

U N I V E R S I T Y *of* **H O U S T O N**

Public Law and Legal Theory Series 2008-A-25



**ANOTHER LIMITATION ON HONEST SERVICES
FRAUD?**

Geraldine Szott Moohr

THE UNIVERSITY OF HOUSTON
LAW CENTER

This paper can be downloaded without charge at:
The University of Houston Accepted Paper Series Index

The Social Science Research Network Electronic Paper Collection

ANOTHER LIMITATION ON HONEST SERVICES FRAUD?

Geraldine Szott Moohr

Two federal circuit courts recently attracted attention when they overturned the honest services fraud convictions of, in Judge Easterbrook's words, "a faithful subordinate."¹ The Fifth Circuit case, *United States v. Brown*,² vacated the convictions of opportunistic mid-level managers involved in one of Enron's infamous deals. The *Brown* case threatens to upset the centerpiece of the government's case against Enron officers and employees, the conviction of former Enron Chief Financial Officer, Jeffrey Skilling.³

Within months, the Seventh Circuit, in *United States v. Thompson*,⁴ overturned the conviction of a more sympathetic defendant, a Wisconsin civil servant, for honest services fraud. *Thompson* made the news when the judges hearing the appeal found the evidence "thin", decided the case upon oral argument, and ordered Thompson's immediate release from prison.⁵ The *Thompson* decision also made political news. The investigation, indictment, and trial of Thompson was led by a Republican-appointed United States Attorney during a Democratic governor's re-election campaign. The governor's supporters believe that the prosecution was a political ploy aimed at defeating a Democrat in a swing state.⁶ The case is also implicated in the federal scandal over the firing of six United States Attorneys under former Attorney General Alberto Gonzales.⁷

The *Brown* and *Thompson* cases are of interest here for another reason: the decisions create another limitation on the scope of honest services fraud. This essay identifies the parameters of these congruent limitations, analyzes similarities and distinctions between them, and briefly discusses their wider significance.

I. Honest Services Fraud

For over thirty years federal prosecutors have used the honest services theory to prosecute breaches of a pre-existing duty when coupled with nondisclosure of the breach.⁸ Honest services fraud, codified at 18 U.S.C. § 1346,⁹ is a crime based on a breach of a heightened duty owed to a principal, such as an employer, shareholder or, in cases of appointed or elected officials, citizens. The misrepresentation required of all frauds is the failure to disclose the breach; the victim loses the honest services of the defendant or some other participant in the scheme to defraud. Although the core conduct involves kickbacks, bribery, and self-dealing at the expense of the principal,¹⁰ the statute reaches an extraordinarily broad range of conduct. Professor Julie O'Sullivan, a former prosecutor, has concluded that "if investigators dig deep enough, anyone can be convicted under § 1346."¹¹ Deeply aware of this, for the same thirty years courts have expressed reservations and sometimes outrage about the breadth of the offense.

For instance, appellate courts have noted that honest services fraud can convert workplace rules into a criminal offense and operate as a "draconian personnel regulation," reflecting a broader concern about overcriminalization.¹² Judges also worry that the crime can turn any transgression of state and local government obligations into a federal felony, raising federalism issues about the appropriate balance between state and federal criminal law.¹³ Courts also question the propriety of common law adjudication in criminal cases and the power the statute confers on federal prosecutors, concerns echoed by academics and other observers.¹⁴

For all of these reasons, courts frequently observe that "not every breach of fiduciary duty constitutes an honest services fraud."¹⁵ Following this principle, courts have formulated tests to distinguish between breaches of duty that constitute honest services and those that do not. At the

present juncture in this continuous evolution, four circuits have adopted a materiality test, under which prosecutors must prove that the omission, a failure to disclose a breach of a heightened duty, “naturally tend[s] to lead . . . a reasonable employer to change its conduct.”¹⁶ A second limitation, adopted by five circuits, requires proof that the defendant “foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach.”¹⁷ The precise boundaries of these limitations vary between circuits, but each is subject to a general critique. The use of materiality in this context overlaps with the material misrepresentation required of all frauds; the limitation of foreseeable harm reflects a standard more suited to tort than to criminal law. Against this background, the *Brown* and *Thompson* decisions add a third limitation to honest services fraud. At the outset, it should be noted that neither case involves kickbacks or bribery or fits smoothly into the self dealing category.

II. Misaligned Interests in the Fifth Circuit

The four appellants in *United States v. Brown* were Merrill Lynch mid-level managers who had been tried with two Enron managers.¹⁸ They had all worked on a deal involving three power-generating barges that were moored off the coast of Nigeria.¹⁹ Although cast as a transfer of ownership from Enron to Merrill, the barges were not actually sold. In an oral agreement, other Enron executives not charged in this case had promised that Enron would find another buyer or buy the barges back within six months and pay a fixed rate of interest. Because the side agreement guaranteed a risk-free transfer, Merrill did not obtain a true ownership interest. Nevertheless, both firms benefitted. Merrill received an advisory fee of \$250,000 in addition to the promised 15% interest of \$775,000. Booking the transaction as a sale inflated Enron’s end-of-year earnings by \$12 million, ensuring that the firm met its 1999 earnings forecast.

As contractors, neither Merrill nor the Merrill managers owed Enron or its shareholders a heightened or fiduciary duty. Because they could not be charged directly with honest services fraud, the case against them was based on the conduct of the Enron managers. The government's theory was that the Enron executives had breached their fiduciary duty to Enron by not disclosing the full truth about the transaction. Pursuant to this premise, the Merrill defendants were indicted for conspiracy and for causing the Enron managers to deprive their firm of honest services.²⁰

The Fifth Circuit rejected the premise and reversed the convictions.²¹ As the panel saw it, rather than depriving the firm of honest services, the Enron employees had behaved exactly as the company wished.²² Enron's treasurer initiated the deal at the request of the Chief Financial Officer, Andrew Fastow. A vice-president worked with Merrill employees to complete it, and Fastow finalized the agreement in a long conference call.²³ As the court put it, "however benighted that understanding . . . all were driven by the concern that Enron would suffer absent the scheme."²⁴

The court recognized that the Enron managers had personally benefitted from bonuses they received for completing the transaction. But the bonuses were "a promise of the corporation" and thus could not create a conflict of interest between the employees and the firm.²⁵ The purpose of their work on the barge transaction was to benefit Enron and not to surreptitiously enrich themselves. Although the court did "not presume it is in a corporation's legitimate interests ever to misstate earnings,"²⁶ the conduct here was not honest services fraud. The holding reflects its reasoning:

[W]here an employer intentionally aligns the interests of the employee with a specified corporate

goal, where the employee perceives his pursuit of that goal as mutually benefitting him and his employer, and where the employee's conduct is consistent with that perception of mutual interest, such conduct is beyond the reach of the honest-services theory of fraud as it has hitherto been applied.²⁷

III. Misuse of Position in the Seventh Circuit

Georgia Thompson was employed as a section chief in Wisconsin's Bureau of Procurement whose boss had been appointed by the Democratic governor of Wisconsin.²⁸ She was in charge of selecting a travel agent for the state, a contract worth some \$75 million. The selection process was governed by state administrative rules that assigned numerical scores to bidders, based on several factors. Committee members favored awarding the contract to the candidate with the highest score. At that point, Thompson, aware that her boss favored another travel company, expressed that concern and then manipulated the rules to allow rebidding of the contract. The favored company's second bid was lower, resulting in a tied overall score. In accordance with state law, Thompson then declared the favored agency the winner. Three months later, she received a \$1,000 raise in her annual salary. According to the government, Thompson failed to provide honest services when she resorted to delay and manipulated the administrative rules.²⁹

At first blush, the government's theory was consistent with the Seventh Circuit's standard for honest services cases, developed in *United States v. Bloom*.³⁰ The *Bloom* court sought to separate run of the mill violations of state-law fiduciary duty from federal crimes. Reasoning from the Supreme Court decision in *McNally*,³¹ the *Bloom* court held that honest services fraud required a "[m]isuse of office (more broadly, misuse of position) for private gain."³² Thus the

government argued that Thompson had misused her office when she “lent it to political ends” for which she received a boost in salary and enhanced job security.³³

The Seventh Circuit disagreed on both points: Thompson had neither misused her office nor obtained a private gain. The court first considered three political considerations that may have motivated Thompson’s conduct: favoring a donor who had contributed to the governor’s campaign, the political advantage of saving taxpayer’s money, and the desire to favor a local firm. Taking a *real politic* stance, the court reminded that these interests were neither unusual nor illegal.³⁴ Not even campaign contributions donated to the governor were suspect in this case; the contributions were lawful, properly disclosed, and without “a whiff of a kickback or any similar impropriety.”³⁵ Nevertheless, the panel assumed that Thompson had indeed acted for political motives, that her pay raise was linked to her choice of travel company, and that she knew that under the state’s rules the contract should not have gone to vendor her boss preferred.³⁶

Despite these assumptions, the court held that Thompson had not misused her office. The court found the prosecutor’s position, that “any public employee’s knowing deviation from state procurement rules is a federal felony, no matter why the employee chose to bend the rules, as long as the employee gains in the process” was overbroad in the extreme.³⁷ Indeed, it was “preposterous” that taking account of political considerations when deciding how to spend public money was a crime.³⁸

The government had also failed to establish the second prong of *Bloom*, receipt of a private gain. The court found it implausible that Thompson would choose a contractor for the benefit of job security when she already had a secure position as a state civil servant.³⁹ Further, a civil service raise, approved through normal channels, was not the sort of private gain that *Bloom*

envisaged.⁴⁰ In sum, the court held that "neither an increase in salary for doing what one's superiors deem a good job, nor an addition to one's peace of mind, is a 'private benefit' for the purpose of §1346."⁴¹

IV. Honest Services Fraud and the Faithful Subordinate

The Fifth and Seventh Circuit panels were engaged in a similar task, to articulate a standard that applies to faithful subordinates accused of violating the honest services fraud statute in the absence of gains from third parties through kickbacks, bribery, or self-dealing. The cases begin from common facts involving employees who engaged in suspect conduct and received a financial gain – raises and bonuses – that were linked with the conduct at issue. Although the reasoning differs in the particulars and leads to slightly different tests, the tests are congruent and lead to the same conclusion: the conduct at issue was not forbidden by the statute.

The Fifth Circuit found the aligned interests of employee and employer determinative whereas the Seventh Circuit relied on its misuse of position standard. The courts took a similar view about the requirement of defendant's gain, concluding that a pecuniary reward from the employer for doing a good job did not establish honest services fraud. Despite the differences in the specific tests, the limitations they articulate are congruent, outlining a similar limitation to honest services fraud as it applies to a faithful subordinate.

A. The Requirements of Misaligned Interests and Misuse of Position

The limitations articulated by the *Brown* and *Thompson* courts concern subordinates, acting in good faith, who receives a benefit from a principal. In the view of the Fifth Circuit, a breach in these circumstances requires a conflict of interest between the subordinate and the employer. The *Brown* majority gave great weight to the absence of divergent interests between

Enron employees and the firm's interest, as that interest was defined by executive supervisors. The employer had aligned its interests with that of the employees, so that both benefitted when the assigned goal was achieved. Thus, almost by definition, the Enron employees could not deprive the employer of honest services. Although the conduct in *Brown* was hardly innocent and may have violated other criminal statutes, actions that are aligned with the interest of the firm do not deprive it of honest services.

In dissent, Judge Reavley chided the majority for failing to recognize that a corporation is composed of both executive managers and shareholders, both of whom are principals to whom employees owe heightened duties.⁴² Putting aside how this definition of duty comports with corporate governance standards, it raises problematic issues that merit further attention. For instance, taking full account of a heightened duty to both executives and shareholders would require employees to serve two masters – and to know when the interests of the two masters diverge. Such a duty places an unrealistic burden on employees that is also unfair when they are ill-equipped to discharge it. Further practical problems in the workplace may ensue if the imposition of a two-master duty encourages employees to second guess their immediate supervisors or leads supervisors not to share information with subordinates. The dilemma illustrates why criminal law is not always the appropriate venue for assigning liability in honest services cases.

In *Thompson*, consistent with Seventh Circuit precedent, the limitation requires a misuse of position for personal gain. Although the test is not as specific as the *Brown* court's misalignment of interests, it similarly establishes a prerequisite for proving honest services fraud. Georgia Thompson had not misused her office. Even though she might have acted for political

reasons, she did not act unlawfully. Further, there was no evidence that her choice conflicted with the interests of her ultimate employer, the citizens of the state who might appreciate the choice of a local firm or an effort to save tax dollars.

The *Thompson* court recognized that its misuse of position requirement might be as slippery a standard as is the term honest services. Indeed, a Third Circuit panel has offered a similar critique.⁴³ Conceding that the term creates some uncertainty, Judge Easterbrook noted that future judicial glosses of the phrase were necessary.⁴⁴ Such a project is, however, subject to all of the critiques that have accompanied courts' efforts to apply and define honest services fraud.

B. For Personal Gain

Both courts recognized that the respective defendants had benefitted from their conduct. In *Thompson*, the putative misuse of position resulted in a salary increase of \$1,000; as noted earlier, the court assumed it was given because Ms. Thompson had accomplished what her boss wanted. In *Brown*, the court similarly acknowledged that the bonuses were a reward for successfully completing the barge transaction. Nevertheless, these rewards did not constitute a gain for purposes of honest services fraud. In explaining why these monetary rewards were insufficient, the decisions define the nature of the required gain.

The courts measured the concept of gain against an unlawful benefit that is obtained from third parties through kickbacks, bribes, or self-serving deals. In the *Brown* case, the court distinguished an alignment of employee/employer interests from those situations in which an employee understood that "the benefit to him resulting from his misconduct to be at odds with the employer's expectations."⁴⁵ When an economic benefit is given to fulfill an employer's promise, the gain does not create or evidence a conflict of interest between the principal and the employee.

The *Thompson* court similarly distinguished the facts before it from those involving kickbacks and bribes from third parties. According to *Thompson*, limiting section 1346 to such situations is justified because the limitation is consistent with the statutory language of – and, one might add, the requirement of – a scheme to defraud.⁴⁶ As the court explained, although the principal does not lose money in bribery cases, it suffers from the loss of services, for instance fair adjudication when a judge is bribed.⁴⁷

The *Thompson* panel also discussed the requirement of financial gain, as opposed to a non-pecuniary benefit. As the court noted, if gain is defined too broadly, the requirement loses its meaning and function. Indeed, the *Thompson* court recognized that it was “linguistically possible to understand ‘private gain’ as whatever adds to the employee’s income or psyche.”⁴⁸ The court discouraged this conception of gain, however, because the rule of lenity does not allow courts “to read criminal statutes for everything they can be worth.”⁴⁹

The circuits may diverge, however, on whether the duty-breaching employee is the relevant recipient of the benefit. The Fifth Circuit defined gain as “some personal benefit accruing to the duty-breaching employee.”⁵⁰ Although the *Thompson* opinion did not directly address this issue, a subsequent district court decision applying the *Thompson/Bloom* standard stated that the gain need not be directed to a specific defendant as long as some other participant in the scheme benefitted.⁵¹ This standard does not, however, provide guidance when there are no other participants, as in a two party honest services case like *Thompson*. In such situations, the Seventh Circuit may also require that the duty-breaching defendant receive the gain.

C. The Significance of the Faithful Subordinate Limitations

The *Brown* and *Thompson* decisions focus on breaches of duty that are outside the

heartland of conduct and harm that honest service fraud was developed to address. Thus the limitations devised by the courts are unlikely to apply to kickback, bribery, and self-dealing cases that involve monetary gains from third parties or entities controlled by the defendant. In addition, neither opinion discusses whether the limitations would apply to both private and public sector cases, in which courts utilize a higher standard of fiduciary duty to citizens.⁵² Nominally, Thompson's status as a public employee places this opinion in a public sector context, but the court treats the defendant as an employee rather than as a public official.

The decisions are nonetheless significant. As a general matter, they provide another reminder, if one is needed, of the inherent problems in defining honest service. More specifically, the standards articulated in *Thompson* and *Brown*, unlike the material misrepresentation and foreseeable harm limitations, take into account the reality of the employment relationship and the institutional workplace setting.⁵³ The decisions and the limitations they articulate recognize that employees – even high-flying managers in a Fortune 500 firm and lowly civil servants – may act in accord with supervisor's preferences in order to benefit the principal and be rewarded for doing so. In these circumstances, a faithful subordinate need not fear becoming entangled in the criminal justice system.⁵⁴

In addition, the limitations that apply to faithful subordinates seem sensible; the precision of the Fifth Circuit's holding and the brevity and clarity of the Seventh Circuit's standard are a significant improvement over the ambiguity of the "honesty" of services rendered. In particular, the emphasis on conduct, acting on a conflict of interest or misusing one's position, gives meaning and content to the term "honest services." Thus, these more precise standards will also be useful in analyzing self dealing cases, in which the harm is less obvious than in kickback or bribery cases.

Conclusion

In identifying when a breach of a heightened duty merits criminal treatment, the *Thompson* and *Brown* limitations protect those innocent of the corrupt self-dealing inherent in the concept of fraud. The cases also show the criminal justice system at its best. Individuals who were convicted for conduct that was not within the reach of a statute – who, baldly stated, had not committed a crime – were vindicated. The system worked as predicted: “Prosecutors sometimes make mistakes as to the reach of criminal statutes; courts correct them.”⁵⁵

But before becoming complacent about the vindication of innocent people, one should note that *Thompson* and the *Brown* defendants were tried, found guilty, imprisoned, and suffered irredeemable losses of reputation, money, and careers. A sanguine reliance on courts ignores the ambiguity of honest services fraud which often presents a question that is answered first by federal prosecutors, whether section 1346 applies to the conduct at issue. Many mistakes of this nature never reach reviewing courts. Indeed, given the prevalence of plea-bargaining, the odds are that many such mistakes never even reach trial courts. Relying on courts, moreover, to catch mistakes does little to reduce the ability of prosecutors to define the crime or to constrain the courts’ inappropriate common law methodology of resolving these questions.

The judges on the *Thompson* and *Brown* panels recognized these dangers to individuals and to the criminal justice system. Led by Judge Easterbrook, the Seventh Circuit judges challenged Congress to take another look at “the wisdom of enacting ambulatory criminal prohibitions,” noting the high costs of “hazy” statutes that avoid loopholes through which the guilty can escape imposed on those innocent of the offense.⁵⁶ The *Brown* majority, led by Judge Jolly, registered concern over “the danger we face of defining an ever-expanding and ever-

evolving federal common-law crime.”⁵⁷ Judge DeMoss wrote separately in *Brown* to urge Congress to “repair” section 1346 so that it provides “minimal guidelines to govern law enforcement.”⁵⁸ Judge DeMoss’s advice is particularly pertinent in light of the negative effects of the *Brown* and *Thompson* cases. Considering the loss of credibility and respect that such misguided prosecutions entail and the perceptions of political motives that they generate, federal officials have an obvious self interest in laws that provide enforcement and adjudication guidelines. The limitations that emerge from the *Brown* and *Thompson* cases provide sound starting points for such legislation.

1. See *United States v. Thompson*, 484 F.3d 877, 880 (7th Cir. 2007).
2. 459 F.3d 509 (5th Cir. 2006), *cert denied*, 127 S. Ct. 2249 (2007).
3. See *United States v. Skilling*, Cr.No. H-04-025-02, 2006 WL 3030721 (S.D. Tex. Oct. 23, 2006) (denying motion for bond but noting that *Brown* raises a substantial question that is likely to result in a reversal of the conspiracy to commit mail fraud); see also *United States v. Howard*, 471 F. Supp. 2d 772 (S.D. Tex. 2007) (relying on reasoning of *Brown* to vacate conviction of Kevin Howard, former Chief Financial Officer of Enron Broadband Services).
4. 484 F.3d 877 (7th Cir. 2007).
5. See Jason Stein, *Georgia Thompson Acquitted, Set Free; Her Conviction in Travel Agency Case is Overturned*, WIS. ST. J., April 6, 2007 at A1.
6. See Ryan J. Foley, *Was Probe Done to Tarnish Doyle?: Some Democrats Question the Motives Behind the Prosecution of Georgia Thompson*, WIS. STATE J., April 7, 2007, at A4.
7. See Evan T. Barr, *Outside Counsel: Limiting the Scope of Honest Services Fraud*, N.Y. L.J., July 23, 2007, at 4 (suggesting that the USA's interest in the case, which he personally tried, was to impress superiors in Washington who were displeased by his failed investigation into voter fraud); *Another Layer of Scandal*, N.Y. TIMES, April 9, 2007 at A16.
8. There was a brief interruption after the Supreme Court invalidated the theory in *McNally v. United States*, 483 U.S. 350 (1987), and before Congress passed § 1346, the honest services amendment.
9. See 18 U.S.C. § 1346 (stating "For purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible rights of honest services.").
10. See *United States v. Rybicki*, 354 F.3d 124, 139-41 (2d Cir. 2003) (en banc); *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996).
11. Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 666 (2006).
12. *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997); see also *United States v. Frost*, 125 F.3d 346, 368-69 (6th Cir. 1997).
13. See e.g., *McNally v. United States*, 483 U.S. 350, 360 (1987); *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (en banc); *United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996).

14. See e.g., *McNally*, 483 U.S. at 360; *United States v. Bloom*, 149 F.3d 649, 656 (7th Cir. 1998) (citing the “tradition, (which verges on constitutional status) against common-law federal crimes); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2136-38 (1998) (discussing link between vague statutes and prosecutorial authority).
15. See *United States v. Carpenter*, 791 F.2d 1024, 1035 (2d Cir. 1986), *aff’d* 484 U.S. 19 (1987); *United State v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998). The observation is also used in reference to public employees. See *United States v. Thompson*, 484 F.3d 877, 882 (7th Cir. 2007) (“no one *really* thinks that §1346 treats all legal errors by public employees as criminal”) (emphasis in original).
16. *United States v. Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003); see also *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *United States v. Gray*, 96 F.3d 769, 774-75 (5th Cir. 1996); *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996).
17. *United States v. Frost*, 125 F.3d 346, 368 (6th Cir. 1997); see also *United States v. Vinyard*, 266 F.3d 320, 328-29 (4th Cir. 2001); *United States v. Martin*, 228 F.3d 1, 17 (1st Cir. 2000); *United States v. deVegeter*, 198 F.3d 1324, 1329-30 (11th Cir. 1999); *United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998).
18. See *United States v. Brown*, 459 F.3d 509, 513 (5th Cir. 2006). The decision vacated convictions of four Merrill Lynch employees for conspiracy to commit wire fraud and two substantive wire fraud counts. *Id.* at 531. The court also acquitted one of the four appellants and affirmed the perjury and obstruction convictions of Brown. *Id.* Sheila Kahanek, the Senior Director in Enron’s APACHI energy division, was acquitted; Daniel Boyle, Enron Vice-President of Global Finance, was convicted and did not appeal. *Id.* at 513.
19. See *id.* at 513-17 (recounting facts).
20. See *id.* at 534-35 (DeMoss, J., concurring in part and dissenting in part) (registering concern about coupling conspiracy with honest services fraud).
21. The government had charged both property and honest services fraud. Because the jury had returned a general verdict that did not distinguish between the charges, the court necessarily vacated the conviction. *Brown*, 459 F.3d at 523. Thus the court did not address the property fraud charge, although it indicated that the government might use the fraud statute without its honest services component. *Id.* The government is retrying the case. See *United States v. Bayly*, C.R. No. H-03-363, 2008 WL 89624 (S.D. Tex. Jan. 7, 2008) (denying motion to dismiss).
22. See *Brown*, 459 F.3d at 522 (defendants’ dishonest conduct was “associated with and concomitant to the employer’s own immediate interest”).
23. See *id.* at 514-15.
24. See *id.* at 522.

25. *See id.*
26. *Id.*
27. *Id.*
28. *See* United States v. Thompson, 484 F.3d 877, 878-79 (7th Cir. 2007) (recounting facts).
29. *See id.* at 882. Thompson was also convicted of violating 18 U.S.C. § 666 for federal program bribery, which the court also reversed. *See id.* at 880-82.
30. 149 F.3d 649 (7th Cir. 1998).
31. *See* McNally v. United States, 483 U.S. 350, 355 (1987) (“[A] public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud.”)
32. *See* United States v. Bloom, 149 F.3d 649, 655 (7th Cir. 1998).
33. *See Thompson*, 484 F.3d at 882.
34. *See id.* at 879-80.
35. *Id.* at 879.
36. *See id.* at 879 & 882.
37. *Id.* at 880.
38. *See id.* at 883.
39. *See id.* at 882.
40. *See id.* at 883.
41. *Id.* at 884.
42. *See Brown*, 459 F.3d at 533 (Reavley, J., concurring in part and dissenting in part).
43. *See* United States v. Panarella, 277 F.3d 678, 692 (3d Cir. 2002) (stating that the *Bloom* test is both over- and under-inclusive).
44. *See Thompson*, 484 F.3d at 883.
45. *Brown*, 459 F.3d at 522.
46. *See Thompson*, 484 F.3d at 884.

47. *Id.* at 883.
48. *Id.* at 884.
49. *Id.*
50. *See Brown*, 459 F.3d at 520 (citing *Bloom*) (emphasis added).
51. *See United States v. Rezko*, No. 05-CR 691, 2007 WL 2904014 (N.D. Ill. Oct. 1, 2007) (“The test, however, is not whether an individual *personally* gained, but rather whether a participant realized a *private* gain (emphasis original) (citing *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (“a participant in a scheme to defraud is guilty even if he is an altruist and all the benefits of the fraud accrue to other participants”))).
52. *See United States v. Rybicki*, 354 F.3d 124, 139 (2d Cir. 2003) (distinguishing private and public sector cases); *United States v. deVegeter*, 198 F.3d 1324, 1328-29 (11th Cir. 1999) (noting that corruption of official action violates “the essence of the political contract”); *see also generally* John C. Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998).
53. *See Geraldine Szott Moohr, Of Bad Apples and Bad Trees: Considering Fault-Based Liability for the Complicit Corporation*, 44 AM. CRIM L. REV. 1343, 1347-50 (2007) (discussing barriers to preventing crime in workplace settings).
54. *See* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 91-97 (1968).
55. *See Rybicki*, 354 F.3d at 143.
56. *See Thompson*, 484 F.3d at 884.
57. *See Brown*, 459 F.3d at n. 13.
58. *See id.* at 534 (DeMoss, J., concurring in part and dissenting in part).