical conduct, in this complicated area affecting so many students and parents. . . .

Problem 2-5

Set aside for the moment the *Abdelaziz* court's legal analysis and consider only the facts involving Abdelaziz's and Wilson's dealings with Singer. If you were the prosecutor at the charging stage of this case, how else might you have premised a charge that the defendants committed wire fraud?

Given the ongoing curtailment of honest services fraud doctrine, what about a charge of honest services fraud involving bribery across international boundaries? In the next opinion, the Second Circuit reversed a trial judge for ruling that the honest service statute does not apply to such conduct, at least on the facts of this case.

UNITED STATES v. LOPEZ, 2025 WL 1818945 (2d Cir. July 2, 2025)

John M. Walker, Jr., Circuit Judge:

Following a lengthy trial, Defendants-Appellees Hernán Lopez, a top executive at Twenty-First Century Fox, and Full Play Group, S.A., a South American sports marketing company, were each convicted of conspiracy to commit honest services wire fraud in connection with their involvement in a notorious FIFA corruption scandal. . . .

The district court reasoned that, following the Supreme Court's decisions in *Percoco* and *Ciminelli*, honest services fraud did not encompass Defendants' conduct and therefore the evidence adduced at trial was insufficient to sustain Defendants' convictions.

For the reasons that follow, we hold that the district court erred . . . ,

Defendant Lopez, an American citizen and resident, held, until 2016, top executive positions at Twenty-First Century Fox ("Fox"), an American media conglomerate. He ran Fox's Latin American division until he was promoted to run Fox's entire international division. Defendant Full Play is a private sports marketing company incorporated in Uruguay with its principal office in Argentina.

The Fédération Internationale de Football Association ("FIFA") is the international body governing organized soccer. FIFA is a nonprofit entity organized under Swiss law and headquartered in Zurich, Switzerland. It comprises over 200 member associations, each representing organized soccer in a particular nation or territory, including the United States. To become a member of FIFA, an association must first join one of six continental confederations, which include the Confederación Sudamericana de Fútbol ("CONMEBOL") (the South American confederation), headquartered in Paraguay, and the Confederation of North, Central American, and Caribbean Association Football ("CONCACAF"), headquartered in the United States.

As a condition of membership in FIFA, member associations agree to be bound by FIFA's statutes and code of ethics. FIFA's written code of ethics was introduced in 2004 and prohibits officials (defined to include executives of FIFA, its continental confederations, and member associations) from accepting bribes or otherwise abusing

their positions of power for personal gain. The code also imposes on officials a duty of "absolute loyalty" to FIFA. Many confederations, including CONMEBOL, have also adopted their own ethics codes that prohibit officials from using their positions to obtain personal benefits and require "absolute loyalty" to CONMEBOL, FIFA, and the associations. CONMEBOL's code of ethics was adopted in 2013.

Both FIFA and the continental confederations host and own the broadcast and media rights to popular international soccer tournaments. For example, FIFA hosts the World Cup tournament, the most watched sporting event in the world, in which teams from all six confederations compete every four years for the title of world champion. CONMEBOL hosts the Copa América tournament, another popular quadrennial event with teams from each of CONMEBOL's ten South American countries plus invited teams from outside the region. CONMEBOL also hosts the Copa Libertadores, an annual tournament involving the region's club teams. Additionally, the six confederations each organize World Cup qualifier matches (where teams compete to qualify for the World Cup), and individual national associations organize matches between national or club teams, referred to as "friendlies."

FIFA, CONCACAF, CONMEBOL, and the individual member associations typically contract with sports marketing companies, such as Full Play, to transfer the highly lucrative rights to their soccer events. Those companies then sell the rights to television and radio networks, which broadcast games, as well as to sponsors and licensees.

Corruption in international soccer is not new. It was rampant for decades before the events at issue here. This case concerns Lopez's and Full Play's participation in bribery schemes for the media rights to the Copa América and the Copa Libertadores tournaments, as well as World Cup qualifiers and friendlies.

The government adduced evidence that, between 2009 and 2015, Full Play bribed the federation presidents of Paraguay, Bolivia, Colombia, Venezuela, Peru, and Ecuador (known as the "Group of Six") in exchange for the media rights to their federations' respective World Cup qualifiers and friendly matches, some of which were played in the United States. Full Play used United States dollars and bank accounts to fund these bribes.

Between 2010 and 2015, Full Play also bribed the Group of Six and CONMEBOL officials in connection with the Copa América tournament. And, between 2000 and 2015, Full Play helped another media company, T&T Sports Marketing, Ltd. ("T&T"), transmit millions of dollars in bribes to the Group of Six in connection with Copa Libertadores media rights, so that Full Play could further solidify its relationships with the officials. Many of these payments were wired through United States bank accounts.

To conceal these bribes from authorities, Full Play used code names on ledgers and encouraged bribe recipients to move their bank accounts from American banks to overseas banks. Evidence also showed that Full Play's owners met in the United States to discuss how to make their illegal payments appear legitimate.

As for Lopez, the government alleged that he was involved only in the Copa Libertadores scheme. It submitted that he had studied T&T's Copa Libertadores media rights contracts and understood that T&T was likely paying bribes to secure those contracts, which he identified as being undervalued and containing unusually long terms. In 2011, after Lopez confirmed with the head of Torneos y Competencias, Alejandro Burzaco, that T&T was indeed using bribery to obtain media rights, Lopez's division of Fox acquired 75% of the economic rights to T&T. Lopez intervened in the due diligence process for the acquisition to ensure that auditors' red flags did not stymie the deal.

For the next three years, Lopez "perpetuated, protected, and hid the bribes," which were funded by Fox. Throughout this time, Lopez held meetings in the United States with coconspirators to effectuate the scheme. The government's evidence also demonstrated how Lopez exploited his relationship with bribed executives to benefit his own career. In late 2011, for example, Lopez obtained from a top FIFA executive inside information to help Fox outbid a competitor for the broadcasting rights to the 2018 and 2022 World Cups.

In 2014, Lopez attempted to cover up the bribes by bringing whistleblower allegations to Fox, resulting in an audit that he was, in large part, able to control. Later, with Carlos Martinez (a subordinate to Lopez) and Burzaco, he devised a contract to minimize the paper trail of bribes traceable to Fox while maintaining payments to soccer executives, but the government's first indictment was unsealed before the contract was finalized. . . .

We draw several conclusions from the [recent honest services fraud] cases . . . . *First*, for § 1346 to apply, the conduct at issue must involve bribery and/or kickbacks.

Second, the requisite fiduciary relationship cannot be determined based on a test for dominance and control or reliance, but an employer-employee relationship, or a similar relationship, is a well-accepted example of a fiduciary relationship that falls within the scope of § 1346.

Third, a violation of local law is not required to establish a breach of a fiduciary duty, and an employee's violation of his employer's codes of conduct—including the exact codes at issue here—may establish such a breach.

Fourth, the presence of foreign defendants or an international component to a scheme does not categorically remove an offense from the ambit of § 1346. . . .

Intellectually curious jurists, and certainly law professors, can debate whether *Percoco* and *Ciminelli* "*signal[ed]* limits on the scope of the honest services wire fraud statute." *Full Play Grp.*, 690 F. Supp. 3d at 8 (emphasis added). But in adjudicating the case before us, we must focus on the concrete holdings of the cases that currently bind us rather than on "signals" that may forecast future decisions. Here, those concrete holdings lead us to conclude that Defendants' conduct falls within the scope of § 1346. . . .

Lopez and Full Play essentially contend that because they cannot find exact replicas of the fact pattern we are confronted with here—including the specific sort of fiduciary relationship at issue here—in pre-*McNally* case law, foreign commercial bribery of the sort with which they were charged is not encompassed by § 1346. But such a methodology is unduly restrictive. To be sure, the Supreme Court endorsed the approach of looking to pre-*McNally* case law to determine the general conduct and duties encompassed by § 1346. Neither the Supreme Court nor this court, however, has held that whenever a *specific fact pattern* cannot be located in virtually identical form in pre-*McNally* case law, it is not covered by § 1346. . . .

Neither the Supreme Court nor this court has ever held that pre-*McNally* decisions are the only sources that inform our analysis of § 1346. Indeed, we have recognized well-accepted fiduciary duties as falling within the scope of § 1346 without looking to pre-*McNally* case law for factual analogies. *See, e.g.*, *Avenatti* (stating that defendant "cannot . . . argue that he lacked notice that, as an attorney, he owed a fiduciary duty to his client" and citing *Chestman*, for proposition that attorney-client relationship was "hornbook fiduciary relationship").

Rather than investigate whether pre-*McNally* case law contains perfectly analogous foreign commercial bribery prosecutions, we find it more useful to dissect the schemes before us into their salient components and look at each separately to determine whether any component takes the scheme outside the scope of § 1346. Such components include the conduct at issue; the players involved in the scheme; where the scheme took place; and the nature of the fiduciary duty that was purportedly breached. . . .

The fiduciary nature of the relationship between the bribed officials and their respective organizations, *i.e.*, an employer-employee relationship, is one that is commonly recognized, including by pre-*McNally* cases, as "beyond dispute." *See Skilling*. And, like the United Nations in *Bahel*, FIFA and CONMEBOL had express rules proscribing the use of an employment position for personal gain and imposing on officials a duty of "absolute loyalty." Indeed, Defendants do not dispute that an employer-employee relationship is a well-recognized fiduciary relationship that falls within the scope of § 1346; they argue instead that a *foreign* employee's duty to his *foreign* employer does not yield a cognizable duty under the honest services doctrine.

Yet *Bahel* counsels that the foreign identity of the officials and their employers does not remove the schemes from § 1346's reach. There, like here, the bribed official was a foreign national and the victim was a multinational organization with global operations. And there, like here, there was relevant misconduct within the United States contributing to the breach of duty. Moreover, *Bahel* explicitly observed "that fraud actionable under Section 1346 is limited to the nature of the offenses prosecuted in the pre-*McNally* cases (*i.e.*, bribery and kickback schemes)—not the identity of the actors involved in those cases." . . .

We conclude, therefore, that the nature of Defendants' conduct (bribery), coupled with the character of the relationship between the bribed officials and the organizations to

whom they owed a duty of loyalty (employer-employee relationships), place the schemes presumptively within the scope of § 1346. Further, the foreign identity of certain organizations and officials does not remove the schemes from the ambit of § 1346, especially where, as here, relevant conduct occurred in the United States, for the benefit of United States-based executives and organizations (*e.g.*, Lopez and Fox), and the victims were multinational organizations with global operations and significant ties to the United States.

Lopez and Full Play argue that the limited scope of domestic bribery statutes, 18 U.S.C. §§ 201 and 666, in combination with Congress's "surgical precision" when extending other criminal statutes to foreign commercial bribery, indicates that § 1346 does not cover foreign commercial bribery. But the wire fraud statute is not a bribery statute, and although we may look to the bribery statutes to shed light on what Congress meant by "bribery" or "kickback" in the wire fraud context, that does not mean that we should read the statutes in a like manner. Further, we have specifically observed that the wire fraud "statute reaches *any* scheme to defraud involving money or property, [regardless of] whether the scheme . . . involves foreign victims and governments." *Trapilo.* . . .

In sum, we hold that the schemes at issue here fall under § 1346 and that, therefore, the district court erred in holding that foreign commercial bribery is excluded from § 1346's reach as a matter of law and vacating Defendants' convictions.

2. "Kickback"

UNITED STATES v. DEMIZIO, 741 F.3d 373 (2d Cir. 2014)

KEARSE, Circuit Judge:

In the securities industry, financial institutions and their customers sometimes participate in transactions such as "short sales"—i.e., sales of stock not then owned by the seller—that require them to borrow securities from other financial institutions. The present prosecution charged [Defendant Darin DeMizio] principally with conspiracy to commit securities fraud and wire fraud by causing his employer, Morgan Stanley & Co. Inc. ("Morgan Stanley"), to conduct stock-loan transactions through intermediary firms in a manner that, at Morgan Stanley's expense, caused large sums of money to be paid to DeMizio's brother and father for little or no work. . . .

On appeal, DeMizio contends principally that he is entitled to a judgment of acquittal on Count One, arguing that the evidence at trial was insufficient to prove an honest-services fraud conspiracy. He contends that (a) a payment in the private sector qualifies as a kickback only when the recipient does not perform any work other than the conferral of business in connection with the payment, and [his brother and father] did perform work; (b) a payment in the private sector qualifies as a kickback only when it is the employee who receives the payment, and [DeMizio] never received any money from the alleged schemes; and (c) there is no violation of § 1346 without nondisclosure of material

information to the employer by the employee, and [his father's] involvement . . . was fully disclosed. . . .

In *Skilling*, addressing a contention that § 1346 was void for vagueness, the Supreme Court concluded that the section is not unconstitutionally vague to the extent that it covers schemes involving bribery and kickbacks. The Court reasoned that fraudulent schemes involving bribery and kickbacks had long been held to be within the scope of §§ 1341 and 1343, and that in enacting § 1346 in the wake of *McNally* to proscribe fraudulent schemes for deprivation of the intangible right of honest services, Congress "no doubt . . . intended § 1346 to reach at least "schemes to defraud involving "bribes and kickbacks." The *Skilling* Court concluded that § 1346 cannot be interpreted to reach an "amorphous category" such as "conflict-of-interest" cases, and that the section "criminalizes only the bribe-and-kickback core of the pre-*McNally* case law."

A kickback scheme typically involves an employee's steering business of his employer to a third party in exchange for a share of the third party's profits on that business. *See, e.g.*, Black's Law Dictionary 948 (9th ed. 2009) (defining "kickback" as the "return of a portion of a monetary sum received, esp. as a result of coercion or a secret agreement"). We reject at the outset DeMizio's suggestion that, in determining whether the evidence against him was sufficient under § 1346, we should ignore cases involving public officials. The *Skilling* Court noted that although honest-services cases most often involved bribery of public officials, private sector honest-services fraud had been recognized at least as early as 1942. The Court analyzed cases involving public officials as well as cases involving employees in the private sector in deciding the appeal brought by Skilling himself, a private-sector employee; and it noted that while the principal federal bribery statute, 18 U.S.C. § 201, "generally applies only to federal public officials, . . . § 1346's application to . . . private-sector fraud reaches misconduct that might otherwise go unpunished."

We also reject DeMizio's argument that kickbacks (a) do not include payments made to entities other than the employee who steers his employer's business to a third party in exchange for those payments, and (b) do not include payments of large sums of money to those recipients so long as they perform some minimal amount of work. Although the kickback amount frequently is paid directly to the employee who steered the contract, the scheme is no less a kickback scheme when the employee directs the third party to share its profits with an entity designated by the employee in which the employee has an interest. For example, as noted in *Skilling*, a statute prohibiting kickbacks with respect to federal contracts defined "kickback," in part, to include "any money, . . . thing of value, or compensation of any kind which is provided, directly or indirectly," to a prime contractor or its employee "for the purpose of . . . rewarding favorable treatment in connection with . . . a subcontract relating to a prime contract," 41 U.S.C. § 52(2) (2006). . . .

In this vein, payoff schemes have been viewed as involving kickbacks when the defendant has directed that the contracting party's profit be shared with family, friends, or others loyal to the defendant.

In light of these authorities, and the failure of DeMizio to cite any authority to support his constrained conception of kickbacks, we reject his contention that a payment in a private-sector scheme does not qualify as a kickback unless the defendant employee himself or herself receives the payoff. The evidence overwhelmingly established that DeMizio directed Morgan Stanley stock-loan business to companies that agreed to pay commissions to his father and/or brother, in whom DeMizio plainly had an interest.

Further, there was evidence from which it could be inferred that the payoffs benefited DeMizio himself financially. For example, [a witness] testified DeMizio asked him to pay commissions to DeMizio's brother Craig because DeMizio said Craig "wasn't making a lot of money . . . and he needed help." (Tr. 98.) [The witness] also testified that he formed [his company] in 1999 at the suggestion of DeMizio, who asked him to hire DeMizio's father . . . in 2000. [Another witness] testified that around that time DeMizio was complaining . . . that [his father] was "hurting for money" and was requesting money from DeMizio. . . .

We agree with the district court's post-*Skilling* view that the rule advocated by DeMizio—i.e., that so long as "any" work at all is done by the recipient of a share of the contracting party's profits, that payoff is not a kickback—"would be untenable," allowing "[p]otential fraudsters [to] shield themselves from criminal liability merely by performing some token labor in exchange for what would otherwise be an illegal kickback." And we agree with the district court that there was ample evidence from which a reasonable jury could have inferred that the payments to [the father and brother] were kickbacks. They performed work on no more than 10 to 20 percent of the transactions for which they were paid. The work they did perform was of minimal quality and difficulty, and there was even evidence that they were not competent to perform work as finders. In exchange for this "work," they received in excess of $1.5 million in payments. While DeMizio was free to argue to the jury that these payments were in exchange for legitimate work, the jury reasonably found otherwise.

Finally, we reject DeMizio's contention that the government's evidence was insufficient to show fraud, i.e., that Morgan Stanley was unaware of his kickback schemes. [A witness] testified to the existence of "a code that [DeMizio] would use with [him] to discuss these transactions"; that DeMizio said he wanted to use code "because he didn't want the people seated next to him to hear" him "instruct[ing the witness to] . . . put his brother in" on stock-loan tickets, . . . [b]ecause Morgan Stanley did not want him to deal with his brother." (Tr. 98–99.) [Another witness] testified that he and DeMizio did not discuss the arrangement . . . "to pay his brother Craig in front of other people," and [the witness] "did . . . not tell the other traders" at Freeman about the arrangement because "it was illegal" and "Darin didn't want anybody else to know about it." Evangelista also

testified that DeMizio told him that if anyone found out about the arrangement "[DeMizio] would deny the whole thing.". . .

3. "Fiduciary Duty"

PERCOCO v. UNITED STATES, 143 S. Ct. 1130 (2023)

Justice ALITO delivered the opinion of the Court.

In this case, we consider whether a private citizen with influence over government decision-making can be convicted for wire fraud on the theory that he or she deprived the public of its "intangible right of honest services." 18 U.S.C. §§ 1343, 1346. Petitioner Joseph Percoco was charged with conspiring to commit honest-services wire fraud during a period of time that included an eight-month interval between two stints as a top aide to the Governor of New York. Percoco was convicted of this offense based on instructions that required the jury to determine whether he had a "special relationship" with the government and had "dominated and controlled" government business. We conclude that this is not the proper test for determining whether a private person may be convicted of honest-services fraud, and we therefore reverse and remand for further proceedings.

Percoco was a longtime political associate of former New York Governor Andrew Cuomo. Except for a brief but important hiatus in 2014, Percoco served as the Governor's Executive Deputy Secretary from 2011 to 2016, and that position gave him a wide range of influence over state decision-making. In April 2014, Percoco resigned from this position to manage the Governor's reelection campaign, but after the Governor was reelected, he resumed his role as Executive Deputy Secretary in December 2014.

The question we address today arises from Percoco's activities during his break in government service. In July 2014, Empire State Development (ESD), a state agency, informed developer Steven Aiello that his real-estate company, COR Development, needed to enter into a "Labor Peace Agreement" with local unions if he wished to receive state funding for a lucrative project. Interested in avoiding the costs of such an agreement, Aiello reached out to Percoco through an intermediary so that Percoco could "help us with this issue while he is off the 2nd floor," *i.e.*, the floor that housed the Governor's office. Percoco agreed and received two payments totaling $35,000 from Aiello's company in August and October 2014. On December 3, mere days before returning to his old job, Percoco called a senior official at ESD and urged him to drop the labor-peace requirement. ESD promptly reversed course the next day and informed Aiello that the agreement was not necessary. . . .

Over defense counsel's objection, the court instructed that Percoco could be found to have had a duty to provide honest services to the public during the time when he was not serving as a public official if the jury concluded, first, that "he dominated and controlled any governmental business" and, second, that "people working in the government

actually relied on him because of a special relationship he had with the government." . . .

In *Margiotta*, . . . Joseph Margiotta chaired the Republican Party Committees for Nassau County and the town of Hempstead, New York, and he used the influence that came with those positions to carry out a kickback scheme. He was indicted for honest-services mail fraud, and although he held "no elective office," the prosecution argued that he nevertheless breached a duty to render honest services because his party positions "afforded him sufficient power and prestige to exert substantial control over public officials."

A divided Second Circuit panel agreed. The majority found that "there is no precise litmus paper test" for determining when a private person "owes a fiduciary duty to the general citizenry" but that "two time-tested measures of fiduciary status [were] helpful." These were (1) whether "others rel[ied] upon [the accused] because of [his] special relationship in the government" and (2) whether he exercised "de facto control" over "governmental decisions." Admitting that the case before it was "novel" and that determining when a private person owes a duty of honest services was "a most difficult enterprise," the majority nevertheless concluded that a private person could commit honest-services fraud if he or she "dominate[d] government." In a strongly worded partial dissent, Judge Winter complained that the majority's interpretation lacked "the slightest basis in Congressional intent, statutory language or common canons of statutory interpretation" and that it erroneously treated a variety of "politically active persons" who have informal but strong influence over government as subject to the same duties as officeholders. . . .

Skilling's approach informs our decision in this case. Here, the Second Circuit concluded that "Congress effectively reinstated the *Margiotta*-theory cases by adopting statutory language that covered the theory." But *Skilling* was careful to avoid giving § 1346 an indeterminate breadth that would sweep in any conception of "intangible rights of honest services" recognized by some courts prior to *McNally*.

This is illustrated by *Skilling*'s rejection of the Government's argument that § 1346 should be held to reach cases involving "'undisclosed self-dealing by a public official or private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.'" Because the pre-*McNally* lower court decisions involving such conduct were "inconsisten[t]," we concluded that this "amorphous category of cases" did not "constitute core applications of the honest-services doctrine." . . . .

[W]e reject the argument that a person nominally outside public employment can *never* have the necessary fiduciary duty to the public. Without becoming a government employee, individuals not formally employed by a government entity may enter into agreements that make them actual agents of the government. An "agent owes a fiduciary obligation to the principal," see, *e.g.*, 1 Restatement (Third) of Agency § 1.01, Comment

e, p. 23 (2005), and therefore an agent of the government has a fiduciary duty to the government and thus to the public it serves. In this Court, Percoco has agreed that individuals who are "delegated authority to act on behalf" of a public official and to perform government duties have a duty to provide honest services. This well-established principle suffices to confirm that the lower courts correctly rejected Percoco's *per se* rule and, in doing so, did not stretch § 1346 past heartland cases.

Rejecting this absolute rule, however, is not enough to sustain Percoco's convictions on the wire fraud conspiracy counts. "[T]he intangible right of honest services" codified in § 1346 plainly does not extend a duty to the public to *all* private persons, and whether the correct test was applied in this case returns us to *Margiotta*. . . .

Directly applying *Margiotta*, the trial judge told the jury that Percoco owed a duty of honest services to the public if (1) he "dominated and controlled any governmental business" and (2) "people working in the government actually relied on him because of a special relationship he had with the government." But *Margiotta*'s standard is too vague. From time immemorial, there have been *éminence grises*, individuals who lacked any formal government position but nevertheless exercised very strong influence over government decisions. Some of these individuals have been reviled; others have been respected as wise counselors. The *Margiotta* test could be said to apply to many who fell into both of these camps. It could also be used to charge particularly well-connected and effective lobbyists. . . .

The Government does not defend these jury instructions as an accurate statement of the law, but it argues that their imprecision was harmless. Specifically, the Government argues that a private individual owes a duty of honest services to the public "in two discrete circumstances": (1) "when the person has been selected to work for the government" in the future and (2) "when the person exercises the functions of a government position with the acquiescence of relevant government personnel."

The first theory differs substantially from the jury instructions, which did not tell the jury that Percoco could be found to owe a duty of honest services because he had been selected for future government service. While the prosecution offered evidence that Percoco intended to return to government service after the election and had made plans to do so, the jury could have found that the requirements set out in the jury instructions were satisfied without relying on that evidence. Thus, even if we assume for the sake of argument that there is some merit in the Government's first new theory, it is far from clear that the erroneous jury instructions would be harmless.

The Government's second new theory—*i.e.*, that a private citizen owes a duty to render honest services "when the person exercises the functions of a government position with the acquiescence of relevant government personnel"—appears, as defined in its brief, to restate *Margiotta*'s erroneous construction of the law.

For these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. . . .

Problem 2-6

(a) Can the following case be charged as mail/wire fraud: Albert, a professor of engineering at the University of Texas, grants PhDs to three students who fail the examination in a required course on statistical methods; the three students obtain jobs with NASA in Houston and later recommend that Albert be hired as a consultant on a project for which NASA pays Albert $10,000 for his work. (Many wire communications across state lines occur in the course of the matter.)

(b) Can the following case be charged as mail/wire fraud: Lucy, a partner at a large New York law firm, is asked to represent Corp B, a Delaware corporation, in a bid for a very large construction contract with the City of New York. During the "conflicts check," Lucy's partners tell her she can't represent Corp B because another partner at the firm is representing Corp A, a New Jersey corporation, which is bidding for the same construction contract. Lucy continues to represent Corp B, and collects a fee for doing so, while hiding her representation of Corp B from her partners.

(c) Under what circumstances do you think a senior officer (the CEO, for example) of a large publicly held corporation could be charged with honest services fraud after *Skilling*?