Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal

by

SARA SUN BEALE*

Watergate involved public corruption at the highest levels of the federal government. Federal criminal prosecutions and impeachment are the remedies for conduct of this nature, and other contributions to this symposium have focused on the developments in the mechanisms available to respond to federal corruption. This essay will consider the changes in the federal response to state and local corruption since Watergate (i.e., since the early 1970s). During this period Congress did not adopt any new statutes overtly aimed at the prosecution of state and local corruption, but new theories were developed to prosecute corrupt state and local officials under existing federal statutes. The courts and Congress acquiesced, and the number of federal prosecutions of state and local corruption increased enormously.

Federal prosecutors stretched existing federal statutes aimed principally at other forms of criminal conduct—most notably fraud and extortion—to permit a federal response to corruption at the

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* Professor of Law, Duke University School of Law. I am grateful to Trina Jones and Sarah Welling for helpful comments on an earlier draft, and to Chris Schroeder and Mike Gerhardt for sharing their expertise regarding the federal ethics laws and the impeachment process. This research was supported in part by the Eugene T. Bost Professorship of the Charles A. Cannon Charitable Trust No. 3.

state and local level, triggering an evolutionary expansion of the fraud and extortion statutes to reach bribery and other forms of corruption and misconduct. As a result, federal jurisdiction over political corruption at the state and local level is gradually expanding to fulfill the same functions as the statutes punishing corruption within the federal system. Indeed this essay will suggest that, at its outer limits, the “honest services” branch of the mail and wire fraud statutes has the potential to give federal prosecutors authority to prosecute state and local officials for conduct that might warrant discipline or removal from office but is a highly questionable basis for a federal prosecution. If the honest services theory sweeps this broadly, it reaches not only conduct that would be a crime under federal anti-corruption statutes, but also ethics violations that do not otherwise constitute crimes. This is a rather startling state of affairs, given the nature of the federal system.

The developments that are the focus of this article raise not only issues of the proper scope of the laws defining public corruption and ethics in government, but also issues of federalism. Whether the prosecution of state and local corruption is consistent with the principles of federalism has been vigorously debated by judges and scholars. Those who argue in favor of such prosecutions generally point to the need for investigation and prosecution by an outside agency that is not drawn from and responsible to the local political establishment. Those who oppose such prosecutions argue that they cut deeply into the fabric of federalism, interfering with the states’ genuine interest in controlling their own political institutions—

including institutions (such as political patronage systems) of which federal officials may disapprove. Indeed, in this context federal prosecutions may do more harm than good, since they may reduce the incentive for state and local authorities to clean up their own houses. These arguments are typically raised in cases or articles critiquing or interpreting individual statutes.

This essay undertakes a more comprehensive review of the federal statutes that have been used to prosecute state and local corruption, and it seeks to cast light on the proper interpretation of those statutes by juxtaposing them with the laws regulating the conduct of federal officials. The first section of this essay reviews briefly the statutory framework regulating federal officials and the tools available to prosecute federal corruption. The second section describes the development and application of the new theories that have permitted federal prosecutions of state and local officials for various forms of corruption. The third section suggests that, in construing the honest services prong of the mail fraud statute, federal courts should look to the scope of the criminal statutes regulating federal officials and to the line that Congress has drawn in that context between criminal violations and mere ethical lapses. If adopted, this proposal would serve two purposes. First, by providing content to the definition of "honest services" it would rein in federal prosecutions at the state and local level, limiting such prosecution to conduct that has been defined by Congress and identified as sufficiently serious to warrant criminal punishment. It would also address, at least partially, federalism concerns. Second, and perhaps equally important, this proposal would also have significant implications for the prosecution of federal officers and employees. This proposal would eliminate the incentive for federal prosecutors to prosecute federal officials under the mail and wire fraud statute, using the undefined and elastic phrase "honest services" to evade the carefully drawn limitations in the statutes that regulate the conduct of federal officials.

I. The Tools Available toProsecute Federal Corruption

The federal government has three basic mechanisms for combating corrupt and unethical behavior by its officers and employees: criminal statutes, professional and ethical regulations enforced by civil sanctions and disciplinary action (but not criminal sanctions), and impeachment.

The most important criminal provision dealing with federal political corruption is 18 U.S.C. § 201, which criminalizes both the offer and receipt of bribes and illegal gratuities by federal officials. Section 201 is supplemented by what the Supreme Court has called
"an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." Criminal prohibitions regulate the behavior of federal officials before, during, and after the period of their governmental service. Entry into federal service is regulated by prohibitions against the payment, solicitation, or receipt of anything of value (including campaign contributions) in return for aid in obtaining an appointive office or position in the executive branch. During their federal service, federal officers and employees are subject to both general and narrowly focused prohibitions. For example, it is a crime for any executive employee to participate in any decision or proceeding relating to a matter in which he has a financial interest, or for an employee of the executive branch or an independent agency to receive any contribution to or supplementation of his salary from any source other than the government. Federal officials are also prohibited from acting as an "agent or attorney" for anyone prosecuting a claim against the United States, and from receiving any compensation for providing representational assistance to anyone involved in a proceeding in which the United States has a direct and substantial interest. Other provisions are more narrowly drawn to apply to particular federal officials. For example, it is a crime for a federal employee to accept a gift in connection with the "compromise, adjustment, or cancellation of any farm indebtedness," or a gift for the "compromise, adjustment, or settlement of any charge or complaint" for violation of the tax laws. After their federal service, former officers or employees of the executive branch are permanently barred from making any communication to or appearance before any government body in connection with a matter in which they personally and substantially participated if the United States is a party or has a direct and substantial interest. A two-year bar applies to communications or appearances as to matters that were pending under the officer or employee's responsibility within the last year of his or her federal

5. See id. § 208.
6. See id. § 209.
7. Id. § 205(a).
8. See id. § 203.
9. Id. § 217.
service.\textsuperscript{12}

In addition to these criminal provisions, a variety of statutes and regulations impose ethical and professional restrictions upon federal officers and employees. The Ethics in Government Act\textsuperscript{13} created a framework requiring extensive financial disclosure, including disclosure of the source and value of all gifts received from a source other than a relative of the reporting individual, if the gifts from one source have an aggregate value of more than $250 (or a lower number established by another statute) in one year.\textsuperscript{14} Ethical rules have also been promulgated for each branch of the federal government,\textsuperscript{15} and each branch regulates its employees' acceptance of gratuities.\textsuperscript{16}

These statutes and regulations do not, however, cover all possible forms of official misconduct or misuse of office, and the impeachment process has highlighted this gap. The Constitution permits the impeachment of any officer of the United States for "Treason, Bribery, or other high Crimes and Misdemeanors."\textsuperscript{17} The weight of authority appears to support the view that misuse of office that constitutes a "political crime" may provide a basis for impeachment, even if it does not constitute a violation of the criminal code.\textsuperscript{18} The records of the Constitutional Convention of 1787\textsuperscript{19} and the ratification debates support the view that high-level governmental officials may be impeached and removed from office for non-indictable political offenses. Congress has relied upon conduct that did not violate the criminal code in impeaching both executive and judicial officers.\textsuperscript{20} This view is also consistent with the British

\textsuperscript{12} See id. § 207(a)(2).
\textsuperscript{15} These provisions are collected and described briefly in \textit{United States v. Sundiamond Growers}, 119 S. Ct. 1402, 1409 (1999). For regulations applicable to the executive branch, see 5 C.F.R. pt. 2635 (2000).
\textsuperscript{17} U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").
\textsuperscript{19} See Bowman & Sepinuck, supra note 18, at 1523-26.
\textsuperscript{20} See Gerhardt, supra note 18, at 613-14 (concluding that only four of sixteen men impeached by House were impeached primarily or solely on conduct constituting a criminal offense, and of the seven who have been convicted and removed by the Senate,
impeachment precedents, which would have been familiar to some of the drafters of the Constitution. 21

The Supreme Court has suggested that the federal ethics rules and regulations may have a bearing on the construction of the criminal statutes, and may at least in some instances be a factor favoring a narrow interpretation of these statutes. In United States v. Sun-Diamond Growers, 22 a unanimous decision interpreting the federal gratuities statute, the Supreme Court concluded that the detailed provisions of the ethics regulations, which include various prophylactic rules as well as exemptions, supported a narrow reading of the criminal gratuities provision:

[T]his regulation, and the numerous other regulations and statutes littering this field, demonstrate that this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter. Absent a text that clearly requires it, we ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits. 23

Thus the fact that conduct violates a provision of the federal ethics regulations does not establish that it is also criminal. To the contrary, federal courts should interpret each piece of the "regulatory puzzle" in light of the other pieces, and criminal provisions should not be interpreted as meat axes that cut indiscriminately across conduct that is subject to much more nuanced regulations enforced by disciplinary rules.

II. The Federal Tools Available to Prosecute State and Local Corruption

In contrast to the array of weapons available to combat corruption within the federal government, at first glance the cupboard

four were convicted and removed on the basis of nonindictable offenses). Bowman and Sepinuck compiled a synopsis of the articles of impeachment and the Senate's votes in each of the sixteen cases. See Bowman & Sepinuck, supra note 18, at 1526-27, 1530-38, 1566-97. They agree that in many of these cases the conduct in question did not constitute an indictable offense, and find differences between the cases of judicial and executive removal. See id.

21. Some scholars have relied heavily on English precedent. See, e.g., RAOUl BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 71-73, 88-89 (1973); See generally PETER CHARLES HOFFER & N. E. H. HULL, IMPEACHMENT IN AMERICA, 1635-1805 (1984). Others have questioned whether these precedents would have been familiar, for example, to all of the 1,600 ratifiers who adopted the Constitution at the state convention. See Bowman & Sepinuck, supra note 18, at 1525.


23. Id. at 1410.
seems virtually bare when one seeks federal laws explicitly aimed at state and local corruption. The only federal provision that refers explicitly to bribery or corruption by state and local officials is the federal program bribery statute, which criminalizes bribery of private grantees as well as state and local officials in connection with federal grants, contracts, subsidies, and other funds. Indeed, a superficial review of the federal criminal code and regulations might lead to the conclusion that federal corruption is the province of federal law, but that federalism leaves state and local corruption to be dealt with exclusively by the states.

Despite the absence of clear statutory authority, however, in the period since Watergate the legal landscape has been radically altered by the expansive definitions given to the federal mail and wire fraud statutes, the Hobbs Act, and, most recently, to the federal program bribery statute. These definitions extend the statutes' reach, thereby providing prosecutors with expansive and flexible authority to prosecute many forms of misconduct by state and local officials. Indeed, the net result of these expansive interpretations is that federal prosecutors have as broad or broader authority to prosecute state and local officials as they have to prosecute federal officials under the intricate web of statutes referred to above. This development has occurred because of (1) the interpretation of extortion as including official bribery under the Hobbs Act, (2) the evolving interpretation of the jurisdictional provisions of the federal program bribery statute that have attenuated the connection between the bribe and the federal funds, and (3), most important, the development of the intangible rights theory of mail and wire fraud and the amendment of these statutes to include the fraudulent deprivation of honest services.

24. 18 U.S.C. § 666 (1999) makes it a federal crime for an agent of state or local government to solicit or receive a bribe in connection with a transaction or series of transactions involving $5,000 or more when the government in question is receiving federal grants, subsidies, or other benefits in excess of $10,000 per year. See infra, note 48, for a discussion of § 666.

25. In addition, the Travel Act (enacted in 1961) and RICO (enacted in 1971) list state “bribery” as one of the predicate offenses that can constitute a federal offense if various other elements are established. See 18 U.S.C. § 1952(b)(2) (1999) (defining “unlawful activity” under Travel Act to include “bribery ... in violation of the laws of the State in which committed or of the United States”); 18 U.S.C. §§ 1961(1)(A), 1961(5), 1962 (racketeering activity includes “act or threat involving ... bribery” that is chargeable under state law as a felony; pattern of racketeering activity is element of each form of RICO offense). Although these provisions are not limited to the bribery of governmental officials, they are clearly intended to reach such conduct where the other statutory elements are met. Cf. Perrin v. United States, 444 U.S. 37 (1979) (concluding that Travel Act extends beyond common law definition of bribery of a public official and also reaches commercial bribery).
A. The Hobbs Act

One of the key changes that has allowed federal prosecutors to prosecute state and local corruption was a shift in the interpretation of the extortion provisions of the Hobbs Act to encompass official bribery. Given the minimal jurisdictional requirements under the Act, this interpretative shift has brought the bribery of most state and local officials under federal jurisdiction.

The Hobbs Act makes it a federal crime to obstruct, delay, or affect commerce by robbery or extortion. On its face this provision has no obvious application to bribery or other forms of official corruption. Initially the lower federal courts held that extortion required proof of duress or fear on the part of the victim and did not reach the acceptance of voluntary payments to influence or procure official action. However, the tide began to turn in the lower courts in 1972. The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

The lower courts began to accept the government’s view that this language encompassed at least some conduct that could also be termed bribery. Ninth Circuit Court of Appeals Judge John T. Noonan, Jr. characterized the impact of the 1972 decision as follows:

As effectively as if there were federal common law crimes, the court in Kenny... amended the Hobbs Act and [brought] into existence a new crime—local bribery affecting interstate commerce. Hereafter, for purposes of Hobbs Act prosecutions, such bribery was to be called extortion. The federal policing of state corruption had begun.

In the early 1990s, the Supreme Court endorsed the view that the Hobbs Act reaches official bribery, even when it is merely the passive acceptance of a contribution not accompanied by any demand or threat. Over a vigorous dissent, the Court held that “the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was

28. The first decision to interpret the Hobbs Act to encompass kickbacks to public officials despite the absence of fear, duress, or threats, United States v. Kenny, 462 F.2d 1205, 1229 (3d Cir. 1972), was followed two years later by United States v. Braasch, 505 F.2d 139, 151 (7th Cir. 1974).
30. See McCormick, 500 U.S. at 278 (Scalia, J., concurring) (collecting cases).
32. See id. at 258-59.
made in return for official acts.” Although the majority presented its conclusion as one required by “the common-law definition” of the term extortion, the dissenting justices argued that common law extortion under color of official right required a pretense that the officer was entitled to the money or property in question. The dissent charged that, in contravention to the tenets of federalism, “the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials.”

There are two principal limitations to the crime of bribery as extortion under color of official right under the Hobbs Act. First, the Act is limited to extortion that “obstructs, delays, or affects interstate commerce.” In practice this requirement can be met in virtually any case. The Supreme Court has held that this language manifests the intent to employ “all the constitutional power Congress has” under the Commerce Clause. The lower courts have concluded that the Act reaches an actual impact on commerce that is small or even “de minimis,” as well as cases in which there is a “realistic probability that an extortionate transaction will have some effect on interstate commerce.” The courts have upheld convictions where the effect or potential effect on commerce is negligible. For example, the Seventh Circuit upheld the conviction of a state judge who agreed to accept a bribe to fix a sham case, but then, fearing a trap, backed out before any bribe was paid. The court found that payment of a bribe of $1,000-$2,000 would have depleted the law firm’s assets, reducing its ability to purchase goods in interstate commerce, such as document covers and calculators. Unless the Supreme Court imposes a more restrictive reading, the jurisdictional requirement will not

33. Id. at 268.
34. Id. at 259.
35. See id. at 290-91 (Thomas, J., dissenting). The Chief Justice and Justice Scalia joined the dissent.
36. Id. at 290.
40. United States v. Staszcuk, 517 F.2d 53, 60 (7th Cir. 1975). See generally WELLING 1, supra note 39, §15.3(C) (collecting cases).
41. See United States v. Stillo, 57 F.3d 553 (7th Cir. 1995).
42. See id. at 558-59. For other examples, see WELLING 1, supra note 39, § 15.3 (A)-(C).
43. In the context of prosecutions under the robbery prong of the Hobbs Act, several lower courts have struggled with the question whether a local robbery of a business which
significantly limit the reach of the Hobbs Act as a mechanism to prosecute state and local corruption in the federal courts.

Second, in order to distinguish between extortion and the everyday behavior of raising contributions to fund political campaigns, the Supreme Court held that the Hobbs Act requires a quid pro quo. The color-of-right prong of the Hobbs Act only reaches campaign contributions if the official knows that the payments are made in return for an explicit or implicit promise to use his official position to help the payor.\textsuperscript{44} Although there is still some question as to how far the quid pro quo extends beyond cases involving campaign contributions, most lower courts have concluded that this requirement extends to all Hobbs Act color-of-official-rights prosecutions.\textsuperscript{45} Under this interpretation, the Act reaches bribery but not illegal gratuities.

Thus as long as a bribe paid to a state or local official is sufficient minimally to deplete the assets of the payor and reduce its ability to purchase goods and services in interstate commerce, it is subject to federal jurisdiction under the Hobbs Act.

B. Federal Program Bribery

The most recent of the post-Watergate developments concerns the federal program bribery statute, 18 U.S.C. § 666, which makes it a crime for agents of state and local government to accept bribes in connection with the receipt of federal funds if certain financial thresholds are met. The statute requires that the bribe be connected with a transaction or series of transactions involving anything valued purchases some goods or services really has a sufficient impact on interstate commerce to warrant federal jurisdiction as a constitutional matter. The Fifth Circuit split evenly on this issue in an \textit{en banc} case. See Hickman v. United States, 179 F.3d 230 (5th Cir. 1999) (en banc), \textit{petition for cert. filed}, 68 U.S.L.W. 3178 (U.S. Sept. 16, 1999) (No. 99-464). Certiorari has been granted in a case that will permit the Supreme Court to consider the issue under an analogous statute. See United States v. Jones, 178 F.3d 479 (7th Cir. 1999), \textit{cert. granted}, 120 S. Ct. 494 (U.S. Nov. 15, 1999). The questions presented in \textit{Jones} are whether the arson statute, 18 U.S.C. § 844(f), reaches the arson of a private residence and, if so, whether the statute is constitutional. The Seventh Circuit upheld the application of the statute to residential arson, stating that “[t]he statute requires proof that the arson with which the defendant is charged have some effect on commerce; only it needn’t be a large effect, since the sum of many small effects can be a large effect...” \textit{Jones}, 178 F.3d at 480. Since the arson statute, like the Hobbs Act, requires a case-by-case showing of an effect on commerce, the Supreme Court’s reasoning in \textit{Jones} will be applicable to the Hobbs Act as well.

44. The various opinions in the Supreme Court’s two cases on the quid pro quo requirement phrase this requirement differently, and the lower courts are divided on the question how to reconcile these differences. See generally \textsc{Welling} 1, \textit{supra} note 39, §15.15.

45. \textit{See id.} §15.15(A)(iii).
at $5,000 or more,46 and also requires that the state or local government have received, in any one-year period, benefits in excess of $10,000 "under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance."47 This provision seems to criminalize state and local corruption only insofar as it can be linked to federal funds or a federally funded program. However, recent decisions have suggested that § 666 may be a broader weapon in the federal campaign against bribery (and perhaps gratuities) on the part of state and local officials, though the outer limits of the statute are still being defined by the courts.48 Despite its potential breadth, § 666 has received so little scholarly attention that one article refers to it as the stealth statute.49

In *Salinas v. United States*,50 the Supreme Court held that § 666 is not limited to cases in which a bribe has a demonstrated effect on federal funds. The case involved a county sheriff and his deputy who took bribes to allow contact visits between an inmate in the local jail and his wife and girlfriend. Federal funds had been provided in exchange for the county’s agreement to house federal prisoners in the jail on a contract basis. The bribes were paid by a federal prisoner housed in the jail pursuant to this agreement. There was no claim, however, that the bribe affected the federal funds by diverting or misappropriating them, and the Court unanimously rejected the defendant's argument that the statute applied only to bribes with an effect on federal funds. Because the bribe in this case related to a federal prisoner who was housed in the jail pursuant to this contractual agreement, the Court found it unnecessary to decide whether the statute requires "some other kind of connection between a bribe and the expenditure of federal funds."51 *Salinas* thus leaves open the question what, if any, nexus is required between the receipt

47. Id. § 666(b).
48. Professor George Brown has noted that another portion of § 666 may offer an alternative basis for the prosecution of state and local corruption, since it criminalizes the conduct of one who "embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies" property valued at $5,000 or more that is in the care, custody, or control of one of the designated governments, agencies or organizations. 18 U.S.C. § 666(a)(1)(A) (emphasis added). This provision has not been used much to date, but in the long run it may add significantly to the broad sweep of § 666. The next section discusses the breadth of the term "fraud" as it has been defined in the context of mail and wire fraud. Arguably § 666 adopts the same expansive definition of fraud in the context of federal funding of state and local government. See generally George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247 (1998).
49. See id.
51. Id. at 59.
of federal funds and corrupt conduct on the part of a particular state or local official. The lower courts are now wrestling with this issue.\textsuperscript{52} The question how much, if any, nexus is required between the federal funds and a bribe will determine the sweep of § 666. If little or no nexus were required, the statute’s sweep would be truly stunning. It seems fair to assume that every state and virtually every city and county receive federal funds of more than $10,000 per year. Indeed, the reported prosecutions involve not only states and large cities, but cities with populations of less than 10,000.\textsuperscript{53} Thus \textit{Salinas} seems to open up the possibility that the corruption of any state or local government employee is now within the reach of § 666, as long as the transaction in question involves at least $5,000.

It is unclear whether § 666 is limited to bribery, or whether it also encompasses illegal gratuities. The statute makes it a crime to “corruptly” offer or give anything of value “with intent to influence or reward.”\textsuperscript{54} The lower courts are divided on the question whether this language reaches only bribery or extends as well to illegal gratuities where there is no quid pro quo.\textsuperscript{55} Obviously the statute will have a far broader impact if it includes not only cases where there is proof of a quid pro quo, but all cases in which a state or local official received a payment because of his official position or duties. Indeed, if § 666 reaches gratuities, it may be somewhat broader than the gratuities provision applicable to federal officials.\textsuperscript{56}

\textsuperscript{52} The circuits are divided on this issue. \textit{Compare} United States v. Dakota, 188 F.3d 663, 668 (6th Cir. 1999) (no nexus required), \textit{with} United States v. Santopietro, 166 F.3d 88, 92-93 (2d Cir. 1999) (connection between bribe and risk to federally funded program required), \textit{and} United States v. Zwick, 199 F.3d 672, 681-88 (3d Cir. 1999) (connection between bribe and federal interest required).

\textsuperscript{53} See Brown, \textit{supra} note 48, at 276.

\textsuperscript{54} 18 U.S.C. § 666(a)(2).

\textsuperscript{55} The term “corruptly” is generally associated with bribery, and the statute speaks of an intent to influence. On the other hand, it is also sufficient if the donor has only the “intent to... reward,” and this language seems broad enough to encompass gratuities. The Second Circuit has concluded that § 666 reaches gratuities. \textit{See} United States v. Bonito, 57 F.3d 167, 171 (2d Cir. 1995). It has been suggested that the Second Circuit’s analysis blurs the distinction between bribery and gratuities by referring to gratuities given corruptly. \textit{See} United States v. Jennings, 160 F.3d 1006, 1015 n.4 (4th Cir. 1998). Of course, if the statute reaches gratuities as well as bribery this would substantially increase its impact. It would also subject defendants in gratuities cases to a sentence of up to ten years, in contrast to the maximum two-year sentence for a gratuities violation under § 201. For a discussion of this issue, see Brown, \textit{supra} note 48, at 307-11.

\textsuperscript{56} In \textit{United States v. Sun-Diamond Growers}, 119 S. Ct. 1402 (1999), the Supreme Court interpreted the federal gratuities provision, 18 U.S.C. § 201(c)(1)(A), as requiring that an illegal gratuity have a nexus with a particular official act, not merely the official’s position. The language upon which the Court relied is not present in § 666, which refers only to an “intent to... reward.” 18 U.S.C. § 666(a)(2).
C. Mail and Wire Fraud Include Bribery, Failure to Disclose, and Other Breaches of "Honest Services"

Since the early 1970s, the mail and wire fraud statutes have been used to prosecute the governors and former governors of several states and many hundreds of lower level officials in state and local government. Most of these cases have been brought under what came to be called the intangible rights theory. Although this theory originated in the 1940s, it was not widely used until the early to mid-1970s, i.e., the Watergate period.

(1) The Intangible Rights Theory and the "Honest Services Prong" of the Mail Fraud Statute

The intangible rights cases substantially extended the concept of fraud. The cases typically involved neither an express misrepresentation, nor the loss of any money or tangible property by the victim of the scheme. The element of deceit or misrepresentation was generally satisfied by nondisclosure of dishonest or corrupt actions, and the loss of an intangible right obviated the necessity to determine whether the scheme caused any economic loss. For example, former Illinois governor Otto Kerner was convicted of mail fraud on the theory that his failure to disclose a sweetheart deal with the racing industry deprived the public of his faithful services as an elected official. The governor had reaped a large profit after being permitted to buy stock in certain racing operations below the market price. In return, he supported a statutory increase in the number of days horse racing was permitted in the state. Kerner appealed on the ground that there was no proof that the state (or any group of citizens


58. The intangible rights theory is usually traced to Shushan v. United States, 117 F.2d 110 (5th Cir. 1941), overruled on other grounds by United States v. Cruz, 478 F.2d 408 (5th Cir. 1973). In Shushan, the Fifth Circuit upheld the mail fraud prosecution of a member of a Louisiana parish levy board for receiving kickbacks from the underwriters of a plan to refund outstanding bonds of the levy district. Although the refunding operation had actually been profitable to the levy board, the court stated: "No trustee has more sacred duties than a public official and any scheme to obtain an advantage by corrupting such a F.one must in the federal law be considered a scheme to defraud." Shushan, 117 F.2d at 115.

59. See United States v. Isaacs, 493 F.2d 1124 (7th Cir. 1974).
within the state) had suffered any financial loss. To the contrary, the increased racing days produced additional racing revenues and thus additional taxes. Reasoning that "[t]he mail fraud statute is not restricted in its application to cases in which the victim has suffered actual monetary or property loss," the court of appeals upheld Kerner's conviction on the ground that "[t]he State of Illinois and its citizens were deprived of the loyal and honest services of their governor, Kerner, [and] that the defendants actually did exert special influence in favor of and bestowed preferential treatment on [the racing owner who provided the stock to Kerner]."61

The intangible rights theory had been adopted by all circuits and in wide use for more than a decade when it was belatedly rejected by the Supreme Court and promptly resurrected by Congress. After routinely rejecting certiorari petitions on this issue for many years,62 the Supreme Court surprised many observers by granting review and concluding in 1987 that the mail fraud act applies only to the deprivation of property, and does not reach other intangible rights.63 The Court grounded its decision in the legislative history of the statute and the common law conception of fraud, but it also referred to the policies of federalism in the following language:

Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.64

Shortly thereafter, Congress accepted the Court's invitation to speak more clearly by adopting 18 U.S.C. § 1346, which amends the mail and wire fraud statutes to include "a scheme... to deprive another of the intangible right of honest services."65

(2) The Impact and Reach of Honest Services in State and Local Public Corruption Cases

The "honest services"/intangible rights theory gives federal prosecutors a highly flexible and adaptable tool to prosecute state and local corruption. A review of cases decided both before and after the

60. Id. at 1149-50.
61. Id. at 1150.
64. Id. at 360.
adoption of § 1346 reveals general agreement that the mail and wire fraud statutes reach the bribery of state and local officials, and many cases endorse the view that in the case of public officials the duty of honest services includes a fiduciary duty to disclose material information. Of course the prosecution must also prove a mailing or an interstate wire transmission, but the jurisdictional provisions have been given a very generous interpretation, and prosecutors find this requirement relatively easy to meet.

The virtue and vice of the honest services prong of the mail fraud statute is that it can be adapted to reach not only clear cut official bribery, but also a wide range of other conduct. The absence of any statutory definition of the term honest services has left prosecutors and courts to define what this term means on a case-by-case basis.

Federal prosecutors have responded by bringing not only cases based upon allegations of bribery, but also prosecutions based upon ethical breaches that would not violate the criminal statutes regulating the conduct of federal officers and employees. For example, in United States v. Sawyer, a lobbyist was prosecuted on the theory that his payments for meals, rounds of golf, and other entertainment deprived the state and its citizens of a key legislator's honest services. The government argued that because these payments violated the state gift and gratuities statutes they were also, ipso facto,
a breach of honest services.\textsuperscript{71} In \textit{United States v. Bloom}\textsuperscript{72} federal prosecutors charged a Chicago alderman who also maintained a private law practice with a breach of honest services on the theory that he violated his undivided duty of loyalty to the city by advising a private client how to avoid taxes—reducing the city's tax revenues—by the use of an undisclosed proxy at a tax scavenger sale. In \textit{Bloom} (as in \textit{Sawyer}), prosecutors argued that because the defendant's conduct violated a state ethics standard it necessarily constituted a violation of the honest services for purposes of the mail and wire fraud statutes.\textsuperscript{73}

\textit{Sawyer} and \textit{Bloom} demonstrate the potential for honest services prosecutions to reach conduct that would not fall within the criminal statutes that govern the conduct of federal officers and employees. For example, as the Supreme Court made clear in the \textit{Sun-Diamond} case, many gifts that might create the appearance of impropriety or even create the potential for favoritism fall outside the federal bribery and gratuity statute, and are governed only by federal ethics regulations that are not enforced by criminal sanctions. Under \textit{Sun-Diamond} at least part of the government's case in \textit{Sawyer} would fall only within the federal ethics regulations, and not within the criminal prohibitions of 18 U.S.C. § 201. In \textit{Bloom}, the government's theory was that the defendant, a city alderman and practicing lawyer, violated a fiduciary duty of loyalty to the city by giving advice to a private client that would reduce the client's taxes and hence the city's revenues.\textsuperscript{74} If the defendant had been a federal employee it appears that this representation would not have run afoul of the prohibition against representing a party with a claim against the United States,\textsuperscript{75} since Bloom's client was not presenting any claim. Federal law also makes it a crime for a federal officer or employee to provide assistance to a party "involved in a proceeding" in which the United States has a direct and substantial interest,\textsuperscript{76} but it is doubtful that Bloom's client was involved in any "proceeding" in this sense. The gravamen of the government's complaint was not that the alderman's conduct violated any criminal prohibition, but rather that it violated a broad interpretation of a prior state ethics decision censuring an attorney-alderman.\textsuperscript{77}

Both defendants' convictions were reversed on appeal, as the

\textsuperscript{71} See \textit{id.} at 726.
\textsuperscript{72} 149 F.3d 649 (7th Cir. 1998).
\textsuperscript{73} \textit{id.} at 651.
\textsuperscript{74} \textit{id.}
\textsuperscript{75} See 18 U.S.C. § 205(a).
\textsuperscript{76} \textit{id.} § 203.
\textsuperscript{77} See \textit{In re} Vrdolyak, 560 N.E.2d 840 (Ill. 1990).
courts struggled to articulate some limits on the scope of the honest services prong of the mail fraud statute. In *Bloom*, the Seventh Circuit held that state ethical violations are not cognizable under the mail and wire fraud statute unless they involve misuse of office for private gain.\textsuperscript{78} In *Sawyer*, the First Circuit held that actual corruption, not merely the appearance of corruption, was required to violate the mail and wire fraud statutes. In the context of gifts and gratuities, the First Circuit required proof that the gifts were intended to "cause the legislator to deviate from the honest performance of his duties."\textsuperscript{79} Although these decisions had the effect of reining in the prosecutions in question, other circuits have not yet endorsed these limitations, and the danger remains that federal prosecutors will continue to press for more literal and sweeping interpretation of the phrase "honest services."

As employed by the prosecutors in cases like *Sawyer* and *Bloom*, the honest services prong of the mail fraud statute has the potential to extend beyond bribery, illegal gratuities, and other conduct criminalized under the criminal statutes applicable to federal officers and employees, and to reach conduct on the part of state and local officials that would be subject, at most, to discipline or removal from office under federal ethical rules.\textsuperscript{80} Criminal liability for breach of honest services also has the potential to cast a long shadow over political and electoral activities.

The breadth of the honest services prong of the mail fraud statute and some of the difficult issues it poses are illustrated by a case arising in the Eleventh Circuit. In *United States v. Lopez-Lukis*,\textsuperscript{81} federal prosecutors charged a county commissioner with failing to disclose her relationship with, and her receipt of payments from, a lobbyist (whom she later married) whose clients had interests before the commission, and with opposing the election of another candidate for the commission who favored policies opposed to the interests of the lobbyist's clients. The government also charged that during the election campaign the defendant threatened to and subsequently did release a tape showing this candidate's marital infidelity.\textsuperscript{82} In a pretrial appeal the Eleventh Circuit ruled that the

\textsuperscript{78} 149 F.3d at 655.
\textsuperscript{79} United States v. Sawyer, 85 F.3d 713, 728 (1st Cir. 1996).
\textsuperscript{80} Indeed, at its outer limits, "honest services" bears a resemblance to the concept of "political crimes" that may justify federal impeachment even if they are not indictable offenses.
\textsuperscript{81} 102 F.3d 1164 (11th Cir. 1997). There is no reported decision describing the evidence presented at trial. For an interlocutory decision describing the prosecution's theories, see *Lopez-Lukis*, 102 F.3d at 1164.
\textsuperscript{82} See id. at 1166.
videotape incident was admissible. At a jury trial, the lobbyist and the commissioner were acquitted of all charges except one count based upon the commissioner's mailing misleading responses to a questionnaire from a reporter. At one level, Lopez-Lukis is an easy application of the mail fraud statute, because the government charged—though it did not convince the jury—that the payments to the commissioner were bribes. At another level the case raises a host of difficult questions. What if the prosecutor had charged the commissioner with a breach of honest services because of her failure to disclose her relationship with the lobbyist before she acted on matters in which his clients had an interest? Assume the payments were intended to be personal gifts. Does the honest services provision nevertheless require disclosure since the voters might feel that the gifts would tend to influence the commissioner's vote? In the context of the campaign, what disclosure was required by the concept of honest services? What standards govern one political candidate's support of, or opposition to, another candidate running for a different office? And what standards govern a candidate's provision of false or misleading information to the news media (which was the only charge upon which the commissioner was convicted)?

One way of addressing these issues is to ask what standards would govern if a federal official engaged in the conduct charged in Lopez-Lukis. How would this conduct be assessed under the statutes and regulations governing federal officials and employees? Under 18 U.S.C. § 201 this conduct could be charged as bribery, which would require proof of a quid pro quo for the payments, or as an illegal gratuity, which would require proof that the payments were made in connection with a specific official act. To my knowledge, there is, however, no general or specific requirement of disclosure of a personal relationship, even if it might be thought to be relevant to the public or the voters in assessing a public official or a candidate for public office. Indeed, there is a rather striking parallel between some aspects of Lopez-Lukis and of the controversy surrounding President Clinton and his relationship with White House intern, Monica Lewinski. As far as I know, there was no suggestion that the federal criminal laws required the president to disclose a personal relationship that might affect the voters' and or public's judgment of him, nor any general prohibition against misleading comments to the press or the public regarding such a relationship. Federal law does, however, require disclosure of various matters, most notably

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83. See id. at 1171.
campaign contributions and information regarding the personal finances of federal officials. For example, the Ethics In Government Act requires all covered officers and employees to file disclosure reports identifying the source and the value of all gifts received from a source other than a relative of the reporting individual during the preceding year the value of which aggregates to more than $250 (or a lower value established by another provision). Note, however, that violations of these reporting requirements are punishable by a civil penalty or appropriate personnel action, rather than by a criminal sanction. Under one view, the prosecutor in Lopez-Lukis, like the prosecutor in Sun-Diamond, was seeking to base a federal criminal conviction on an ethics violation that would fall outside the statutes defining the criminal liability of federal officers and employees. In Lopez-Lukis the prosecution also sought to police political campaigning and the provision of information to the press, albeit in a context that the prosecution characterized as a bribery scheme.

(3) The Potential Impact of Honest Services in Federal Public Corruption Cases

Although virtually all of the reported cases brought under the intangible rights/honest services theory of mail and wire fraud involve corrupt state and local officials, this theory also has a potential impact in cases involving misconduct by federal officials.

To this point, the honest services theory has seldom been applied in cases involving federal officials. Federal prosecutors developed the intangible rights/honest services theory to reach state and local corruption, and in enacting § 1346 Congress sought to reverse McNally, thereby permitting such prosecutions to continue. There is no indication that Congress was concerned with providing a mechanism to prosecute federal officials. As noted above, federal prosecutors have a panoply of criminal statutes that proscribe misconduct by federal officials, and thus they have little incentive to employ the mail and wire fraud statutes to reach conduct covered by these more specific statutes.

But federal prosecutors may have an incentive to characterize as

87. See id. § 104(a) & (c).
88. For a discussion of the sparse legislative history of § 1346 and the judicial decisions construing that provision, see WELLING 2, supra note 57, § 17.19.
89. Prosecutors might also have an incentive where the penalty would be greater under the mail or wire fraud statutes. This is not likely to play a significant role in most cases, however, since the penalties for most of the offenses described in Section I of this essay are as severe (or more severe) than those applicable to mail and wire fraud, and, in any event, the Sentencing Guidelines might minimize any sentencing advantage that might otherwise be derived from bringing charges under those statutes.
a breach of honest services misconduct that is not addressed by the framework of federal criminal statutes designed to govern the conduct of federal officers and employees. In one recent instance, federal prosecutors sought, unsuccessfully, to do so. They brought wire fraud charges under an honest services theory against an IRS employee who violated agency rules—but no specific criminal statute—by browsing through the confidential files of taxpayers in whom he had an interest. The court of appeals reversed the resulting conviction on the grounds that the case fell outside of the developing boundaries of honest services, since the employee had not been bribed or influenced in a public decisionmaking capacity, he received no tangible benefit, and he had no notice that his “workplace” violation could subject him to criminal liability.

Thus the honest services theory has the potential to serve as a basis for the prosecution of federal officers and employees, but only to the degree that it expands to encompass conduct that is not already subject to criminal liability under the statutes described in Section I of this essay. As noted in the preceding section, this potential exists because of the undefined and potentially expansive character of the concept of honest services (and the ease with which the jurisdictional predicates for mail and wire fraud can ordinarily be satisfied). Certainly nothing on the face of the mail or wire fraud statutes precludes their application to a federal officer or employee if the elements of the statute can be established.

III. A Proposal for Limiting Honest Services Under § 1346

Sawyer, Bloom, and Lopez-Lukis indicate the need for some principles to limit the honest services line of cases under the mail and wire fraud statutes. In a federal system, there is no justification for subjecting a city alderman or county commissioner to more stringent federal criminal penalties than those applicable to federal officials. Nor should the mail and wire fraud statutes be employed to prosecute federal officials under a stricter standard than that created by the web of criminal and civil statutes and regulations that have been designed to regulate their conduct. Indeed, allowing a federal prosecutor to bring honest services charges against federal officials for conduct that falls outside of the carefully drawn limitations of the federal bribery and gratuity statute would fly in the face of the Supreme Court’s


91. See Czubinski, 106 F.3d at 1077.

92. For further discussion of the federalism issues raised by § 1346, see Abrams & Beale, supra note 2, (manuscript at 149-52, on file with author).
recent decision in *Sun-Diamond*, which construed the gratuities provision narrowly, leaving other conduct subject only to the enforcement mechanisms provided for the ethical rules and regulations.93

The amorphous content of the phrase “honest services” gives prosecutors enormous leeway in selecting targets, and this unguided discretion raises many additional concerns.94 Prosecutors may succumb to the desire to chalk up a victory over prominent political figures, even when the evidence shows only relatively unimportant misconduct. There is also a potential for politically motivated prosecutions, and a threat to First Amendment values.95 *Lopez-Lukis* indicates that honest services could also be used to police the ethics of political campaigns and the content of politicians’ communications with the press and public. There are, however, no administrative checks to prevent ambitious or politically motivated prosecutors from abusing the mail and wire fraud statutes.96 The vagueness of the concept of honest services also gives rise to constitutional concerns, and several commentators have suggested that § 1346 may be subject to a successful attack under the void-for-vagueness doctrine.97

The lower courts have recognized the need for boundaries to limit the concept of honest services, and have generally agreed that federal, rather than state law, should define these limitations,98 but no consensus has emerged on the proper standard. While *Sawyer* and

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94. *See ABRAMS & BEALE, supra* note 2, (manuscript at 146-49, on file with author).
96. Administrative guidance, but not control, is provided in one class of cases. Federal prosecutors are required to consult with the Public Integrity Section in all federal criminal matters that focus on violations of federal or state campaign financing laws, federal patronage crimes, and corruption of the electoral process. *See* U.S. Dept of Justice, UNITED STATES ATTORNEYS MANUAL § 9-85.210 (Sept. 1997). This provision refers explicitly to prosecutions under the mail fraud and wire fraud statutes, but—rather surprisingly—it does not mention the Hobbs Act.
98. With one exception, the federal circuits are in agreement that federal law defines the scope of honest services under the mail and wire fraud statutes, and therefore it is not necessary to show the violation of a duty created under state law. *See* WELLING 2, *supra* note 57, § 17.19(A)(iii)(a). The exception is the Fifth Circuit. *See* United States v. Brumley, 116 F.3d 728, 733-35 (5th Cir. 1997) (en banc).
Bloom required proof of intent to cause a deviation from honest conduct and misuse of office for private gain, other cases have required proof of harm to the public.\textsuperscript{99}

The decisions to date have an ad hoc quality, and fail to establish a clear and predictable standard. State law could establish clearer and more predictable standards. However, resorting to state law would be contrary to the general principle that Congress intended the mail and wire fraud statutes establish a uniform federal standard.\textsuperscript{100}

In the context of state and local corruption, defining "honest services" in terms of state law could prevent federal enforcement where it might be most needed, where states and localities fail to articulate any prohibitions against official corruption, or had standards that fall far below national norms.

Accordingly, a federal standard is needed, and this standard should meet several criteria. First, the standard should be clear enough to limit prosecutorial discretion and provide sufficient notice. Second, given federalism concerns, the standard should not require more of state and local officials than is demanded of federal officials. Finally, the definition of honest services should not be so broad that it provides an incentive for federal prosecutors to bring mail or wire fraud charges against federal officials whose misconduct does not constitute any other federal crime, because doing so would override the carefully drawn limitations in the criminal statutes that regulate federal officers and employees.

To satisfy all of these criteria, prosecutors and courts should base the definition of the phrase "honest services" on the federal statutes that criminalize conduct by federal officers and employees.\textsuperscript{101} These statutes reflect a congressional determination that the conduct in question is serious enough to warrant criminal sanctions, and more serious than conduct that is subject only to civil sanctions, discipline, or removal from office. The federal criminal statutes also establish a relatively clear standard that provides notice to the officials in question and sets limits on prosecutorial discretion. Finally, bench marking the definition of honest services on these criminal statutes would eliminate the possibility that state and local officials would be subject to more onerous federal standards than their federal counterparts, and would also ensure that federal prosecutors could not nullify the limitations inherent in the criminal statutes designed to

\textsuperscript{100} See generally Durland v. United States, 161 U.S. 306 (1896).
\textsuperscript{101} For a brief description of the principal statutes, see supra text accompanying notes 2-22.
regulate the conduct of federal officials by bringing cases against federal officials under an honest services rubric.

This proposal, of course, is well adapted only to honest services prosecutions in the governmental context, not prosecutions arising in the private sector. While private sector cases raise important concerns, they do not raise the distinctive issues that necessarily arise in cases involving the conduct of government actors, the involvement of the federal government in the affairs of state and local government, and First Amendment concerns. For these reasons, and others, it is appropriate to separate the public sector and private sector interpretation of honest services under the mail and wire acts. A separation of this nature is consistent with the understanding that the nature of a fiduciary’s duties—or honest services—varies according to the context of the relationship.


103. Thus, although our rationale is different, I agree with Professor John Coffee’s suggestions that the public and private uses of honest services be treated separately. Coffee advocates a more restrictive standard for private sector cases under § 1346 than for cases involving public fiduciaries. In his view, the shared culture provides public fiduciaries with the necessary knowledge of the standards of conduct, and no independent violation of state or federal law should be required as a prerequisite for a mail or wire fraud conviction of a public fiduciary. Coffee argues that private fiduciaries lack such a shared understanding except as it arises from state and federal law, and accordingly that mail fraud prosecutions in the private sector should be limited to cases in which the prosecution can demonstrate a violation of state law (e.g., state corporate law) or a violation of an independent federal statute (e.g., the securities laws). See id. at 463.


The words fiduciary duty are no more than a legal conclusion and the legal obligations actually imposed under that label vary greatly from relationship to relationship. Nevertheless, because fiduciary relationships in the private sector have been the subject of centuries of common law development, there is a considerable body of law based on implied or express contract governing whether particular behavior is legal. Its most notable feature, however, is the degree to which fiduciary obligations vary from relationship to relationship. Partners, employees, trustees and corporate directors are all fiduciaries, yet their legal obligations may be wholly dissimilar. While an hourly employee usually may quit a job without fearing legal action even though he leaves at a time which makes it difficult for the employer to continue business, a trustee may not so easily abandon his beneficiaries. While a trustee's actions are void or voidable if tainted by conflict of interest, the corporate officer generally can act even if he is personally interested so long as the action is fair to the corporation.

See also Securities & Exch. Comm’n v. Chenery Corp., 318 U.S. 80, 85-86 (1943) (“But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?”). The American Law Institute is now beginning discussions of a third
Conclusion

Despite the fact that Congress has not focused on state and local corruption in the post-Watergate period, the federal extortion and fraud statutes have been evolving in a manner that extends federal jurisdiction over a wide range of corrupt conduct by state and local officials. The federal program bribery provision also affords promise as a basis for federal jurisdiction over state and local officials that is not closely tied to federal funds. Bribery on the part of state and local officials is now subject to prosecution under a range of federal statutes, most notably the Hobbs Act, the federal program bribery statute, and the mail and wire fraud acts. Although each requires the prosecution to make a jurisdictional showing, these statutes do not impose a demanding standard, and most if not all official bribery could be prosecuted under one statute or another. The offer and acceptance of illegal gratuities may be an offense under the federal program bribery statute, and at least some gratuities offenses also violate the honest services branch of the mail and wire fraud statutes. Finally, federal prosecutors have brought a number of mail and wire fraud prosecutions based, at least in part, upon allegations of a wide range of other misconduct on the part of state and local officials. In effect, federal prosecutors have sought to use honest services prosecutions to reach conduct that would, if committed by a federal officer, run afoul of federal ethics rules and regulations, and statutes enforced only by civil sanctions and employee discipline. Unless this expansion is checked, it has the potential to subject state and local officials to federal criminal liability when their federal counterparts would be subject only to civil sanctions, discipline, or removal. It also has the potential to subject federal officials to criminal sanctions for this conduct, despite the fact that Congress did not deem criminal penalties necessary.

In order to place appropriate limits on the concept of honest services under the mail and wire fraud statutes, the federal courts should assume that Congress did not intend the phrase to sweep more broadly than the criminal statutes that regulate the conduct of federal officials, and should use those statutes to give content to § 1346.

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restatement of the law of agency, while recognizing the existence of the question whether "Agency remains a free-standing doctrinal subject," because of the evolution of "specific rules concerning agency relationships" in a variety of fields, including "employment law, corporation law, torts, the law of real-estate transactions." RESTATEMENT (THIRD) OF THE LAW OF AGENCY ix (Tentative Draft No. 1, 2000).