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Honest Services Fraud and the Fiduciary Relationship Requirement: How the Ninth Circuit Got It Wrong in *United States v. Milovanovic*

I. INTRODUCTION

Honest services mail fraud[1] is one of the more difficult white collar crimes to understand, mostly because, as Justice Scalia phrased it, prosecutors are "all over the place" in how they interpret it.[2] Most attempts to clarify the statute's meaning have only confused the legal community more. Yet, despite its ambiguity, many describe the statute as the prosecutor's "true love"— his catch-all, go-to weapon against white collar criminals.[3]

The Ninth Circuit Court of Appeals recently addressed the issue of honest services fraud in *United States v. Milovanovic*.[4] After falsifying paperwork for commercial drivers licenses in exchange for bribes, the defendants in *Milovanovic* were charged with honest services fraud.[5] The defendants challenged the indictment, claiming that a fiduciary relationship[6] between plaintiff and defendant is necessary for honest services fraud, and no such relationship existed

1. Honest services fraud refers to "a scheme or artifice to defraud" by "depriv[ing] another of the intangible right of honest services." 18 U.S.C. §§ 1341, 1346 (2006). It is a charge frequently used in public corruption cases. Thomas M. DiBiagio, *Politics and the Criminal Process: Federal Public Corruption Prosecutions of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statutes*, 105 DICK. L. REV. 57, 57 (2000).

2. Transcript of Oral Argument at 49–50, Weyhrauch v. United States, 130 S. Ct. 2971 (2010) (No. 08-1196), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts /08-1196.pdf.

3. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980).

4. 627 F.3d 405 (9th Cir. 2010), *reh'g en banc granted*, 655 F.3d 1106 (9th Cir. 2011).

5. *Id.* at 407. Specifically, the defendants were charged with mail fraud and conspiracy to commit mail fraud. *Id.*

6. A fiduciary relationship is one "in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship." BLACK'S LAW DICTIONARY 1402 (9th ed. 2009).

between the defendants and their employers, the Washington State Department of Licensing.[7] The Ninth Circuit ruled that a fiduciary relationship is not a sine qua non requirement of honest services fraud,[8] making it the third circuit court to make this ruling.[9] The case is currently set to be reheard en banc by the Ninth Circuit.[10]

This Note will argue that Milovanovic was decided incorrectly, as the court failed to contemplate the policy considerations of discrimination, over-criminalization, and over-regulation of the private sector. Part II of this Note provides the history of the honest services fraud statute and more recent developments in the statute's interpretation. Part III discusses the facts and procedural history of *Milovanovic*. In Part IV, this Note argues that the Ninth Circuit in *Milovanovic* disregarded several important policy considerations when eliminating the fiduciary relationship requirement—namely, discriminatory application, over-criminalization, and over-regulation of the private sector. With this recent ruling, prosecutors in the Ninth Circuit's jurisdiction will effectively have unchecked discretion to prosecute almost anyone for almost *anything* remotely related to fraud. This reckless expansion of the already broad honest services fraud statute should—and must—be reversed when the Ninth Circuit rehears *Milovanovic* en banc.

II. SIGNIFICANT LEGAL BACKGROUND

A. Early History

The mail fraud statute, as amended in 1909, criminalized using the mail to advance "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[11] Over time, courts broadened the interpretation of "money or property" to include

7. *Milovanovic*, 672 F.3d at 408.

8. *Id*. at 413.

9. *See, e.g.*, United States v. Rybicki, 354 F.3d 124, 155 (2d Cir. 2003) (Raggi, J., concurring) ("While a particular relationship may shed light on whether one person owes another honest services, the language of § 1346 indicates that the critical factor is the type of service at issue, not the relationship of the parties."); United States v. Ervasti, 201 F.3d 1029, 1036 (8th Cir. 2000) ("We reject the Ervastis' contention that § 1346 requires the breach of a fiduciary duty . . . . [T]he breach of a fiduciary duty is not a necessary element of § 1346. Certainly nothing in . . . the language of either § 1341 or § 1346 suggests the contrary.").

10. United States v. Milovanovic, 655 F.3d 1106 (9th Cir. 2011).

11. 18 U.S.C. § 1341 (2006).

deprivation of intangible rights such as honest services, a concept officially articulated in the 1941 Fifth Circuit Court of Appeals decision of *Shushan v. United States.*[12]

In *Shushan*, a public official accepted bribes in exchange for supporting a certain city contract.[13] The city lost no money or property in the course of the fraud, but instead saved money.[14] The public official was nevertheless convicted of mail fraud because "[n]o trustee has more sacred duties than a public official," and taking advantage of this duty meant depriving the public of its right to an official's honest services.[15] Prosecutors subsequently began using deprivation of intangible rights, such as honest services, as the basis for charging defendants with fraud more frequently.[16] Honest services became a catch-all deprivation when suspect behavior did not fall under the definition of another crime.[17] The doctrine of intangible rights during this period was like an "exotic flower that quickly overgrew the legal landscape in the manner of the kudzu vine until . . . few ethical or fiduciary breaches seemed beyond its potential reach."[18]

The Supreme Court eventually addressed intangible rights in *McNally v. United States*, holding that mail and wire frauds only applied to schemes to defraud others of tangible property or money.[19] The *McNally* decision called upon Congress to "speak more clearly" if it wanted to include honest services as a deprivation.[20] One year later, in response to this request, Congress added language to the United States Code clarifying that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[21]

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

13. *Id.* at 114.

14. *Id.*

15. *Id.* at 115.

16. John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 430 (1998).

17. *Id.* at 463.

18. *Id.* at 427.

19. McNally v. United States, 483 U.S. 350, 359–60 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508.

20. *Id.* at 360.

21. 18 U.S.C. § 1346 (2006).

B. More Recent Approaches in the Private Sector

Over the last twenty years, prosecutors have used the honest services fraud statute in the private sector much more frequently to respond to the complexities of corporate crime.[22] *United States v. Frost* was not the first case to involve an honest services fraud charge in the private sector, but it is one of the most cited.[23] In *Frost*, the defendants—two University of Tennessee professors who had aided student plagiarism—argued that they were not susceptible to honest services fraud prosecution because they were not public servants.[24] The Sixth Circuit Court of Appeals was not persuaded by their argument, holding that "private individuals . . . may commit mail fraud by breaching a fiduciary duty and thereby depriving the person or entity to which the duty is owed of the intangible right to the honest services of that individual."[25]

Since *Frost*, courts have dealt with the honest services fraud statute in various ways. The results have been both clarifying and confusing. First, the courts of appeals have developed two approaches to determining the scope of the honest services fraud statute: the reasonably foreseeable economic harm test and the materiality test. Second, in an effort to prevent vagueness, the Supreme Court has held that the honest services fraud statute only applies in cases involving bribery and kickbacks. Finally, the courts of appeals have split over the question of whether honest services fraud requires a breach of a fiduciary relationship.

1. Reasonably foreseeable economic harm test versus materiality test

Federal courts of appeals today generally use two approaches in private sector honest services cases: the reasonably foreseeable economic harm test and the materiality test.[26] The reasonably foreseeable economic harm test requires the government to prove that an employee intentionally breached his fiduciary duty and "foresaw or reasonably should have foreseen that his employer might

22. Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 DEL. J. CORP. L., 1, 38 (2010).

23. 125 F.3d 346 (6th Cir. 1997).

24. *Id.* at 365.

25. *Id.* at 366.

26. *See, e.g.*, *id.* at 368.

suffer economic harm as a result of the breach."[27] The materiality test, on the other hand, requires that the government prove that the defendant fraudulently intended to make "any misrepresentation that has the natural tendency to influence or is capable of influencing" the victim to change his behavior.[28] The courts have acknowledged the existence of both tests and several have taken the opportunity in opinions to explain why one test is superior to the other.[29]

2. Vagueness

The Supreme Court has narrowed the honest services fraud statute's application in order to prevent vagueness. A statute is unconstitutionally vague when it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[30] *Skilling v. United States* addressed vagueness in the context of honest services fraud.[31] Skilling, the former CEO of Enron, was convicted in 2006 of honest services fraud and securities fraud.[32] Skilling challenged the honest services conviction, arguing that § 1346 is unconstitutionally vague.[33] The Supreme Court of the United States agreed and ruled in favor of Skilling.[34] The Court kept the statute alive, however, by holding that § 1346 can still be used to prosecute crimes where a bribe or kickback is involved.[35]

27. *Id*.

28. United States v. Vinyard, 266 F.3d 320, 328 (4th Cir. 2011) (citations omitted).

29. For example, the Sixth Circuit reasons that the reasonably foreseeable harm test is better because it "properly focuses on the intent of the employee, and explicitly acknowledges [an] implicit assumption of the 'materiality' standard." *Frost*, 125 F.3d at 368–69. In contrast, the Second Circuit feels that the materiality test "[arose] out of fundamental principles of the law of fraud," while the reasonably foreseeable harm test is merely "something of an *ipse dixit* designed simply to limit the scope of section 1346." United States v. Rybicki, 354 F.3d 124, 146 (2d Cir. 2003).

30. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

31. 130 S. Ct. 2896, 2907 (2010).

32. *Id*. at 2907–11.

33. *Id*. at 2925.

34. *Id*. at 2907.

35. *Id*. Justices Scalia, Kennedy, and Thomas noted in *Skilling* that they would have preferred to do away with the statute entirely rather than inventing limitations not present in the statute in order to keep it alive. *Id*. at 2939 (Scalia, J., concurring).

The *Skilling* decision was certainly a victory for criminal defense lawyers since it will prevent the government from prosecuting cases with no evidence of bribes or kickbacks under § 1346; however, the honest services fraud statute was not blunted beyond use. The definition of "kickbacks" could be interpreted so broadly that it would encompass most corruption cases that come before prosecutors anyway. The Court does not specify that a "kickback" must be monetary—it is possible a prosecutor could satisfy the kickback requirement by simply offering evidence of a quid pro quo agreement. The effects of this decision are only just starting to play out in the courts, so it is difficult to ascertain how much of an effect *Skilling* will have on honest services fraud cases.

3. Fiduciary relationship requirement

Today, the federal courts of appeals are also at odds in regard to the requirement of a breach of fiduciary relationship. The Third,[36] Fourth,[37] Fifth,[38] Sixth,[39] and Eleventh[40] Circuits have all held that honest services fraud requires the defendant to have breached a fiduciary duty to the victim, while the Second[41] and Eighth Circuits[42]

36. United States v. McGeehan, 584 F.3d 560, 568 (3d Cir. 2009) (noting case law which held "that state law must provide the specific honest services owed by the defendant in a fiduciary relationship" (quoting U.S. v. Murphy, 323 F.3d 102, 116 n.5 (2003))

37. United States v. Vinyard, 266 F.3d 320, 329 (4th Cir. 2011) ("Thus . . . we must assess whether there was sufficient evidence . . . to find that [one] willingly aided and participated in the breach of a fiduciary duty . . . , and that he could reasonably foresee that the breach would create an identifiable economic risk.").

38. United States v. Brown, 459 F.3d 509, 519 (5th Cir. 2006) ("'Honest services are services owed to an employer under state law,' including fiduciary duties defined by the employer-employee relationship."(quoting United States v. Caldwell, 302 F.3d 399, 409 (5th Cir. 2002)).

39. United States v. Frost, 125 F.3d 346, 366 (6th Cir. 1997) ("We therefore hold that private individuals . . . may commit mail fraud by breaching a fiduciary duty and thereby depriving the person or entity to which the duty is owed of the intangible right to the honest services of that individual.").

40. United States v. Browne, 505 F.3d 1229, 1265 (11th Cir. 2007) ("[T]o prove 'honest services' mail fraud, the Government must show that the accused intentionally participated in a scheme or artifice to deprive the persons or entity to which the defendant owed a fiduciary duty of the intangible right of honest services, and used the United States mails to carry out that scheme or artifice.").

41. United States v. Sancho, 157 F.3d 918, 920 (2d Cir. 1998) ("Sancho contends that criminal liability . . . for a scheme to deprive another of honest services requires the existence of a 'genuine fiduciary relationship' to the entity being defrauded . . . . There is no such requirement."), *overruled in part on other grounds by* United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003).

have rejected such a requirement. The Ninth Circuit is the latest to join the Second and Eighth Circuits in rejecting this fiduciary requirement in *United States v. Milovanovic*.[43]

III. FACTS AND PROCEDURAL HISTORY

A. Facts

The defendant, Brano Milovanovic (Milovanovic), was indicted for honest services fraud along with four other codefendants.[44] Milovanovic and his cronies developed a scheme to help out-of-state Bosnian-Americans illegally obtain commercial drivers licenses in the state of Washington in exchange for bribes.[45] Milovanovic was an independent contractor hired by the Washington State Department of Licensing as a Bosnian interpreter.[46] During the course of his employment, Milovanovic gave applicants the answers to the written test portion of the license application, and he bribed the administrator of the driving test, another codefendant, to forge the test results.[47] The defendants were not considered to be state employees, and their employment contracts specifically stated that Milovanovic and the other interpreters in question were not "agents" of the state.[48] In fact, no specific paperwork existed to suggest that a fiduciary duty accompanied the relationship between the defendants and the state of Washington.[49]

B. Procedural History

The United States indicted the defendants for honest services fraud in the United States District Court for the Eastern District of Washington.[50] The defendants argued that a fiduciary relationship is

42. United States v. Ervasti, 201 F.3d 1029, 1037 (8th Cir. 2000) ("We reject the Ervastis' contention that § 1346 requires the breach of a fiduciary duty. . . . [T]he breach of a fiduciary duty is not a necessary element of § 1346. Certainly nothing in . . . the language of either § 1341 or § 1346 suggests the contrary.").

43. 627 F.3d 405 (2010), *reh'g en banc granted*, 655 F.3d 1106 (9th Cir. 2011).

44. *Id*. at 407.

45. *Id*.

46. *Id*.

47. *Id*.

48. *Id*.

49. *Id*.

50. *Id*. at 406.

a sine qua non of honest services fraud; the district court agreed and dismissed the indictment, basing its decision on the lack of a fiduciary relationship.[51] The United States appealed in the Ninth Circuit Court of Appeals.[52] Upon taking the case, the Ninth Circuit was faced with the question of whether honest services fraud must be committed by a fiduciary, a question it answered with a resounding "no."[53]

The majority opinion reasoned that honest services fraud, found in Title 18, § 1346 of the United States Code, is an extension of the mail fraud statute found in § 1341.[54] Thus, by reading the text of the two statutes together, it is evident that "[w]hoever having devised or intending to devise a scheme or artifice to defraud" by "depriv[ing] another of the intangible right of honest services" through the use of mail has committed honest services fraud.[55] The use of the word "whoever" was especially significant to Judge Kleinfeld, who argued that Congress could have indicated here that the relevant sections would only apply to fiduciaries.[56] However, Congress notably chose to use the much more broad term, "whoever," which is indicative of its application to anyone guilty of such acts.[57]

The majority opinion also relied on the purposes behind § 1346, which are to limit social harm and to prevent and punish fraud.[58] There is no suggestion, the majority reasoned, that this statute should only apply to fiduciaries; if there was such a requirement, the statute would not list counterfeiting as a type of fraud fitting within this definition.[59] The majority explained that counterfeiting is not a fraud that involves a fiduciary relationship.[60] In fact, there are several types of traditional mail fraud that do not involve a fiduciary relationship.[61] The majority argued that this interpretation even

51. *Id.* at 407.
52. *Id.*
53. *Id.* at 413.
54. *Id.* at 409; 18 U.S.C. §§ 1341, 1346 (2006).
55. 18 U.S.C. §§ 1341, 1346.
56. *Milovanovic*, 627 F.3d at 409–10.
57. *Id.*
58. *Id.* at 410.
59. *Id.*
60. *Id.*
61. *Id.*

stands up to the *Skilling*[62] decision, as bribes and kickbacks do not necessitate a fiduciary relationship either.[63]

The majority's final point of reasoning was that the language of § 1346 already suggests five limitations on its use,[64] implying that these are the only limitations in place. According to the majority, § 1346 requires (1) that a "legally enforceable right to have another provide honest services" exists; (2) that honesty was "inherent in the services performed by the perpetrator"; (3) that the perpetrator had the "intent to defraud"; (4) that the scheme used fraud; and (5) that the mail was "used to further the scheme."[65] The court held that if these limitations are met, then the conduct constitutes honest services mail fraud.[66]

The dissent stated that the majority's legislative intent argument is flawed.[67] It argued that the majority was mistaken when it reasoned that Congress must not have intended there to be a fiduciary duty requirement because it did not explicitly state so in § 1346. The dissent reasoned that, in reality, Congress did not include a reference to the fiduciary duty requirement because in 1988, when Congress passed the honest services fraud statute in response to *McNally v. United States*,[68] it assumed that all previous case law on honest services fraud was in place.[69] The dissent explained that "legislatures act with case law in mind,"[70] and the case law on honest services fraud at this point more often than not discussed the requirement for a fiduciary relationship breach.[71] The dissent stated that in this regard, the fact that Congress did not explicitly state that a breach of a fiduciary relationship *was not* necessary—knowing that the majority of courts called for proof of the relationship and breach thereof—is indication that it intended for the relationship to be

62. United States v. Skilling, 130 S. Ct. 2896, 2931 (2010) (holding that honest services fraud must involve bribes or kickbacks). *Skilling* is further discussed *supra* Part II.B.2.

63. *Milovanovic*, 627 F.3d at 411.

64. *Id.* at 412.

65. *Id.*

66. *Id.* at 413.

67. *Id.*

68. 483 U.S. 350 (1987), *superseded by statute*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100–690, § 7603, 102 Stat. 4508.

69. *Milovanovic*, 627 F.3d at 413–14.

70. *Id.* at 414 n.2 (quoting Abuelhawa v. United States, 556 U.S. 816, 988 (2009)).

71. *Id.* at 414–15.

required.[72] The dissent also reasoned that the heightened sense of duty required in honest services fraud simply was not present in the *Milovanovic* facts.[73]

Currently, the case is set to be reheard by the Ninth Circuit en banc.[74]

IV. ANALYSIS

As the majority opinion notes, there was already a circuit split on whether a fiduciary relationship was required at the time of the *Milovanovic* decision.[75] This is an important federal question. Should a case reach the Supreme Court of the United States on this matter, it seems likely the Court would grant a writ of certiorari to straighten out this significant unsettled area of the law. There are persuasive textual and legislative history arguments both against and for requiring a fiduciary relationship. Policy considerations, however, tip the balance in favor of the fiduciary relationship requirement. The Ninth Circuit decided this case incorrectly by failing to consider the effects such a decision would have on society in its analysis. The Ninth Circuit should have held that honest services fraud necessitates proof of a fiduciary relationship based on policy considerations—specifically the dangers of discriminatory prosecution, disrespect for the law, and over-regulation of the private sector.

A. Discretion and Discrimination

By eliminating the fiduciary relationship requirement, the court has afforded prosecutors an inappropriate amount of discretion. Wider prosecutorial discretion opens the door to discriminatory application, as prosecutors are more able to pick and choose defendants based on factors such as notoriety or race.

The majority opinion in *Milovanovic* references the purpose of the honest services fraud statute, which is to prevent and punish fraud.[76] The flexibility granted by the statute enables prosecutors to penalize conduct that does not exactly fall under other criminal statutes. Federal prosecutors are responsible for prosecuting "all

72. *Id.*

73. *Id.* at 415–16.

74. United States v. Milovanovic, 655 F.3d 1106 (9th Cir. 2011).

75. *Milovanovic*, 627 F.3d at 409.

76. *Id.* at 410.

offenses against the United States," yet gaps in the law often require them to use their discretion "in almost every task [they] perform[]."[77] Prosecutors are afforded such discretion because they review a large number of cases, which involves scrutinizing various pieces of evidence, various actors, and so on, thus, they are assumed to be in the best position possible to decide whether or not to file charges. Such abounding discretion allows prosecutors to weed out weaker cases. In situations where prosecutors decide it is in the best interest of justice to prosecute, they rely on this statutory flexibility to do so. Thus, the mail and wire fraud statutes, referred to as the government's "first line of defense," are the prosecutor's go-to statutes.[78]

Given this substantial amount of discretion with which prosecutors pursue cases, it seems dangerous to afford them more discretion than is functionally required. Prosecutors' practical needs are already being met with such a flexible and oft-applied statute; there is certainly no need to expand the statute's already far-reaching scope. The courts have always been concerned about allowing the mail fraud statute to encompass far too much activity,[79] and by eliminating the fiduciary relationship requirement in honest services fraud, the Ninth Circuit may have made this concern a reality.

By giving such broad power to prosecutors, courts have opened the door to systemic abuse. Prosecutors anxious for headlines may be tempted to use the honest services statute against high profile political figures and CEOs who are guilty of unethical, but not necessarily criminal, behavior.[80] As Justice Scalia complained in *Sorich v. United States*, the honest services fraud statute "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."[81] This argument is

77. Alexa Lawson-Remer, Note, *Rightful Prosecution or Wrongful Prosecution? Abuse of Honest Services Fraud for Political Purpose*, 82 S. CAL. L. REV. 1289, 1311 (2009) (quoting 28 U.S.C. § 547 (2006)) (internal quotation marks omitted).

78. United States v. Maze, 414 U.S. 395, 405–06 (1973) (Burger, C.J., dissenting).

79. *Milovanovic*, 627 F.3d at 414. In 1876, the Supreme Court noted that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." United States v. Reese, 92 U.S. 214, 221 (1876).

80. Sorich v. United States, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari).

81. *Id.*

especially strong in light of honest services fraud prosecution in the private sector. While public officials have an inherent duty to preserve the public's interests, this duty is not the same in the private sector where relationships are less valued. Relationships in the private sector are subject to much less loyalty and consideration; private actors often act in their own best interest when it is adverse to others' interests. The phrase "it's just good business" is frequently used to explain away various betrayals and ethical quagmires.

Such broad discretion also opens up opportunities for prosecutors to abuse their positions in order to indulge their prejudices. It is a sad reality that the justice system is not void of actors who discriminate based on race, gender, religion, and so on[82]—there are surely prosecutors who, when given the opportunity, would unfairly prey on certain classes of people.

The statute as applied by most courts is already broad, even taking into account the recent limitations imposed by *Skilling*. While requiring a fiduciary duty may or may not limit the honest services fraud statute depending on how "fiduciary duty" is defined,[83] it is too risky to eliminate it altogether as the Ninth Circuit did. The Ninth Circuit recklessly disregarded such policy concerns and practical realities when deciding *Milovanovic*.[84]

B. Over-Criminalization and Disrespect for the Law

In addition to the discriminatory problems that often accompany wide discretionary powers, a broader reading of § 1346 would result in over-criminalization of the private sector. Already, interpretations of § 1346 seem to imply that mere unethical behavior by an employee is enough to prosecute him or her. *United States v. Bronston* is a good example of the statute's overreach into ethical—but not criminal—violations.[85] In *Bronston*, a Second Circuit Court of Appeals case, the defendant Samuel Bronston was a New York state senator and partner at a local law firm.[86] The law firm began to

82. *See generally* CYNDI BANKS, CRIMINAL JUSTICE ETHICS: THEORY AND PRACTICE (2d ed. 2009).

83. Justice Scalia made sure to scoff at the "indeterminacy" of the term "fiduciary duty" in his *Skilling* concurrence. United States v. Skilling, 130 S. Ct. 2896, 2937 (2010) (Scalia, J., concurring in part and concurring in the judgment).

84. *See generally Milovanovic*, 627 F.3d at 407–13.

85. 658 F.2d 920 (2d Cir. 1981).

86. *Id.* at 922.

represent two venture capital companies investing in BusTop Shelters, Inc. ("BusTop").[87] A friend and current client of Bronston named Saul Steinberg asked Bronston to represent him in an effort to acquire BusTop, but Bronston's firm prohibited Bronston from representing Steinberg due to a conflict of interest.[88] Bronston proceeded to represent the client in secret.[89] Because Bronston failed to disclose the conflict of interest to the firm's venture capitalist clients, he was subsequently convicted of honest services fraud for this ethical violation.[90]

Bronston is regarded as the high-water-mark case for honest services mail fraud, and it is widely criticized for over-criminalizing the private sector.[91] Such over-criminalization leads to increasing disrespect and disregard for the law.[92] Furthermore, over-criminalization often leads to violations of individual freedoms.[93] The government interest in expanding this catch-all provision is low, and the resulting government encroachment on daily life that will surely result from *Milovanovic* trumps this interest. The Ninth Circuit either failed to contemplate or completely avoided discussing these negative consequences and important policy considerations in *Milovanovic*.

C. Over-Regulation Effects on the Economy

The government has already shown its willingness to "polic[e] the internal affairs of corporations" by criminalizing some corporate fiduciary obligations.[94] By eliminating the fiduciary relationship

87. *Id*.

88. *Id*.

89. *Id*. at 923.

90. *Id*. at 930.

91. *See* Coffee, *supra* note 16, at 434.

92. *See* Sanford Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 160 (1967). The Prohibition Era is a prime example of over-criminalization leading to rampant disrespect for the law. *See generally* Harry Gene Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, 12 CONTEMP. DRUG PROBS. 63 (1985). Some would argue that current criminal laws designed to prohibit drug use have yielded the same disrespect. *See* Ronald Bayer, *Introduction: The Great Drug Policy Debate–What Means This Thing Called Decriminalization?*, 69 MILBANK Q. 341 (1991).

93. Fernando Molina, *A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks for How to Deal with It*, 14 NEW CRIM. L. REV. 123, 136 (2011).

94. Peter R. Ezerksy, Note, *Intra-corporate Mail and Wire Fraud: Criminal Liability for*

requirement for honest services fraud and effectively expanding the statute's scope, the *Milovanovic* decision has created more opportunity for the government to regulate corporate affairs. An increase in regulation in the private sector will have negative economic effects because "the heightened possibility of liability . . . for business failure or suspect loyalty is likely to magnify the already excessive risk-aversion of corporate managers—or cause them to demand increased compensation to offset the risk of criminal liability—and thereby reduce returns to shareholders."[95] Such regulation is not an appropriate responsibility of the federal government. Congress has charged the *states* with substantive regulation of intracorporate affairs[96] while federal law has only spoken to the mandatory disclosure of securities sales and exchanges.[97] It is no secret that states scheme and compete with one another to come up with the most beneficial laws for companies in hopes to attract business.[98] Such interstate competition is typical of the free market and is healthy for the private sector—it leads to self-correction in corporate state law as states each work to find the optimal amount of regulation to satisfy both business owners and other constituents such as environmentalists.[99] This optimal amount of regulation would be jeopardized if the federal government began to regulate corporate behavior more aggressively using broad wire and mail fraud statutes.

The Ninth Circuit's decision to expand the honest services fraud statute beyond the point of necessity is one more step in the direction of over-regulation. As prosecutors exercise this new, broader authority to prosecute honest services mail fraud, these negative effects of over-regulation will not take long to materialize.

V. CONCLUSION

While the majority opinion in *Milovanovic* accurately points out that where a statute is sufficiently clear, the court does not need to

Fiduciary Breach, 94 YALE L.J. 1427, 1442 (1985).

95. *Id.* at 1439.

96. *See* Cort v. Ash, 422 U.S. 66, 84 (1975).

97. SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963).

98. *See* Ezerksy, *supra* note 94, at 1442–43.

99. *See id.* at 1443.

look further than the language,[100] it takes for granted that the honest services fraud statute is clear. In reality, the honest services fraud statute is incredibly vague, as is evident by its almost-demise in *Skilling*. If not for Justice Ginsburg's creative interpretation of § 1346, it would surely have been struck down.[101] The Ninth Circuit did not decide *Milovanovic* correctly, as it failed to properly contemplate the policy considerations of discrimination, over-criminalization, and over-regulation of the private sector.

The honest services fraud statute has already been distorted beyond its original form to serve as a catch-all for most instances of fraud. The Ninth Circuit has enabled prosecutors to use the statute even more frequently than before, and—as history has shown—if prosecutors can use a statute, they do. When the Ninth Circuit rehears *Milovanovic* en banc, it should reverse its original holding and find that a fiduciary relationship is in fact a requirement for honest services fraud.

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100. *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000); Burton v. Stevedoring Servs. of Am., 196 F.3d 1070, 1072 (9th Cir. 1999); City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802, 804 (9th Cir. 1994).

101. United States v. Skilling, 130 S. Ct. 2896, 2907 (2010).

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