# VALUING HONEST SERVICES: THE COMMON LAW EVOLUTION OF SECTION 1346

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*In this Note, Alex Hortis analyzes the application of the mail fraud statute, as codified at 18 U.S.C. § 1346, to enforce citizens' intangible right to the "honest services" of public officials. Reviewing the evolution of § 1346, Hortis finds that, although it has been perceived as statutorily vague and intrusive into state and local affairs, § 1346 has not been used in an unnecessary or overly broad manner, does not violate defendants' constitutional rights, and does not result in a significant number of federal prosecutions of state and local officials. Rather, viewed from an economic perspective, Hortis argues that § 1346's broad malleability, as a form of federal common law, is one of its greatest assets as it is more efficient to let the courts define crimes on a case-by-case basis than to redraft statutes to address new forms of corruption. Hortis further argues that centralizing enforcement at the federal level takes advantage of economies of scale and prosecutorial experience. Hortis concludes that § 1346's broad applicability benefits the public by reducing prosecution costs with its lower evidentiary requirements, creating marginal deterrence against corruption, and reinforcing a desirable standard of conduct for public officers.*

## INTRODUCTION

### *Case 1:* United States v. Hawkey

Lester Hawkey was a South Dakota sheriff responsible for administering a nonprofit association for his county.[1] Hawkey made agreements with concert promoters to telemarket tickets for a series of charitable concerts to benefit the association. After creating two bank accounts for proceeds from the ticket sales,[2] Hawkey embezzled at least $27,000 from the accounts in 1991 and spent it on a number of personal items. Hawkey engaged in a series of transactions to mask the withdrawals. He was indicted on charges of tax fraud, illegal monetary transactions, and mail fraud.[3]

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1 See United States v. Hawkey, 148 F.3d 920, 922-23 (8th Cir. 1998) (detailing background of case).

2 See id. at 923.

3 See id. at 924-26.

*Case 2:* McNally v. United States

Howard Hunt was a political party chairman who had de facto control over awarding contracts to service his state's government insurance policies.[4] From 1975 to 1979, Hunt directed the state's insurance contracts to insurance companies owned by longtime friends and political associates in exchange for a series of kickbacks. The state's losses as a result of the scheme were unclear: The legislature had already set aside a predetermined amount for insurance, the premiums charged were no higher than those of other insurance companies, and the insurance company provided full insurance coverage to the state.[5] Hunt and his associates were nevertheless indicted on charges of mail fraud.[6]

*Case 3:* United States v. Manges

Clinton Manges was an oilman, rancher, and political kingmaker.[7] In 1989, Manges schemed with David Wayne Myers to help Myers keep his lease to an oil tract owned by the state. Under state law, Myers had to maintain a minimum level of oil production or risk forfeiting the lease.[8] To cover up inadequate production levels, Myers submitted false reports to the state General Land Office (GLO). Meanwhile, Manges used his own influence and $30,100 in payments, deposited in the accounts of the son of the chief clerk of the GLO, to persuade the GLO that Manges met production levels. Soon thereafter, the GLO mailed a letter confirming Myers's production levels.[9] Manges and Myers were indicted on charges of conspiracy and mail fraud.[10]

In each of these cases, federal prosecutors alleged that the defendants, through their mail fraud, schemed not only to defraud the citizenry of money or property, but also to deprive the people of "their intangible right to the honest services of a government official."[11] Prosecutors in each case relied on the honest services, or intangible rights, theory that is codified at 18 U.S.C. § 1346.[12]

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4 See McNally v. United States, 483 U.S. 350, 352 (1987).

5 See id. at 360-61.

6 See id. at 353.

7 See United States v. Manges, 110 F.3d 1162, 1167 (5th Cir. 1997).

8 See id. The state received annual rental fees plus royalties on oil revenues from its tracts. See id.

9 See id. at 1168.

10 The defendants were charged with conspiracy to commit mail fraud and conspiracy to commit bribery. See id. The latter conspiracy charge was deleted by the district court in its jury charge. See id. at 1169. In addition, Manges was charged with bribery. See id. at 1168.

11 Id.

12 18 U.S.C. § 1346 (1994).

Under the intangible rights theory, government officials and others standing in a position of trust with the public become public fiduciaries and thus owe fiduciary duties to the citizenry.[13] When such officials scheme to breach those duties, the public is deprived of its intangible right to the "honest services" of their public officials.

Section 1346 allows federal prosecutors to bring mail and wire fraud charges against public officials and others for engaging in fraudulent schemes that involve a government office or a government process.[14] The most common § 1346 cases involve giving or accepting bribes,[15] soliciting or receiving gratuities,[16] or failing to disclose conflicts of interest.[17] In addition, the intangible rights theory has been applied to a wide range of public corruption schemes, including government embezzlement,[18] election fraud,[19] and kickbacks.[20]

The use of § 1346[21] to prosecute public corruption is one of the most controversial applications of federal criminal law.[22] Critics as-

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13 See infra Part I.B.

14 Section 1346 or intangible rights theories of mail or wire fraud have been used in private sector cases as well. See, e.g., United States v. Bronston, 658 F.2d 920, 927 (2d Cir. 1981) (holding that lawyer deprived private client of intangible rights by not disclosing conflict of interest). This Note's focus is limited to the issues arising in public corruption cases rather than private sector cases.

15 See, e.g., United States v. Lopez-Lukis, 102 F.3d 1164, 1169 & n.14 (11th Cir. 1997) (discussing scenarios in which bribery could constitute mail fraud and § 1346 offense and citing Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941)).

16 See, e.g., United States v. Woodward, 149 F.3d 46, 57-63 (1st Cir. 1998) (affirming state legislator's conviction for accepting gifts with intent to deprive constituents of his honest services).

17 See, e.g., United States v. Bissell, 954 F. Supp. 841, 863 (D.N.J. 1996) (holding that failure to disclose conflict of interest violates § 1346).

18 See, e.g., United States v. Rostenkowski, 59 F.3d 1291, 1295 (D.C. Cir. 1995) (discussing § 1346 scheme to defraud involving embezzlement).

19 See, e.g., United States v. Clapps, 732 F.2d 1148, 1153 (3d Cir. 1984) (upholding mail fraud conviction for obtaining fraudulent absentee ballots).

20 See, e.g., United States v. Diggs, 613 F.2d 988, 998 (D.C. Cir. 1979) (finding that United States Congressman's kickback scheme defrauded citizens not only of money but also of their right to honest and faithful services).

21 Prosecutions based on some form of the intangible rights theory have been given various names, including the intangible rights doctrine, honest services prosecution, and simply mail fraud. In order to maintain consistency throughout this Note, I have chosen to use the term § 1346 prosecutions to refer to intangible rights cases brought prior to McNally v. United States, 483 U.S. 350 (1987), the Supreme Court case voiding the intangible rights theory, as well as to cases brought under § 1346.

22 The literature on mail fraud and § 1346 is prolific, and most of it is highly critical. See John C. Coffee, Jr., The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime, 21 Am. Crim. L. Rev. 1, 27 (1983) (arguing that mail fraud should be treated similarly to other inchoate crimes and that broad intangible rights doctrine should be narrowed); Peter J. Henning, Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute, 36 B.C. L. Rev. 435, 440 (1995) (describing amended mail fraud statute as attempt to extend federal jurisdiction over fraud without careful consideration or specific drafting of legislation); Geraldine Szott Moohr,

sert that § 1346's vagueness is prone to prosecutorial abuse[23] and lets federal courts legislate the offense from the bench.[24] Some commentators have written that § 1346 is unconstitutional, arguing that it violates the First Amendment,[25] is facially vague,[26] or disturbs structures of separation of powers and federalism.[27] One commentator has even predicted that after *United States v. Lopez*,[28] § 1346 is prime for Supreme Court review and uncertain to survive in its current form.[29]

Yet every circuit of the courts of appeals that has addressed the issue to date has found Congress intended to enact an intangible rights

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The Federal Interest in Criminal Law, 47 Syracuse L. Rev. 1127, 1181 (1997) [hereinafter Moohr, The Federal Interest] (arguing that federal interest in prosecuting fraud by public officials "warrants specific federal legislation that closely defines prohibited conduct"); Geraldine Szott Moohr, Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us, 31 Harv. J. on Legis. 153, 208-09 (1994) [hereinafter Moohr, Someone to Watch] (arguing that state and local legislators are better suited to define corrupt behavior than federal legislators because electorate can police local politicians more effectively); Gregory Howard Williams, Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud, 32 Ariz. L. Rev. 137, 170 (1990) (arguing that "it is time to develop some criteria to guide application of the statute"); Charles N. Whitaker, Note, Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach, 78 Va. L. Rev. 1617, 1619 (1992) (suggesting need for "a specific statute that avoids the practical and fairness problems of the existing scheme").

23 See, e.g., Williams, supra note 22, at 151-53 (arguing that vagueness of mail fraud statute gives inadequate notice of what behavior is proscribed, allowing arbitrary prosecution and undue interference with First Amendment rights).

24 See Ellen S. Podgor, Mail Fraud: Opening Letters, 43 S.C. L. Rev. 223, 269 (1992) (describing courts' function in mail fraud cases as legislative rather than adjudicative); Todd E. Molz, Comment, The Mail Fraud Statute: An Argument for Repeal by Implication, 64 U. Chi. L. Rev. 983, 994 (1997) (concluding that Congress intends broad language of mail fraud statute to act as delegation of lawmaking power to courts); see also United States v. Brumley, 116 F.3d 728, 736 (5th Cir. 1997) (en banc) (Jolly & DeMoss, JJ., dissenting) (arguing that in defining terms of § 1346, "the majority assumes a role somewhere between a philosopher king and a legislator").

25 See Moohr, Someone to Watch, supra note 22, at 180-81; cf. Peter T. Barbur, Note, Mail Fraud and Free Speech, 61 N.Y.U. L. Rev. 942, 943 (1986) (arguing criminal mail fraud prosecutions for libel could be threat to free speech).

26 See Moohr, Someone to Watch, supra note 22, at 196 ("Section 1346, the legislation that incorporates the intangible rights doctrine into the mail fraud statute, is facially vague because it fails to provide standards to guide police and prosecutors in the exercise of their discretion.").

27 See George D. Brown, Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez* Analysis, 82 Cornell L. Rev. 225, 229 (1997) ("The mail fraud statute, in particular, with its seemingly open-ended prohibition of bad government, is especially intrusive on federalism values."); see also Moohr, Someone to Watch, supra note 22, at 172 (concluding that federal intangible rights prosecutions of state and local officials damage benefits of federalism).

28 514 U.S. 549, 551 (1995) (striking down federal criminal statute as beyond limits of Congress's Commerce Clause powers).

29 See Brown, supra note 27, at 299 (1997) (arguing that federalism concerns about § 1346 actions against state and local officials could be mitigated by applying state law to help define honest services).

theory by passing § 1346,[30] and many have upheld explicitly the law's constitutionality.[31] As a result, § 1346 is firmly established as an anticorruption measure in federal criminal law. Nevertheless, most writing on § 1346 remains devoted to constitutional challenges or policy proposals that would reform, curtail sharply, or otherwise eliminate the statute.[32]

This Note takes up a new challenge offered by Professor Dan Kahan for those examining federal criminal laws. Kahan argues that much federal criminal law can "most appropriately [be] viewed as a species of *federal common law*."[33] Despite the admonition that there

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[30] See, e.g., United States v. Catalfo, 64 F.3d 1070, 1077 n.5 (7th Cir. 1995); United States v. Bryan, 58 F.3d 933, 939-43 (4th Cir. 1995); United States v. Waymer, 55 F.3d 564, 568 n.3 (11th Cir. 1995); United States v. Bucuvalas, 970 F.2d 937, 942 n.9 (1st Cir. 1992); United States v. Alkins, 925 F.2d 541, 548 (2d Cir. 1991); United States v. Ames Sintering Co., 927 F.2d 232, 235 (6th Cir. 1990); United States v. Granberry, 908 F.2d 278, 281 n.1 (8th Cir. 1990). The only case holding that § 1346 did not reach the honest services of public officials was a panel decision whose opinion on this point was not adopted in a rehearing en banc. See United States v. Brumley, 79 F.3d 1430, 1441-42 (5th Cir. 1996), supersed'g and withdraw'g 59 F.3d 517 (5th Cir. 1995), rev'd en banc, 116 F.3d 728, 731-32 (5th Cir. 1997).

[31] See, e.g., *Brumley*, 116 F.3d at 732-34; *Waymer*, 55 F.3d at 568-69.

[32] See Molz, supra note 24, at 996-1007 (arguing for judicial repeal by implication); Moohr, Someone to Watch, supra note 22, at 200-04 (proposing new legislation on mail fraud).

[33] Dan M. Kahan, Lenity and Federal Common Law Crimes, 1994 Sup. Ct. Rev. 345, 347 [hereinafter Kahan, Lenity and Federal Common Law Crimes]. Kahan has expanded on his thesis in subsequent works. See, e.g., Dan M. Kahan, Is *Chevron* Relevant to Federal Criminal Law?, 110 Harv. L. Rev. 469, 471-88 (1996) [hereinafter Kahan, Is *Chevron* Relevant?] (explaining how federal criminal law is often system of common lawmaking delegated to courts and administrative bodies); Dan M. Kahan, Three Conceptions of Federal Criminal-Lawmaking, 1 Buff. Crim. L. Rev. 5, 5, 11-16 (1997) [hereinafter Kahan, Three Conceptions] (arguing that "common-law conception" best describes federal criminal lawmaking).

Kahan's arguments about a jurisprudence of federal criminal common law have attracted much attention. See, e.g., George D. Brown, Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666, 73 Notre Dame L. Rev. 247, 256 (1998) (outlining Kahan's challenge to attacks on delegation of lawmaking to courts); John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113, 192-93 (1998) (noting Kahan's "thorough and well-reasoned argument" in favor of delegating lawmaking authority to Justice Department and describing "New Federal Common Law"); Adam H. Kurland, First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction, 45 Emory L.J. 1, 37 n.117 (1996) (citing Kahan "[f]or an excellent discussion of judicial interpretation of broad statutory language in modern federal criminal statutes and an assertion that such activity creates a species of federal criminal common law authority").

Kahan's normative claim about the utility of federal criminal common lawmaking has drawn criticism from at least one author. See Robert Batey, Vagueness and the Construction of Criminal Statutes—Balancing Acts, 5 Va. J. Soc. Pol'y & L. 1, 3, 41-42 & n.197 (1997) (dismissing Kahan's "strikingly expansive concept of judicial legislation" and finding Kahan's rebuttal on dangers of broad construction of federal crimes unconvincing).

can be no criminal common law,[34] Kahan argues that Congress effectively has delegated much criminal lawmaking power to the federal courts. Rather than disparage or deny this fact, Kahan promotes the examination and development of principles, strategies, and techniques for understanding and using federal common law crimes.[35]

Indeed, Kahan specifically cites § 1346 as an example of his theory, and he views "intangible rights" language as "another empty standard that depends on judge-made implementing doctrines."[36] According to this view, the critics are correct: Section 1346 is little more than a statutory shell for corruption offenses that are largely defined in the courts.

The critics' views are incomplete, however, until they look at § 1346's development in the courts. Common law courts are not static bodies; rather, they are actively involved in molding law. This Note argues that § 1346 is indeed evolving through a common law process. The amorphous boundaries of § 1346 prosecutions are being shaped by nonlegislative actors that include federal courts, federal prosecutors, and the United States Sentencing Commission, each of which has contributed new principles governing § 1346. To demonstrate this process, this Note examines each component of a § 1346 prosecution—the caselaw defining the offense, the way the section is implemented, and, finally, the sentencing stage.

If § 1346 is part of a common law process, it is appropriate to use economic analysis as a tool for examining the statute.[37] Much of the common law—contract, tort, and property law in particular—has been a fruitful subject of law and economics studies,[38] and Kahan and

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[34] See Kahan, Lenity and Federal Common Law Crimes, supra note 33, at 346 n.8 (noting "central principle" in United States law that there "are and can be no 'federal common law crimes'" and citing United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812)).

[35] See Kahan, Lenity and Federal Common Law Crimes, supra note 33, at 426-27.

[36] Kahan, Three Conceptions, supra note 33, at 12.

[37] Efficiency analysis—also referred to as cost-benefit analysis or more generally as law and economics—assumes that an individual is rational (i.e., she will act in ways that will maximize her utility), and as such, that the law creates incentives for individuals to act in certain ways. Law and economics scholars concede that economic motives cannot explain all human behavior, but argue that their model captures one powerful explanatory force. See, e.g., Richard A. Posner, Economic Analysis of Law 16-18 (4th ed. 1992).

[38] See, e.g., John H. Barton, The Economic Basis of Damages for Breach of Contract, 1 J. Leg. Stud. 277 (1972) (providing economic analysis of contract law); Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970) (providing economic analysis of tort law); Louis De Alessi, The Economics of Property Rights: A Review of the Evidence, 2 Res. L. & Econ. 1 (1980) (providing economic analysis of property law).

Such analysis is also commonly applied to the criminal law. The leading modern article is Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968). See also A. Mitchell Polinsky & Steven Shavell, The Optimal Use of Fines and

others have applied an approach similar to law and economics in their own analyses of § 1346.[39] Moreover, if, as many law and economics scholars believe, the common law process tends to create efficient rules,[40] then economic analysis might provide some insight into why § 1346 jurisprudence has evolved in the ways that it has. There are some significant limits to such an economic analysis,[41] and this Note stops far short of making a normative argument about whether § 1346 is an efficient anticorruption measure or whether efficiency alone should determine our choice of anticorruption measures. Rather, this Note argues that § 1346 is becoming much better defined than its critics have recognized, and that cost-benefit analysis explains many, though not all, of the emerging principles shaping § 1346.

This Note proceeds as follows. Part I provides a background on the elements of mail fraud, the origins of the intangible rights theory, the enactment of § 1346, and the costs and benefits of its statutory vagueness. Part II examines principles and precedents that federal courts have developed through a common law process of adjudication, and concludes that many of the principles in the caselaw have efficient

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Imprisonment, 24 J. Pub. Econ. 89 (1984) (using formulas to analyze deterrent value of fines and imprisonment); Steven Shavell, Deterrence and the Punishment of Attempts, 19 J. Legal Stud. 435 (1990) (examining punishment of attempts from perspective of theory of optimal deterrence of undesirable acts); Samuel Kramer, Comment, An Economic Analysis of Criminal Attempt: Marginal Deterrence and the Optimal Structure of Sanctions, 81 J. Crim. L. & Criminology 398 (1990) (analyzing incentives arising from increasing magnitude of sanctions as crime progresses toward completion).

[39] For example, at one point Kahan uses cost-benefit analysis when arguing about the superiority of common lawmaking versus legislative lawmaking. See Kahan, Is *Chevron* Relevant?, supra note 33, at 475; Jeffrey Standen, An Economic Perspective on Federal Criminal Law Reform, 2 Buff. Crim. L. Rev. 249, 289-92 (citing mail fraud as example where "indictment . . . , not the act of Congress, occasions the practical definition of federal criminal law" and arguing that "this allocation of law-making authority may be defensible as an exercise of comparative institutional choice"); cf. Moohr, The Federal Interest, supra note 22, at 1171-74 (discussing expenses and benefits of federal prosecutions of state and local officials under mail fraud).

[40] See generally Posner, supra note 37, at 251 (describing "Implicit Economic Logic of the Common Law"); see also Paul H. Rubin, Why Is the Common Law Efficient?, 6 J. Legal Stud. 51 (1977) (arguing efficiency of common law results from utility-maximizing decisions of disputants rather than from wisdom of judges).

[41] First, while economic analysis is concerned only with the deterrent effects of law, anticorruption measures are also imbued with values of retribution and just dessert. See, e.g., James B. Jacobs et al., Pension Forfeiture: A Problematic Sanction for Public Corruption, 35 Am. Crim. L. Rev. 57, 76-79 (1997) (criticizing just dessert and deterrence considerations in pension forfeiture remedies for public corruption cases). In addition, the costs and benefits of corruption and anticorruption controls are especially difficult to measure and compare. See Frank Anechiarico & James B. Jacobs, The Pursuit of Absolute Integrity: How Corruption Control Makes Government Ineffective 195 (1996) ("An enormous barrier to evaluating the efficacy of corruption controls is lack of basic data, indeed, practically any data, and an absence of indicators about the costs of corruption and the costs and benefits of corruption control.").

rationales. Part III examines federal prosecutions of state and local officials, in which mail fraud and § 1346 have had an important role. Part IV analyzes the sentencing stage of § 1346 prosecutions by examining the United States Sentencing Guidelines and reveals how an increasingly sophisticated disincentive system—important for creating marginal deterrence against corruption—has developed.

## I
## MAIL FRAUD, INTANGIBLE RIGHTS, AND SECTION 1346

### *A. The Elements of Mail Fraud*

Section 1346 prosecutions are brought under the federal mail fraud statute[42] or under the federal fraud by wire statute.[43] The current federal mail fraud statute states:

> 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, . . . shall be fined under this title or imprisoned not more than five years, or both.[44]

Mail fraud statutes originated in the late nineteenth century as a means of controlling swindles and financial frauds perpetrated through the mails.[45] The purpose of the mailing element was related to its goal of protecting the integrity of the U.S. mail system, which at the time was rife with "get-rich-quick" schemes.[46] From the beginning, mail fraud was imprecisely defined. As a result, a body of

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[42] See 18 U.S.C. § 1341 (1994).

[43] See id. § 1343.

[44] Id. § 1341. The related fraud by wire statute states:

> 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 five years, or both.

Id. § 1343. This Note focuses on mail fraud for simplicity's sake and because most of the important caselaw to date involves mail fraud.

[45] For the definitive history of the mail fraud statutes, see Jed S. Rakoff, The Federal Mail Fraud Statute (Part I), 18 Duq. L. Rev. 771 (1980).

[46] See id. at 780.

caselaw spanning nearly a century developed through common law-making by the federal courts.[47]

While the precise definition of mail fraud remains unsettled, there is consensus on at least two of the elements necessary to prove a charge of mail fraud. First, there must be a "scheme or artifice to defraud."[48] Second, there must be a mailing[49] for the purpose of executing the scheme or artifice. Other quasi-elements have arisen in the caselaw as well. For example, some cases have explicitly held that mail fraud requires an intent to deceive.[50] Some have labeled mail fraud an inchoate crime like conspiracy or attempt because the fraud need not actually have been completed and the intended victim need not actually have been defrauded for criminal liability to arise.[51] Today, the mailing element is only tangentially related to its nineteenth century purpose of protecting the mails.[52] Instead, the mailing element serves as an overt act requirement similar to that found in the law of conspiracy.[53]

Thus, mail fraud, the basis for § 1346 prosecutions, has itself evolved during its hundred year history in the courts. The mail fraud statute's own common law history is the root of § 1346's present common law status in the federal courts. As a result, § 1346 rests on a body of intangible rights caselaw that continues to develop.

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47 See id. at 781-821 (outlining history of federal court interpretation of mail fraud statute).

48 18 U.S.C. § 1341 (1994).

49 See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (codified as amended at 18 U.S.C. § 1341 (1994)) (amending mail fraud statute such that mailing element now can include either U.S. mail or private interstate carriers such as Federal Express or U.P.S.).

50 See United States v. Mandel, 415 F. Supp. 997, 1008 & n.3 (D. Md. 1976) (holding that intent to deceive is necessary element, and that openly accepting gratuities or bribes is not sufficient to trigger mail fraud); see also Rakoff, supra note 45, at 805 (stating that there is no genuine doubt as to requirement of some form of deception).

51 See Durland v. United States, 161 U.S. 306, 315 (1896) (holding that mail fraud need not actually be effectuated); United States v. Regent Office Supply Co., 421 F.2d 1174, 1180 (2d Cir. 1970) (holding that government does not have to show that intended victim was actually defrauded); Moohr, Someone to Watch, supra note 22, at 160-62 (identifying mail fraud as inchoate crime).

52 See Henning, supra note 22, at 450-60 (tracing Supreme Court decisions on meaning of mailing element, and finding dwindling connection to original purpose of protecting post office).

53 See Barbur, supra note 25, at 945-46 (considering mailing element's role in reducing inchoate nature of crime). The transformation of the mailing element is the first example of how mail fraud has evolved in the caselaw.

### B. *The Origins of Intangible Rights and Section 1346*

Under the intangible rights theory, individuals can be found to owe the public fiduciary duties.[54] While the theory has its origins in cases from past decades,[55] it only became well known beginning in the 1970s after a number of public corruption cases that relied on the theory.[56] Soon, the intangible rights theory became a new tool for federal prosecutors attacking public corruption.[57]

The rise of the theory can be attributed, in part, to a serious evidentiary problem in public corruption cases where a specific harm was difficult to ascertain. The intangible rights theory served as a basis for mail fraud prosecutions in which no tangible loss could be clearly identified, providing prosecutors with an alternative to common law fraud, in which money or property loss had to be shown in order to sustain liability.[58]

The most famous articulation of the intangible rights theory was offered in *United States v. Mandel*.[59] In *Mandel*, the governor of Maryland received a series of gifts, ranging from clothing to lucrative real estate ventures, from a racetrack association.[60] Without disclosing the relationship, Mandel used his office to influence state legislators to pass legislation benefiting the racetrack association.[61] Because of the nature of the legislation passed (increasing the racing season from thirty-six to ninety-four days and allowing longer racetracks), it was difficult to ascertain tangible property loss to the people of Maryland.[62] Mandel was nonetheless prosecuted on federal mail fraud charges for devising a scheme to defraud the people of Maryland of "their right to the conscientious, loyal, faithful, disinterested and unbiased" services of the governor's office, without "bribery, corruption,

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54 See infra Part II.A.

55 See, e.g., Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941) ("No trustee has more sacred duties than a public official.").

56 See, e.g., United States v. Margiotta, 688 F.2d 108, 121-25 (2d Cir. 1982) (upholding mail fraud convictions of chairman of Nassau County, N.Y., political party based on public fiduciary duty theory); United States v. States, 488 F.2d 761, 762-67 (8th Cir. 1973) (denying motion to dismiss mail fraud indictment for voter registration fraud despite no tangible property loss).

57 See Henning, supra note 22, at 460-61 ("Beginning in the 1970s, federal prosecutors began using the mail fraud statute to attack political corruption at the federal, state, and local level.").

58 See Moohr, Someone to Watch, supra note 22, at 163 (explaining difference between mail fraud and common law fraud requirement of tangible property loss); see also infra notes 190-98 and accompanying text (discussing intangible rights theory as response to evidentiary difficulties of proving common law fraud).

59 591 F.2d 1347, rev'd on reh'g en banc, 602 F.2d 653 (4th Cir. 1979) (per curiam).

60 See id. at 1356.

61 See id. at 1356-57, 1367.

62 See id. at 1355.

partiality, willful omission, bias, dishonesty, deceit, official misconduct and fraud."[63]

The court in *Mandel* analogized to the private sector in finding a "public official-public body" relationship, establishing a general duty to disclose material facts to the public, and holding that "[a government official's] duty to disclose need not be based upon the existence of some statute prescribing such a duty."[64] The court also explained that the public official becomes a "trustee for the citizens and the state . . . and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty" to the public.[65]

In 1988, the intangible rights theory reached the Supreme Court in the landmark case of *McNally v. United States*.[66] As outlined above,[67] the state official in *McNally* channeled state insurance contracts to insurance companies owned by friends and political associates in exchange for kickbacks. Since a set amount of funds were already allocated and the premiums charged were no higher than the market rate for insurance, tangible costs to the state as a result of corruption were not easily identifiable.[68] Based on its interpretation of the facts, the Court found there was no property or monetary loss from the kickback scheme.[69] This reading proved crucial, for the Court found that Congress did not state that the mail fraud statute was to reach intangible losses. The Court then overturned the entire body of caselaw defining the intangible rights theory, stating:

> Rather than construe 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 mail fraud statute] as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[70]

Congress responded almost immediately by passing 18 U.S.C. § 1346 as part of the Anti-Drug Abuse Act of 1988.[71] Section 1346

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63 Id. at 1353.

64 Id. at 1363 (quoting United States v. Bush, 522 F.2d 641, 652 (7th Cir. 1975)) (alteration in original). Other courts have used similar language to establish the concept of a public fiduciary. See, e.g., United States v. Gray, 790 F.2d 1290, 1296 (6th Cir. 1986) (holding that party official became public fiduciary because he "substantially participated in governmental affairs").

65 *Mandel*, 591 F.2d at 1363.

66 483 U.S. 350 (1987).

67 See supra text accompanying notes 4-6.

68 See *McNally*, 483 U.S. at 360-61. See also infra Part IV.B.2 (discussing *McNally*).

69 See id. at 360 ("It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance.").

70 Id.

71 Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (1988).

reads in its entirety: "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."[72] There is strong evidence that Congress's purpose in passing § 1346 was to overturn *McNally* and reinstate the intangible rights theory. After final passage, the Senate Judiciary Committee entered a report into the Congressional Record stating:

> This section overturns the decision in *McNally v. United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change.[73]

The reaction to § 1346, like its predecessor intangible rights theory, was decidedly negative among commentators.[74] This is due largely to what its critics perceive as an impermissible degree of statutory vagueness.

### C. *The Costs of Section 1346's Statutory Vagueness*

Critics argue that § 1346 is so vague that it forces federal courts to define the statute's terms and legislate the offense from the bench.[75] Some courts, too, have acknowledged this fact; in a recent case, the Fifth Circuit stated, "Congress, then, has set us back on a course of defining 'honest services.'"[76] Courts have also acknowledged that definitions of public sector "fraud" and "honest services" are by their nature elusive, making them unamenable to bright-line rules.[77]

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[72] 18 U.S.C. § 1346 (1994).

[73] 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). But see United States v. Brumley, 116 F.3d 728, 736-45 (5th Cir. 1997) (en banc) (Jolly & DeMoss, JJ., dissenting) (disputing validity of post-enactment report as element of legislative history and arguing that Congress did not intend to overrule *McNally*'s holding that mail fraud does not extend to citizenry's right to honest and impartial government).

[74] See supra notes 22-29 and accompanying text.

[75] See Podgor, supra note 24, at 269 ("[P]resently the court serves as the legislator, as opposed to adjudicator, when a mail fraud issue is the subject of the resolution."); Molz, supra note 24, at 1000-01 ("The broad language of the mail fraud statute fails to identify what conduct it outlaws. . . . [T]he mail fraud statute's breadth indicates vagueness."); see also *Brumley*, 116 F.3d at 736 (Jolly & DeMoss, JJ., dissenting) (criticizing court for assuming "a role somewhere between a philosopher king and a legislator" in defining terms of § 1346).

[76] *Brumley*, 116 F.3d at 733.

[77] See, e.g., United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996) ("The concept of governmental 'honest services' in this context eludes easy definition.").

The costs of vagueness and not having bright-line rules can be enormous. First, information costs for courts in determining liability are higher when there are no parameters narrowing the scope of the inquiry.[78] For example, it is much cheaper in terms of judicial search costs to determine whether someone exceeded dollar limits on a gratuity than to determine whether that person had the specific intent to corrupt a governmental process or otherwise deprive the people of "honest services."

Vague statutes also inflict costs that reduce the deterrent effects of the law.[79] First, the deterrent value of a law may be diminished when the law's reach and scope are uncertain. An official might be undeterred by an anticorruption law if it is so vague that she is not put on notice that the law will apply to her conduct. Alternatively, vagueness or uncertainty might create overdeterrence problems. If the scope of the law is unclear, a person may be overly cautious for fear of being swept up in its reach.[80] One might think that no amount of deterrence against "corruption" is enough, as there are no benefits to such conduct. However, § 1346 has, on occasion, encompassed conduct that arguably holds some social value, such as petitioning or lobbying.[81] The cost of error amplifies these concerns. Courts generally tolerate less vagueness in the criminal law because criminal sanctions are more significant than civil sanctions and thus the costs of erroneous convictions are higher.[82]

A related efficiency concern is connected to the issue of prosecutorial discretion. Because corruption cases often have political

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78 See Posner, supra note 37, at 543 ("The existence of specific rules limits the scope and hence cost of the judicial inquiry . . . .").

79 See, e.g., Thomas L. Patten, From Ethics Issues to Criminalization: Deterring the Wrong Conduct, 58 Geo. Wash. L. Rev. 526, 526 (1990) (noting overdeterrence costs of vague criminal statutes meant to enforce ethical behavior).

80 See Posner, supra note 37, at 543-44.

81 Perhaps as a result of confronting such an issue, the First Circuit has carved out a safe harbor from mail fraud for some routine lobbying activities. In United States v. Sawyer, 85 F.3d 713, 720-21, 725 (1st Cir. 1996), the court held that giving gratuities, even those that violate state gratuity laws, cannot be a basis for § 1346 prosecutions where the intent was merely to cultivate a working relationship for lobbying and was not to deceive or defraud the public. While some might find the distinction slight, it may also reflect subtle differences between political bribery and lawful petitioning of the government. Cf. George D. Brown, The Gratuities Offense and the RICO Approach to Independent Counsel Jurisdiction, 86 Geo. L.J. 2045, 2051-57 & n.97 (1998) (discussing judicial and scholarly arguments about gratuities, and noting "strand of the pro-gratuity argument . . . emphasizing the special needs of those who communicate with the government on a regular basis, particularly lobbyists").

82 See, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

implications, concerns about selective prosecution are heightened in § 1346 cases.[83] Prosecutors may even seek public corruption cases to launch a political career.[84] If these assertions are true, they might create significant agency costs. In other words, it is costly to prevent prosecutors from exceeding their mandate when the statute is vague.[85] Moreover, if potential targets believed § 1346 to be enforced arbitrarily, its deterrent value might be distorted because no course of conduct could protect them from prosecution.[86]

### *D. The Benefits of Section 1346's Malleability*

Congress and the federal courts interpreting § 1346 clearly have come down on the side of using standards rather than bright-line rules to reduce corruption. There are many reasons supporting this decision.

First, corruption is a crime that involves standards of government conduct. Distinguishing illicit corrupt activities from noncorrupt legal activities can be extraordinarily difficult.[87] Because corruption and fraud in government elude easy definition, it is often more useful to examine government officials' conduct on a case-by-case basis than to

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[83] Chief Judge Ralph K. Winter, a noted expert on law and economics, criticized the honest services theory on these grounds in United States v. Margiotta, 688 F.2d 108, 139-44 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part), writing that "[t]he majority's use of mail fraud as a catch-all prohibition of political disingenuousness . . . creates a real danger of prosecutorial abuse for partisan political purposes." Id. at 139.

[84] See Moohr, Someone to Watch, supra note 22, at 180-81 ("Selective mail fraud prosecution may result from personal motives of political aspirations, simple careerist concerns, or a desire to eliminate political opponents or activists. This potential misuse of the mail fraud statute creates a danger to the political process that may eclipse the danger posed by corrupt officials." (citations omitted)). However, prosecutors often are not politically rewarded by prosecutions of public corruption or dislike them. See Anechiarico & Jacobs, supra note 41, at 94; cf. George T. Frampton, Jr., Some Practical and Ethical Problems of Prosecuting Public Officials, 36 Md. L. Rev. 5, 14 (1976) ("[M]ost prosecutors are reluctant to go after high-ranking elected officials unless it appears that very solid evidence of criminality can be adduced. This reluctance is based not so much on fear of the public official's power as on respect for his role in the political system.").

[85] Cf. Posner, supra note 37, at 224 ("[I]f the consequences of error are sufficiently enormous, even a very slight risk of error will generate avoidance measures that may be socially very costly.").

[86] See id. at 544 (considering agency costs of law enforcement authorities conceptualized as agents of society). Rakoff seemed to imply such costs when he argued that if prosecutors use mail fraud charges irrationally, they will cease to command moral force. See Rakoff, supra note 45, at 779.

[87] See Kenneth U. Surjadinata, Revisiting Corrupt Practices from a Market Perspective, 12 Emory Int'l L. Rev. 1021, 1021 (1998) ("Although most, if not all, states confront corruption . . ., corrupt practices are extremely difficult to define."); see also Daniel H. Lowenstein, Political Bribery and the Intermediate Theory of Politics, 32 UCLA L. Rev. 784, 788, 798-805 (1985) (describing difficulties in labeling acts corrupt or not corrupt).

draft statutes to capture specific acts.[88] Even seemingly straightforward ethics rules, such as maximum dollar limits on gifts to government officials, can lead to confusing interpretive problems.[89] This may explain why courts have tended not to set specific and narrow rules on the scope of § 1346.[90]

A second reason to prefer standards of conduct to specific rules involves the value of standards for spreading information. Supposedly clearer specific rules do not always communicate information as efficiently as a general standard might.[91] Thus, it might be more cost effective for deterrence purposes in corruption cases to rely on standards rather than rules. Public corruption cases allow potential violators to comprehend what patterns of corrupt activity will likely trigger liability more cheaply than relying on experts like ethics lawyers to explain complicated anticorruption rules properly. To paraphrase Judge Posner, more people understand what it means to exploit a conflict of interest than know the intricate web of financial disclosure rules.[92]

A third reason why courts have not defined § 1346 by bright-line rules reflects the historic role that the underlying mail fraud statute has long played. As Kahan and others have noted, the aspect of the mail fraud statute that has received the most criticism, its broad malle-

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88 Federal courts have long acknowledged this in criminal mail fraud prosecutions. See, e.g., Foshay v. United States, 68 F.2d 205, 211 (8th Cir. 1933) ("To try to delimit 'fraud' by definition would tend to reward subtle and ingenious circumvention and is not done. The particular facts determine its presence or absence on principles long settled by the courts . . . ."). Some corruption experts have argued that because corruption encompasses a wide range of acts, it should be examined using a case-by-case, multifactor analysis to classify various gradations of corruption. See John G. Peters & Susan Welch, Gradients of Corruption in Perceptions of American Public Life, in Political Corruption: A Handbook 723, 723-41 (Arnold J. Heidenheimer et al. eds., 1989) (discussing various ways of classifying corruption).

89 See, e.g., Ruth Marcus, Lobbyists, Senators Score MCI Tickets Without Penalty, Wash. Post, Sept. 24, 1997, at A1 (detailing confusion about and manipulation of Senate's gift ban).

90 A rigid mail fraud statute might not capture all forms of fraud:

> Courts have properly ignored . . . proposals . . . [t]o define the limits of mail fraud [because they] would destroy the statute's ability to adapt and thereby capture new forms of fraud. This adaptability is important because crime assumes many forms, criminals can find and exploit statutory loopholes, and Congress has limited resources with which to draft, debate, and enact criminal statutes.

Molz, supra note 24, at 984-85.

91 See Posner, supra note 37, at 544-45 (comparing information-spreading value of rules versus standards).

92 See id. at 545 ("More people understand what it means to be careless than know the intricate matrix of common law tort rules.").

ability, has also been cited as its greatest value.[93] For example, Chief Justice Warren Burger endorsed it as a first line of defense in many new forms of private sector fraud, such as credit card fraud in the 1970s, that otherwise would elude bright-line statutory definitions.[94] This simply reflects the reality that bright-line rules tend to create loopholes and let escape conduct they are intended to prevent, whereas more general standards can catch more ingenious adaptations of the same crime. At the same time, this flexibility may come at the cost of deterrence value.[95]

A fourth major reason justifying the vagueness of § 1346 is that it is cheaper and more efficient to let the courts define the crime on a case-by-case basis rather than redraft statutes to meet new forms of corruption.[96] Some have criticized this use of the mail fraud statute, arguing that once a new fraud is discovered, Congress should draft and enact a more specific statute to address it.[97] However, Congress has, for the most part, chosen to rely instead on the existing body of caselaw to define § 1346.[98] Since specific statutes become obsolete more quickly than general caselaw standards, their high transaction costs[99] would only be compounded if Congress continually had to update the specific statutes.[100] Congress specifically rejected this approach when it passed § 1346 to overturn the *McNally* decision and instead explicitly codified the precedent that developed before *McNally*.[101] This makes sense if one looks at caselaw as a kind of

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93 See Kahan, Is *Chevron* Relevant?, supra note 33, at 482 (citing United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting) (describing role of mail fraud statute in catching new frauds)); see also Henning, supra note 22, at 438 ("The broad reach of the mail fraud statute . . . has been attributed to the willingness of courts to impose few restrictions on the application of the 'scheme and artifice to defraud' element . . . . [As a result, t]he statute became a strategic tool in fighting political corruption." (citations omitted)).

94 See *Maze*, 414 U.S. at 405-06 (Burger, C.J., dissenting).

95 See supra notes 79-80 and accompanying text.

96 Statutory enactment is costly; coming to an agreement among hundreds of parties (i.e., members of Congress) entails high transaction costs. See Posner, supra note 37, at 542; see also Kahan, Is *Chevron* Relevant?, supra note 33, at 473-74 ("Congress lacked the practical and political resources necessary to enact a completely specified version of RICO.").

97 See Henning, supra note 22, at 440 (criticizing "Federal Fraud Statute" because it allows Congress to "avoid writing comprehensive criminal laws that address specific activities worthy of criminal punishment").

98 For the legislative history of § 1346, see Adam H. Kurland, The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials, 62 S. Cal. L. Rev. 367, 487-91 & nn. 450-55 (1989).

99 See supra note 96.

100 See Posner, supra note 37, at 543.

101 For a fuller discussion, see supra note 73 and accompanying text.

capital stock of information for the courts and litigants.[102] Rather than running up costs crafting a statute hundreds of pages long, Congress acted to recover a rich body of caselaw.

## II

## PRINCIPLES EMERGING FROM THE COMMON LAW PROCESS INTERPRETING SECTION 1346

Kahan has argued that by drafting very general federal criminal statutes, Congress can initiate a kind of common law process in which the federal courts are delegated responsibility for settling the substantive details of new federal criminal law.[103] Section 1346 is a prime example of such a delegation of lawmaking power to the courts.

The common law process of interpretation and modification of § 1346 has coalesced around some discernable principles. Some of these principles can be labeled as binding precedent—that is, they provide specific, substantive rules as to what does and does not constitute a § 1346 offense. Others are more general principles about the utility of § 1346 that guide how it should be most effectively employed as an anticorruption measure. While the costs of having vague criminal statutes are real and serious,[104] § 1346 has, through use and interpretation, evolved in a way that reduces these costs and lends § 1346 meaning and definition. Critics have failed to recognize fully the principles that support § 1346 and the caselaw governing it. This Note argues that these emerging principles can be explained through a cost-benefit analysis, and, indeed, have generally made § 1346 a more effective anticorruption measure from an economic point of view.

Those who have examined the common law process of judge-created rulemaking have found that much of it makes economic sense.[105] Some have postulated that the common law process tends to produce legal incentives that have efficient rationales.[106] Common law rulemaking does not, of course, guarantee efficient outcomes.[107] But given that this body of common law on the intangible rights theory is now three decades old (and caselaw on the mail fraud statute now spans more than a century), one might expect efficient principles to develop in the caselaw as they have done in other areas of the com-

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102 See Posner, supra note 37, at 539.

103 See Kahan, Lenity and Federal Common Law Crimes, supra note 33, at 370-71.

104 See supra Part I.C.

105 See supra note 40 and accompanying text.

106 See, e.g., Rubin, supra note 40, at 61 (finding tendency towards efficiency when both litigants are interested in precedential value).

107 See Posner, supra note 37, at 255 (noting that many common law doctrines do not make economic sense).

mon law.[108] This Part argues that the courts indeed have developed some discernible principles in the caselaw, and that these principles can be explained through an efficiency point of view.

### *A. The Revival of the Public Fiduciary Approach to Corruption Control*

As a threshold issue, federal courts have revived the concept of the public fiduciary.[109] For example, in *United States v. Sawyer*,[110] the First Circuit invoked fiduciary duties in a § 1346 case:

> A public official has an affirmative duty to disclose material information to the public employer. When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act. Thus, undisclosed, biased decision making for personal gain, whether or not tangible loss to the public is shown, constitutes a deprivation of honest services.[111]

Of course, private sector fiduciary duties have been vague and indeterminate.[112] One could also doubt whether it is possible to transplant fiduciary duties from the private sector to public corruption cases.[113] But there is an efficiency rationale for the law of fiduciaries in the private market that translates to the public sector. As Judge Posner explains:

> The fiduciary principle is the law's answer to the problem of unequal costs of information. It allows you to hire someone with superior information to deal on your behalf with others having superior

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[108] See supra notes 38-40 and accompanying text.

[109] See United States v. Lopez-Lukis, 102 F.3d 1164, 1169 (11th Cir. 1997) ("Elected officials generally owe a fiduciary duty to the electorate.") (citing Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941)).

[110] 85 F.3d 713 (1st Cir. 1996).

[111] Id. at 724 (citations omitted); see also United States v. Holzer, 816 F.2d 304, 307 (7th Cir. 1987) (Posner, J.) ("A public official is a fiduciary toward the public, including, in the case of a judge, the litigants who appear before him, and if he deliberately conceals material information from them he is guilty of fraud."); United States v. ReBrook, 837 F. Supp. 162, 170 (S.D. W. Va. 1993) ("To support the validity of the indictment, the Court need only find at least one of these duties [of honest service] existed, so that the allegations . . . properly accuse Defendant of violating a fiduciary duty to his employer.").

[112] See, e.g., Meinhard v. Salmon, 249 N.Y. 458, 464 (1928) (Cardozo, J.) (stating that standard of behavior for fiduciary is "[n]ot honesty alone, but the punctilio of an honor the most sensitive"); see also Robert W. Hillman, Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving, 67 Tex. L. Rev. 1, 45 (1988) (criticizing vague applications of partners' fiduciary duties).

[113] On a related note, see Edward C. Banfield, Corruption as a Feature of Governmental Organization, 18 J.L. & Econ. 587, 591-99 (1975) (citing various differences between private sector corruption and public sector corruption).

> information. The principle does more. By imposing a duty of utmost good faith rather than the standard contractual duty of ordinary good faith, it minimizes the costs of self-protection to the fiduciary's principal.[114]

Electorates have tried to protect themselves from corruption of their government in a variety of ways. One approach is to use proactive, prophylactic measures that are implemented by large-scale bureaucratic machinery. For example, New York City uses complex conflict of interest laws and financial disclosure requirements for its city officials and employees.[115] The City further employs internal investigations,[116] multiple audits, and various financial controls.[117] Some skeptics have questioned whether these programs actually reduce corruption.[118] Additionally, the costs of corruption controls are being reexamined.[119] For example, the New York Department of Investigation alone had an annual budget of $18.8 million and a staff of 345 in fiscal year 1994.[120] Other costs include time lost to paperwork, harm to morale, and the stifling of management and employee innovation.[121]

Excessive federal prosecutions could lead to similar costs. However, a series of targeted § 1346 prosecutions of large-scale corruption might yield better results than expensive, and often ineffective, monitoring and corruption controls. There are examples where relatively few intangible rights mail fraud prosecutions helped reduce widespread corruption that had existed alongside of anticorruption bureaucracies.[122] Through investigations such as Operation Greylord, in which several local Chicago judges were caught engaging in corrupt

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114 Posner, supra note 37, at 113.

115 See Anechiarico & Jacobs, supra note 41, at 53-62 (discussing advantages and disadvantages of New York's efforts).

116 See id. at 76-92 (describing New York City Department of Investigation).

117 See id. at 139-50 (explaining history of various agencies responsible for financial controls).

118 See id. at 172 ("It is possible that the actual amount, frequency, or rate of corruption has declined over the course of the century, but a strong argument can be made that the anticorruption project has had a minimal impact on corruption.").

119 See id. at 150 (noting that the effects of expanded anticorruption controls on public administration are "not all . . . positive").

120 See Dep't of Investigation, New York City, Report to the Mayor 1990-1993, at 4 (1993) (on file with the *New York University Law Review*).

121 See Anechiarico & Jacobs, supra note 41, at 173-85 (describing various problems that stem from anticorruption controls).

122 The New York City corruption scandals of the mid-1980s provide a good example of the difference that federal mail fraud prosecutions can make. See id. at 104 (describing how small number of federal mail fraud prosecutions at height of scandal helped break up rampant corruption in city agencies).

practices,[123] federal mail fraud prosecutions have at times proved more effective in reducing extensive corruption than local anticorruption measures.

### B. *Requiring Discretionary Authority*

Another principle that has emerged is the curtailing of § 1346's reach over lower-level public employees who have limited or no discretionary authority, an idea that originated in the pre-*McNally* caselaw. For example, in *United States v. McNieve*,[124] a city plumbing inspector received gratuities along with permit applications sent to him by a contractor. The court focused on the finding that McNieve's duty to approve permits was ministerial and not discretionary.[125] Because McNieve could not really affect enforcement, and given the fact that there was no available evidence that the public actually lost anything,[126] the court held that McNieve could not be culpable for a scheme to defraud under the intangible rights theory. In recent decisions, courts have revived the *McNieve* rule in § 1346 prosecutions.[127]

This presumption against finding § 1346 liability when the employee lacks discretionary authority generally makes economic sense. There are relatively few benefits to prosecutions of isolated government employees who lack discretionary authority. First, an employee with little discretionary authority has, almost by definition, little ability to impose costs by corruption; absent cooperation among several employees, she will be unable to execute corrupt acts through her nondiscretionary position.[128] Second, employees with little or no dis-

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123 See generally James Tuohy & Rob Warden, Greylord: Justice, Chicago Style (1989) (discussing trials of Chicago-area state judges on corruption charges).

124 536 F.2d 1245 (8th Cir. 1976).

125 See id. at 1246.

126 The city received the full fee for the permit, McNieve enforced the plumbing code effectively, and he did not solicit or conceal his acceptance of gratuities. See id. at 1252.

127 See United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997) (citing *McNieve* in vacating conviction of low-level IRS employee who lacked discretionary authority); see also United States v. Blumeyer, 114 F.3d 758, 766 (8th Cir. 1997) (distinguishing facts from *McNieve* because legislator defendant had significant discretion in his position).

128 For example, the *Czubinski* court stressed that the nondiscretionary nature of the low-level defendant's role limited his capacity to act in a self-interested way: "Czubinski was not . . . influenced in any public decisionmaking capacity. . . . His official duty was to respond to informational requests from taxpayers regarding their returns, a relatively straightforward task that simply does not raise the specter of secretive, self-interested action, as does a discretionary, decision-making role." 106 F.3d at 1077. Many corruption experts have stressed the correlation between government officials' discretionary authority and government corruption. See, e.g., Robert H. Sutton, Controlling Corruption Through Collective Means: Advocating the Inter-American Convention Against Corruption, 20 Fordham Int'l L.J. 1427, 1434-35 (1997) (noting that corruption-ridden countries suffer from problems caused when public officials have great discretionary power over commercial activities).

cretionary authority tend to be low-level and are generally held in lower esteem in the public's mind, making their corruption a less costly breach of the public trust than a high-level official's corruption would be.[129]

There are also significant costs to investigating and prosecuting employees who come from the lower ranks of government. The start-up costs for federal investigators to learn the complexities of unfamiliar low-level, local bureaucracies can be relatively high.[130] Thus, § 1346 prosecutions are most warranted from a cost-benefit analysis when there is systemic corruption that has pervaded the locality and in some way interfered with local prosecutors.[131] This might explain why federal prosecutors have been more successful prosecuting large pockets of corruption in city agencies than they have been at rooting out isolated city employees.[132]

### C. *State-Defined Duties as Guidelines*

Another approach to limit the scope of § 1346 is to tie it to state-defined duties of conduct for government officials.[133] Some recent decisions have incorporated, but not required, reference to state anticorruption rules. Two recent Court of Appeals decisions are particularly noteworthy in this regard: *United States v. Sawyer*[134] and *United States v. Brumley*.[135]

In *Sawyer*, a lobbyist violated several state gift and gratuity statutes in the course of lobbying state representatives. In remanding Sawyer's wire fraud conviction, the First Circuit found that § 1346 does not reach all reprehensible misconduct,[136] nor does it "encompass every instance of official misconduct that results in the official's personal gain."[137] The court held that while violations of state an-

129 For a more complete explanation of why decisionmaking authority is an important factor in the sentencing process as well, see infra Part IV.

130 See Anechiarico & Jacobs, supra note 41, at 103 (noting that "federal officials may be unfamiliar with the nuances of local politics, and, as a result, have to rely on and work with local law enforcement").

131 Even critics of the use of § 1346 to prosecute state and local government corruption concede that there is some role for federal prosecutions when state prosecutors are unable or unwilling to prosecute, even if they disagree with the use of § 1346 itself. See, e.g., Moohr, The Federal Interest, supra note 22, at 1127 ("In some cases of political corruption, the state is unable or unwilling to safeguard its interests . . . by prosecuting local and state officials who engage in corrupt practices.").

132 See Anechiarico & Jacobs, supra note 41, at 104.

133 See Brown, supra note 27, at 230-31 (urging greater use of state and local law in mail fraud cases).

134 85 F.3d 713 (1st Cir. 1996).

135 116 F.3d 728 (5th Cir. 1997).

136 See *Sawyer*, 85 F.3d at 725.

137 Id.

ticorruption laws are not by themselves sufficient to sustain a conviction under § 1346, they may play a role in the court's consideration.[138]

In *Brumley*, the defendant, a regional director of a state workers' compensation commission, borrowed over $85,000 from a lawyer who made frequent appearances before the commission.[139] Like the First Circuit, the Fifth Circuit looked to state-defined work duties. In defining "honest services" the court held that to sustain a § 1346 conviction, it is necessary to prove first that services were required under state law, and second that the services were in fact not provided by the official.[140] Interestingly, the court implied that a public official who faithfully fulfilled state-prescribed services could not be convicted under § 1346, even if her acts may have violated state gratuity statutes.[141] The court declined to decide whether a breach of duty must also violate the state's criminal law in order to result in a § 1346 conviction.[142]

There are many factors that went into the Fifth Circuit's limited incorporation of state law into § 1346 offenses. Federalism concerns surely played a part.[143] The courts' decisions also try to balance two more practical goals. State laws on public sector job duties provide guidance to potential violators, and hence provide deterrent effects.[144] At the same time, by holding that state law is merely a factor in determination of guilt under federal law, the courts might have wanted to preserve the adaptability of § 1346[145] while lowering judicial inquiry costs. It also provides a somewhat clearer anticorruption law, and thus has a greater deterrent effect. It remains to be seen whether other circuits will follow suit, make state law binding, or continue to ignore state anticorruption laws altogether.

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138 See id. at 731.

139 See *Brumley*, 116 F.3d at 730-31.

140 See id. at 733-35.

141 See id. It is not clear why the court seemed to favor looking to employee work duties as described by their government employer over state anticorruption laws against bribery, receiving gifts, or failing to disclose conflicts of interest as guidelines for § 1346 prosecutions.

142 See id. at 734.

143 See id. at 735 ("The federalism arguments that inform the definition of 'honest services' under federal criminal law are powerful, and we acknowledge them in our holdings today."); see also infra Part III (analyzing costs and benefits of federal enforcement of § 1346 against state and local corruption).

144 See supra Part I.C (outlining costs of vagueness).

145 See supra Part I.D (outlining benefits of vagueness).

## III

## THE COSTS AND BENEFITS OF FEDERAL ENFORCEMENT OF SECTION 1346

The scholarly writing on § 1346 is greatly concerned with federalism issues, particularly the use of § 1346 by federal prosecutors to prosecute state and local corruption.[146] This section recasts these arguments explicitly into a debate over the efficiency of such prosecutions.[147] While many of these arguments could be applied to a host of federal statutes used in corruption prosecutions,[148] this section is included because of the great attention given to § 1346's role in federal prosecution of state and local government corruption.

Federalism is considered valuable from an economic point of view because it prevents a federal monopoly on government power, checks an unwieldy centralization of government, and encourages experimentation in public policy among the fifty states.[149] When a powerful federal government treads on state and local decisionmaking, inefficiencies may result. This is essentially what Moohr argues when she states that "an engaged electorate is the source of innovation"[150] and concludes that federal mail fraud prosecutions "encourage[ ] citizens to abdicate their responsibility for self-government at the state and local levels. The ultimate result is a diminished demand on state and local legislative and executive branches to control political corruption."[151] Over the long run, such costs could be severe.

However, there is evidence that the role of § 1346 in such corruption prosecutions has been exaggerated. First, the significant majority of federal prosecutions for corruption are against federal officials

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146 The literature on § 1346 and federalism is extensive and mostly critical of § 1346. See Brown, Should Federalism Shield Corruption?, supra note 27, at 229 (noting breadth of mail fraud statute's intrusion on federalism principles); see also Moohr, Someone to Watch, supra note 22, at 172 ("An examination of the benefits of a federalist system leads to the conclusion that the application of the intangible rights doctrine to state and local political corruption diminishes those benefits and damages the federalist system.").

147 While it might seem strange to use efficiency to evaluate federalism, many courts and commentators have done so implicitly to criticize § 1346. See, e.g., Moohr, Someone to Watch, supra note 22, at 156 (arguing that costs to federalization outweigh benefits).

148 Federal prosecutions of state and local officials can involve federal laws such as the Hobbs Act, 18 U.S.C. § 1951 (1994); the Travel Act, 18 U.S.C. § 1952 (1994); and the Racketeer Influenced and Corrupt Organizations (RICO) law, 18 U.S.C. §§ 1961 to 1968 (1994).

149 See Posner, supra note 37, at 635-36 (noting that "[i]f all government in the United States were federal . . . [it] would be immense and unwieldy . . . with divergent approaches to problems of public policy . . . curtailed").

150 Moohr, Someone to Watch, supra note 22, at 174.

151 Id. at 175.

rather than state or local officials.[152] Second, while recent statistics are not readily available, even the absolute numbers of federal prosecutions of state and local officials using mail fraud or § 1346 are small;[153] probably no more than 130 persons at the local level and 50 persons at the state level are indicted each year principally on mail fraud charges.[154] This does not imply that § 1346 is inconsequential. But it does suggest that claims about its effects—both the costs and the benefit of § 1346 prosecutions—might be somewhat exaggerated.

In addition, many benefits of federal enforcement have been overlooked. In many cases, having federal prosecution of public cor-

[152] Table I shows the total number of federal indictments of state and local public officials and employees for select years over the past 25 years, under all of the federal criminal statutes relating to public corruption in some way (including but not limited to mail fraud):

TABLE I. FEDERAL INDICTMENTS OF PUBLIC OFFICIALS AND EMPLOYEES FOR OFFENSES INVOLVING ABUSE OF PUBLIC OFFICE

| | Federal | State | Local |
|---|---|---|---|
| 1973 | 60 | 19 | 85 |
| 1977 | 129 | 50 | 157 |
| 1981 | 198 | 87 | 244 |
| 1985 | 563 | 79 | 248 |
| 1989 | 695 | 71 | 269 |
| 1991 | 803 | 115 | 242 |
| 1992 | 624 | 81 | 232 |
| 1993 | 627 | 113 | 309 |
| 1994 | 571 | 99 | 248 |
| 1995 | 527 | 61 | 236 |

Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 495 (Kathleen Maguire & Ann L. Pastore eds., 1997). As Table I shows, there was a large increase in federal prosecution of state and local officials in the 1970s, but then a leveling off period in the 1980s, after which it has remained steady. Moreover, the significant majority of indictments have been of federal, not state or local, officials. See id.

[153] Past estimates and statistics indicate that mail fraud is the principal charge in approximately 40% of all federal prosecutions of state and local corruption. See Williams, supra note 22, at 144-45 (citing estimate that 40% of all public corruption cases involve mail or wire fraud charges). There are no recent statistics on how often mail fraud is included as a secondary charge.

[154] Using the 40% figure, see supra note 153, an estimate on the absolute number of such cases can be calculated as follows:

TABLE II. ESTIMATED NUMBER OF FEDERAL INDICTMENTS OF STATE AND LOCAL OFFICIALS WITH MAIL FRAUD AS PRINCIPAL CHARGE, 1991-1995

| | State | Local |
|---|---|---|
| 1991 | 48 | 102 |
| 1992 | 34 | 97 |
| 1993 | 47 | 130 |
| 1994 | 42 | 104 |
| 1995 | 26 | 99 |

ruption is more efficient than giving state and local officials exclusive power to prosecute corruption. To understand why, it is first necessary to examine the economic rationale for federal law enforcement of federal corruption. One rationale is interstate externalities;[155] federal corruption creates costs to citizens in each of the fifty states, but those individual state losses are not as great as the aggregate cost. Thus, individual states will not have as much incentive to fully investigate federal officials, and their combined efforts would be duplicative and uncoordinated.[156] Even critics of § 1346 itself concede that there is an obvious primary federal interest in federal prosecution of federal government corruption.[157]

Many argue that states and localities should have the primary authority to prosecute state and local corruption.[158] There are economic rationales for this, since the costs of nonfederal corruption are borne by the citizens of a particular state or locality rather than by the nation.[159] However, even of those who have emphasized the local interest in corruption control—and this Note in no way disputes that premise—many have conceded various reasons for a substantial federal role.[160] This section discusses various arguments for a significant federal role in prosecuting state and local corruption.

First, there are advantages to raising the costs to those who would seek to corrupt state and local government. As Posner explains:

> Some federal criminal jurisdiction is explicable by reference to the point . . . that monopolies of political power are more easily achieved at the state than at the federal level. Federal criminal prosecutions of corrupt local government officials exploit the rela-

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155 See Posner, supra note 37, at 637 (asserting that "[m]uch of federal criminal law . . . is explicable as a response to the problems of interstate externalities").

156 See id.

157 See Moohr, The Federal Interest, supra note 22, at 1171 n.207 (1997) (finding primary federal interest in prosecution of federal corruption, but arguing for specific political corruption statutes).

158 See Moohr, Someone to Watch, supra note 22, at 175-76 (articulating reasons why criminal corruption control is primarily interest of states and localities and detailing damaging effects of federal intervention).

159 See Moohr, The Federal Interest, supra note 22, at 1172 ("The state interest is also more immediate [than the federal interest] because the corrupt conduct of state and local public officials directly threatens and harms state institutions."); cf. Posner, supra note 37, at 637 (comparing bank fraud, with FDIC-insured losses borne by federal government, to bank robbery, with nonpecuniary costs in fear and injury borne by state citizens).

160 Moohr, for example, has been very balanced and intellectually honest in examining the federal interests in prosecuting state and local corruption, even though she has been skeptical of many examples of federal intervention and of § 1346 in particular. See Moohr, The Federal Interest, supra note 22, at 1171-81 (detailing federal interests in fighting state and local corruption while criticizing § 1346 specifically).

> tive incorruptibility of federal officials . . . in order to reduce corruption at the local level.[161]

This theory seems to be borne out in practice. Examples abound of seemingly intractable local corruption finally broken by U.S. Attorneys' offices. For example, for decades in New York State, convictions for bribery of public officials were frequently overturned by state appellate judges; it was not until bribery-related charges (often based on mail fraud) were brought in federal court in the 1980s that many convictions were sustained.[162] Critics should not be too dismissive of the benefits of federal corruption prosecutions of state and local government officials.

Specialized federal prosecutors might also achieve economies of scale in corruption control. The Public Integrity Section of the Department of Justice was founded in 1976 to oversee and coordinate "the federal effort to combat corruption . . . at all levels of government."[163] As such, the Section has a staff at any one time of between twenty-five and thirty attorneys who are devoted solely to investigating and prosecuting public corruption and who include experts on election laws, conflicts of interest, and bribery. The Section further provides technical advice and training to U.S. Attorneys across the country.[164] Few states or localities have the resources to assemble this body of expertise[165] and it would be wasteful for each locality to try.[166]

A third, often overlooked, benefit is that mail fraud and § 1346 prosecutions introduce a healthy federal versus state competition in pursuing public corruption. For example, some have suggested that the high-profile public corruption cases by then-U.S. Attorney Rudolph Giuliani in the 1980s gave local prosecutors more incentives to prosecute widespread bribery in New York City government.[167]

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161 Posner, supra note 37, at 637.

162 See Anechiarico & Jacobs, supra note 41, at 94 (suggesting reason for appellate courts' notorious hostility to corruption cases may have been judges' dependence on political party endorsement).

163 Pub. Integrity Section, U.S. Dep't of Justice, Report to Congress on the Activities of the Public Integrity Section for 1993, Introduction (on file with the *New York University Law Review*).

164 See id. at 1-6.

165 Perhaps the only local agency that can compare to the Public Integrity Division's resources is New York City's Department of Investigation (DOI). See supra notes 115-20 and accompanying text.

166 Undercutting this argument is the fact that local corruption has local characteristics, and the fact that the start-up costs will be cheaper for local investigators than for federal prosecutors who are less familiar with the locality.

167 See Anechiarico & Jacobs, supra note 41, at 102.

Rather than stultify state and local innovations to prevent corruption, mail fraud prosecutions might instead spur them.

In conclusion, federal intervention and prosecution in state and local corruption, often through the use of mail fraud and § 1346, has in many cases been beneficial, even necessary, in breaking state or local corruption. There are economic reasons to support such interventions. At the same time, the long-run costs to federalism are nearly impossible to weigh. Given the highly sensitive nature of federal intervention in state and local government, and the potential for very serious costs, it will likely continue to be the principal source of concern over the use of § 1346. However, to the extent that federal prosecutors stray from the most cost-effective uses of § 1346 in state and local corruption cases, the federal courts may exercise their common law authority over § 1346 to heed policy prescriptions for reform and thereby judicially limit the scope of intangible rights prosecutions.[168]

## IV
## PUNISHING SECTION 1346 OFFENSES: THE SENTENCING GUIDELINES

### *A. Marginal Deterrence*

Given the amount of attention that § 1346 has received, surprisingly little scholarly attention has been devoted to the sentencing phase of § 1346 cases.[169] The United States Sentencing Guidelines

[168] There is some evidence that this is happening through the common law process. For example, the Judicial Conference, made up of representatives from the federal judiciary, has advocated limiting federal prosecutorial intervention to cases involving serious, high-level or widespread local corruption. See Committee on Long Range Planning, Judicial Conference of the U.S., Long Range Plan for the Federal Courts 24-25 (1995), cited in Moohr, The Federal Interest, supra note 22, at 1144-45. This reform measure makes sense based on the cost-benefit analysis of federal intervention detailed above, see supra Part III, and it is borne out empirically, see Anechiarico & Jacobs, supra note 41, at 104 ("The U.S. attorney's office . . . appears more successful at investigating and prosecuting large pockets of corruption in city agencies, rather than prosecuting isolated corrupt employees."). Perhaps for those reasons, federal courts have occasionally come up with judicially crafted limits on the ability of federal prosecutors to prosecute arguably corrupt acts by isolated, low-level local government employees. See, e.g., United States v. McNieve, 536 F.2d 1245, 1252-53 (1976) (vacating mail fraud conviction of city employee who took small tips in course of ministerial, nondiscretionary job). The *McNieve* court noted, "[I]t seems that the [federal] Government's vast . . . resources would be far better occupied if petty cases such as these were left to the province of state legal, or even political, processes." Id. at 1252 n.13.

[169] One study used a sophisticated efficiency analysis to examine the sentencing of federal fraud offenders. However, the author relied on data from 1984, and, being only tangentially concerned with intangible rights, made no specific conclusions as to intangible rights cases. See Joel Waldfogel, Are Fines and Prison Terms Used Efficiently? Evidence on Federal Fraud Offenders, 38 J.L. & Econ. 107 (1995).

consider an array of factors quantifying the form and degree of corrupt activities in order to determine punishment for § 1346 offenses.[170] Because deterrence is related to punishment, the incentives created by the Federal Sentencing Guidelines are an important component in analyzing § 1346.[171]

Economic analysis considers the ways in which sanctions can deter people from committing criminal acts.[172] Growing empirical evidence supports the assumption that individuals respond to the level of punishment as well as the probability of being punished in deciding whether or not to commit a particular crime.[173] If an individual expects to be made worse off by committing the criminal act, she would rationally be deterred from doing so. Because of the lack of evidence on the probabilities of detection and punishment in corruption cases, this Note focuses on the level of sanctions for various § 1346 offenses.

To maximize the deterrence effects of all criminal sanctions, we could punish all crimes equally and severely. This approach, however, would ignore the effects of marginal deterrence. Marginal deterrence can be described as the positive incentive "to substitute less for more serious crimes."[174] For example, a public employee might have the option of either accepting a minor payoff or asking for a major bribe. If both crimes were punished equally, and she were equally likely to be caught, then the public employee would actually have a perverse incentive to attempt a major bribe because the expected punishment costs would be no different. For marginal deterrence purposes, it is important to be able to assess the relative costs of various crimes and to set up gradations of punishment that reflect those differences. In short, it makes economic sense to make the punishment fit the crime.

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170 See infra Part IV.C.

171 Because § 1346 is a federal offense, the federal sentencing guidelines dictate the range of criminal sanctions. See Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3559, 3561-3566, 3571-3574, 3581-3586 (1994).

172 See generally Becker, supra note 38.

173 See, e.g., David J. Pyle, The Economics of Crime and Law Enforcement 29-88 (1983) (summarizing econometric studies of crime in general and of capital offenses in particular); Isaac Ehrlich, Participation in Illegitimate Activities: An Economic Analysis, in Essays in the Economics of Crime and Punishment 68 (Gary S. Becker & William M. Landes eds., 1974) (claiming that offenders respond to incentives much as participants in legitimate activities do); William N. Trumbull, Estimations of the Economic Model of Crime Using Aggregate and Individual Level Data, 56 S. Econ. J. 423 (1989) (presenting data supporting deterrence predictions of economic model of crime). But see Samuel Cameron, The Economics of Crime Deterrence: A Survey of Theory and Evidence, 41 Kyklos 301 (1988) (disputing strength of rational deterrence theory and empirical studies supporting it).

174 Posner, supra note 37, at 226.

Thus, it is essential to examine the various costs of corruption that fall under § 1346, and how they are punished.[175]

### B. *Assessing the Tangible and "Intangible" Costs of Corruption*

Marginal deterrence requires an assessment of the relative costs of corrupt activities. Public corruption takes many different forms,[176] and thus the costs of public corruption can vary.

In many cases, costs of corruption can be extremely difficult to determine because of significant evidentiary obstacles to investigating and proving corruption.[177]

Taking a cue from Alan Vinegrad,[178] this Note argues that the difficulty (i.e., the high inquiry costs incurred by the judicial process) in determining losses by fraudulent corruption can explain, in part, why the intangible rights theory was developed in the first place. High judicial inquiry costs[179] led the courts and now the Congress, through the Federal Sentencing Guidelines, to adopt policies for estimating the costs of various corrupt acts. The remainder of this Part reexamines the three case examples from the Introduction to illustrate the costs of corruption that are the subjects of § 1346 prosecutions.

#### 1. United States v. Hawkey: *Mail Fraud Cases Involving Low Judicial Inquiry Costs*

Simple mail fraud charges cover public corruption in which the government was obviously defrauded of a discernible, specific amount of money or property. Such cases include embezzlement in which a specific amount of government funds were diverted,[180] overcharging

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175 The deterrence rationale for punishment can only take us so far, if only because public corruption sentencing is imbued with retributive as well as deterrent purposes. See supra note 41.

176 See Anechiarico & Jacobs, supra note 41, at 3-5 (discussing varieties of corruption).

177 See, e.g., Erica H. McMahon, *Colorado Republican Federal Campaign Committee v. Federal Election Commission*: A Flood of Party Dollars to Wash Away Campaign Finance Laws, 6 Geo. Mason L. Rev. 365, 391 (1998) (noting difficulty in proving corruption and bribery).

178 Vinegrad distinguished between three forms of damages typical in government corruption cases—easily proven monetary losses, difficult-to-prove monetary losses, and "intangible" losses of public trust—and developed ideas as to how these costs could be recovered through civil RICO suits. See Alan Vinegrad, Note, Government Corruption and Civil RICO: Providing Compensation for Intangible Losses, 58 N.Y.U. L. Rev. 1530, 1575-81 (1983). This Note applies these general ideas to evidentiary presumptions about the costs of corruption that have arisen in the context of § 1346.

179 Judicial inquiry costs are the costs that courts and litigants incur in carrying out the trial and proving relevant facts.

180 See, e.g., United States v. Trost, 152 F.3d 715, 716-18, 722 (7th Cir. 1998) (affirming mail fraud convictions in case involving diversion and embezzlement of government funds).

for government goods and services with an identifiable market price,[181] and government payments for undelivered goods or services.[182] In such cases, the costs of corruption are discernable, evidence is readily available, and trials relatively uncomplicated. In other words, the judicial inquiry costs are low.[183]

*United States v. Hawkey*[184] provides an example of the simplest form of corruption to prosecute. In *Hawkey*, a county sheriff embezzled at least $27,000 from county bank accounts;[185] in other words, a government official stole a discernable amount of money directly from government coffers. As such, the monetary costs of this particular act of corruption were clear: Hawkey's corruption cost the county government at least $27,000.[186] Such cases are relatively easy to adjudicate and incur low judicial inquiry costs. Not surprisingly, these cases are not particularly controversial, and can provide significant enforcement benefits at relatively low costs.

### 2. McNally v. United States: *Mail Fraud Cases Involving High Judicial Inquiry Costs*

The discernable monetary cost that is represented so clearly in *Hawkey* is only one form of cost from corruption. One of the reasons that courts have permitted intangible rights theories to develop is that in some cases the conduct could not otherwise be reached by ordinary mail fraud charges.[187] While there has been much confusion and mislabeling in the caselaw, there are essentially two kinds of costs that the courts group under the broad rubric of "intangible rights."

The first kind of cost to be labeled an intangible loss really entails tangible monetary losses for which evidence is not obtainable. Under the common law definition of fraud, the plaintiff or prosecutor had to show that an amount of money or property was lost; otherwise the fraud was considered not actionable.[188] This evidentiary problem was

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181 See, e.g., United States v. Kovic, 830 F.2d 680, 681 (7th Cir. 1987) (affirming conviction for mail fraud involving systematic overcharging for repairs to police vehicles).

182 See, e.g., United States v. Dvorak, 115 F.3d 1339, 1341 (7th Cir. 1997) (involving scheme in which seventeen individuals were paid in excess of $550,000 through sheriff's office despite performing "little or no work").

183 Indeed, even though they involve government corruption, they are sometimes not even called intangible rights cases but simply mail fraud.

184 148 F.3d 920 (8th Cir. 1998).

185 See id. at 923 (explaining Hawkey's scheme).

186 See id. at 925 (noting purchase of two automobiles with misappropriated county funds).

187 See Maass, Public Policy by Prosecution, 89 The Public Interest 107, 114-15 (1997).

188 See supra note 58 and accompanying text for discussion of differences between common law fraud and mail fraud; cf. Posner, supra note 37, at 446 (stating that "[u]nder conventional [securities] fraud principles," no action can be brought until there has been

also a factor behind the passage of § 1346. As one proponent explained during the floor debate over § 1346's passage, as a result of *McNally*:

> [A] public official who uses the mails to . . . defraud the county treasury of $10,000 could be prosecuted under the current statute. However, a public official who uses the mails to . . . have a contract awarded as a favor to a personal friend could not be prosecuted . . . . It is virtually impossible to show a property or financial loss in such a situation.
>
> . . . .
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> . . . Breach of the public trust, whether or not it results in economic [sic] loss, is a serious offense that should not go unprosecuted.[189]

The "virtually impossible" task of showing monetary losses in many corruption cases often represents an enormous judicial inquiry cost.

*McNally v. United States*[190] is perhaps the most extreme example of labeling what amounts to a costly evidentiary problem as an "intangible loss." In *McNally*, a state official responsible for awarding the state's insurance contracts funneled state business to companies owned by friends and political associates in exchange for kickbacks.[191] It was very difficult to discern tangible property loss since the state funds already had been appropriated, the premiums of the coconspirator's insurance company were competitive with the market rate, and the state received full insurance coverage.[192]

The Supreme Court found that the mail fraud statute was limited to cases involving monetary or property loss, and, because the jury charge did not require such a finding, vacated the defendant's conviction.[193] The *McNally* decision, however, relied on overly limited assumptions about what constituted monetary losses, and overlooked the enormous judicial inquiry costs that the intangible rights theory, in part, addresses. By distinguishing between outright embezzlement, in which economic loss easily can be shown, and the awarding of a contract to a political associate, in which it is "virtually impossible"[194] to

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reliance on misrepresentation). If the common law is generally efficient, see supra note 40, one might argue that when § 1346 diverges from the common law, § 1346 is inefficient. However, this Note argues that this divergence is really an evidentiary problem. See infra notes 190-98 and accompanying text.

189 134 Cong. Rec. 15,047 (1988) (statement of Sen. Thurmond).

190 483 U.S. 350 (1987).

191 See supra notes 4-6, 67-70 and accompanying text.

192 See *McNally*, 498 U.S. at 360-61.

193 See id.

194 134 Cong. Rec. 15,047 (statement of Sen. Thurmond).

show economic loss, one is really saying that proving loss due to public corruption fraud poses unique evidentiary problems.

Given unlimited prosecutorial and court resources, some monetary loss could at least be presented in many cases. For example, the *McNally* prosecutors could have made an exhaustive case showing that the favored insurance company agents felt that because the contract was assured, they did not have to provide as many customer services for the state. Or perhaps the market price of insurance premiums in Texas would have been pennies lower if the favored insurance companies had to compete for it like everyone else. Expert witnesses from customer service managers to insurance agents to regional economists could have been summoned in an expensive effort to show some identifiable, monetary loss. Of course, not every relevant fact can be proven in a court of law, and indeed, our legal system compensates for this reality in a variety of ways, including the acceptance of circumstantial proof. In many public corruption cases, however, the question is not one of impossibility of proof but of cost of proof.

One could argue that for such small amounts of loss, the case should not be brought in the first place. However, difficulty in proof (which entails high judicial inquiry costs) does not always correlate with small monetary losses. With a few subtle acts, a powerful official on a legislative committee could enact into law an arcane provision that shifts millions of dollars into the coffers of a coconspirator. Trying to prove such losses would involve enormous judicial costs. With an unlimited amount of resources for expert witnesses such as political scientists, economists, insurance experts, legislative experts, and lobbying experts, a prosecutor could make a costly attempt to show that improper influence affected enough legislators to vote in favor of the bill. Yet such a trial could consume great resources.

In his dissent from *McNally*, Justice Stevens seemed to recognize the problem of judicial inquiry costs, stating:

> It is sometimes difficult to define when there has been a scheme to defraud someone of intangible rights. But it is also sometimes difficult to decide when a tangible loss was caused by fraud. The fact that the exercise of judgment is sometimes difficult is no excuse for rejecting [the intangible rights theory].[195]

Justice Stevens further implied that the line separating intangible rights cases from ordinary mail fraud cases involving property loss was hazy. He pointed out that many cases involving intangible rights

[195] *McNally*, 483 U.S. at 376 (Stevens, J., dissenting).

losses could be reformulated into cases of tangible economic loss,[196] and presented an interesting hypothesis:

> When a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer—who is not getting what he paid for. Additionally, "[i]f an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal." This duty may fulfill the Court's "money or property" requirement in most kickback schemes.[197]

In the period after *McNally* and before § 1346, prosecutors took his cue: They continued to bring mail fraud indictments, only this time they creatively transformed intangible rights losses into tangible monetary losses.[198]

This approach is somewhat similar to the fraud-on-the-market theory adopted by the Supreme Court for federal securities laws, in which the Court has held that purchasers of stock do not affirmatively have to show reliance on misleading statements to prove actionable harm.[199] Instead, reliance is presumed,[200] based on the theory that in open markets, the price of stock is determined by all of the available material information. This presumption compensates for the enormous difficulties in proving individual reliance.[201] As the Court stated, "[p]resumptions typically serve to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult."[202] In § 1346 cases, the federal courts seem to presume that certain kinds of acts they label as corrupt will distort the democratic process. Rather than try to make a prohibitively costly evidentiary showing, the distortion itself is assumed to impose some costs on the public.

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196 See id. at 377 (noting that "[e]ven without Congressional action, prosecutions of corrupt officials who use the mails to further their schemes may continue since it will frequently be possible to prove some loss of money or property").

197 Id. at 377 n.10 (alteration in original) (quoting Restatement (Second) of Agency § 403 (1958)).

198 See John E. Gagliardi, Back to the Future: Federal Mail and Wire Fraud Under 18 U.S.C. § 1346, 68 Wash. L. Rev. 901, 913-14 & n.90 (1993) (discussing creative pleadings used to find property rights lost to mail fraud).

199 See Basic Inc. v. Levinson, 485 U.S. 224, 241-47 (1988) (explaining and adopting fraud-on-the-market theory).

200 See id. at 245-47.

201 See id.

202 Id. at 245.

### 3. United States v. Manges: *Mail Fraud Cases Involving Both High and Low Judicial Inquiry Costs*

The majority of § 1346 cases likely involve a mix of both discernable monetary costs and less discernable costs that are grouped under the title "intangible losses." The *Manges* case[203] provides an example of how tangible losses frequently are compounded with intangible losses that are often very difficult to prove. In *Manges*, a Texas oilman retained his state-owned oil lease by submitting false reports and bribing a state agency.[204] As a result of the act of corruption, the state lost a variety of revenues, some of which were easier than others to discern after the fact.

For example, the mail fraud charges were based on the theory that the state was deprived of money and property, specifically "the lease to tract 350 and the additional royalties that the state would earn if the lease reverted and were re-bid."[205] If the language the court used to describe the prosecutor's charges is vague, there is a reason: No specific monetary losses were detailed, in all likelihood because many of them would have been very difficult to establish with any degree of certainty. If the state had alleged that Manges had cost the state additional production royalties that would have flowed to the state had Manges tried to comply with the law by undertaking "timely and diligent workover efforts to restore or increase productive capacity,"[206] the state would have had a much more difficult time proving exactly what was lost. Such a speculative effort would have been considerably costlier to prove, and would likely have required extensive testimony by involved engineers and oil industry experts. Even more difficult to prove, for the reasons detailed above in the discussion of *McNally*,[207] would have been the monetary losses associated with Manges's bribes to the General Land Office (GLO) that deprived the citizens of Texas of the GLO's "honest services."[208]

Instead, the prosecutors made a broad allegation that the citizens of the state were deprived of "money and property." In *Manges*, on appellate review, the court did not attempt to second-guess the losses

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203 United States v. Manges, 110 F.3d 1162 (5th Cir. 1997).

204 See supra notes 7-10 and accompanying text.

205 *Manges*, 110 F.3d at 1168.

206 Id. at 1167.

207 See supra Part IV.B.2.

208 The *Manges* court noted the distinction the prosecutors made in their theories supporting the mail fraud charges that divided, in this Note's opinion somewhat artificially, the losses due to the lease and potential royalties, and the "honest services" of the bribed state employee. *Manges*, 110 F.3d at 1168 (noting separate theories for mail fraud charges). See also infra Part IV.B.4 for an additional theory of the "honest services" costs presented in *Manges*.

on which the prosecution made its mail fraud charges. Thus, again, the mail fraud statute often serves to create evidentiary presumptions of monetary loss, not only in cases where it is difficult to prove any loss, but where it is difficult to ascertain some of the losses.

### 4. *All Intangible Rights Cases: Externality Costs to Public Trust*

Punishment for corruption is not tied to the existence of strictly monetary losses. While specific intent to defraud is usually required,[209] § 1346 offenses are punished whether or not they actually defrauded the government out of money or property. One of the reasons for this is the additional social cost accompanying public corruption: the external cost to the public trust that is inflicted with each incident of public corruption.

Public corruption violates the public trust and breeds public cynicism. These concerns were reflected in the congressional debate on the enactment of § 1346: "Breach of the public trust, whether or not it results in econ[o]mic loss, is a serious offense that should not go unprosecuted."[210] This statement can be translated into cost-benefit terms.[211] The costs to government from corruption are primarily reputational costs—a damaging of trust in government—which can dramatically increase the transaction costs of government doing business with an untrusting citizenry.[212] Public sector fraud inflicts unique costs that go above and beyond the cost associated with private sector fraud. As the Eighth Circuit stated:

> In a democracy, citizens elect public officials to act for the common good. When official action is corrupted by secret bribes or kickbacks, the essence of the political contract is violated. But in the private sector, most relationships are limited to more concrete matters. When there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible "rights" have been violated.[213]

While the court was noting that the repercussions of private sector fraud are limited, it is equally effective at showing the converse, that

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209 See supra note 50 and accompanying text.

210 134 Cong. Rec. 15,047 (1988) (statement of Sen. Thurmond).

211 Vinegrad went so far as to urge civil RICO suits by governments damaged by corruption, translating intangible losses into monetary damages. See Vinegrad, supra note 178, at 1572-81.

212 See id. at 1568-70. Posner describes it another way, focusing on the reduction of costs through trust. See Posner, supra note 37, at 261 ("Honesty, trustworthiness, and love reduce the costs of transactions. Forswearing coercion promotes the voluntary exchange of goods.").

213 United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996) (distinguishing private sector case from public sector cases involving § 1346).

fraud involving public corruption is often more costly to society than private sector fraud.

In *Manges*, the corruption of the state General Land Office (GLO) by Manges and his coconspirators created costs beyond the tangible and intangible monetary costs. For example, when news about the extent of influence that Manges exercised over the GLO leaked out, it surely cost some degree of trust that citizens may have had in this government agency. Whether the court explicitly recognized this by increasing the sentence[214] is not known, but the court certainly had the power to do so.

### *C. Creating Marginal Deterrence for Section 1346 Offenses*

Two sections in the Sentencing Guidelines apply to § 1346 in determining the offense level.[215] Section 2F1.1 addresses offenses involving fraud or deceit.[216] Section 2C1.7 more specifically deals with fraud involving deprivation of the intangible right to the honest services of public officials.[217] Also within Part C are guidelines relating to gratuities, bribery, and conflicts of interest.[218] The following subsections look at how these provisions work in tandem to account for specific costs associated with corruption.

#### *1. Reflecting Costs to the Public Trust*

The Sentencing Guidelines respond to intangible harms to the public trust by providing for increased punishment regardless of whether there were tangible monetary costs.[219] This explains the special range of guidelines that enhance sanctions for fraud involving breaches of public, as opposed to private, trust. For example, the base offense level for ordinary fraud is six,[220] while the base offense level for fraud involving a public official is ten.[221] As a result, if a private sector employee and a public sector employee each embezzled $10,000, the latter would be punished more severely.

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214 See infra Part IV.C.1 for a discussion of the higher sentences imposed for the loss of trust in a government office or process.

215 Under the U.S. Sentencing Guidelines, the base offense level, adjusted for various considerations, is one of two factors, together with the defendant's prior criminal history, used to determine the appropriate range of punishment. The higher the offense level, the more severe the punishment. See U.S. Sentencing Comm'n, Federal Sentencing Guidelines Manual § 1B1.1(g) (1998) [hereinafter Sentencing Guidelines Manual].

216 See id. § 2F1.1.

217 See id. § 2C1.7.

218 See id. §§ 2C1.1 (bribery), 2C1.2 (gratuities), 2C1.3 (conflicts of interest).

219 See supra Part IV.B.4.

220 See Sentencing Guidelines Manual, supra note 215, § 2F1.1(a).

221 See id. § 2C1.7(a).

However, not all violations of public trust are the same. We know instinctively that lower-level corruption does not usually damage the public trust as much as higher-level corruption. Professors Anechiarico and Jacobs observe:

> Perhaps it will be determined that corruption in the judiciary and prosecutors' offices . . . is most destructive to government legitimacy, while certain conflicts of interest in contracting are less destructive, at least when the government receives full value for its expenditures. Arguably, corruption by high-level officials is more destructive to the body politic than corruption by low-level personnel.[222]

The extraordinarily large costs of upper-level corruption are specifically addressed by section 2C1.7(b)(1)(B), which increases an offense by eight levels "[i]f the offense involved an elected official or any official holding a high-level decision-making or sensitive position."[223] The Sentencing Guidelines also address extreme cases of public corruption. An application note to section 2C1.7 states that "[w]here the court finds that the defendant's conduct was part of a systematic or pervasive corruption of a governmental function, process, or office that may cause loss of public confidence in government, an upward departure may be warranted."[224] Thus, the Sentencing Guidelines recognize the range of costs that different forms of corruption impose and adjust criminal sanctions accordingly. In so doing, they have made the punishment incentives more sophisticated than simply punishing every § 1346 crime equally. Both of these effects should improve the deterrent value of punishment.

### 2. *Differentiating Section 1346 Offenses*

One of the hallmarks of efficient sentencing is broad sentencing discretion, because such discretion allows for "price discrimination" based on the defendant and the nature of the crime.[225] The Sentencing Guidelines are looked at with skepticism by law and economics scholars because they reduce the sentencing discretion of judges.[226]

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222 Anechiarico & Jacobs, supra note 41, at 195.

223 Sentencing Guidelines Manual, supra note 215, § 2C1.7(b)(1)(B). The commentary gives as examples of such officials, "prosecuting attorneys, judges, agency administrators, supervisory law enforcement officers, and other government officials with similar levels of responsibility." Id. § 2C1.7 note 2.

224 Id. § 2C1.7 note 5.

225 See Posner, supra note 37, at 564.

226 See, e.g., id.; Kenneth G. Dau-Schmidt, An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions, 25 U.C. Davis L. Rev. 659, 662 (1992) ("[A]lthough general rules and appellate review are needed to reduce disparity in sentencing among individual judges, an optimal sentencing policy probably in-

Nevertheless, while discretion per se is quite limited, the Guidelines still provide opportunities for federal judges to differentiate among various acts that fall under the rubric of § 1346. This is particularly important given the variety of corrupt acts that § 1346 prosecutions in fact encompass.

While section 2C1.7 is the only guideline for § 1346 offenses, it instructs the judge to depart from the guideline if the offense is more accurately described in another guideline: "If the offense is covered more specifically under § 2C1.1 (Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right), § 2C1.2 (Offering, Giving, Soliciting, or Receiving a Gratuity), or § 2C1.3 (Conflict of Interest), apply the offense guideline that most specifically covers the offense."[227] These three sections, along with section 2C1.7, provide the judge with the ability to vary sanctions according to the specific kind of corruption involved.

Additionally, within each guideline, Specific Offense Characteristics and application notes allow courts to tailor sanctions according to the specific acts of corruption. For example, the commentary on gratuities allows the judge to consider the following:

> In some cases, the public official is the instigator of the offense. In others, a private citizen who is attempting to ingratiate himself or his business with the public official may be the initiator. This factor may appropriately be considered in determining the placement of the sentence within the applicable guideline range.[228]

The bribery guidelines similarly contain detailed comments for the judge to consider.[229]

There is evidence that courts are using these provisions to differentiate mail fraud and § 1346 offenses that are punished under section 2C in the Sentencing Guidelines. Consider the following statistics drawn from the United States Sentencing Commission's database on federal criminal sentences, indicating how often public corruption offenders were prosecuted under specific Sentencing Guidelines:

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volves more delegation of discretion to individual judges than is achieved under the current system.").

227 Sentencing Guidelines Manual, supra note 215, § 2C1.7(c)(4).

228 Id. § 2C1.2 note 3.

229 See id. § 2C1.1 notes.

TABLE III. FREQUENCY EACH GUIDELINE WAS SELECTED, 1994-1995

| | § 2C1.1 (Bribery) | § 2C1.2 (Gratuities) | § 2C1.3 (Conflicts) | §2C1.7 (Intangible Rights) |
|---|---|---|---|---|
| 1994-1995 | 220 | 37 | 10 | 26 |

To explain the meaning of these statistics, it is helpful to refer to the sentencing scheme for § 1346 offenses. Again, section 2C is the umbrella sentencing section among offenses involving public corruption, including § 1346 cases. Of the hundreds of § 1346 cases prosecuted annually,[230] between 1994 and 1995 (the last period for which statistics are available) federal judges resorted to the most general provision, section 2C1.7 "Intangible Right[s]," in fewer than thirty cases. The courts were able to categorize § 1346 offenses by the specific form of government corruption involved, including bribery, gratuities, and conflicts of interest, in over ninety percent of the cases.

These statistics also imply that most § 1346 prosecutions do not involve wildly creative or suspect theories about corruption that turn vaguely improper acts into federal offenses. In the overwhelming number of cases, federal judges are able to characterize the acts as a conflict of interest, bribery, or gratuity, and only in rare cases does the court sentence the offense under the title "deprivation of intangible rights." Thus, a more accurate description of the use of § 1346 might be that federal prosecutors use it to pursue many acts that resemble bribery or gratuities but for various reasons are not prosecuted under the bribery or gratuity statutes.[231] These sentencing statistics suggest that the picture of § 1346 as an unrestrained, roving good government device has been exaggerated.

The fact that § 1346 now has its own sentencing regime itself shows that it has attained some depth and permanence in the federal criminal law. These provisions allow federal judges to differentiate among the range of corrupt acts that fall under the rubric of § 1346, thus creating greater marginal deterrence effects. Moreover, as in other areas of § 1346 jurisprudence, these provisions generally make sense from an economic point of view. If they continue to develop, the Sentencing Guidelines could eventually provide guidance to prosecutors and courts engaged in the common law process of defining the offense.

230 See Table I supra note 152.

231 Without an exhaustive, case-by-case analysis of the reasons why prosecutors use § 1346, it is impossible to speculate as to why a particular prosecutor chooses to prosecute under § 1346 versus other federal criminal statutes.

## CONCLUSION

Professor Kahan's proposal to explore the idea of federal criminal common law has much promise, and is particularly useful in examining § 1346. Such an approach can help refocus the debate on § 1346 in a more fruitful direction.

Section 1346 has in fact evolved a great deal through federal caselaw, federal prosecutions, and the U.S. Sentencing Guidelines. The critique that § 1346 is completely devoid of content is now becoming outdated. Principles in the caselaw are emerging, and these principles can be described through economic rationales. Additionally, the Federal Sentencing Guidelines have created marginal deterrence incentives by providing for considerable differentiation of acts falling under the general rubric of § 1346.

It should not come as a surprise that § 1346, as a form of federal common law, is developing in this way. For pragmatic reasons alone, courts and litigators seek consistent principles in litigating matters, and courts in particular seek to achieve the benefits of § 1346 while incurring lower costs. This principle is analogous to what Judge Posner observed about the common law: that over time, the common law develops in ways that encourage efficient actions by making people take into account the full cost of their actions.[232]

It is true that, at least on paper, § 1346 remains vague, malleable, and open to prosecutorial abuse. In other words, there are potentially significant costs associated with it. Policymakers may find that the common law process is not appropriate, or is perhaps even inefficient, for federal anticorruption measures. However, before policymakers seek to reform § 1346 they should consider how it has evolved and the economic rationales underlying those changes.

[232] Posner labeled it "The Implicit Economic Logic of the Common Law." Posner, supra note 37, at 251; supra note 40 and accompanying text.