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BACK TO THE FUTURE: FEDERAL MAIL AND WIRE FRAUD UNDER 18 U.S.C. § 1346

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Abstract: In 1988, Congress added section 1346 to the federal mail and wire fraud statutes to overturn the Supreme Court decision of *McNally v. United States* and provide statutory protection of the "intangible right of honest services." This Comment analyzes the extent to which section 1346 restores the protection of intangible rights as existed prior to *McNally* and concludes that most if not all of those intangible rights are again covered by the statutes. Further, this Comment recommends that the judiciary limit the application of the mail and wire fraud statutes in the private sector to cases involving a breach of a fiduciary duty which has a "reasonable foreseeability" of causing harm.

Prosecutors have historically used the federal mail and wire fraud statutes with great success to attack various kinds of fraudulent schemes in the United States. Proponents hail the statutes as a versatile weapon against fraud—a "catchall" device that encompasses crimes not yet recognized or well defined in other statutes. Critics argue that this strength is also a weakness because these statutes afford prosecutors too much discretion and fail to give adequate notice of exactly what type of conduct the statutes proscribe. Like many criminal statutes, the mail and wire fraud statutes are subject to the competing demands of flexibility and adaptability on the one side and established limits on the other. In 1987, the Supreme Court in *McNally v. United States*[1] limited the application of the mail and wire fraud statutes to cases involving crimes against property rights.

In an apparent effort to maintain the statutes' versatility, Congress in 1988 acted to overturn the *McNally* decision. Congress added section 1346 to the Code, extending mail and wire fraud protection to the "intangible right of honest services,"[2] as well as to property rights. Yet the amendment to date has received little substantive judicial interpretation because the amendment has prospective application only. In applying section 1346, courts to some extent will have to look to the interpretation of mail and wire fraud prior to the *McNally* decision to determine the statutes' future scope.

This Comment reviews the law of mail and wire fraud as it existed before *McNally* and addresses issues courts will face in interpreting this

1. 483 U.S. 350 (1987).

2. 18 U.S.C.A. § 1346 (West Supp. 1993).

congressional modification of the statutes. It concludes that the "honest services" language of section 1346 in conjunction with recent judicial interpretations of intangible property rights should effectively permit use of the statutes to protect most if not all of those rights protected before *McNally*. To address vagueness criticisms of the statutes, this Comment further suggests that the judiciary tie the "honest services" requirement of private individuals to a breach of a fiduciary duty that has a "reasonable foreseeability" of causing economic harm. This standard would limit the reach of the statutes to conduct that is more clearly criminal and yet retain the statutes' flexibility in attacking new kinds of fraud as they arise.

I. MAIL AND WIRE FRAUD BEFORE SECTION 1346

The federal mail and wire fraud statutes punish "whoever" uses mail or wire communications to further "any scheme" to defraud.[3] Because these two federal statutes share the same relevant language, court decisions construing one statute are generally applicable to the other as well.[4] Until recently, both Congress and the Supreme Court favored broad use of the statutes and consistently expanded their coverage.[5] This

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3. The mail fraud statute states in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, 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 . . . shall be fined not more than $1000 or imprisoned not more than five years, or both.

18 U.S.C.A. § 1341 (West 1984 & Supp. 1993).

The wire fraud statute states in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Id. § 1343 (West 1984 & Supp. 1993).

4. *See, e.g.*, Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.").

The only real difference in the two statutes is the means used to effectuate the fraud: the mail in one and interstate wires in the other. *Compare* 18 U.S.C.A. § 1341 (West 1984 & Supp. 1993) (mail fraud statute) *with id.* § 1343 (West 1984 & Supp. 1993) (wire fraud statute).

5. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980). For a discussion of the history and expansive use of the fraud statutes, see generally *id.*

expansion ultimately led to protection of "intangible rights," such as the public's right to the honest service of government officials,[6] as well as tangible property rights. In 1987, however, the Supreme Court in *McNally v. United States* narrowed the reach of the fraud statutes to protect only property rights.[7] In 1988, Congress overruled *McNally* by restoring coverage to the "intangible right of honest services."[8] This Congressional modification blurs the scope of the statutes. Circuit courts have as yet had little opportunity to employ the legislative addition to the fraud statutes[9] and instead have continued to apply the standards previously established by the Supreme Court.[10]

A. The Basic Elements Of Mail and Wire Fraud

While certain aspects of mail and wire fraud thus continue to be in flux, the judiciary has firmly established the basic elements of the crime. Courts generally agree that the crimes of mail and wire fraud consist of two core elements: a scheme to defraud and use of the mails or wires in furtherance of the scheme.[11] Inherent in the scheme to defraud, and

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6. See *infra* part I. B. for a discussion of intangible rights.

7. 483 U.S. 350, 359–60 (1987).

8. On November 18, 1988, Congress added section 1346 to Title 18. Pub. L. 100-690, Title VII, § 7603(a), 102 Stat. 4508 [codified at 18 U.S.C.A. § 1346 (West Supp. 1993)]. Section 1346 states in full, "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." *Id.* This amendment applies to both the mail and wire fraud statutes. 134 CONG. REC. H11,251 (daily ed., October 21, 1988) (hereinafter Legislative History).

9. Most courts conclude section 1346 does not apply retroactively. *See, e.g.,* United States v. Telink, Inc., 910 F.2d 598, 601 n.2 (9th Cir. 1990) (listing cases from other circuits that have concluded section 1346 has no retroactive effect).

To support prospective application only, courts often cite to the ex post facto clause in the U.S. Constitution, art. I, section 9, cl. 3, which prohibits Congress from punishing any act which was not punishable at the time it was committed. *See* Weaver v. Graham, 450 U.S. 24, 28–30 (1981). Courts therefore have not applied the amendment because cases to date have concerned conduct occurring prior to the enactment of section 1346.

10. See *infra* part I. D. for a discussion of the controlling Supreme Court cases.

11. *See, e.g.,* Pereira v. United States, 347 U.S. 1, 8 (1954); United States v. Biesiadecki, 933 F.2d 539, 545 (7th Cir. 1991); United States v. Ames Sintering Co., 927 F.2d 232, 235 (6th Cir. 1990).

The second element—use of the wires or mails in furtherance of the scheme to defraud—is satisfied for mail fraud when the government proves the defendant acted with knowledge that use of the mails would follow in the ordinary course of business, or where the defendant could reasonably foresee that use of the mail would result, and the mail is actually used. *See* Thomas Lynch & William A. McConagha, *Mail And Wire Fraud,* 29 AM. CRIM. L. REV. 465, 477 (1992). The accused need not have actually intended the mails to be used. *Id.* For wire fraud, the government must prove only that a wire communication occurred which was reasonably foreseeable. *Id.* Other

sometimes listed as a separate third element, is a specific intent to defraud.[12] Fraudulent intentions are sufficient; the accused need not have succeeded in the scheme to be guilty of the crime.[13] Before *McNally,* the accused's scheme must have merely contemplated some harm or injury to the defrauded party's tangible or intangible rights to satisfy this element.[14]

B. Coverage Under the Intangible Rights Doctrine

Neither Congress nor the Supreme Court has clearly defined "scheme or artifice to defraud." Lower courts have consequently struggled to define that phrase.[15] Their interpretation of this vague statutory language is central to understanding the scope of mail and wire fraud until 1987.

From the early 1970s until 1987, circuit courts consistently held that "scheme to defraud" encompassed two general categories.[16] The first category includes those schemes that seek to deprive others of money or tangible property rights.[17] The second category includes schemes to defraud others of their "intangible rights."[18] The abstract concept of

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issues concerning this second element are beyond the scope of this Comment and thus will not be addressed.

12. *See, e.g., Ames Sintering Co.,* 927 F.2d at 235; United States v. Bonallo, 858 F.2d 1427, 1433 (9th Cir. 1988).

13. United States v. Wallach, 935 F.2d 445, 461 (2d Cir. 1991), *petition for cert. filed,* 61 U.S.L.W. 3635 (U.S. Mar. 3, 1993) (No. 92-1437); United States v. Keane, 522 F.2d 534, 545 (7th Cir. 1975), *cert. denied,* 424 U.S. 976 (1976). *See generally* Lynch & McConagha, *supra* note 11, at 466 (reviewing elements of mail fraud).

14. *See, e.g.,* United States v. Lemire, 720 F.2d 1327, 1336 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1226 (1984); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974).

15. United States v. McNeive, 536 F.2d 1245, 1248 (8th Cir. 1976).

16. *See, e.g.,* United States v. Bohonus, 628 F.2d 1167, 1171 (9th Cir.), *cert. denied,* 447 U.S. 928 (1980); *McNeive,* 536 F.2d at 1248.

17. *Bohonus,* 628 F.2d at 1171; *McNeive,* 536 F.2d at 1248.

18. *Bohonus,* 628 F.2d at 1171; *McNeive,* 536 F.2d at 1249.

Some courts have contrasted tangible and intangible rights schemes in the following manner:

> A scheme to obtain tangible property is cognizable under the mail fraud statute regardless of the relationship between the defendant and his victim. In contrast, an intangible rights scheme is only cognizable when at least one of the schemers has a fiduciary relationship with the defrauded person or entity. . . . There can be no doubt that a nonfiduciary who schemes with a fiduciary to deprive the victim of intangible rights is subject to prosecution under the mail fraud statute.

intangible rights escapes clear definition; it generally encompasses a variety of rights not connected to money or property rights. Cases brought under this intangible rights theory have fallen roughly into two groups: one involving corruption of public officials where the scheme is to defraud the public of honest government service, and the other involving schemes to defraud private parties.[19]

The basis for protection of these intangible rights in both these categories usually arose from the existence of a fiduciary duty. Simply stated, a fiduciary duty is "[a] duty to act for someone else's benefit, while subordinating one's personal interests to that other person."[20] The common law has defined the phrase with deliberate imprecision and surprising expansiveness.[21] Courts have therefore been quite liberal in finding fiduciary duties in the mail and wire fraud context.[22]

The first broad group of public corruption cases usually involved public officials accused of defrauding the public of its right to good

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United States v. Lovett, 811 F.2d 979, 984 (7th Cir. 1987) (quoting United States v. Alexander, 741 F.2d 962, 964 (7th Cir. 1984), *overruled by* United States v. Ginsburg, 773 F.2d 798 (7th Cir. 1985)).

The intangible rights doctrine began gaining prominence in the 1970s with the case of United States v. States, 488 F.2d 761, 766 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974). The *States* court concluded, in an election fraud case, that a scheme to defraud the public of certain "intangible political and civil rights" was within the scope of mail fraud statute. The *States* court reading of precedent was crucial to the creation of the intangible rights doctrine. *See* Peter M. Oxman, Note, *The Federal Mail Fraud Statute After* McNally v. United States, 107 S. Ct. 2875 (1987): *The Remains Of The Intangible Rights Doctrine And Its Proposed Congressional Restoration,* 25 AM. CRIM. L. REV. 743, 749 (1988).

19. Oxman, *supra* note 18, at 748. The history of the intangible rights theory has been well documented elsewhere, so this article merely provides a summary of what rights the theory encompasses. For a more thorough review, see *id.* at 747–59.

20. BLACK'S LAW DICTIONARY 625 (6th ed. 1990). As one court stated, "[t]he duty breached need not arise from state or federal law; in particular, it may stem from an employment relationship of the sort that imposes discretion and consequently obligations of loyalty and fidelity on the employee." United States v. Lemire, 720 F.2d 1327, 1336 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1226 (1984) (citations omitted).

21. John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalizations of Fiduciary Breaches and the Problematic Line Between Law and Ethics,* 19 AM. CRIM. L. REV. 117, 150 (1981) [hereinafter Coffee, *From Tort to Crime*]. The article notes the diverse applications of fiduciary duties, with case law emphasizing "the relation need not be legal, but can be moral, social, domestic or merely personal." *Id.* at 151 (quoting from Trustees of Jesse Parker Williams Hosp. v. Nisbet, 14 S.E.2d 64, 76 (Ga. 1941)).

22. *See, e.g.,* United States v. Margiotta, 688 F.2d 108, 121–22 (2d Cir. 1982) (private individual was deemed to be a de facto public official and to have violated a duty owed to citizens by distributing kickbacks to political allies), *cert. denied,* 461 U.S. 913 (1983).

government.[23] This right to good government includes various intangibles like the right to an election free from fraud,[24] the right of citizens to honest and impartial government,[25] and the right to the loyal and faithful service of public officials.[26] One court even extended this duty to persons who were not in fact public officials but who exerted such control over public affairs that they became de facto public officials, thus owing a fiduciary duty to the public.[27]

The second group of intangible rights, involving schemes to defraud private parties, generally protected the employer's or other principal's right to the honest, faithful and disinterested service of its employees or agents.[28] The majority of cases in this private sphere involve an employee's breach of fiduciary duty to the employer.[29] For example, courts have found an actionable breach where the employee took kickbacks,[30] embezzled company funds,[31] had an undisclosed interest in a

23. *See* Oxman, *supra* note 18, at 748 n.23 (providing an extensive list of public corruption cases). Courts have recognized that the duty owed by public officials, appointees and employees to the public is a fiduciary one. *See, e.g., Margiotta,* 688 F.2d at 121.

24. *See, e.g.,* United States v. Clapps, 732 F.2d 1148, 1153 (3d Cir.) (concluding that a scheme to deprive an electoral body of its "political rights to fair elections" is within purview of the mail fraud statute), *cert. denied,* 469 U.S. 1085 (1984); United States v. States, 488 F.2d 761, 766 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974).

25. *See, e.g.,* United States v. Mandel, 591 F.2d 1347, 1355–62 (4th Cir.) (Governor defrauded citizens of their right to honest and impartial government by taking certain positions on pending legislation without disclosing his personal interests), *aff'd in relevant part,* 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied,* 445 U.S. 961 (1980); United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir.) (Governor who accepted bribes for setting racing dates defrauded state and citizens of the Governor's honest and faithful service), *cert. denied,* 417 U.S. 976 (1974).

26. *See, e.g.,* United States v. Bruno, 809 F.2d 1097, 1099–1105 (5th Cir.) (employees of sheriff's department bribed judge to fix cases), *cert. denied,* 481 U.S. 1057 (1987); United States v. Bush, 522 F.2d 641, 647–48 (7th Cir. 1975) (aide to mayor used official position to influence city officials in awarding contracts to firm in which aide had an undisclosed interest), *cert. denied,* 424 U.S. 977 (1976).

27. United States v. Margiotta, 688 F.2d 108, 121–22 (2d Cir. 1982) (county chairperson of Republican party violated fiduciary duty owed by a de facto public official to citizens by distributing kickbacks to political allies), *cert. denied,* 461 U.S. 913 (1983).

28. Oxman, *supra* note 18, at 752.

29. *Id.* at 753.

30. *See, e.g.,* United States v. Lemire, 720 F.2d 1327, 1332–34 (D.C. Cir. 1983) (employee convicted for taking bribes from contractor and not disclosing to employer that his contractor was overcharging for the job), *cert. denied,* 467 U.S. 1226 (1984); United States v. Bohonus, 628 F.2d 1167, 1174–75 (9th Cir.) (employee received kickbacks in obtaining insurance coverage on employer's vehicles), *cert. denied,* 447 U.S. 928 (1980).

31. *See, e.g.,* United States v. Siegel, 717 F.2d 9, 14 (2d Cir. 1983) (employees who used cash proceeds from the sale of corporate goods for non-corporate purposes breached their fiduciary duty to act in the best interests of the corporation).

firm with which the employer has dealings,[32] or traded in the securities market on inside information.[33] Courts have also extended fiduciary duties in the private sector beyond the employer-employee relationship.[34] The intangible rights doctrine did not stop here, however, in safeguarding certain intangible rights.

Some courts extended protection to a "miscellaneous" group of intangible rights unconnected to any fiduciary duty and where the victim suffered no actual monetary or proprietary loss.[35] In these few cases, mail and wire fraud protection has reached such intangibles as the right to privacy[36] and rights to "time, effort, money, and expectations."[37] Instances of license[38] and election fraud[39] may also arise where no fiduciary duty exists between the defrauded party and the accused.

C. *Criticisms of Expansive Interpretation of the Statutes*

This expanding protection of intangible rights by the courts prompted criticism from commentators[40] and the judiciary itself.[41] Among the

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32. *See* United States v. McCracken, 581 F.2d 719 (8th Cir. 1978) (employee knowingly used his fiduciary position in employer's business to create gain for his own companies).

33. *See, e.g.*, United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986) (employee of *Wall Street Journal* used confidential business information to make profit on securities trading), *aff'd*, 484 U.S. 19 (1987).

34. *See, e.g.*, United States v. Boffa, 688 F.2d 919, 931 (3d Cir. 1982) (union official who accepted payment from employer for obtaining lower wage rates defrauded union members of loyal and faithful service), *cert. denied*, 460 U.S. 1022 (1983); United States v. Bronston, 658 F.2d 920, (2d Cir. 1981) (attorney engaged in conflict of interest violated his fiduciary duty to his clients, defrauding them of his loyal service), *cert. denied*, 456 U.S. 915 (1982).

35. *See* Oxman, *supra* note 18, at 758.

36. United States v. Louderman, 576 F.2d 1383, 1387 (9th Cir.) (scheme to obtain confidential commercial information from the telephone company and post office, defrauded the telephone subscribers and post office box holders of their right to privacy and part of the service for which they paid), *cert. denied*, 439 U.S. 896 (1978).

37. United States v. Condolon, 600 F.2d 7, 8–9 (4th Cir. 1979) (defendant who posed as a talent agent to obtain sexual favors from female job applicants defrauded them of their "time, effort, money, and expectations").

38. *See, e.g.*, United States v. Bucuvalas, 970 F.2d 937, 938–39 (1st Cir. 1992) (involving a scheme by private individuals to fraudulently obtain liquor licenses from municipal licensing board), *cert. denied*, 113 S. Ct. 1382 (1993).

39. *See, e.g.*, United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

40. *See generally* John C. Coffee, Jr., *The Metastasis Of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1 (1983) [hereinafter Coffee, *The Metastasis of Mail Fraud*]; Coffee, *From Tort to Crime*, *supra* note 21; Daniel J. Hurson, *Limiting the Federal Mail Fraud Statute - A Legislative Approach*, 20 AM. CRIM. L. REV. 423 (1983); Donald V. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45

major criticisms leveled at the broad construction of the statutes is that such interpretation is so vague and all encompassing that it potentially covers any deceptive conduct that involves the use of the mail or wires.[42] This unlimited expansion in the criminalization of fiduciary breaches fails to give notice to a potential defendant.[43] The sweeping use of the statutes thus raised the specter of "overcriminalization."[44] Finally, critics argued that the intangible rights doctrine affords prosecutors too much discretion in enforcing the statutes, allowing federal involvement in matters of little federal concern.[45]

From this criticism arose substantive suggestions from commentators to limit the intangible rights doctrine. For example, Professor John Coffee proposed introducing as an affirmative defense a causation standard to link a breach of fiduciary duty to some actual or threatened loss to the victim.[46] Professor Coffee explained that such a standard would serve as a proxy for culpability, because acts that foreseeably will cause harm tend to be more blameworthy than those that do not.[47] Another critic, David Hurson, proposed an entirely new statute to replace the existing mail and wire fraud statutes.[48] While commentators called

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(1980); Ralph E. Loomis, Comment, *Federal Prosecutions of Elected State Officials For Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U. L. REV. 63 (1978).

41. *See, e.g.*, United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983):

> Where a statute, particularly a criminal statute, does not regulate specific behavior, enforcement of inchoate obligations should be by political rather than criminal sanctions. . . . [W]hat profoundly troubles me is the potential for abuse through selective prosecution and the degree of raw political power the free swinging club of mail fraud affords federal prosecutors.

Id. at 143 (Winter, J., dissenting).

42. Morano, *supra* note 40, at 78. *See also* Hurson, *supra* note 40, at 435.

43. Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 151 (1990).

44. Overcriminalization concerns, among other things, the adverse consequences of using criminal law to achieve conformity with private moral standards. John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121, 147 (1988). Such adverse consequences include: 1) increased disrespect for the law; 2) heightened potential for corruption and discriminatory enforcement; 3) the creation of a "crime tariff" that simply drives up prices and eliminates competition; and 4) the misallocation of law enforcement resources. *Id.* at 147–48.

45. *See* Loomis, *supra* note 40, at 73.

46. Coffee, *From Tort to Crime*, *supra* note 21, at 163–66.

47. *Id.* at 164.

48. Hurson, *supra* note 40, at 457–58. Hurson's proposed statute attempted to establish a concrete and comprehensive definition of "scheme to defraud" to give firm guidance to prosecutors

for a legislative response to limit the coverage of the statutes, it was the Supreme Court that took action.

D. Limiting the Scope: McNally *and* Carpenter

The unchecked expansion of mail and wire fraud as a catchall device for fraudulent activity[49] continued until 1987. In *McNally v. United States,* the Supreme Court stemmed the expansionist interpretation of mail fraud by rejecting protection of "intangible rights" by the statute.[50] Prosecutors' tremendous success in utilizing the fraud statutes to strike against political corruption and employee disloyalty thus came to a sudden and unexpected end.

The *McNally* Court established that the mail fraud statute protects people from "schemes to deprive them of their money or property," but does not protect the "intangible right of the citizenry to good government."[51] The case involved a self-dealing patronage scheme which allegedly defrauded the citizens and government of Kentucky of certain "intangible rights," such as the right to honest government service.[52] In reversing the convictions of the two defendants, the *McNally* Court held this conduct was not within the reach of section 1341.[53] The Court applied the doctrine of lenity[54] in concluding that a stricter reading of the statute limiting its scope to the protection of property rights is the proper interpretation.[55]

Six months after *McNally,* the Supreme Court again had the opportunity to discuss the coverage of the mail and wire fraud statutes in *Carpenter v. United States.*[56] While continuing to interpret the statutes to protect only property rights, the Court clarified that coverage extends to

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as to what fraudulent schemes to attack. *Id.* at 458. For a quick summary of Hurson's statute, see Oxman, *supra* note 18, at 788.

49. *See* Hurson, *supra* note 40, at 435.

50. 483 U.S. 350, 360–61 (1987).

51. *Id.* at 356.

52. *Id.* at 352.

53. *Id.* at 361. To reach this conclusion, the Court looked to the statute's sparse legislative history, subsequent judicial interpretation, and congressional modifications. *Id.* at 356–59.

54. "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to chose the harsher only when Congress has spoken in clear and definite language." *Id.* at 359–60 (citations omitted).

55. *Id.* The Court stated: "[W]e read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." *Id.* at 360.

56. 484 U.S. 19 (1987).

both tangible and intangible property rights.[57] The *Carpenter* Court unanimously upheld the mail and wire fraud convictions of a *Wall Street Journal* reporter who had disclosed financial information, gathered in the course of business, to investor friends who traded on that information before its publication in the *Journal*.[58] In so holding, the Court recognized that confidential business information is intangible property protected by the fraud statutes.[59] Further, the *Carpenter* Court stated that a scheme to defraud does not require any showing of actual monetary loss or injury, but can rest on a showing that the victim was deprived of the right to exclusive use of the information.[60]

II. RESTORING COVERAGE: RAMIFICATIONS OF SECTION 1346

In response to *McNally,* Congress in 1988 added section 1346 to the U.S. Code to provide mail and wire fraud coverage of the "intangible right of honest services."[61] The great majority of recent judicial references to section 1346 conclude the amendment does not apply retroactively.[62] As such, courts have not had opportunity to address the substantive effects of section 1346 on mail and wire fraud.[63] Yet the interpretation of the amendment is vital to establishing the scope of the statutes.

This section will analyze the potential impact of section 1346 and the degree to which prosecutors may again employ the mail and wire fraud statutes to protect intangible rights. While there are legitimate arguments for both a narrow and broad interpretation of the amendment, a broad interpretation is more consistent with the overall purpose of the statutes. Regardless of which interpretation is followed, section 1346 applied together with a *Carpenter* rationale of intangible property should permit

57. *Id.* at 25.

58. *Id.* at 22–24.

59. *Id.* at 25–26.

60. *Id.* at 26.

61. *See supra* note 8 and accompanying text.

62. *See supra* note 9 and accompanying text.

63. As *McNally* applies retroactively, courts generally conclude in those cases involving conduct occurring prior to the enactment of section 1346, a scheme to defraud must involve property rights. *See, e.g.,* United States v. Mitchell, 867 F.2d 1232, 1233 (9th Cir. 1989). For conduct occurring after November 18, 1988, however, section 1346 should govern. *See* Lynch & McConagha, *supra* note 11, at 491.

nearly as complete protection of intangible rights as existed before *McNally*.

A. The Problem: The Extent To Which the Intangible Rights Doctrine Will Be Revived

The ramifications of *McNally*, *Carpenter*, and section 1346 are uncertain. *Carpenter* weakens the *McNally* distinction in that prosecutors can now merely express intangible rights as intangible *property* rights to avoid such limitation.[64] Indeed, Justice Stevens raised this possibility in his strong dissent in *McNally*.[65] Further, neither Congress nor the Supreme Court has defined what the "honest services" language of section 1346 entails, leaving opportunity once again for varying interpretations among lower courts.[66] Commentators continue to criticize the statutes' vagueness and call for clarification.[67]

The enactment of section 1346 thus raises the issue of whether the "intangible right of honest services"[68] language completely restores the law to its pre-*McNally* status. The intangible rights doctrine, overturned in *McNally*, was based largely on the protection against breaches of fiduciary duties.[69] Some courts, however, had extended the doctrine to protect "miscellaneous" rights against schemes involving neither a breach of a fiduciary duty nor causing pecuniary harm.[70] Courts must therefore determine if both fiduciary and non-fiduciary intangible rights are again protected.

Only after determining the purpose behind the enactment of section 1346 can courts intelligently apply meaning to the "intangible right of honest services."[71] As a starting point, examining the statute's

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64. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections On The Disappearing Tort/Crime Distinction In American Law*, 71 B.U. L. REV. 193, 205 (1991).

65. McNally v. United States, 483 U.S. 350, 377 (1987) (Stevens, J., dissenting).

66. Williams, *supra* note 43, at 167–71.

67. *See, e.g.*, Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 269 (1992) ("The mail fraud statute's uncertainty has exceeded the bounds of mere judicial activism and entered the arena of absurdity. . . . Correction is therefore needed to properly place individuals on notice of what conduct is prohibited and to restore trust in the legal system.").

68. *See supra* note 8.

69. *See supra* notes 20–34 and accompanying text.

70. *See supra* notes 35–39 and accompanying text.

71. The first step in matters of statutory interpretation is attributing a purpose to the statute. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1157 (tentative ed. 1958). "The meaning of a statute is never plain unless it fits with some intelligible purpose." *Id.*

legislative history to determine the intent of Congress is appropriate.[72] A review of the amendment's record, which consists only of statements by Representative John Conyers, floor sponsor of the amendment in the House,[73] provides some clarification of congressional intent.

Representative Conyers's statements support a broad interpretation of the statute's purpose. He states that the amendment is intended to overturn the *McNally* decision and to "restore[] the mail fraud provision to where that provision was before the *McNally* decision."[74] Additionally, Conyers says in apparent justification for the amendment that "cases involving bribery, money laundering, election fraud, and licensing fraud have been dismissed because there was no monetary loss to any victim."[75] Although election fraud and licensing fraud often involve rights not easily connected to "honest services,"[76] this statement implies that Congress intended to make just such a connection. Finally, Conyers declares that "it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property."[77] Viewing these statements as a whole suggests that the purpose of section 1346 is to restore as complete coverage of intangible rights as existed prior to *McNally*.[78]

A plain meaning interpretation of section 1346, however, is that mail and wire fraud cover only the intangible right of the normal and ordinary meaning of "honest services." A student commentator has made several persuasive points in support of limiting the interpretation of "honest services" to those cases involving a breach of fiduciary duty: 1) the language of section 1346 includes only "honest services" and goes no farther to include more; 2) a proposal considered in Congress that would have protected "intangible rights of any kind whatsoever" was not enacted; and 3) Congress's fundamental concern was the coverage of public corruption and white-collar crime, not complete restoration of the intangible rights theory.[79] Courts could also utilize the doctrine of lenity,

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72. *See* Gail Vasterling et al., Project, *Recent Developments In Corporate And White Collar Crime,* 68 WASH. U. L.Q. 779, 814 n.234 (1990); Lynch & McConagha, *supra* note 11, at 490.

73. *See* Legislative History, *supra* note 8.

74. *Id.*

75. *Id.*

76. *See supra* notes 38–39 and accompanying text.

77. *See* Legislative History, *supra* note 8.

78. *See* Vasterling et al., *supra* note 72, at 813–14 (suggesting Congress may have intended to overturn the broad holding of *McNally*); *see also* Lynch & McConagha, *supra* note 11, at 489–90.

79. Donna M. Maus, Comment, *License Procurement and the Federal Mail Fraud Statute,* 58 U. CHI. L. REV. 1125, 1129–31 (1991).

as the *McNally* Court did,[80] to restrict the definition of section 1346's "honest services" to its normal and ordinary meaning. Therefore, those fraud cases involving non-honest service, non-fiduciary duty intangible rights, for example license or election fraud,[81] would still need to meet the *McNally* requirement of a scheme involving money or property rights.[82]

This argument fails, however, to account for the broad statements made by Representative Conyers implying total restoration of the pre-*McNally* intangible rights doctrine.[83] Moreover, such a limiting interpretation is contrary to the statutes' function and purpose as versatile weapons against developing frauds.[84] A liberal interpretation of section 1346 is thus consistent with wide protection from schemes to defraud, a logical purpose to attribute to the mail and wire fraud statutes.

B. The Outcome: De Facto Protection of All Intangibles

Even if courts institute a narrower definition of "honest services" by tying it to a fiduciary duty, creative prosecutors may use other theories to extend protection of other rights formerly labeled "intangible." Some ingenious pleading using section 1346 in conjunction with the *Carpenter* decision[85] should once more enable expansive protection of intangible rights.

The plain language of the amendment undoubtedly restores coverage of those cases involving the service of public and private fiduciaries,[86] and prosecutors may use *Carpenter* to protect non-fiduciary intangible rights. Since the majority of intangible rights cases in the past involved some fiduciary duty, prosecutors should have little trouble framing most future indictments to allege a deprivation of some sort of "honest services." This includes some of those cases that were formerly prosecuted under language other than honest service. For example, prosecutors can easily restate such intangibles as the right to "good

80. *See supra* note 54 and accompanying text.

81. *See supra* notes 38–39.

82. *See* Maus, *supra* note 79, at 1131.

83. *See supra* notes 74–78 and accompanying text.

84. *See* Rakoff, *supra* note 5, at 771–72.

85. *See supra* notes 56–60 and accompanying text.

86. Representative Conyers's statements regarding section 1346 imply coverage of a broad range of "honest services" in the public and private fiduciary cases by listing rights that were involved in important pre-*McNally* decisions. *See* Legislative History, *supra* note 8.

government,"[87] "loyalty,"[88] and "public trust"[89] as instead involving the right of honest services. In addition, many post-*McNally* courts have stretched the *Carpenter* approach to find a property right in many of the cases that formerly may have fallen under the "miscellaneous" intangible rights theory.[90] Prosecutors can therefore plead cases not involving fiduciary duties and "honest service" as cases which instead involve intangible property rights.[91]

As a practical result, most if not all intangible rights are again within the ambit of mail and wire fraud. By the language and legislative history of section 1346, one can assert that Congress intended to restore federal protection against schemes of public corruption and white-collar crime. Any conclusions as to congressional purpose beyond that, however, are mere speculation. Congress certainly did not intend to prohibit the use of the courts' interpretative powers.[92] Taking steps to define more clearly at what point conduct becomes criminal therefore remains within the province of the judiciary. While section 1346 again enables use of the intangible rights rhetoric, the judiciary should design a focused approach in interpreting "honest services."

III. CLARIFYING THE CRIME OF MAIL AND WIRE FRAUD

Congress has thus spoken, but not definitively. It likely concluded that the fraud statutes should be broad enough to criminalize fraudulent schemes that might not be actionable under more limiting or overly

87. *See* United States v. Margiotta, 688 F.2d 108, 120 (2d Cir. 1982), *cert. denied,* 461 U.S. 913 (1983).

88. *See* United States v. Bronston, 658 F.2d 920, 922 (2d Cir. 1981), *cert. denied,* 456 U.S. 915 (1982).

89. *See* United States v. Holzer, 816 F.2d 304, 311 (7th Cir.), *vacated,* 484 U.S. 807 (mem. 1987).

90. For example, many circuits have determined that license fraud involves the deprivation of property rights. *See* United States v. Bucuvalas, 970 F.2d 937, 944 (1st Cir. 1992) (listing cases accepting and rejecting license fraud as involving property rights), *cert. denied,* 113 S. Ct. 1382 (1993). Further, under a *Carpenter* rationale, *supra* text accompanying notes 56–60, a court could conclude that confidential business information like the kind in United States v. Louderman, 576 F.2d 1383 (9th Cir.), *cert. denied,* 439 U.S. 896 (1978), is intangible property subject to the federal fraud statutes. See *supra* note 36 and accompanying text for a description of *Louderman.*

91. *See supra* notes 56–60 and accompanying text.

92. Rep. Conyers's statements regarding section 1346 assert, "This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended." Legislative History, *supra* note 8.

precise language.[93] By so concluding, Congress has opted on the side of ambiguity and declined to provide a focused response to legitimate criticisms leveled at the statutes.[94] Congress has thus delegated to the courts the task of reconciling the two competing interests of the fraud statutes: the need for breadth and adaptability on the one hand and the desire for clear definition and established limits on the other.[95]

Responsibility thus falls on the judiciary to establish some guidelines for mail and wire fraud offenses under section 1346. Adopting an approach that encompasses both existing and newly developing forms of corruption while still providing adequate notice of what constitutes criminal conduct under the statutes is certainly no simple task.[96] The challenges, however, are not insurmountable. Courts should clearly define the class and conduct covered by the statutes and, specifically, require a breach of a fiduciary duty that foreseeably could cause pecuniary harm when applying the statutes to private individuals.

A. Establishing the Class and Conduct Covered by the Statutes

1. Determining When the "Honest Services" Duty Arises

The first problem becomes determining what class of individuals is subject to section 1346's duty of honest service. Prior to *McNally,* courts generally recognized such a duty where a fiduciary relationship between parties, both in the public and private sectors, existed.[97] As one court explained, the core of the judicially defined "scheme to defraud" involves a trust owed to another and a subsequent breach of that trust.[98] In interpreting section 1346, courts should now at least require both public and private fiduciaries to provide "honest services" when other

93. Lynch & McConagha, *supra* note 11, at 493. This purposely vague language thus provides prosecutors a "stopgap" device permitting mail or wire fraud charges to be brought against occurrences of criminality ill-defined in other promulgations. *See* Podgor, *supra* note 67, at 269–70.

94. *See supra* notes 40–45 and accompanying text.

95. *See* Oxman, *supra* note 18, at 789.

96. *See id.* at 786.

97. See *supra* notes 23–34 for cases involving actionable breaches of fiduciary duties.

98. United States v. Lemire, 720 F.2d 1327, 1335 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1226 (1984).

prerequisites are met.[99] Courts must also determine, however, if the "honest service" duty extends beyond fiduciaries.

Courts should more liberally interpret the "honest services" requirement in the public sector than in the private sector. Certain schemes such as license and election fraud have potential to harm the public by defrauding the government. If indeed a purpose of the mail and wire fraud statutes is to insure the public's right to good government, such schemes should remain under coverage. Since "honest services" in the public sector is the desired result, protecting the public good requires a more generous interpretation of both the duty owed and the type of breach that is subject to sanctions.[100] In the private sector, however, such a liberal interpretation is undesirable,[101] and courts should therefore stipulate that the right to the "honest services" of a private individual arises only when a fiduciary duty exists.

2. *Determining the Proscribed Conduct in the Private Sector*

Reliance on pre-*McNally* case law to interpret the duty of honest service revives the concerns and criticisms of commentators in the early 1980s.[102] The commentators' fear arose primarily out of decisions by some circuit courts[103] which extended the intangible rights doctrine in ways that opened the statutes to potential abuse.[104] For instance, these decisions could be interpreted as making obligatory the disclosure of any conflict of interest lest the fiduciary suffer the criminal consequences of failing to provide honest and faithful services.[105] Such an expansive reading would impose this disclosure obligation even if the defendant

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99. When a fiduciary duty arises is another uncertainty inherent in the application of the fraud statutes to intangible rights, an issue beyond the scope of this Comment.

100. Thus, a court may need to stretch the "honest services" requirement to fraud perpetrators who may not owe a fiduciary duty to the public but whose fraud nevertheless affects the public good. For example, section 1346 would cover situations where a private party defrauds a government agency into issuing a license that enables that private party to interact with the public under a mantle of governmental approval.

101. *See infra* notes 102–9 and accompanying text.

102. *See supra* notes 40–45 and accompanying text.

103. Two decisions that commentators found particularly alarming were United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), *cert. denied,* 456 U.S. 915 (1982), and United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied,* 461 U.S. 913 (1983). *See* Coffee, *From Tort to Crime, supra* note 21, at 123–24 (analyzing implications of the *Bronston* decision); Hurson, *supra* note 40, at 439–40 (analyzing implications of *Margiotta* decision).

104. Oxman, *supra* note 18, at 780.

105. *See* Coffee, *The Metastasis of Mail Fraud, supra* note 40, at 11.

was relatively passive and engaged in little conduct that actually furthered the possibility of economic harm to those entitled to honest service.[106] Fiduciaries potentially could incur criminal sanctions for a breach of duty that may not even rise to an actionable violation under civil law.[107]

In the private sector, covered conduct should equate to something more than mere fiduciary disloyalty. In the arena of private transactions, the honest services of a fiduciary is generally a means to an end, not the end itself. Unlike the public sector, fiduciary loyalty in the private sector is not the overriding goal, but rather a means to obtain and preserve pecuniary benefits for the person or entity to whom the duty is owed.[108] A fiduciary's undisclosed conflict of interest does not alone necessarily pose the threat of economic harm to an employer.[109] If merely depriving an entity to whom a fiduciary duty is owed of honest service constitutes criminal fraud, this means/ends distinction is eliminated. Once that distinction is lost and disloyalty alone becomes the crime, little remains before ordinary business failure yields criminal liability.[110] The difficulty lies in delineating a point at which a breach of duty or trust rises to the level of criminal conduct.

B. Defining When a Breach of Duty Becomes Criminal

Adopting an approach that punishes only certain breaches of private fiduciary duties is a reasonable means of clarifying the statutes' coverage. Prior to *McNally,* in fact, many circuits had already adopted standards to limit mail and wire fraud's reach in both public and private breach of fiduciary duty cases. Of the various limiting doctrines suggested by pre-*McNally* courts, the "reasonable foreseeability" of economic harm standard is superior.[111] Applying such a standard would help reconcile the competing demands on mail and wire fraud.

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106. *Id.*

107. *See* Coffee, Jr., *supra* note 64, at 204.

108. United States v. Lemire, 720 F.2d 1327, 1336 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1226 (1984).

109. *Id.*

110. Peter R. Ezersky, Note, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach,* 94 YALE L.J. 1427, 1439 (1985).

111. This Comment only addresses the point at which breaches of duty in the private sector should be punishable and specifically does not consider the propriety of adopting a similar limitation in the public sector.

*1. Pre-*McNally *Limitations*

Certain judicially created, pre-*McNally* interpretations of mail and wire fraud provide a starting point for limiting coverage where a breach of fiduciary duty has occurred. If the enactment of section 1346 returns the law to its pre-*McNally* status, these interpretations may again play a role in defining the crime of mail and wire fraud. The earliest approach required "active" fraud, as opposed to "constructive" fraud, as a prerequisite for a federal fraud conviction.[112] A second, widely accepted standard required a breach of duty accompanied by a "material non-disclosure or misrepresentation" to a party owed the duty.[113] Finally, one circuit court adopted a test whereby some "reasonably foreseeable" economic harm to the employer must accompany the breach of a duty.[114]

Under this "reasonably foreseeable" standard, the crucial determination is whether the private fiduciary might reasonably have contemplated some concrete business harm to the employer stemming from a failure to disclose the fiduciary's conflict of interest.[115] To convict, a jury must find that the non-disclosure furthers a scheme to abuse an employer's trust such that an identifiable harm to the employer,

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112. United States v. Bohonus, 628 F.2d 1167, 1172 (9th Cir.), *cert. denied,* 447 U.S. 928 (1980); Post v. United States, 407 F.2d 319, 329 (D.C. Cir. 1968), *cert denied,* 393 U.S. 1092 (1969); Epstein v. United States, 174 F.2d 754, 766 (6th Cir. 1949). Active fraud is distinguishable from constructive fraud in that it requires specific intent to defraud in addition to a breach of a fiduciary duty. *Post,* 407 F.2d at 329; *Epstein,* 174 F.2d at 765–66. Further, active fraud requires that fiduciaries intentionally utilize their trusted position to obtain a benefit for themselves at the expense of the person whose trust is betrayed. United States v. Lemire, 720 F.2d 1327, 1335 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1226 (1984).

113. The additional element that transforms a mere fiduciary breach into a criminal offense is a violation of the employee's duty to either disclose material information or to not make a material misrepresentation to his employer. United States v. Von Barta, 635 F.2d 999, 1006 (2d Cir. 1980) (involving non-disclosure of material information), *cert. denied,* 450 U.S. 998 (1981); United States v. Bush, 522 F.2d 641, 648 (7th Cir. 1975) (involving material misrepresentations by public employee), *cert. denied,* 424 U.S. 977 (1976). Information is material if an employee "has reason to believe such information would lead a reasonable employer to change its business conduct." United States v. Ballard, 663 F.2d 534, 541 (5th Cir. 1981), *modified,* 680 F.2d 352 (5th Cir. 1982). Therefore, where an employee breaches a duty but the breach does not involve information which would cause the reasonable employer to act differently had it known, such an employee does not violate the fraud statutes. *Id.* at 541–42.

114. United States v. Lemire, 720 F.2d 1327, 1337 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1226 (1984).

115. *Id.* at 1337. The *Lemire* court expressed no opinion as to the applicability of this test to public officials. Instead, it noted, "[p]ublic officials may be held to a higher standard of public trust; and conflicts of interest may harm the public merely by giving the illusion of unfairness." *Id.* at 1337 n.13.

apart from the breach itself, is reasonably foreseeable.[116] In effect, this standard introduces something akin to the proximate cause concept into these criminal statutes.[117] The breach must be capable of causing some reasonably foreseeable harm to the employer, although no harm need result to find the employee guilty.[118]

The first two limitations, while moving the interpretation in the right direction, are inferior to the "reasonably foreseeable" standard. The distinction between actual and constructive fraud fails to embrace a substantive connection between the intent and the breach of duty. As such, this standard is too imprecise in defining when fraudulent intent is sufficient to merit imposing sanctions.[119] The second "material information" standard improperly shifts the focus away from the intent of the accused toward the probable actions of the victim. An employer presumably would change its business conduct only if, upon disclosure of the conflict of interest, it saw opportunity for profit or savings, or dangers of economic harm.[120] This notion of materiality, taken one logical step further, should focus on whether the employee reasonably foresees potential economic harm to the employer stemming from the employer's ignorance of the conflict.[121] Criminal statutes should concentrate the inquiry on the intent of the accused necessary to establish culpability.[122]

The "reasonably foreseeable" criterion provides the best guidance for consistent application without being overly restrictive. It adds one more link in the mail and wire fraud chain, with the inquiry progressing from "honest services" to breach of a fiduciary duty to the reasonable foreseeability of such breach causing some concrete harm. This standard serves solely as a measure of intent, not as an additional requirement of proof of harm. The intent necessary for conviction must rise above a mere intentional failure to disclose a conflict of interest to the level of foreseeably causing harm. Imposing such a test to the statutes does not

116. *Id.* at 1337.

117. This final judicial standard is somewhat analogous to the proposed causation standard offered by Professor Coffee. *See supra* notes 46–47 and accompanying text.

118. *See supra* note 13 and accompanying text.

119. This problem is evidenced by the courts' failure at times to recognize or institute this "actual harm" distinction when dealing with intentional non-disclosure cases.

120. *Lemire,* 720 F.2d at 1338.

121. *Id.*

122. *See* Coffee, *From Tort to Crime, supra* note 21, at 164.

contravene the legislative intent behind section 1346,[123] because this standard was in place well before the *McNally* decision. Courts should therefore uniformly adopt such a standard in private fiduciary "honest services" cases.

2. *Justifying a "Reasonably Foreseeable" Limitation*

Incorporating a foreseeability test into the "honest services" requirement of private fiduciaries takes a needed step to provide a better measure of criminal intent and to give potential defendants notice of when a scheme will be deemed criminal in nature. Criminal statutes should punish only those who have engaged in the proscribed conduct and have the necessary intent. Because the statutes do not require proof of monetary or economic harm, this standard would act as an imperfect proxy for culpability[124] to punish only those schemes that are criminally blameworthy. Criminal law should require a more exacting standard of proof of fraudulent intent than a mere intentional violation of a private duty standing alone. Proof of intent through a breach of duty coupled with foreseeable harm provides a better measure of criminal conduct. Further, tying "honest services" to a breach of duty where economic harm is foreseeable to the reasonable individual provides private fiduciaries some standard to judge the propriety of their actions.

This standard will not unduly conflict with Congress's apparent desire in enacting section 1346 to keep the fraud statutes flexible. First, this standard would only apply to fiduciary relationships in the private sector, leaving unfettered the prosecution of public corruption cases where honest services is the desired goal. Second, this test will enable prosecutors to continue their use of the fraud statutes to attack new forms of fraud as they develop so long as the scheme can foreseeably cause some concrete harm to the private entity to whom a duty is owed. Because reasonable foreseeability is itself an inexact concept, it is ideal to apply here as a mediating doctrine capable of capturing novel frauds without criminalizing essentially harmless ethical transgressions in the business world.[125] The reasonably foreseeable standard thus permits wide application of the statutes without such an ad hoc approach by the courts.

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123. The record reflects Congress's intent to return the law to its pre-*McNally* status. *See supra* text accompanying note 74.

124. *See supra* text accompanying note 47.

125. *See* Coffee, *From Tort to Crime*, *supra* note 21, at 169.

IV. CONCLUSION

The enactment of section 1346, restoring mail and wire fraud coverage of the "intangible right of honest services," once again places the responsibility of interpretation on the judiciary. Courts must determine if Congress intended the expansive protection of intangible rights as existed prior to the *McNally* decision or merely the protection of plain meaning "honest services." Given the broad statements in the amendment's legislative history, total restoration of the intangible rights doctrine is a legitimate interpretation. Regardless, section 1346 used in conjunction with the *Carpenter* interpretation of intangible property rights should effectively protect most, if not all, of those intangible rights that were protected before 1987.

Congress likely concluded that adding overly precise language to the crime of mail and wire fraud would impair the statutes' effective application to new and developing forms of fraud. Congressional revival of protection of intangible rights, however, still requires the courts to establish criteria to measure "honest services." Restricting the application of the mail and wire fraud statutes in private sector cases to breaches of fiduciary duties that have a reasonable foreseeability of causing pecuniary harm provides a flexible limitation. While it does not solve all of the statutes' problems, it takes a step to reconcile the competing demands on these criminal statutes.