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The Sea and the Mirror: Some Reflections On Corporate Honest Services Fraud and the (Hypothetically) Innocent Corporation

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Introduction

In 1997, my co-author and I thought we had thoroughly made sense of a terribly complex issue – indeed, in the area of corporate criminal knowledge, an issue which seemed to be the *most* complex; namely, the notion of aggregate corporate knowledge.[1] That notion, in which criminal knowledge or intent is potentially attributed to a corporation through the collection of various employees' knowledge, takes on significance when the corporation is alleged to have acted criminally, and involves a debatable extension of the well-settled principle that "in general, the knowledge of corporate agents may be *imputed* to the corporation when those agents have the requisite knowledge to commit a criminal offense."[2]

In 1997, we were all a bit more naive. We never imagined then that the question of imputation to the corporation would turn out to be far more critical in terms of an *individual's* criminal responsibility than a corporation's. But then, in 1997, we were still a few years away from a number of sobering things – most particularly, for purposes of this Article, the fall of Enron in October, 2001, and the progeny of that fall.

The fall of Enron, the outrage sparked by its staggering failure, and aggressive prosecutive decisions in response to that outrage, played out in their aftermath across whole swaths of the legal landscape.[3] This Article focuses on one precise aspect of that aftermath which, ironically enough, holds up a mirror to the question of whether employee knowledge will be imputed to a corporation when the corporation is an alleged *wrongdoer*. That is, under what circumstances will and should employee knowledge be imputed to a corporation when the corporation is an alleged *victim*? To see the complexities in that mirror, however, the Article must also look to the "sea" – to the vast, murky waters of "honest services" fraud.

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[1] Thomas Hagemann & Joseph Grinstein, *The Mythology of Aggregate Corporate Knowledge: A Deconstruction*, 65 GEO. WASH L. REV. 210 (1997) [hereinafter *Mythology*].

[2] *Id.* at 246 n.214. (emphasis added).

[3] For but a few examples, consider the extraordinary sagas from 2001-2008 of (1) the Sentencing Guidelines, which went from being extraordinarily enhanced after Enron's fall, FEDERAL SENTENCING GUIDELINES MANUAL, UNITED STATES SENTENCING COMMISSION, 2001, 2003 Editions, to being declared merely "advisory" by the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005); (2) the Department of Justice ("DOJ") Guidelines for Prosecuting Corporations, which went from being extraordinarily toughened in 2003, Memorandum from DOJ to United States Attorneys regarding Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (the "Thompson Memorandum"), to being degraded and partially defanged, respectively, in *United States v. Stein,* 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd* 541 F.3d 130 (2d. Cir. 2008), *see infra* note 34, and by DOJ in its ensuing, humbled response, *see infra* notes 34 and 129-31 and accompanying text; and (3) not unrelatedly, the prosecution of corporations themselves, which moved from the extraordinary decision to destroy Arthur Andersen in May, 2002, to a world of "deferred prosecution agreements" for corporations. *See, e.g.*, Lawrence Finder and Ryan McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, ST. LOUIS U. L.J. (Fall 2006).

The need for this voyage is twofold. First, the *lone* federal criminal case to consider the issue of imputation and the corporate victim was a 1998 "honest services" case,[4] and, for reasons that will become apparent, an understanding of this type of case is central to the issue itself. Second, however, and more importantly, is the fact that, in a series of cases since, the government has charged individuals with crimes against their corporation – ultimately, in one form or another, with honest services fraud – when it could *just as easily* have attributed the individual's actions to the corporation. It is to that paradox, and from an essential belief the paradox can slip, and has been allowed to slip, into dangerous nonsense, that this Article is devoted.

In Part I, the Article introduces the "shallows" of honest services fraud and corporate knowledge and then, drawn from some recent cases, briefly sets forth examples of the ways in which honest services fraud and the corporate victim have intersected. Part II paints the deeper seascape of honest services fraud insofar as it is necessary to a proper understanding of when a corporation should be considered a victim, and provides a fuller picture of where things stand before the Supreme Court as it prepares to take up its first "honest services" consideration since its landmark decision in *McNally v. United States*.[5] The Article then explores in detail *United States v. Sun-Diamond Growers* – the single case to have considered an "imputation rule" for the alleged corporate victim – and goes on in Parts III and IV to suggest a deeper analytical framework in an effort to sort out what is merely complicated or paradoxical about the notion of a corporate victim and honest services fraud from what seems truly nonsensical and violative of due process.

I. The Shallows

A. "Honest Services" Fraud: First Dive

In a strictly technical sense, "honest services" fraud is a criminal charge based on the combination of 18 U.S.C. § 1341 (mail fraud) or § 1343 (wire fraud) and the expansive definition contained in 18 U.S.C. § 1346, which provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' [the essence of a mail or wire fraud charge] includes a scheme or artifice to deprive another of the intangible right of honest services." This definition, which was passed in 1988, was designed to address the Supreme Court's holding in *McNally v. United States* one year earlier that while "[t]he mail fraud statute clearly protects property rights,…[it] does not refer to the intangible right of the citizenry to good government."[6] It is now a commonplace that "Congress enacted § 1346 in response to *McNally* and reinstated the 'intangible rights' doctrine,"[7] which had previously embraced, among other things, both the public's right to honest government service and various private entities' right to an employee's or agent's "honest services."[8]

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[4] *United States v. Sun-Diamond Growers of California,* 138 F.3d 961 (D.C. Cir. 1998). *See infra* notes 67-79 and accompanying text.

[5] 483 U.S. 350 (1987).

[6] *Id*. at 356.

[7] *United States v. Rybicki*, 287 F.3d 257, 261 (2d Cir. 2002).

[8] As apparent from the title, this Article's focus is on the latter kind. Since at least Justice Stevens's dissent in *McNally*, 483 U.S. at 362, various distinctions have been drawn between "public sector" and "private sector" honest services fraud, although all such distinctions could well be collapsed if the

To understand what was and is added to the prosecutive arsenal in private-sector cases by "honest services" fraud, *United States v. George*[9] – the "Patient Zero" of appellate "honest services" cases[10] – is a helpful exemplar. Yonan, George, and Greensphan were friends. Yonan was a cabinet buyer in the purchasing department of Zenith Corporation. Greensphan owned Accurate Box Corporation, which sold cabinets to Zenith. Greensphan wanted Zenith's business, Yonan wanted kickbacks to give Greensphan Zenith's business, and so they set up George in a phony company, A&G Woodworking. A&G, having done nothing, would submit "commission" invoices to Accurate, Accurate would pay them, and George and Yonan would split up the proceeds. "Zenith" – and we will return to what that means – knew none of this.

But there was no proof that Yonan's gain came "out of Zenith's pockets."[11] Accurate's cabinets were high quality; its quotations were not inflated; Accurate received no proven preferential treatment from Yonan.[12] The dollars to Yonan came from Accurate's profit and the purchase price to Zenith was, from its perspective, fair.[13] Thus, while the court assumed that if the scheme had been known to Zenith, it would have been able to bargain differently with Accurate, the government was not required to prove that Yonan and friends schemed to deprive the corporate victim of money or property:

> Here the fraud consisted in Yonan's holding himself out to be a loyal employee, acting in Zenith's best interests, but actually not giving his honest and faithful services, to Zenith's real detriment.[14]

Conviction of all three affirmed.

From this initial paradigm of an "honest services" case – some form of undisclosed benefit to an employee, with some form of disadvantage to the employer presumed – two points emerge at the outset. First, in a more common sense understanding, although perhaps a rose by another name, a number of other federal crimes can be "honest services" violations as well, so long as an employee is involved and the targeted victim is his employer. That is, a scheme to obtain money or property from an employer,[15] theft of an employer's trade secrets,[16] bank

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Supreme Court finds § 1346 entirely vague. *See infra* Parts II.A.5 and III.B. The Article uses "corporate" and "private-sector" honest services fraud interchangeably.

[9] 477 F.2d 508 (7th Cir. 1973).

[10] The notion of "honest services" evolved in the case law, particularly during the twentieth century, for decades before the *McNally* decision, and the author does not claim to have reviewed each and every mail and wire fraud opinion during that century or any other to assess whether it was arguably a private-sector "honest services" case. Nonetheless, there are two "secondary" sources cataloguing those cases in detail – Justice Stevens's dissent in *McNally*, 483 U.S. at 363-64 nn.3-4, and the Second Circuit's *en banc* opinion in *United States v. Rybicki*, 354 F.3d 124, 138 n.13 (2d Cir. 2003). In Supreme Court and Second Circuit law clerks we trust; and, of these, *George* is the first appellate case upholding defendants' conviction for "honest services."

[11] *George,* 477 F.2d at 512.

[12] *Id*. at 510-12.

[13] *Id.* at 513.

[14] *Id*.

[15] 18 U.S.C. §§ 1341, 1343 (2008).

[16] 18. U.S.C. § 1832 (2008).

fraud,[17] and embezzlement[18] – all involve "honest services" violations, too. Logically, the concept of an "honest services" crime encompasses any and all crimes involving an employee (1) with the employer as victim and (2) involving some knowing lie or non-disclosure to the employer. Second, however, it is only a crime if the employer doesn't "know;" if the employee's – say, Yonan's – actions and knowledge were imputed to the employer, then the employer is, well, not an unknowing victim.[19]

This latter point raises a number of questions centered around: what makes a corporation "know?" Were the employee's actions solely for his own gain, or for his employer's benefit as well? Did the employee's actions hurt the company economically, and were they intended to do so? Does the employee's rank in the organization matter? But let us, for the moment, simplify things…apparently.

Assume Yonan went to his boss at Zenith and said quite clearly, "Boss, Greensphan, my friend, wants to personally pay me a commission for every cabinet he sells to us. He wants to do this for me. I know it's good for me, but I think it's good for Zenith, too." And his boss, with no hidden agenda and no conflict, says, "Odd…but fine. You deserve it, Yonan. You found us Greensphan, who makes the best cabinets in America." And then the government finds out about this and, because Yonan didn't declare this income on his taxes, indicts Yonan. And, because the Boss knew, indicts Zenith for aiding and abetting Yonan's tax evasion. In that case, Yonan and the Boss were "the corporation." And then the government *separately* indicts Yonan for "honest services" fraud and says, "Ahh, but the Boss isn't Zenith." In that case, neither Yonan nor Boss was "the corporation." Who, or what, then is Zenith? Can there be two Zeniths?

B. The (Hypothetically) Innocent Corporation: First Reflections

In the abstract, regardless of what its employees or agents do or know, a corporation is neither guilty for nor innocent of those actions. Being purely a legal entity and without corporeal form, such that it cannot actually know or physically do anything, its vicarious responsibility is purely a function of statute and case law.[20]

One hundred years ago, however, the Supreme Court sketched the essential legal propositions that govern corporate criminal liability. In *New York Central & Hudson River Railroad v. U.S.*[21], drawing upon a variety of state cases, English cases, and treatises, the Court first recognized the basis for a corporation's vicarious criminal liability for an employee's intentional acts:

> If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run

[17] 18 U.S.C. § 1344 (2008).

[18] 18 U.S.C. § 656 (2008).

[19] *See infra* note 121 and accompanying text.

[20] *See Mythology, supra* note 2 at 213 n.7.

[21] 212 U.S. 481 (1909).

> railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.[22]

The Court went on to capture the two principles that have governed an imputation rule for corporate wrongdoing: (1) "the act is done for the benefit of the principal [*i.e.,* the corporation]," (2) "while the agent is acting within the scope of his employment in the business of the principal…."[23] Ever since *New York Central*, a corporation can be: (1) *factually* innocent because no employee did anything wrong, or (2) *legally* innocent because, while an employee may have done something wrong, he either did not act to benefit the corporation or was not acting within the scope of his employment.[24] But when the employee acted (at least in part)[25] to benefit the corporation *and* within the scope of his employment, yet the corporation is *nonetheless* alleged to be an "innocent" – *i.e.*, a victim,[26] then we have identified the *(hypothetically) innocent* corporation; then we have the conditions ripe for nonsense; and now we take the red pill[27] to see some examples from the real world to grasp the many contours of the problem.

C. The Real World: Soundings in Nonsense

1. United States v. Bayly, et al.: *Nonsense on its Face?*

In 2003, the Enron Task Force charged four employees of Merrill Lynch and two employees of Enron, as well as unindicted co-conspirator Andy Fastow, with, among other things, conspiring to defraud Enron, including to deprive Enron of "the intangible right of honest services" and "to obtain money and property."[28] The case became known as the "Nigerian Barge" case, because it involved Merrill Lynch paying $7,000,000 to Enron in December, 1999, in connection with some power-producing barges Enron owned which were moored off the coast of Nigeria.[29] The characterization of the $7,000,000 was everything: if it was a loan from Merrill Lynch to Enron, then Enron should not have booked an accounting gain into earnings; if it was an equity stake in the barges, then the accounting worked.

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[22] *Id.* at 492 (quoting BISHOP'S NEW CRIMINAL LAW, § 417).

[23] *Id*. at 492.

[24] Generally speaking, this latter category contains the "easy" cases for "honest services" fraud – the truly rogue employees. *See infra* notes 129-31 and accompanying text.

[25] *See infra* notes 63-66 and accompanying text.

[26] A distinction must be drawn here between situations in which a prosecuting authority charges individual employees with a crime, but, although she could charge a corporation for its vicarious liability as well, does not charge the corporation. That situation reflects simply the exercise of prosecutorial discretion. The problem of the (hypothetically) innocent corporation arises when the prosecutor could attribute the employee's knowledge and/or intent to the corporation, does not do so, and then, in one fashion or another, asserts the corporation's *innocence*.

[27] THE MATRIX (Berman, Bruce 1999) [hereinafter *The Matrix*] (Morpheus to Neo: "You take the blue pill, the story ends, you wake up in your bed and believe whatever you want to believe. You take the red pill, you stay in Wonderland, and I show you how deep the rabbit hole goes.").

[28] Superseding Indictment at 9-10, *United States v. Bayly, et al.*, CR No. H-03-363 (S.D. Tex. Oct. 14, 2003) (copy on file with the author) [hereinafter *Bayly Indictment*]. The author represented defendant Daniel Bayly during pretrial proceedings, at trial in September, 2004, in Houston, Texas, and throughout the proceedings that followed. *See infra* notes 80-92 and accompanying text.

[29] *Id*. at 4.

What made the $7,000,000 a loan, according to the indictment, was an oral agreement outside the purchase contract – a "side deal" – between Enron and Merrill Lynch, as follows:

> Specifically, Enron promised in an oral "handshake" side-deal that Merrill Lynch would receive a rate of return of approximately 22% and that Enron would sell the barges to a third party or repurchase the barges within six months. Because of these promises from Enron, Merrill Lynch's supposed equity investment was not truly "at risk" and Enron should not have treated the transaction as a sale from which earnings and cash flow could be recorded in 1999.[30]

There was no suggestion in the indictment that any employee at Enron involved in the barge transaction was not acting to benefit Enron or acted outside the scope of his employment, or that they lied to or hid any information from their employer. In short, on the face of the indictment, Enron and Merrill Lynch were alleged to have entered into a side deal that sought to deprive Enron of the "honest services" of its employees.

But what then was this victim "Enron?"

2. United States v. Kramer, et al.*: Nonsense by Definition?*

In 2004, the government charged two high-level trading executives at Duke Energy with, among other things, conspiring to deprive Duke of its employees' honest services. Unlike the Nigerian Barge case, there was no apparent allegation in the indictment that Duke somehow defrauded Duke; however, in a bill of particulars, defendants complained that they could not determine from the indictment or the discovery how they possibly did so.[31] Every action allegedly taken by the defendants was apparently known to others at Duke, and so the trial judge ordered the government "to clarify in writing what the Indictment means when it refers to Duke Energy being defrauded."[32] The government responded that Duke "as a victim is distinguishable from its officers, directors, and employees."[33]

But who then was "Duke?"

3. United States v. Stein, et al.: *Nonsense in Theory?*

In 2005, in the "KPMG" case, a number of former KPMG partners and others were charged with conspiring to defraud the IRS by devising fraudulent tax shelters. By the time of trial, KPMG, and partners Larry DeLap and Jeff Eischeid, were alleged to be unindicted co-conspirators in the indictment and, as reported in the media and in cases, KPMG had only

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[30] *Id*.

[31] Bill of Particulars, *United States v. Kramer, et al.*, CR No. H-04-155 (S.D. Tex. 2005) (copy on file with the author). The author represented defendant Todd Reid during pretrial proceedings and at trial in October, 2005, in Houston, Texas.

[32] Hearing Minutes and Order*, United States v. Kramer, et al.*, CR No. H-04-155 (S.D. Tex. November 18, 2004) (copy on file with the author).

[33] Government's Response to November 18, 2004 Order, *United States v. Kramer, et al.*, CR No. H-04-155 (S.D. Tex. 2005) (copy on file with the author).

staved off indictment by entering into a costly deferred prosecution agreement with DOJ.[34] At trial, however, the government offered testimony that two defendants had lied to DeLap and Eischeid – and, therefore, KPMG – about a critical investment component of the tax shelter. Defendants complained bitterly that the government had constructively amended the indictment from "a tax fraud conspiracy *with* KPMG against the IRS into an honest services fraud conspiracy *against* KPMG,[35] but the trial judge disagreed and instructed the jury that "there is no legal obstacle to the government arguing, as it has, that one or more of the defendants or others sought to mislead particular persons employed by KPMG while at the same time arguing that KPMG, as an organization, was a member of the alleged conspiracy."[36]

But for what "KPMG" did the "[misled] particular persons" work?

4. A Bank Fraud Case:[37] Nonsense in Fact?

In 2007, the government charged four men with bank fraud – a banker, seller, purchaser, and an appraiser. In simplified terms, the alleged fraud involved misrepresentations on a HUD statement, making it appear that cash had been used for down payments when it had not, and based upon which the Bank extended loans to Purchaser. Purchaser had fully disclosed that fact to Banker, but, unbeknownst to Purchaser, Banker was receiving some of Seller's proceeds at closing and not telling the Bank – a discrete "honest services" fraud within a larger alleged fraud.

To Purchaser, however, what was the "Bank"?[38]

II. The Depths

A. "Honest Services" Fraud: Deep Dive

1. Words

There is no definition anywhere in § 1346 or in its legislative history of "another," "honest services," or what it means to "deprive" another of honest services. On its face, the statute might prohibit an effort by a father to convince his son not to become an ordained priest.[39]

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[34] Superseding Indictment, *United States v. Stein, et al.*, 05 CR. 888 (S.D.N.Y. 2005) (copy on file with the author). The author represented defendant John Larson, a former KPMG senior tax manager, at trial in October, 2008. For the extraordinary story which led to the KPMG agreement and, *inter alia*, Judge Kaplan's finding that DOJ's Thompson Memorandum was unconstitutional, *see United States v. Stein, supra* note 3, 435 F. Supp. 2d 335-72. That finding also resulted in the complete dismissal of charges against thirteen of the original nineteen defendants in the KPMG case, including DeLap and Eischeid.

[35] Defendants' Memorandum of Law in Support of Defendants' Motion for Mistrial and Dismissal at 2, *United States v. Stein, et al.*, 05 CR. 888 (S.D.N.Y. 2008).

[36] Jury Instructions at 35, *United States v. Stein, et al.*, 05 CR. 888 (S.D.N.Y. 2008).

[37] While based on the facts of an actual case, this is the only one of the four examples that did not proceed to trial. Thus, the names have not been used to protect the…well, you know.

[38] For those who must have an answer sheet somewhere, the answer to each question is "a (hypothetically) innocent corporation."

[39] So long as the requisite mailing or wiring was involved.

At a slightly less fanciful level, the statute would seem most clearly designed to cover "those who serve" – public servants, whether those who serve their country, state, or locality. It is less clear, except in an archaic sense, that employees "serve" their employers; we speak of public service, military service, and jury service; more rarely of Exxon or McDonald's service.[40] Thus, at the semantic level, it would be fairly easy to draw a public-private distinction in applying the statute.

2. McNally

The statute literally cannot be evaluated, however, without fitting it into *McNally v. United States* and its open-ended invitation. In *McNally*, the Court held that the mail fraud statute was "limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has."[41] In effect, to the vague question asked in *McNally*, "do you, Congress, desire to go further?," Congress simply and vaguely answered "yes." That is all the clarity provided by § 1346; that was all the Court's invitation called for.

At this late date, it is merely ironic to note that *McNally* was a public-sector honest services case, in which a public official and his cohorts had engaged in a "self-dealing patronage scheme [that] defrauded the citizens and government of Kentucky,"[42] and that the "lead-in" to the Court's question was potentially quite narrowing along the same public-private lines:

> *Rather than construe the statute in a manner that leaves its outside boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials*, we read § 1341 as limited in scope to the protection of property rights. If Congress desires…[43]

Certainly, the focus of *McNally* was solely on "honest services" in the public sector. Had the Court asked, "Does Congress desire to involve the federal government in setting standards of disclosure and good government for local and state officials?" or limited its directive to public intangible rights in some other way, one wonders what might have been.

But that is the blue pill.

3. Public and Private Victims

After *McNally* and § 1346, that is, after 1988, the government's use of "honest services" fraud to charge cases in the private sector mushroomed. This is no surprise. No longer simply a concept to be gleaned from a series of cases but instead 28 mouth-watering words,

> …[w]ithout some coherent limiting principle … this expansive phrase invite[d] abuse by headline-grabbing prosecutors in pursuit of local officials, state

[40] If anything, "service" in the private sector today is a thing provided by the employer (through its employees) to its customers, not from the employees to the employer.

[41] *McNally*, 483 U.S. at 360.

[42] *Id*. at 352.

[43] *Id.* at 360 (emphasis added).

> legislators, and corporate CEO's who engage in any manner of unappealing or ethically questionable conduct.[44]

These are Justice Scalia's deliberately incendiary words about § 1346 and its effects, but even a banal description, a calm reading of the statute, explains the expansive use: it is a broadly worded statute that conceivably covers a number of public and private-sector activities. It is, in a word, a hammer.[45]

Yet, from the standpoint of the victim(s), there is a large difference between public and private-sector honest services: with the latter, the victim is a single, identifiable person under the law. Moreover, it is a person who possesses a range of remedies to deal with those who wrong it, especially its employees: discipline, publicity, termination, and the civil courts. And, finally, it is almost always a wealthy person – certainly relative to any one or more of its employees unless his name is Bill Gates or Warren Buffett.

Which raises, at this point, two questions – one already answered by § 1346, perhaps regrettably, perhaps ripe for reconsideration: If no property or money of any nature has been taken or attempted to be taken, is the federal criminal law going to step in to "protect" that person? And another question, never addressed: If so, to what lengths will the criminal law go in defining that "person" to "protect" the interests of that "person?"

With those quotation marks threatening to obscure meaning, this Article has arrived at the High Water Mark of Private-Sector Honest Services Fraud, as the Enron Task Force went to trial in the Nigerian Barge case in the late summer of 2004 and temporarily supplied the second question's answer: any lengths it chooses.

4. Nigerian Barges and the Search for Dishonest Services

A sense of chronology and of the times is invariably instructive in understanding the evolution of the law. In October, 2001, the Wall Street Journal broke the story that "Enron CFO's Partnership Had Millions in Profit."[46] In the ensuing weeks and months, as tales of "LJM," "Raptors," "RADR," Michael Kopper, missing computers, and secret side deals emerged, Andrew Fastow, the former CFO of Enron, became a national poster child for a rogue employee. When he was indicted in April, 2003, on 98 counts ranging from honest services fraud to money laundering to obstruction of justice, his notorious aspect was enhanced; when he pled guilty and agreed to cooperate in January, 2004, his status was confirmed: Fastow was the walking essence of a dishonest employee. And he was at the center of the Nigerian Barge transaction, having made the phone call to Merrill Lynch that purportedly "blew" the accounting.

At the trial in September, 2004, however, in the charged atmosphere of the first trial of individuals by the Enron Task Force, it was never made clear how or by whom Enron had actually been provided "dishonest" service – because there was no such evidence. The government, for reasons known only to them, never called Andy Fastow. Perhaps they knew that his specter alone would suffice. Every shred of evidence and every witness demonstrated

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

[45] *See infra* note 134 and accompanying text.

[46] B. MCLEAN & P. ELKIND, THE SMARTEST GUYS IN THE ROOM 370-71 (Portfolio 2003). The title of the article was the *Journal's* third published the week of October 15, 2001, on the exploding topic of Enron's difficulties that month.

that the transaction was devised and sponsored by a host of high-level and lower-level employees at *Enron* to allow *Enron* to book a gain for *Enron*. No one lied to Enron about the deal; no one hid anything from Enron.[47] In describing what it alleged was the illegal "side" deal, in opening statement, the prosecutor said, "Enron had the exact same understanding. Mr. Boyle[48] had conversations with the folks at Enron about this, high up, to the top levels."[49] Nevertheless, the prosecution persisted with and the trial judge refused to dismiss the honest services charges; the defendants were convicted of conspiracy and wire fraud, including honest services fraud. The (hypothetically) innocent corporation and the broadest view of corporate honest services fraud imaginable – with the victim an "Enron" divorced from the actions, knowledge, or intent of its employees; in short, an "Enron" that did not exist anywhere – had been vindicated.

5. The Fall of Honest Services?

The High Water Mark would hold through the summer of 2006. In the interim, Lord Conrad Black, the CEO of Hollinger International, was indicted for, and Jeff Skilling, the former CEO of Enron, was convicted of, honest services fraud. In the latter case, as Skilling was convicted of a conspiracy whose every objective was alleged to further a *guilty* Enron – falsify earnings, hide debt, inflate the share price[50] – and "a range of secret side deals were pending between Enron and LJM"[51] – hence, they were no secret to Enron – the (hypothetically) innocent Enron roared to life once again. Guilty as charged.[52]

And then something happened; the tide changed. It began in August, 2006, with the analytic disaster of *United States v. Brown*,[53] a 2-1 decision by the Fifth Circuit which reversed the Nigerian Barge convictions due to the government's flawed theory of honest services fraud, and, in doing so, provided a glimpse of the sea at its most frightening:

> If we are not to lapse into defining a common law crime, the outer boundary of this facially vague criminal statute must be determined from the factual circumstances supporting affirmed convictions, not by negative implication from the few constraints mentioned in disparate cases. In essence, the Defendants argue that between the core of cases affirming honest-services fraud convictions and the shell of cases reversing them, there is a gap, a lacuna, a vacuum, a no-man's land, a demilitarized zone, in which this case awkwardly sits alone.[54]

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[47] There was evidence about Enron employees hiding the oral aspects of the transaction from Enron's auditor – Arthur Andersen – but that was indisputably done to book the accounting gain and benefit Enron.

[48] Defendant Daniel Boyle, who was one of two Enron employees indicted and tried in the case.

[49] Transcript of Record at 424-25, *United States v. Bayly, et al.*, CR No. H-03-363 (S.D. Tex. 2004) (copy on file with the author).

[50] Superseding Indictment at 7, *United States v. Skilling, Lay*, CR. No. H-04-25 (S-2) (S.D. Tex. 2004) (copy on file with the author).

[51] *Id*. at 16.

[52] For those readers who have not defended federal criminal cases, it can be hard to fight against a fiction. Facts tend to matter less.

[53] 459 F.3d 509 (5th Cir. 2006). Analytic disaster is discussed *infra* notes 80-94 and accompanying text.

[54] *Id*. at 520 (footnote omitted).

Or, more simply "chaos."[55] That is what Justice Scalia succinctly called the state of affairs in February, 2009, in dissenting from a denial of certiorari of an honest services conviction. Since *McNally* and § 1346:

> To avoid some of these extreme results, the Courts of Appeals have spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles. No consensus has emerged … it seems to me quite irresponsible to let the current chaos prevail.[56]

Whether due to the force of Justice Scalia's dissent in *Sorich*, a ripening sense in the country and the courts that something was out of control, or both, as of this writing:

- The Court has granted Black's petition for certiorari, which directly raised the issue (i) whether a defendant can be convicted of honest services fraud if his scheme contemplated no "identifiable economic harm to the party to whom honest services are owed;"[57]

- The Court has granted Skilling's petition for certiorari, and Skilling has filed an amicus brief "in support of neither party" in Black's case, which raises the question (ii) whether a § 1346 conviction requires proof of "'private gain' rather than to advance the employer's interests;"[58] and,

- Skilling's petition, as well as a Chamber of Commerce amicus brief in *Black* have raised the question (iii) whether § 1346 is unconstitutionally vague.[59]

Thus, for the first time ever,[60] the chaotic sea that is private-sector "honest services" swirls before the Court.[61] Yet, to get it thoroughly right, as will be shown, the Court must look to the sea *and* the mirror; in defining the proper bounds of corporate honest services fraud, it is as important to consider the nature of the victim as it is the nature of the wrongdoing.

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[55] *Sorich*, 129 S.Ct. at 1311.

[56] *Id.* at 1309, 1311.

[57] Petition for Certiorari at 14, *Black, et al. v. United States*, No. 08-876 (U.S. Jan. 9, 2009) [hereinafter *Black Petition*].

[58] Petition for Certiorari at i, *Skilling v. United States*, No. 08-1394 (U.S. May 11, 2009) [hereinafter *Skilling Petition*]; Brief of Jeffrey Skilling as Amicus Curiae in Support of Neither Party at i, *Black, et al. v. United States*, No. 08-876 (U.S. Aug. 6, 2009).

[59] *Skilling Petition* at i; Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioners, Black, et al. v. United States, No. 08-876 (U.S. Aug. 6, 2009).

[60] *McNally*, while temporarily foreclosing honest services prosecutions, was solely about the statutory interpretation and legislative history of the mail fraud statute (18 U.S.C. § 1341).

[61] Indeed, there is a third honest services case in play as of this writing: *Weyhrauch v. United States*, in which the Court has granted the petition and which flows from the public-sector fork of honest services fraud. 548 F.3d 1237 (9th Cir. 2008). In *Weyhrauch*, the Court has limited the question as follows: "Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail fraud statute (18 U.S.C. § 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law." *See Weyhrauch v. United States*, Docket No. 08-1196 entry (June 29, 2009).

B. Imputation and the (Hypothetically) Innocent Corporation: Through the Looking Glass

1. Imputation and the Corporate Wrongdoer: The Benefit Rule

While *New York Central* stated that, to impute liability to a corporation for an employee's acts, "the act is done for the benefit of the principal…,"[62] it has become accepted through the years that the Court did not intend to imply "*solely* for the benefit" of the corporation. To the contrary, only when an employee's or agent's actions were "undertaken *solely* to advance the interests of that agent or of a party other than the corporation"[63] has the corporation been insulated from imputation and the resulting exposure.[64] So long as the employee's acts were motivated "at least in part – by an intent to benefit the corporation,"[65] a corporate conviction will stand.[66] The full impact of this partial logic would come home to roost in 1998, in *United States v. Sun-Diamond Growers* – the case which, not at all coincidentally, is the one case to speak directly to an imputation rule for the alleged corporate victim.

2. Imputation and the Corporate Victim

a. United States v. Sun-Diamond Growers of California[67]

An unusual case to say the least, *Sun-Diamond* arose along the way of an independent counsel's ultimately failed prosecution of former Secretary of Agriculture Mike Espy.[68] A precise understanding of its facts, and the characterization of the players involved, is essential.

Henry Espy, Mike Espy's brother, had run for Mike's seat in Congress after he became Secretary of Agriculture, and had (a) lost and (b) run up "a sizable campaign debt."[69] Richard Douglas, friend of Mike Espy and Sun-Diamond vice president, wanted to help Henry Espy retire that debt, and so, among other things, he called James Lake, a founding partner of RLSM,

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[62] *New York Central*, *supra* note 21, 212 U.S. at 493.

[63] *United States v. Automated Med. Lab., Inc.*, 770 F.2d 399, 407 (4th Cir. 1985) (emphasis added).

[64] *See*, *e.g.*, *Standard Oil Co. of Texas v. United States*, 307 F.2d 120 (5th Cir. 1962). *Standard Oil* contained language that could have supported another interpretation – "the purpose to benefit the corporation is decisive in terms of equating the agent's actions with that of the corporation," *id.* at 128 – but, in effect, that passage has been read to mean "the purpose [along with whatever other purposes may have existed] to benefit…" Although the Supreme Court has never directly spoken to this issue, language in *New York Central* certainly supported a broader view of "benefit," since the employee's actions could be "done wantonly or recklessly or against the express orders of the principal," and still bind the corporation.

[65] *Automated Med. Lab.,* 770 F.2d at 407.

[66] This perspective on the proof of benefit that is required is not simply the prevailing opinion in court cases; it underpins the perspective of federal prosecutors everywhere in evaluating whether to hold a corporation liable for the alleged actions of its agents. *Automated Medical* has been "codified" in the "Principles of Federal Prosecution of Business Organizations." UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS MANUAL ("USAM") Ch. 9-28.000, 9-28.200 (rev'd August, 2008).

[67] 138 F.3d 961 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999).

[68] At his trial, Espy was acquitted on all 30 counts, relating to his receipt of gratuities while in office. *See*, *e.g.*, Bill Miller, Espy Acquitted in Gifts Case, WASH. POST, December 3, 1998, at A1.

[69] *Sun-Diamond,* 138 F.3d at 969.

"which handled communications and public relations matters for Sun-Diamond,"[70] and asked for Lake's help. Here was how: hand over five $1,000 checks written by Lake and four nominees at RLSM, and Sun-Diamond would reimburse them – illegally, due to a statute well-known to Douglas and Lake.[71] Lake did so[72] and "reimbursement" was achieved as follows: Lake caused a false $5,000 reimbursement request for his purported purchase of tickets to a benefit dinner to be submitted to RLSM (and Bozell, its corporate parent). RLSM paid a reimbursement check to Lake, who reimbursed the nominees, and then RLSM invoiced Sun-Diamond for the dinner tickets, which Douglas approved. "The net result: a $5,000 [illegal campaign] expenditure by Sun-Diamond."[73] No one else at Sun-Diamond or RLSM knew about this scheme.

The independent counsel charged Sun-Diamond with, *inter alia*, "honest services" fraud against RLSM, the jury convicted, and, on appeal, Sun-Diamond, as the alleged corporate criminal, said in effect, "excuse me?":

> Here, Sun-Diamond says, Douglas's scheme was designed to – and did in fact – *defraud* his employer, not benefit it. In this circumstance, it strenuously argues there can be no imputation: "[T]o establish precedent holding a principal *criminally* liable for the acts of an agent who defrauds and deceives the principal while pursuing matters within his self-interest merely because the agent's conduct *may* provide some incidental benefit to the principal serves to punish innocent principals with no countervailing policy justifications."[74]

Granting Sun-Diamond's argument had "considerable intuitive appeal," the court of appeals felt itself bound by the sweep of the benefit rule – Sun-Diamond may well have been "deceived," but "the jury was entitled to conclude that [Douglas] was acting instead, or also, with an intent (however befuddled) to further the interests of his employer."[75]

In that case, said Sun-Diamond, we still win: "If Douglas's knowledge can be imputed to Sun-Diamond to hold it responsible for Douglas's acts, then Lake's must be imputed to his employers, RLSM and Bozell, and they cannot be victims."[76] Both Douglas and Lake were high-level employees at their respective companies; both deceived, but acted in part to benefit, those companies; "the imputation rules must be the same on both the perpetrator and victim sides."[77]

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[70] *Id.*

[71] By 2 U.S.C. § 441b(a), corporations are forbidden to make campaign contributions "in connection with" any congressional election.

[72] To be precise, he handed over $4,000 in checks to Douglas and, through their scheme, ultimately pocketed an extra $1,000 for himself, but let us not get lost in the details of petty thieves. *Id.* at 969-70.

[73] *Id.* at 970.

[74] *Id.* (emphasis in the original; quoting from Sun-Diamond's reply brief).

[75] *Id*.

[76] *Id*.

[77] *Id*.

Not so fast, said the court regarding that "faulty assumption." Citing no pertinent or controlling authority,[78] but dismissing the argument in a paragraph, *Sun-Diamond* held that the imputation rules were not the same for corporate wrongdoer and corporate victim. The rule was not "as broad" "on the victim side."[79] And that was it.

But what was it? What if count one had charged Sun-Diamond with depriving RLSM of honest services and count two had charged RLSM with depriving Sun-Diamond of honest services? Or both Sun-Diamond and RLSM had been charged with depriving the other of honest services in the same count? Corporate criminal and victim at the same time? With a broad imputation rule for the corporate defendant and an undefined but narrower one for the corporate victim, that was both legally plausible and logically nonsense. Still, if the rule for the corporate victim was to be more narrow, it must be that the employee had to act *solely*, or have no intent not, to benefit the corporation for imputation to apply. And that was the appellate opportunity for, at the least, further consideration if not complete clarity presented to the Fifth Circuit, as the Nigerian Barge defendants went up on appeal.

b. United States v. Brown[80]

> In order to mask the full agreement from regulators and auditors, *Enron* and Merrill Lynch entered into written agreements…that gave the outward appearance that Merrill Lynch was truly buying the Nigerian barges…hidden from outside parties were the oral components of the agreement between the parties…[which] defraud[ed] *Enron*…of the intangible right of honest services…[81]

There it was, five years later, the possibility implicit in *Sun-Diamond*:[82] Enron described as unindicted co-conspirator[83] and Enron as victim – the (hypothetically) innocent corporation – in the same count. Defendants moved to dismiss the indictment before trial for failure to state an offense and for constitutionally infirm vagueness as applied, since there were no facts in the

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[78] *Id*. The one case cited by the court of appeals, *United States v. O'Brien*, 617 F.2d 299, 311 (1st Cir. 1980), stood for the proposition that "when an individual is swindled, the offender does not escape mail or wire fraud liability just because the victim was unwary, or even 'gullible.'" What that had to do with a corporate person, in which the mindset of the individual *offender* potentially creates the mental state of the corporate *victim* is beyond the scope of this Article and the ken of this author.

[79] *Id*.

[80] 459 F.3d 509 (5th Cir. 2006). The Nigerian Barge case was styled *Brown* on appeal simply because defendant Jim Brown filed the first notice of appeal; it was the same case as *United States v. Bayly, et al.* in the court below.

[81] *See Bayly Indictment* at 4-5, 9, *supra* note 28 (emphasis added).

[82] The Enron Task Force cited and was able successfully to use the open-endedness of an imputation rule for the corporate victim in *Sun-Diamond* at two critical points in the Nigerian Barge proceedings – (1) in defeating the defendants' motion to dismiss the indictment and (2) in fighting off the defendants' requests for jury instructions that would derail the notion that Enron was a victim. Government's Consolidated Response to Defendants' Pretrial Motions at 13, *United States v. Bayly, et al.*, CR No. H-03-363 (S.D. Tex. Mar. 22, 2004) (copy on file with the author); Government's Objections to Bayly's Supplemental Instructions 4-8 at 5-6, CR No. H-03-363 (S.D. Tex. Oct. 22, 2004) (copy on file with the author).

[83] Having declared bankruptcy in 2001, Enron as an ongoing "person" no longer existed when the Nigerian Barge case was indicted in September, 2003. Enron was never indicted in any federal case.

indictment by which Enron could possibly be couched a victim, and reurged those positions as the evidence unfolded. When most of the defendants were convicted,[84] what was needed from the appellate court was a clear statement – that is, some form of imputation rule when the corporation is an alleged victim. Instead, the Nigerian Barge appeal produced the muddle of *United States v. Brown*.

There were three opinions – the majority, a dissent, and a concurrence on the topic of "honest services" fraud resulting in reversal of these convictions.[85] For this Article, what is fascinating to see is how each opinion dealt with these two central facts: (1) every action taken by every Enron employee involved was taken at least in part to benefit Enron, and (2) no Enron employee hid anything about the transaction from anyone at Enron. For the majority, the facts still presented "a very plausible, even strong, case for a criminal deprivation of honest services, alleging a fiduciary breach – the *failure to disclose the full truth* about the barge transaction…"[86] In seeking to amplify that thought, the court observed that "the *dishonest* conduct is disassociated from bribery or self-dealing and indeed associated with and concomitant to the employer's own immediate interest."[87] Yet its recitation of the indictment and the facts had already made it clear that there was no "failure to disclose the full truth" or dishonesty toward Enron; how could there be a "fiduciary breach"? Enter the specter of the (hypothetically) innocent corporation:

> Enron's legitimate interests were not so clearly distinguishable from the corporate goals communicated to the Defendants (via their compensation incentives) that the Defendants should have recognized, based on the nature of our past case law, that the "employee services" taken to achieve those corporate goals constituted a *criminal* breach of duty to Enron.[88]

This statement, in its implications, makes a mess of an employee's fiduciary duty: even if there had been no breach of an employee's duty of loyalty[89] to his employer, there *could* be a criminal fiduciary breach of duty to Enron if he *should* have perceived "Enron's legitimate interests?"

The dissent took this one step further:

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[84] An Enron accountant was acquitted, while the Enron and Merrill Lynch executives were convicted of conspiracy and two wire fraud counts, which had three and two theories of liability, respectively. "Because the jury was not asked to indicate the basis for its verdict, the Government must prove all three theories in order for us to affirm the convictions," 459 F.3d at 518, noted the *Brown* court under the rule in *Yates v. United States*, 354 U.S. 298 (1957). When the honest services theory was held invalid, all convictions containing that theory were vacated.

[85] The dissent (Judge Reavley) and the concurrence (Judge DeMoss) concurred and dissented, respectively, in other aspects of the case which are not pertinent to the "honest services" discussion.

[86] *Brown*, 459 F.3d at 520 (emphasis added).

[87] *Id*. at 522 (emphasis added).

[88] *Id.* (emphasis in the original).

[89] Through its reported decisions, the Supreme Court of Delaware has recognized three fiduciary duties consisting of good faith, due care, and loyalty. *McMullin v. Beran*, 765 A.2d 910, 917 (Del. 2000); *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998). The duty of loyalty underpins the concept of honest services. *See Rybicki,* 354 F.3d at 141-42.

> …falsifying Enron's books does not serve a legitimate corporate purpose…it is no defense that the defendants' co-conspirators included high-ranking executives at Enron. The fact that those co-conspirators were aware of defendants' conduct does not excuse defendants' actions. But most important, Enron *executives* are not Enron itself and, in any event, they owed a fiduciary duty to Enron *and* its shareholders.[90]

No matter that those executives acted to benefit Enron and within the scope of their employment; for Judge Reavley, their actions and intentions remained separate and apart from "the Good Victim Enron" – again, an Enron that had no existence. In the concurring opinion, however, the Nigerian barge transaction was little more than a normal business negotiation, in which "both parties acted to maximize mutual benefits in a clear effort to solidify a business relationship."[91] Some aspects of the negotiations made it into the final integrated agreements between Enron and Merrill Lynch; some did not (i.e., the oral "side deal"), and the concurrence doubted whether "there is any criminal wrong arising from the facts in this record."[92]

Three opinions, three varied images of what "Enron" meant. For the majority, an imagined, legitimate Enron as to whom "employees breached a fiduciary duty," yet a non-criminal breach because the real Enron "intentionally align[ed] the interests of the employee with a specified corporate goal."[93] In dissent, an "Enron" thoroughly divorced from "Enron executives" and, therefore, a victim "squarely within the meaning"[94] of honest services fraud. While for the concurrence, Enron was little more than a contracting party and, most assuredly, not a victim.

Each of these views, and perhaps many others, of Enron as the alleged corporate victim of the Nigerian barge transaction was both possible and arguable because, at present, there is no imputation rule in the criminal law when the corporation is an alleged victim. Untethered from precedent, applied to a "person" whose *every* act and knowledge is a legal fiction, prosecutors, juries, *and judges* have been free to fill the empty vessel as they will. In short…chaos.

III. The Sea through the Mirror: The Proper Understanding of Corporate Honest Services Fraud and the (Hypothetically) Innocent Corporation

Chaos. As of this writing, in both places – in private-sector honest services fraud and in the absence of an imputation rule for the corporate victim: chaos. In this section, the Article analyzes and stakes a large claim: that a resolution of the latter will lead, in combination with

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[90] *Brown,*459 F.3d at 533. The dissent's vision in *Brown* of shareholders as potential victims of honest services fraud is worth an article itself. In fact, there is one. *See* Note, *The Case of the Missing Shareholders: A New Restriction on Honest Services Fraud in* United States v. Brown, 93 CORNELL L. REV. 437 (2008). As a matter of law, however, employees and officers owe a fiduciary duty only to the corporation. *See, e.g.,* OR. REV. STAT. § 60.377(1) (Oregon was Enron's state of incorporation).

[91] *Brown*, 459 F.2d at 536.

[92] *Id*.

[93] *Id*. at 522.

[94] *Id*. at 533.

the most refined, compelling, yet incomplete appellate court thinking to date on the former, to a proper resolution of both.

A. United States v. Rybicki[95]

It is the most recent en banc consideration by a highly respected court of appeals of private-sector honest services fraud. It is vast and deep in its scope and analysis; in *United States v. Brown*, the Fifth Circuit termed it "the leading opinion" on the subject.[96] And it contained within its majority at the time a judge recently risen to even greater prominence – the newest Justice, Sonia Sotomayor.[97] For these reasons, *United States v. Rybicki* is likely to play a central role in the Court's analysis of private-sector honest services.

In *Rybicki*, the court heard the broadest challenge to § 1346: whether it was unconstitutionally vague. Concluding that it was not by using the pre-*McNally* cases to provide the boundaries of the doctrine, the court held that a conviction required:

> [1] a scheme or artifice to use the mail or wires, [2] to enable an officer or employee of a private entity…, [3] purporting to act for and in the interests of his or her employer…[4] secretly to act in his or her or the defendant's own interests instead, [5] accompanied by a material misrepresentation made or omission of information disclosed to the employer…[98]

All of these elements read rather sensibly – in a world where employees only act (a) for the employer or (b) for themselves. Yet, in the puzzles posed by an employee with mixed motives,[99] elements (3) – (5) solve virtually nothing. Or simply redraw the problems of imputation. What of the employee who has acted (partially) "in the interests of her employer," but also "in her own interests"? Can she be convicted? What does "secretly" mean? If a company were charged based on the individual's actions a la Richard Douglas in *Sun-Diamond*, the individual has not acted "secretly" vis-à-vis the company; his knowledge is theirs. The same analysis applies to a "material omission": if the employee's knowledge is attributed to the corporation because she acted in its interests (i.e., at least in part to benefit), then nothing has

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[95] 354 F.3d 124 (2d Cir. 2003) (en banc).

[96] *Brown*, 459 F.3d at 521.

[97] It seems reasonable to expect Justice Sotomayor not simply to possess a measure of confidence in the analysis and holding of *Rybicki*, as well as a considered and persuasive understanding of the issues involved, but also to hold some meaningful sway due to her background and expertise. *See*, *e.g.*, Adam Liptak, *New Court Term May Give Hints to Views on Regulating Business*, N.Y. TIMES, Oct. 5, 2009, at Al, A16 ("While most Supreme Court specialists expect her to vote much as Justice Souter did, there are at least two areas in which she may veer away from his approach. One is criminal law. The other is corporate law, a field in which the expertise she gained on the [2nd Circuit], with its heavy business docket, will play a major role.") The issues addressed in this Article lie at one intersection of criminal and corporate law.

[98] *Rybicki*, 354 F.3d at 141-42. In certain instances, the court may insist on a sixth element, in that "in self-dealing cases, unlike bribery or kickback cases, there may also be a requirement of proof that the conflict caused, or at least was capable of causing, some detriment," but that issue was not reached in *Rybicki*, "which involves secret payments, not conflicts of interest." *Id.*

[99] As the dissent in *Rybicki* pointed out, this probably describes the motives of all private-sector employees. *Id*. at 161. *See infra* notes 122-24 and accompanying text.

been omitted. Put another way, to the concurring Judge DeMoss in *Brown*, the Enron employees omitted nothing from Enron about the Nigerian barge transaction. To the dissenting Judge Reavley, they omitted everything. Both, given their particular visions of "Enron," were correct. Something has to give, and it will only do so with more than *Rybicki*; with either a finding by the Court that § 1346 is unconstitutionally vague or an imputation rule for the corporate victim.

B. A Modest Prediction

It may well not be the former.[100] Partly because no serious challenge has been brought to its application in public-sector cases,[101] partly because it implicates no constitutional freedoms,[102] and partly because, even in private-sector cases, there seems to be a variety of fact patterns that warrant prosecution,[103] there will be a powerful impulse on the Court to attempt to "cabin", but not destroy, private-sector honest services fraud. In that event, as we have seen, to truly make sense of "honest services" it will be necessary to define the elements of the offense *and* the nature of the victim by means of an imputation rule – because the imputation rule chosen will, in part, determine whether the corporation is really[104] a victim. *Rybicki* successfully navigated much of the first task,[105] but failed to consider and integrate the second. It is time for the Court to do so.

C. Sun-Diamond *Revisited*

In *Sun-Diamond*, the court rejected the notion that "the imputation rule must be the same on both the perpetrator and victim sides"[106] and pointed to two justifications for a difference. First, as a matter of policy,

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[100] If it is, to be sure, it will be time for a longer law review article. And for Congress "to speak more clearly." Again.

[101] A central function of federal prosecution for many years has been the prosecution of state and local officials for public corruption in one form or another. "Because state prosecutors may be reluctant to bring charges against their political allies or supporters, federal prosecutors with no such connections play an indispensible role in holding corrupt politicians accountable." Brief Of Amicus Curiae Citizens for Responsibility and Ethics in Washington in Support of Respondent at 5, *Black, et al. v. United States*, No. 08-876 (U.S. Sept. 17, 2009).The amicus brief goes on to note the "critical role" of §1346 in such prosecutions.

[102] Analyzed at length in *Rybicki* by the majority, 354 F.3d at 129-33, two concurrences, *id*. at 147-48 (Katzmann, J., concurring) and 148-52 (Raggi, J., concurring), and the dissent, *id*. at 156-65 (Jacobs, J., dissenting), the nature of the vagueness test to be applied was hotly discussed and disputed, but all agreed that it was a challenge outside of the First Amendment context.

[103] Of which Conrad Black's could easily turn out to be one, depending on how the Court views whether a material omission by Black (about a $5.5 million payment) to his company's board of directors was proven. *Compare United States v. Black*, 530 F.3d 596, 599 (7th Cir. 2008) ("Neither Hollinger's audit committee…nor Hollinger's board of directors, was informed of this transaction") with *Black Petition* at 8 n.6 ("[this transaction] was part of a *larger* amount *previously* approved by the committee") (emphasis in the original). *See infra* note 128 and accompanying text.

[104] In the blue pill-red pill sense of the term, since that "reality" is defined by the choice itself. *See The Matrix*.

[105] *See infra* note 128 and accompanying text.

[106] *Sun Diamond*, 138 F.3d at 971.

> [t]he law imputes the wrongdoer's conduct to the corporation in order to encourage monitoring, but it is not at all clear that imputation on the other side of the equation would be useful in eliciting additional caution on the part of would-be fraud victims.[107]

Second, the court found support for its position in the mere fact of the "honest services" statute: "Indeed, Congress's adoption of 18 U.S.C. § 1346…is hard to square with an imputation rule on the victim side as broad as the one governing corporate criminal responsibility."[108]

Neither justification carries its weight. As to § 1346, this latter justification was little more than a veiled tautology. "Congress's adoption" of honest services fraud certainly implied that Congress wanted there to be honest services fraud. Since, however, Congress did nothing further to define, refine, or expand the reach of honest services, it is hard to square § 1346 as supporting *any* particular imputation rule.[109] As to its one policy consideration, in focusing only on the standard justification for corporate vicarious *liability* – namely, to motivate corporate monitoring of its employees – and then only in passing, the court simply reasoned itself away from this one justification and failed to consider any others. That is, if "it is not at all clear that imputation on the [victim] side of the equation would be useful in eliciting additional caution on the part of [potential corporate] fraud victims," it is not clear that such imputation would do *anything* to that caution. The reason for the caution – to detect and avoid crimes by its employees – remains. And, in looking at only one justification that really did not apply either way, the court missed the opportunity to consider other logical and policy justifications for the rule it summarily rejected.

D. An Immodest Proposal

In honor, then, of that now-defunct corporate criminal and victim at one and the same time, it is time to "ask why."[110] Why shouldn't the imputation rule be "the same on both the perpetrator and victim sides"? As this section suggests, it should be…unless one prefers chaos.

1. The Corporate "Person"

Since a corporation is merely "a creature of legal fiction,"[111] it is perhaps fitting that it first became a person with constitutional rights due to a court reporter's headnote that was not discussed in the body of a Supreme Court opinion and was dicta.[112] In *Santa Clara v. Southern*

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[107] *Id.*

[108] *Id.*

[109] Other than, perhaps, making it implicitly clear that not every employee's conduct, no matter how heinous or self-motivated, will be imputed to his employer-victim, or else there would be no such thing as honest services fraud.

[110] Enron's motto. B. MCLEAN & P. ELKIND, *supra* note 46, at 326.

[111] *Lokay v. Lehigh Valley Corp. Farmers, Inc.*, 492 A.2d 405, 408 (Pa. 1985).

[112] This saga is the stuff of fiction itself and is captured most succinctly in the potentially fictional Wikipedia entry on *Santa Clara v. Southern Pacific Railroad*, which seems the appropriate citation in this instance.

Pacific Railroad,[113] the following headnote appears: "The court does not wish to hear any argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does."[114] Since that time, no matter how intangible, a corporation has been viewed as "a person" under the law.[115] To be sure, it is an unusual person in that *it does not really exist* – but, be that as it may, while it cannot be seen, touched, or speak, while its knowledge can and must be acquired in more complicated ways than individual knowledge,[116] and while there are surely a number of ways both practical and philosophical in which it is not treated as a person, one thing is clear: a corporation is *a* person; it is not two or more persons. It has a knowledge, an intent, not two or more.

This common-sense proposition cuts strongly against more than one imputation rule for corporations in the criminal context which allows, in effect, for two different persons to be created.[117] For example, in the Nigerian Barge case, during trial and in Judge Reavley's dissent, that is what happened because (1) Enron, the villain in this fiction, was created by attributing all of its employees' actions and knowledge to it since it was *Enron* that improperly booked the accounting gain, yet (2) Enron, the victim, was created by allowing *none* of those employees' actions or knowledge into its head.

2. The Constraints of Due Process

It is not simply a common-sense proposition about the corporate person; a dualistic imputation rule violates due process. This violation can be seen most starkly when a prosecution in any respect characterizes the same corporation as both a wrongdoer and a victim. The first characterization would seem to compel dismissal or a judgment of acquittal, in that "'reasonable' jurors 'must necessarily have…a reasonable doubt' as to guilt…"[118] when it cannot unequivocally be said that the corporation is a victim. A corporation cannot defraud itself and, to prove a violation of the mail or wire fraud statutes, the government must establish that the defendant sought to deceive his victim.[119]

Viewed somewhat differently, a theory of prosecution which puts forth a corporation as both wrongdoer and victim is, in fact, two theories of prosecution at the individual's level that are

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[113] 118 U.S. 394 (1886).

[114] *Id.* (according to the syllabus).

[115] Or it is, unless Justice Sotomayor is preparing and able to do something truly revolutionary at the Court. In her first appearance on the Court, during argument in a campaign finance case, the Justice was reported to have mused that judges "created corporations as persons, gave birth to corporations as persons…There could be an argument made that that was the court's error to start with…[imbuing] a creature of state law with human characteristics." Jess Bravin, *Sotomayor Issues Challenge to a Century of Corporate Law*, WALL ST. J., Sept. 17, 2009, at A19.

[116] *See*, *e.g.*, *Mythology*, *supra* note 2, at 240 n.180.

[117] *See supra* notes 80-83 and accompanying text.

[118] *Jackson v. Virginia*, 443 U.S. 307, 318 n.11 (1979) (quoting *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir. 1947).

[119] *See*, *e.g.*, *United States v. Ratcliff*, 488 F.3d 639 (5th Cir. 2007).

so materially different as to be inconsistent and violative of due process.[120] That is, when an individual is charged with honest services fraud in a case in which the corporation is portrayed as both wrongdoer and victim, the individual (or one of his individual employee co-conspirators) must necessarily be portrayed as both agent (binding the corporate wrongdoer) and rogue (harming the corporate victim). Yet, the same due process problem exists if the corporation is only alleged to be a victim, but the evidence shows that the individual agent acted in part on its behalf. The corporation has then been shown to be a participant-wrongdoer, and not a victim.[121]

3. The Realities of Human Behavior

A more narrow view of an imputation rule for the alleged corporate victim would necessarily require a showing that the to-be imputed individual acted more than *in part* to benefit the corporation – that is, that she acted *primarily* or *solely* to benefit the corporation. Surely the second, but probably either, of these adverbs would effectively mean no individual's actions or knowledge could or would ever be imputed to the alleged corporate victim, because that is not why people work for or take action in the private sector. Speaking of an employee preferring "her own interest to the interest of her employer," the dissent in *Rybicki* noted that "it is naïve to assume that this preference is not the most common premise of private employment.[122]

In the private sector, people are expected to act for themselves *and* on their company's behalf, but the mix probably varies from day to day, week to week. Civil cases, which have been dealing far longer with corporations as both alleged wrongdoers and victims, have recognized as much, and apply the same general rule of imputation to corporations in either posture; that rule is identical to the one applying corporate criminal liability.[123] In civil cases,

> [t]here is, however, a well established exception to the imputation rule. A corporation is not imputed with the "knowledge of an agent

[120] *See, e.g.*, *Bradshaw v. Stumpf,* 545 U.S. 175 (2005) (recognizing the validity, although not the precise parameters, of such a due process challenge); *Smith v. Groose*, 205 F.3d 1045, 1049 (8th Cir. 2000) (noting the fact-driven nature of the inquiry and that the 9th and 11th Circuits "have recognized that inconsistent prosecutorial theories can, in certain circumstances, violate due process rights").

[121] Although not controlling, civil cases have clearly held that "a participant in a fraud cannot also be a victim." *In re Phar-mor, Inc. v. Securities Litigation*, 900 F. Supp. 784, 786 (W.D. Pa. 1995), *quoting Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 454 (7th Cir. 1992), *cert. denied*, 459 U.S. 880 (1982). The reason for the rule in civil cases is "derived from the fact that one of the elements of a fraud claim, namely, reliance on the truth of the fraudulent misrepresentations, is absent." *Id.* at n.4. Although reliance is not an element of criminal fraud, the logic seems equally applicable in defeating the fifth element of *Rybicki*: a participant cannot make a material misrepresentation or omission to itself. Allowing such prosecutions to go forward violates due process.

[122] *Rybicki*, 354 F.3d at 161 (Jacobs, J. dissenting). The *Rybicki* majority did not address this delicate balance.

[123] *Phar-Mor, Inc.,* 900 F. Supp. at 786 ("the general rule of imputation provides that the fraud of an officer of a corporation is imputed to the corporation when the officer's fraudulent conduct was (1) in the course of his employment, and (2) for the benefit of the corporation.") (*quoting Rochez Bros., Inc. v. Rhoades*, 527 F.2d 880, 884 (3d Cir. 1975), *cert. denied*, 425 U.S. 993 (1976).

> in a transaction in which the agent secretly is acting adversely to the [corporation] and *entirely* for his own or another's purposes."[124]

This is the one exception that bars imputation in civil cases, and it also bars imputation of corporate criminal liability.

4. The Virtue of Consistency

And, unless there is some other compelling reason for deviation,[125] it should be the one exception to bar imputation for the alleged corporate victim as well, simply because it would harmonize the imputation rule and its exception across all civil and criminal fronts. To be sure, "a foolish consistency is the hobgoblin of little minds,"[126] but, just as surely, "some coherent limiting principle"[127] is what is needed to make sense of – and to limit the application of – honest services fraud for prosecutors, juries, and judges. *Rybicki* plus the proposed imputation rule provides that working principle.

IV. From Sea to Shining Sea: The Reduction of Chaos

A. The Law of the Land: Rybicki *"Plus"*

If *Rybicki* generally carries the day before the Supreme Court in its consideration of honest services, and *if* the problem of imputation were recognized and the proposed imputation rule adopted, only a slight but crucial addition would appear in *Rybicki's* third through fifth elements:

> [3] purporting to act for and in the interests of his or her employer…[4] secretly to act *solely* in his or her or the defendant's own interests instead, [5] accompanied by a material misrepresentation made or omission[128] of information disclosed to the employer…

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[124] *Phar-Mor, Inc.*, 900 F. Supp. at 786 (*quoting F.D.I.C. v. Shrader & York*, 991 F.2d 216, 223 (5th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994) (emphasis added); *see also, Rogers v. McDorman*, 521 F.3d 381, 394 n.57 (5th Cir. 2008) (notice to an agent "is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act *solely* for the agent's own purposes or those of another person's") (emphasis added).

[125] One remaining reason would be that our society believes we need more private-sector honest fraud prosecutions. That potential impulse is addressed *infra* Part IV.D. One additional virtue of the proposed imputation rule is that it easily allows for public-private distinctions since the mail and wire fraud statutes do not allow prosecution of the public or government entities and, therefore, the notion of a consistent imputation rule when the public or a government entity is the victim does not even apply. *United States v. Brumley*, 116 F.3d 728, 731-32 (5th Cir. 1997) (en banc).

[126] RALPH WALDO EMERSON, *Essays, First Series, Self-Reliance*, as found in FAMILIAR QUOTATIONS, (John Bartlett ed. 1919), http://www.bartleby.com/100/420.47.html.

[127] *Sorich*, 129 S.Ct. at 1310.

[128] The notion of "material omission" is fraught as well with difficulties in the private sector context, since employees omit telling their employers a constant stream of information, especially about matters of their own self-interest. There is a substantial body of authority that the only material omissions should be those which people have a legal duty to disclose, and, on the public sector side of the honest services equation, that is the issue before the Court in *Weyhrauch*, *supra* note 61. *Rybicki* allows for a broader

The implications of these limiting principles would be many – for investigative and indictment decisions, trials, and for the number of private-sector honest services fraud prosecutions – and all to the good.

B. Principles for Prosecutors

Today, unlike the twenty-one pages of single-spaced guidance promulgated by DOJ to assist federal prosecutors in evaluating the prosecution of corporations,[129] there is not one sentence to aid them in considering when an employee's or officer's actions or knowledge should be imputed to the corporate victim. Actually, since the proposed imputation rule would be the same, the first sentence is already there, albeit in the corporate liability context: "Agents may act for mixed reasons – both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation."[130] All that would be needed is two more guiding sentences:

> If the corporation may be held liable for such agent's actions, ordinarily that agent should not be charged with any crime against the corporation, including but not limited to honest services fraud. In other words, the imputation rule that applies to whether a corporation may be held criminally liable applies to whether the corporation may be a victim.

While the individuals in the Nigerian Barge and Duke cases would presumably not have been charged with "honest services" fraud, and Richard Douglas and James Lake in *Sun-Diamond* and even Yonan might well not have been, federal prosecution would not grind to a halt with this guidance. All forms of employee schemes to take from a company – whether money or property (both tangible and intangible, including trade secrets) – would be unaffected by this guidance; it is truly a rare employee who can convince a jury he stole from his company to benefit it. And, if Yonan schemed to receive kickbacks and Zenith received demonstrably bad cabinets, a prosecutor might easily decide she could carry her burden of proof. But if no such scheme or detriment is present, then the decision to prosecute would become more complicated – as it should be.

In the terms of *Rybicki*, the assessment would involve: What purportedly was done for the employer's benefit? How secretly did the employee act? How did those actions further the employee's interests? How egregious were the misrepresentations or omissions? And, although not necessarily elements of the crime, how, if at all, was the employer harmed or potentially harmed, and how much did the employee gain? Finally, even if the prosecutor saw some arguable benefit to the employer, such that the corporation could have been charged, the purpose of the word "ordinarily" would be to allow the prosecutor to proceed, with whatever

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meaning of materiality, but one that is workable with the addition of "solely" to the fourth element. That is, a proof combination of an employee purporting to act for the corporation yet acting *solely* in his interests – i.e., not at all to benefit the corporation -- and intentionally omitting information that "would naturally tend to lead or is capable of leading a reasonable employer to change its conduct," *Rybicki*, 354 F.3d at 145, could provide the degree of proof necessary to establish the exception to the imputation rule.

[129] UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS MANUAL ("USAM") Title 9, Ch. 9-28.000 (rev'd August, 2008).

[130] *Id.* at 2 (citing *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006).

degree of pre-indictment review was involved, to indictment and post-indictment proceedings[131] in the belief that she could prove beyond a reasonable doubt that the employee acted "solely" in his interests.

C. Principles for Judges and Juries

But there would be post-indictment consequences at every stage. An indictment that failed to allege the "*Rybicki*-plus" elements in some form or fashion would be a more likely candidate for pretrial dismissal.[132] Certainly, it would be subject to more searching inquiries by trial courts and defense attorneys, taking the form of bills of particulars, discovery requests, and requests for offers of proof, to name but a few. At the close of the government's case, if the judge believed that a reasonable jury would have to find that the defendant acted in part to benefit his employer, she would be forced to grant a motion for a judgment of acquittal.[133] Jury instructions, post-trial and appellate review would be guided accordingly.

D. The Future of Corporate Honest-Services Fraud

The increased scrutiny at every stage would have its effects. If it is the right interpretation of the law, the real-world consequences should not matter, but it must be acknowledged that the consequences of "*Rybicki*-plus" and the Court's adoption of the proposed imputation rule would surely be to reduce the prosecution of individuals for private-sector honest services fraud. Whether at the stage of prosecutorial, jury, or judicial review, it would largely kill the (hypothetically) innocent corporation, and that death, coupled with the more nuanced and limited version of a "corporate victim," would result in fewer of these prosecutions. In this final section, the Article suggests why this result has been long overdue.

In a quote attributed to Bernard Baruch, he said, "If all you have is a hammer, everything looks like a nail."[134] After 1988, with no limiting principle and no imputation rule in place, that is what corporate honest-services fraud gradually became – a hammer, with nails strewn everywhere, which is another description of chaos. With no definition of the victim-corporation, no definition of what went on, or should be put, in the mind of that victim-corporation, and with a statute that required nothing tangible or intangible to be taken from an undefined thing…nails; chaos; nonsense, everywhere. Ask why.

Private-sector honest services fraud *assumes* no money or property taken. It *assumes* a single victim, one almost invariably capable of helping itself in dealing with its employees' misdeeds. It is in no way a crime against the public, against unidentifiable victims, or against someone who needs protection in any meaningful sense. In a world of scarce prosecutorial resources, the proper limitation of such a crime should be a welcome thing. To be sure, there will be federal jurisdiction if the mail or wires are used, and a righteous crime if the elements of *Rybicki* as refined in this Article are satisfied, but it is not a branch of crime for which our society needs a hammer. Instead, we need to appreciate and reflect on the nuances of Baylor and its basketball program.

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[131] It is also worth noting that any and all such guiding principles within DOJ are simply that; they do not create law or enforceable legal rights. *See*, *e.g.*, *id*. at 21.

[132] FED. R. CRIM. P. 12(b)(3).

[133] FED. R. CRIM. P. 29(a).

[134] Baruch, Bernard, http://www.brainyquote.com/quotes/quotes/b/bernardbar181387.html.

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There were these three assistant basketball coaches at Baylor, who came up with a fraudulent, highly beneficial scheme to establish academic eligibility for five transfer students to play basketball at Baylor.[135] They did not "contemplate economic or other property harm" to Baylor, nor were they interested in the "acquisition of some sort of private gain." They wanted "to help Baylor by ensuring a successful basketball team."[136] Or so they said. So they helped those would-be transfer students to cheat on their junior college finals and did not tell anyone else at Baylor of their scheme. When it was discovered, they, of course, lost their coaching positions.

Should that trio be indicted for a federal crime? Did they act "at least in part" to benefit Baylor? Certainly Baylor basketball; far more controversially, "Baylor." They told no one outside of Baylor basketball of their plan. On those facts, a jury could find they acted to benefit Baylor but they could also find that Baylor's "legitimate interests"[137] did not include doing anything to win. Or they could discredit the coaches' purported motives. As one court in the civil arena said, "…the inquiry into the application of the…exception [to the imputation rule] is fact-intensive."[138] That inquiry requires something other than a hammer. That inquiry requires nuanced thinking – as *Rybicki* and the proposed imputation rule would mandate. That is as it should be – for prosecutors, judges, and juries; for our system of justice.

V. Conclusion

Twenty years after *McNally*, Justice Scalia's observation is unshakably correct: "the current chaos [cannot] prevail."[139] If the statute survives the constitutional attack, much of the solution for private-sector honest services fraud is before the court in *United States v. Rybicki*, but it is not, standing alone, enough. The Court, or future courts, will hopefully recognize that the opportunity missed ten years ago in *Sun-Diamond* should not be missed again. Rather than a "faulty assumption," an imputation rule that is "the same on both the perpetrator and victim sides" is the missing piece to the puzzle of honest services – or, in the conceit of this Article, the mirror by which the tempestuous sea can be made calm as a clock.[140]

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[135] *United States v, Gray*, 96 F.3d 769 (5th Cir. 1996).

[136] *Gray*, 96 F.3d at 774.

[137] Lurking within that phrase is the ghost of the (hypothetically) innocent corporation, hidden within the question of what are "the interests of the employer?" Who gets to define those "interests"? And are they to be set and judged by contemporaneous evidence, aspiration, or the 20-20 vision of hindsight?

[138] *Phar-Mor*, 900 F. Supp. at 786.

[139] *Sorich*, 129 S.Ct. at 1311.

[140] W.H. AUDEN, SELECTED POEMS 136 (Edward Mendelson ed. Vintage Books 1979) ("THE SEA AND THE MIRROR").