

## Essays

### SQUARE-PEG FRAUDS

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**ABSTRACT**—The square-peg fraud is a kind of case that until very recently enjoyed the widespread support of prosecutors, jurists, and the general public. Rather than punishing a scheme that rids a victim of her money or property, the square-peg prosecution has long focused on deprivations of *intangible* property. For years, enforcement actors have employed this concept to pursue innumerable varieties of corruption.

Nowhere has the square peg been more essential than in the government’s prosecution of higher education scandals. From the Varsity Blues parents who wrongfully secured elite college slots for their children, to the business school dean who shaped certain facts to inflate his school’s *U.S. News* ranking, the government has relied on various intangible property “hooks” to shove highly specific fact patterns within fraud law’s boundaries.

The aim of this Essay is to explore this square-peg phenomenon and highlight one of the less-explored reasons for being wary of it, which is its expressive effect. Whatever its benefits, the square-peg prosecution conveys counterproductive signals about victimhood, which stymie the movement towards deeper, systemic reforms.

One of criminal law’s strongest justifications is that it conveys a moral lesson. In the higher education context, however, the square peg perverts that lesson. To show a loss of property in the Varsity Blues cases, prosecutors denominated universities and standardized testing companies as “victims,” notwithstanding their moral complicity in an admissions system that is only superficially meritocratic. To establish an actionable property loss in the rankings fraud case, the government’s case treated the *U.S. News* graduate school rankings as a reliable arbiter of value. Not only are these narratives questionable, but they also promote the very competitive, winner-take-all attitude that undergirds higher education’s corruption problem.

Recent decisions by the Supreme Court and First Circuit might well dampen the appetite for intangible property fraud prosecutions. But there will always be new theories and new square pegs. Accordingly, we would all do well to take note of the square peg’s drawbacks. Using higher education as its exemplar, this Essay sets us on that path.

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*“Every single university in the United States has people doing the same exact operations.”*

—Isaac Gottlieb<sup>†</sup>

INTRODUCTION

On March 12, 2019, the federal government announced criminal charges against a “nationwide conspiracy” to cheat on standardized college

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<sup>†</sup> Jeremy Roebuck, *Ex-Temple Employees Sentenced to Probation for Fraud Tied to Business School Rankings*, PHILA. INQUIRER (May 5, 2022), <https://www.inquirer.com/news/temple-rankings-scandal-fox-school-isaac-gottlieb-marjorie-oneill-moshe-porat-20220505.html> [https://perma.cc/S27V-VYHX]. The Fox employee who made this claim was not exactly exaggerating. For a summary of ranking and academic reporting scandals within the higher education sector, see COLIN DIVER, *BREAKING RANKS: HOW THE RANKINGS INDUSTRY RULES HIGHER EDUCATION AND WHAT TO DO ABOUT IT* 64–67 (2022), which describes numerous undergraduate and graduate programs found to have provided misleading or

entrance exams and submit false applications to elite universities and colleges.<sup>1</sup> This prosecution, breathlessly dubbed “Operation Varsity Blues,” would eventually result in the conviction of fifty-six individuals.<sup>2</sup> For many, the case emphasized the degrees to which wealthy and powerful parents were willing to corrupt the process so that they might secure their children’s admission to the nation’s top schools.<sup>3</sup>

A couple of years later, in April 2021, federal prosecutors announced the indictment of seventy-four-year-old Moshe Porat, the former Dean of Temple University’s Fox School of Business (Fox).<sup>4</sup> The crux of Porat’s indictment was “that he conspired and schemed to deceive the school’s applicants, students, and donors into believing that the school offered top-ranked business degree programs, so they would pay tuition and make donations to [Fox].”<sup>5</sup> Or to put it more coarsely, Porat knowingly provided (or directed others to provide) faulty and misleading information to the *U.S. News and World Report*’s ranking service in order to pump up the rankings of Fox (raising its online program to number one) and thereby compete more

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inaccurate information to ranking programs. For the latest example, see Melissa Korn, *University of Southern California, Sued over Education-School Rankings Claims*, WALL ST. J. (Dec. 20, 2022, 2:26 PM), <https://www.wsj.com/articles/university-of-southern-california-sued-over-education-school-rankings-claims-11671561070> [https://perma.cc/2W4Z-A9DK].

<sup>1</sup> Press Release, U.S. Att’y’s Off., Dist. of Mass., Arrests Made in Nationwide College Admissions Scam: Alleged Exam Cheating & Athletic Recruiting Scheme (Mar. 12, 2019), <https://www.justice.gov/usao-ma/pr/arrests-made-nationwide-college-admissions-scam-alleged-exam-cheating-athletic> [https://perma.cc/P4XZ-RKBH].

<sup>2</sup> *Georgetown Father Found Not Guilty in Final Trial of “Varsity Blues” College Admissions Scandal*, CBS NEWS (June 16, 2022, 8:23 PM), <https://www.cbsnews.com/news/georgetown-father-amin-khoury-not-guilty-final-trial-varsity-blues-college-admissions-scandal/> [https://perma.cc/6GVA-77TS]. Only one defendant prevailed at trial and that parent’s scheme appeared to lie outside the core conduct described in the Varsity Blues complaint. *Id.* On May 10, 2023, the U.S. Court of Appeals for the First Circuit overturned one of the convictions and threw into question whether slots for admission could be considered intangible property for purposes of the wire and mail fraud statutes. *See United States v. Abdelaziz*, No. 22-1129, 2023 WL 3335870, at \*22, \*25 (1st Cir. May 10, 2023). *Abdelaziz* did not foreclose the claim in *all* cases, but instead held that slots could not *categorically* qualify as property. *Id.* at \*22. One day later, the Supreme Court held that the wire and mail fraud statutes did not encompass cases in which an actor had been deprived of valuable economic information necessary to make a discretionary allocation of money or property. *Ciminelli v. United States*, 143 S. Ct. 1121, 1127 (2023). For more on these decisions and their implications, see *infra* Part II.

<sup>3</sup> On the ways in which the admissions process has been skewed by wealth and power, see generally DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA’S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* (2019), and *infra* Part III.

<sup>4</sup> Press Release, U.S. Att’y’s Off., E. Dist. of Pa., Former Temple Business School Dean Indicted for Fraud (Apr. 16, 2021), <https://www.justice.gov/usao-edpa/pr/former-temple-business-school-dean-indicted-fraud> [https://perma.cc/Q46C-87D8].

<sup>5</sup> *Id.*

successfully for students and donors.<sup>6</sup> Porat litigated his case aggressively and lost. A judge dismissed his motion for acquittal or a new trial, a jury found him guilty of committing and conspiring to commit wire fraud, and the U.S. Court of Appeals for the Third Circuit rejected his appeal.<sup>7</sup>

Conceptually, a prospective student's scheme to defeat the undergraduate admissions process and a business school's effort to defraud a third-party rankings service share little in common. They feature different schemes, different types of defendants and victims, different institutions and intermediaries, and different segments of the higher education industry. They also cast attention on divergent phases of the admission process. Varsity Blues revolves around the student side of the admissions relationship, while Porat's case focuses on universities and the temptation to either "game" or lie to third-party ranking organizations.

Beneath the surface, however, a common problem knits the two cases together. The first of these problems is well known to anyone who works in higher education: a perceived winner-take-all market encourages universities and colleges to lie to students (or "game the system" in politer circles) and similarly impels students to mislead universities and colleges ("market oneself aggressively"). This sorry state of affairs has been the focus of higher education literature for years.<sup>8</sup>

Aside from higher education's punishing market structure, a separate characteristic binds the two cases: the government deployed the same legal

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<sup>6</sup> The U.S. Attorney's Office for the Eastern District of Pennsylvania issued a press release summarizing the indictment, that provided in pertinent part:

From at least 2010 until at least July 2018, Porat directed subordinates at Fox to provide false information to the Rankings Publications in order to inflate their rankings of Fox's online MBA program ("OMBA"), part-time MBA program ("PMBA"), executive MBA program ("EMBA"), and traditional or "global" MBA program. . . .

. . . Porat marketed the fraudulently-inflated rankings to potential Fox applicants, students, and donors in order to obtain money from them.

Press Release, U.S. Att'y's Off., E. Dist. of Pa., *United States v. Moshe Porat, et al.* (Mar. 15, 2022), <https://www.justice.gov/usao-edpa/united-states-v-moshe-porat-et-al> [<https://perma.cc/7QYE-X55H>].

<sup>7</sup> See *United States v. Porat*, No. 22-1560, 2023 WL 5009238, at \*8 (3d Cir. Aug. 7, 2023) (affirming conviction); *United States v. Porat*, No. CR 21-170, 2022 WL 685686, at \*1 (E.D. Pa. Mar. 8, 2022) (rejecting motion for acquittal or new trial); Press Release, U.S. Att'y's Off., E. Dist. of Pa., *Former Temple Business School Dean Convicted of Fraud* (Nov. 29, 2021), <https://www.justice.gov/usao-edpa/pr/former-temple-business-school-dean-convicted-fraud> [<https://perma.cc/DB7K-DGU7>].

<sup>8</sup> See, e.g., DIVER, *supra* note †, at 60–63 (decrying distortions caused by students' and colleges' dependence on rankings); DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE* 32–45 (2019) (exploring corrosive aspects of the "meritocracy myth" and its impacts on different sectors of society, including higher education). For earlier accounts of winner-take-all markets and their instantiation in higher education, see ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 147–66 (1995).

enforcement tool to convict and punish the Varsity Blues and Fox defendants. Both sets of prosecutions relied heavily on the federal mail and wire fraud statutes, laws known—until recently—for their plasticity and utility in addressing corporate and commercial malfeasance. And both cases, I shall argue here, demonstrate the shortcomings of relying on an expansive theory of criminal fraud to redress problems that cry out for a panoply of regulatory and other tools.

Over the years, the government’s aggressive use of the mail and wire fraud statutes has triggered due process and separation of powers objections, fueled by the anxiety that the government’s fraud “nets” will scoop up unwitting commercial actors and overstep boundaries that separate federal and state power.<sup>9</sup> But “lack of notice” type arguments rightfully carried little water in the school fraud cases, as both prosecutions teemed with direct evidence of knowing falsehoods and corrupt intent.<sup>10</sup> There were wiretaps and taped recordings in the Varsity Blues prosecution<sup>11</sup> and damning emails and deposition testimony in the Fox case.<sup>12</sup> If prosecutors frequently struggle to prove a defendant’s “specific intent to defraud,” no such problem plagued

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<sup>9</sup> See generally Lucian E. Dervan & Ellen S. Podgor, “White-Collar Crime”: *Still Hazy After All These Years*, 50 GA. L. REV. 709 (2016) (mapping the murky lines between street and white-collar crimes and arguing that more specific line drawing on certain offenses would lead to greater transparency on how offenses are charged); David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371 (2008) (explaining how mail, wire, and honest services fraud have become important tools for prosecutors). For an excellent account of how prosecutorial discretion and judicial constraints can prevent broad laws from devolving into prosecutorial fiat, see Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1976 (2006), which unpacks and defends the “consciousness of wrongdoing” constraint that has been added to “novel” examples of fraud.

<sup>10</sup> “[S]ome of the most damning evidence against [Moshe Porat] came from his own mouth. Porat did not testify at his criminal trial, but the Government played dozens of excerpts taken from his five days of sworn, videotaped deposition testimony in his ill-conceived defamation lawsuit against Temple.” *Porat*, 2022 WL 685686, at \*5 (explaining reasons for rejecting Porat’s posttrial motions for a judgment of acquittal or a new trial).

<sup>11</sup> Kirk Carapezza & Sean Corcoran, *Listen to Wiretapped Tapes from the First Week of the Varsity Blues Trial*, GBH NEWS (Sept. 17, 2021), <https://www.wgbh.org/news/education/2021/09/17/listen-to-wiretapped-tapes-from-the-first-week-of-the-varsity-blues-trial> [<https://perma.cc/N5WQ-HWDR>].

<sup>12</sup> *Porat*, 2022 WL 685686, at \*1 (citing emails exchanged with a subordinate “about the effect of the false information on the ranking of the [business school’s] online MBA program”).

either the Varsity Blues or Fox prosecutions.<sup>13</sup> Nearly all of the defendants knew exactly what they were doing, to whom they were lying, and why.<sup>14</sup>

The underexplored story of these two cases is that by skirting and stretching fraud law's basic tenets, prosecutors unwittingly generated a series of unfortunate narratives. Neither Varsity Blues nor Fox's case represented a standard instance of mail or wire fraud. Instead, they were square pegs, forced into a statutory round hole to satisfy fraud law's property element. It is this phenomenon that this Essay aims to uncover and highlight as one of the reasons for being wary of innovations in criminal fraud prosecutions. The problem is not simply that we punish unwitting defendants for marginal behavior. Nor is it that we enable the federal government to interfere with state prerogatives. Rather, the underexplored problem with the square-peg fraud is that we send confusing and counterproductive signals to victims, third parties, and the general public.<sup>15</sup>

Prosecuting someone for fraud tells the public more than the bare fact that "Joe" is a criminal or a deceptive person. It simultaneously conveys additional information, such as who counts as a victim, which kinds of harms and institutions the government is prepared to defend and protect, and which kinds of activities the public can safely engage in on an ongoing basis. The criminal justice system conveys these messages, not necessarily through a prosecutor's explicit statements in court (although those certainly matter) but more broadly through the implicit messages a particular prosecution

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<sup>13</sup> On the difficulties of establishing the "specific intent to defraud," see Samuel W. Buell, *The Responsibility Gap in Corporate Crime*, 12 CRIM. L. & PHIL. 471, 473 (2018). For arguments in favor of such hurdles, see Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 578–89 (2002), which advocates for interpreting more stringent mens rea obligations for statutes that threaten disproportionately high terms of imprisonment.

<sup>14</sup> In the *Abdelaziz* case, the prosecutors declined to prove that the parent-defendants knew that their corrupt "side" payments (donations of hundreds of thousands of dollars) were received by coaches or other administrators and not by some "university account." The evidence nevertheless established that the defendants knew that they were grossly misrepresenting their students' athletic prowess. See *United States v. Abdelaziz*, No. 22-1129, 2023 WL 3335870, at \*4–7 (1st Cir. May 10, 2023) (explaining that defendants were aware they were paying money to have their children receive admission through a "side door" but that they could have believed their payments were sent to a "university account").

<sup>15</sup> On law's expressive and "social meaning," see Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351 (1997), which equates expression as "all of the ways in which the law creates and shapes information about the kinds of behavior that members of the public hope for and value, as well as the kinds they expect and fear," and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996), which defines law's expressive function as "the function of law in 'making statements' as opposed to controlling behavior directly."

communicates through the government’s reliance on and application of certain legal doctrines.<sup>16</sup>

It is one matter when these messages are exactly the ones our society wishes to convey. But when the messages themselves are at odds with what most of us believe, or with what government officials say in other contexts, then the square-peg fraud prosecution does some real damage.

To build this argument, it is important to explain how the Varsity Blues and Fox cases diverge from what I will refer to throughout this piece as the “paradigmatic” case of fraud. The paradigmatic case is not synonymous with legally mandated rules of fraud, but rather the scenario that most easily comes to mind when laypersons and experts use the word “fraud.”<sup>17</sup>

In a paradigmatic case, an individual—call her Alice—devises a scheme of lies to induce a victim—let’s say Bruce—to give her his money or property. Critically, Alice’s lies must at least threaten a loss of property to Bruce. There are many other lies Alice might tell Bruce. Those lies might well be hurtful and harmful, but if they do not contemplate the loss of money or property, they cannot serve as the basis of mail or wire fraud.<sup>18</sup> As will be discussed below, the *legal* definition of fraud has gradually outgrown this paradigm, creating a series of challenges for legal actors.

Despite the lies in the school fraud cases, it is difficult to identify a loss insofar as that term is defined under a conventional model. There is no doubt, for example, that the Varsity Blues parents paid their standardized testing fees and school tuition, and no one doubts that Fox is a legitimate educational institution that provided the class instruction and other features of a typical business school.

Rather, the losses in both cases were at least partially “intangible,” a legal concept that has increasingly attracted skepticism among the practitioners and jurists who try and encounter fraud cases.<sup>19</sup> The intangibles in both the Varsity Blues and Fox cases were many. University victims lost their power to control and allocate their scarce admission slots. They also

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<sup>16</sup> “Under the expressive view, the signification of punishment is moral condemnation. By imposing the proper form and degree of affliction on the wrongdoer, society says, in effect, that the offender’s assessment of whose interests count is wrong.” Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996). For an expressive account that explicitly considers the offender’s victims and the potential messages a prosecution sends them, see Jack Boeglin & Zachary Shapiro, *A Theory of Differential Punishment*, 70 VAND. L. REV. 1499, 1503 (2017), which contrasts “victim-facing justifications” for punishment that are either grounded in expressive theories that grant dignitary “respect to victims for the harm that they have suffered” and those that “recognize victims’ desire for [vengeance].”

<sup>17</sup> On the existence and importance of paradigms in white-collar crime cases, see MIRIAM H. BAER, *MYTHS AND MISUNDERSTANDINGS IN WHITE-COLLAR CRIME* ch. 5 (forthcoming 2023).

<sup>18</sup> See discussion *infra* Part I.

<sup>19</sup> See discussion *infra* Part II.

were deprived of the “honest services” of the university coaches who accepted personal bribes. The students who attended Fox were defrauded of the opportunity to make a genuine comparison between the schools from which they had received offers. They were also ultimately deprived of the prestige that attaches to attending a “number one” ranked school.<sup>20</sup>

Some might argue that the concerns raised in this Essay have been laid to rest by the Supreme Court’s recent decision, *Ciminelli v. United States*, in which a unanimous Court rejected the claim that the “right to control” one’s assets is synonymous with “property” for purposes of the wire and mail fraud statutes.<sup>21</sup> That view is, at best, premature, and it misses the ways in which the Varsity Blues and Fox prosecutions produce a case study—generalizable to crimes in other contexts—in the expressive shortcomings of square-peg prosecutions. Even if the *Ciminelli* opinion has extinguished one theory, it cannot address the many alternatives that will surely arise in its wake. Accordingly, those who value creative (and aggressive) enforcement approaches to white-collar crime would do well to consider the normative and expressive shortcomings of the square-peg prosecution.

Many are aware of criminal law’s expressive dimension, whereby a trial or conviction tells a pithy story that enters society’s consciousness and subtly alters subsequent behavior. It is because of this expressive dimension that we pursue criminal prosecutions, even though we are well versed in their drawbacks. On net, we assume the expressive dimension makes criminal prosecution worth its weighty costs. But as these cases demonstrate, sometimes a criminal prosecution tells a story that all but solidifies the status quo. In proving that an individual meets the law’s definition of *villain*, the prosecutor chooses and denominates *victims* who are not really victims at all. Even worse, such prosecution just as callously ignores other victims, whose diffuse harms fall outside of criminal law’s definitional boundaries. Thus, the criminal prosecution ends up telling a story that is inaccurate, incomplete, and likely to encourage institutions to engage in more harm and not less.<sup>22</sup>

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<sup>20</sup> See discussion *infra* Part III. The Third Circuit nevertheless conceptualized the loss as a tangible loss of money insofar as the students paid tuition for a lesser brand. See *United States v. Porat*, No. 22-1560, 2023 WL 5009238, at \*6 (3d Cir. Aug. 7, 2023) (concluding that Fox’s high ranking could have played an essential role in its students’ decision to attend the school).

<sup>21</sup> 143 S. Ct. 1121, 1127 (2023) (“The right-to-control theory cannot be squared with the text of the federal fraud statutes, which are ‘limited in scope to the protection of property rights.’” (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987))).

<sup>22</sup> For similar arguments about criminal law’s shortcomings in the bribery context, see Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 *FORDHAM L. REV.* 463, 465 (2015).



Neither the Varsity Blues nor the Fox prosecutions facilitated the kind of deep structural reform that is necessary to prevent future abuses.<sup>23</sup> Indeed, these cases ably reflect the high-stakes, competitive markets that both students and schools routinely navigate. Amidst this punishing backdrop, only a naïve observer would conclude that a criminal prosecution—even a highly publicized one—is sufficient to rebut the incentives to employ lies and deception to place one’s application or school on a better footing.

Stretching criminal law’s meaning to accommodate square-peg cases promotes perverse consequences. To show a loss of property, the square-peg fraud dynamic denominates as “victims” institutions and organizations who should be the very *targets* of structural reform. To mount a claim of “loss of control,” the square-peg fraud conveys the questionable message to the public that a magazine’s rankings of graduate schools are valuable and reliable, and ironically increases the likelihood that consumers will continue to rely on such rankings in the future *and potentially engage in admissions fraud*. Thus, the very enforcement tool used to *punish* higher education’s rankings fraud reinforces a pernicious, winner-take-all system that *encourages* admissions fraud. Rather than putting an end to admissions and rankings fraud, the Varsity Blues and Fox cases teach higher education’s actors that the key lesson is to avoid getting caught.

The remainder of this Essay examines this problem in four parts. Part I opens with an overview of mail and wire fraud, contrasting paradigmatic examples with intangible property fraud cases, many of which have arguably survived the Supreme Court’s latest foray into this area. Part II describes the growing category of schemes that contemporary courts have rejected as falling under the federal fraud label. Part III treats Varsity Blues and Fox as case studies in square-peg frauds. It examines the theories that undergirded the respective prosecutions, the legal arguments that were lodged by various defendants, and the civil cases that succeeded in some instances, but failed in many others. Finally, it mines the implications of relying on federal fraud law to regulate and punish objectionable practices in higher education. Part IV explains why square-peg prosecutions are unable to redress higher

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<sup>23</sup> Demonstrating prosecutorial naïveté in this area, one outlet reported in the wake of Porat’s conviction:

“The hope is that this case sends a message to other college and university administrators that there are real consequences to making representations that students and applicants rely on,” Assistant U.S. Attorney Mark B. Dubnoff said. “So many people turn to these rankings . . . to help them make informed decisions of where to go to college, graduate school, and it’s important that people are honest and fully truthful with the representations they make.”

John A. Byrne, *Arrogance Is What Ultimately Caused This B-School Dean’s Downfall*, YAHOO (Dec. 2, 2021) (alteration in original), <https://money.yahoo.com/arrogance-ultimately-caused-b-school-061434546.html> [<https://perma.cc/HW3P-29C4>].

education's fraud problem and sketches several alternatives to criminal prosecution.

## I. PARADIGMS AND SQUARE PEGS

### A. *The Federal Definition of Fraud*

In the late 1880s, John Durland made fraudulent promises to convince unsuspecting investors to part with their money. Acting as the president of Provident Investment Company, Durland advertised and sold “bonds” that promised to pay their holders a handsome guaranteed profit upon redemption. There was, however, just one catch: Durland had no intention of paying the bonds as described in his offering circular. His promises of future performance were the hollow components of a newfangled postal scam.<sup>24</sup>

No one would have had any difficulty discerning Durland's state of mind. The sticking issue was instead the fact that Durland's scheme relied on statements of *future* performance as opposed to representations of *existing* fact.<sup>25</sup> Common law crimes such as “false pretenses” required evidence of the latter. The issue in *Durland v. United States* was whether the new mail fraud statute, enacted in the decades following the Civil War, was similarly constrained.

The Court resolved the question with little hesitation: Congress had purposely enacted a broad federal fraud law, to protect both the postal service as well as the victims too unsophisticated to protect themselves from the Durlands who promised “large returns on small investments.”<sup>26</sup> What mattered, the Court explained, was that Durland used the mail to devise a scheme to defraud.<sup>27</sup> If the paradigmatic fraud case had once been constricted by a certain type of misrepresentation (i.e., lies about past or existing performance), it no longer suffered such limitations. As Professor Daniel Richman points out, far from pushing back on this expansion, Congress codified it in its 1909 version of the revised mail fraud statute.<sup>28</sup>

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<sup>24</sup> *Durland v. United States*, 161 U.S. 306, 312 (1896).

<sup>25</sup> *Id.* at 312–13.

<sup>26</sup> *Id.* (“It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. . . . In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.”); see also Daniel Richman, *Defining Crime, Delegating Authority—How Different Are Administrative Crimes?*, 39 YALE J. ON REGUL. 304, 324 (2022) (using *Durland* as an example of the Court's and Congress's willingness to expand federal fraud law's reach).

<sup>27</sup> *Durland*, 161 U.S. at 315.

<sup>28</sup> Richman, *supra* note 26, at 324.

In the century and a quarter that has followed, courts and commentators have periodically echoed *Durland's* themes: that fraud is by its nature pernicious and evasive; that its victims are as hurt by one type of lie as by another; and that Congress's broad language was deliberately constructed to protect the unsuspecting public and deny wrongdoers the use of federal instrumentalities such as the postal service and interstate wires.<sup>29</sup>

Although *Durland's* simple bond scheme fell outside the common law's definition of false pretenses, it sits easily within the category of crimes that we might refer to today as paradigmatic or conventional frauds.<sup>30</sup> The basic idea—Alpha makes statements or misrepresentations to Beta in order to induce Beta to part with money or property—can easily be found in public and private settings, affecting everything from the most prosaic transactions up to and including high-stakes international finance. Much of our federal criminal code reflects this breadth, punishing a wide range of frauds, from general prohibitions such as the mail and wire fraud statutes, to laws directed at more specific schemes concerning health care, banking, and government procurement.<sup>31</sup>

The legal elements of a federal fraud case are relatively few, requiring the prosecutor to prove only that the defendant (a) devised or participated in a scheme to defraud, (b) with a specific intent to defraud, and (c) contemplated using the mails or wires incident to an essential part of the scheme.<sup>32</sup> Moreover, for a criminal case to proceed, one need not prove the scheme's success nor an actual loss of property.<sup>33</sup> Criminal fraud is, like conspiracy and attempt, an inchoate crime.<sup>34</sup> It is therefore enough that a person's loss of money property is the contemplated target of a scheme.

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<sup>29</sup> See, e.g., Buell, *supra* note 9, at 1973–75, 1990 (tracing fraud law's history as an adaptable doctrine to broadly combat evolving permutations of deceptive wrongdoing).

<sup>30</sup> On paradigms and their relationship to criminal law, see BAER, *supra* note 17, ch. 5, which summarizes literature investigating the connection between linguistic theories of families and paradigms and statutory interpretation. For a useful explanation of linguistics and its implications for statutory construction, see Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 62–86 (1998).

<sup>31</sup> See, e.g., 18 U.S.C. § 1341 (mail fraud); *Id.* § 1343 (wire fraud); *Id.* § 1347 (health care fraud); *Id.* § 1344 (bank fraud); *Id.* § 1031 (government procurement fraud).

<sup>32</sup> See, e.g., *United States v. Spalding*, 894 F.3d 173, 181 (5th Cir. 2018) (listing the three elements); 2 MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL ¶44.01, at 44-3 (2023) (setting forth jury instructions for the elements of mail, wire, and health care fraud).

<sup>33</sup> *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000) (“[T]o establish a scheme to defraud for purposes of the wire fraud statute the prosecution need not show that the scheme in fact resulted or would have resulted in a loss to the person who is the target of the plan.”).

<sup>34</sup> See *United States v. Lupton*, 620 F.3d 790, 805 (7th Cir. 2010) (“The wire fraud statutes criminalize the fraudulent acts undertaken to secure illicit gains, not their ultimate successes.”); *United States v. Neal*, 294 F. App'x 96, 101 (5th Cir. 2008) (“Wire fraud is complete when a defendant makes a

There are variations to this recipe. When the scheme relies on lies or misstatements, they must be “material” or naturally likely to affect someone’s decision to part with her money.<sup>35</sup> But as a practical matter, materiality is hardly the limitation one might fear it to be. Perhaps that is because prosecutors already screen cases for potential jury and juridical appeal.<sup>36</sup> Compared to civil fraud—where evidence of reliance and damages are required—criminal fraud’s materiality element appears relatively tame.<sup>37</sup>

The “specific intent to defraud” prong has, in many commentators’ minds, proven to be the highest hurdle for most prosecutors. Fraudsters—at least effective ones—rarely declare out loud their nefarious intentions. Accordingly, the government must often rely on circumstantial evidence to prove the fraudster’s intent to swindle his mark. For some schemes, the conduct itself—if it is outrageous enough or steeped in obvious falsehoods—proves the mental state.<sup>38</sup> It is not difficult to discern the mens rea of the telephone marketer who purposely targets the elderly and promises a too-good-to-be-true insurance policy that is in fact completely made up. Juries do not need much else to convict. But in other settings, where operational business decisions are bound up in risk and transactions are many, the line between fraud and negligent (or even reckless) conduct is murkier.<sup>39</sup> For these contexts, more evidence of specific intent is needed. Accordingly, secret bank accounts, profligate spending, and efforts to destroy and cover

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communication to advance what he knows to be a fraudulent scheme. . . . Because the *actus reus* is the communication, whether the defendant actually obtains the funds or property he sought is immaterial to his criminal liability.”)

<sup>35</sup> See *Neder v. United States*, 527 U.S. 1, 16 (1999).

<sup>36</sup> Cf. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2118 (1998) (arguing that the much-idealized adversarial system of justice is in fact an administrative one); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 *LAW & CONTEMP. PROBS.* 23, 23 (1997) (describing meetings with defense attorneys in white-collar cases in which the attorneys’ appeals “were addressed to prosecutorial discretion” and not legal arguments *per se*).

<sup>37</sup> See *Neder*, 527 U.S. at 24–25.

<sup>38</sup> As I have argued elsewhere:

The garden-variety confidence scheme is easy to prove because the actions themselves imply maleficence. If a smooth talker promises to invest an elderly person’s money in a real estate transaction and instead uses the funds to purchase his own Picasso, juries can ably infer fraudulent intent. They don’t need a wiretap or written confession to know what’s going on. The purchase of the Picasso does all the work.

BAER, *supra* note 17, ch. 5 (internal citations omitted); see also 1 PETER HENNING, *CORPORATE CRIMINAL LIABILITY* § 8:10, at 913–14 (3d ed. 2020) (“[T]he intent of the crime . . . [may be] shown by the scheme itself.” (quoting *United States v. Bruce*, 488 F.2d 1224, 1229 (5th Cir. 1973))).

<sup>39</sup> On the ways in which the hindsight bias magnifies this problem, see Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 *NW. U. L. REV.* 773, 773 (2004), which notes that “[w]hat looks today like fraud, in many circumstances might have once been nothing more than misplaced optimism.”

up evidence all do the work of demonstrating someone's "specific intent" to defraud. None of these "badges of guilt" are themselves elements of the crime, but they nevertheless help the government enforcement agency decide whether to press forward with a case.<sup>40</sup>

### B. *The Emergence of Square Pegs*

Decisions like *Durland* paved the way for more cases like it, and today, it does not matter whether one's material lies pertain to future promises or statements of existing fact. Notice, however, that *Durland* looks and feels very much like a conventional case: Offender A (*Durland*) deprives victims B (investors) of their money by lying to them and using the mails to do it. The case's symmetry remains intact: *Durland* *obtains* money, and his investors *lose* that same money.

Over time, fraud prosecutions expanded to include other types of schemes, which no longer caused or threatened direct losses of property or money, but which nevertheless interfered with a victim's decision-making process and discretionary allocation of resources or funds. In all of these cases, the scheme did not necessarily cause a loss of money, but it induced the decision-maker to do something that she might not otherwise have done under more transparent circumstances. These square-peg cases eventually evolved into the categories now known as honest services and intangible property fraud.

#### 1. *The Birth of Honest Services Fraud*

Consider a different type of scheme from that in the *Durland* case. Instead of selling a fake bond, imagine *Durland* sold a legitimate investment, perhaps securities in real estate he was developing. Imagine, as well, that he marketed that investment to a state's investment fund. Assume all of the statements he made in his offering documents were accurate and true, that the state received the return on its investment that it expected, and that *Durland* consequently received fees no greater than which he openly sought. One might call that a win-win for each side of the transaction—it certainly would not be fraud, much less a crime worthy of prosecution. Yet, it *would* be a crime if we later learned that *Durland* had bribed the state's comptroller to induce him to approve the investment. *Fine*, one might respond, *but bribery is different from fraud*. As a practical matter, that is indeed true, but under today's federal code, bribery *is* often prosecuted as "honest services

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<sup>40</sup> See Buell, *supra* note 9, at 2000 ("An inquiry relying on badges of guilt is concerned with an actor's outward behavior that manifests consciousness of wrongdoing.").

fraud.”<sup>41</sup> That is, we would say that Durland and the comptroller were guilty of conspiring to deprive the state’s citizens of the comptroller’s “honest services” and the right to control its property with accurate information.<sup>42</sup> The comptroller’s honest services, and the polity’s right to make decisions based on accurate information, may well be valuable and worthy of protection. They are, however, not the same thing as money or tangible property.

In the 1960s and ’70s, prosecutors began to see a use for fraud law beyond its conventional confines. Bribery, corruption, and organized crime compromised city and state governments. State and local prosecutors arguably lacked proper incentives and resources to pursue local- and state-level corruption.<sup>43</sup> Federal prosecutors were somewhat limited in the tools they could use. The federal bribery statute, 18 U.S.C. § 201, applied only to federal officials. The federal program bribery statute, 18 U.S.C. § 666, had yet to be enacted.<sup>44</sup> And the Hobbs Act, which punished (among other things) extortion under color of official right, was still a relatively young statute.<sup>45</sup> Prosecutors accordingly sought to deter corruption by prosecuting bribery as a deprivation of one’s right to honest services.<sup>46</sup> The city councilman who stealthily accepted money or other tangibles in exchange for his vote on a piece of legislation was said to *defraud* his constituents of their intangible right to honest services, even if the legislation itself was inevitable or represented good public policy.

In some courtrooms, honest services proved elastic enough to apply to other instances of corrupt conduct, such as those in which the offender

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<sup>41</sup> 18 U.S.C. § 1346; see Randall D. Eliason, *Surgery with a Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929, 932–33 (2009).

<sup>42</sup> BAER, *supra* note 17, ch. 5.

<sup>43</sup> On the historical relationship between federal and state enforcers and the growth of federal criminal jurisdiction, see Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 CRIMINAL JUSTICE 2000, at 81, 90 (Charles M. Friel ed., 2000), which describes prosecutors’ use of mail and wire fraud statutes to address a wide variety of otherwise local harms.

<sup>44</sup> Section 666 was added to the Code in 1984. On § 666’s history and purpose, see *Sabri v. United States*, 541 U.S. 600, 606–07 (2004), which explains the need to fill regulatory gaps in the federal bribery framework. See also George D. Brown, *Stealth Statute—Corruption, the Spending Power, and the Rise of 18 U.S.C. § 666*, 73 NOTRE DAME L. REV. 247, 276 (1998). For a more contemporary analysis, see Rohit D. Nath, Comment, *Corruption Clarified: Defining the Reach of “Agent” in 18 USC § 666*, 80 U. CHI. L. REV. 1391, 1423 (2013).

<sup>45</sup> On the Hobbs Act’s history and eventual application to bribe cases (even those in which there was no affirmative act of inducement by a public official), see *Evans v. United States*, 504 U.S. 255, 261–65 (1992), which explains that Congress passed the Act in 1946 as a means of shoring up anti-racketeering efforts against organized crime within labor unions.

<sup>46</sup> They could have also relied on the Travel Act, 18 U.S.C. § 1952, which prohibits the use of interstate travel or facilities to engage in extortion or bribery. On the Travel Act’s enactment and its use by prosecutors in the 20th century, see Richman, *supra* note 43, at 88, which describes the 1961 Act as one of the “most sweeping measure[s]” that expanded federal criminal jurisdiction.

accepted kickbacks; to fact patterns involving *private* violations of fiduciary duty and commercial bribery; and (most controversially) to situations in which an offender failed to disclose a conflict of interest.<sup>47</sup> This last extension—whereby a person’s failure to disclose a conflict could transform an otherwise humdrum transaction into a federal fraud case—drew criticism not only from those who feared the expansion of Executive Branch power but also those who believed prosecutors and lower court judges had effectively rewritten the mail and wire fraud statutes to capture local graft and diffuse instances of immorality.<sup>48</sup> Writing of this time period, Professor Richman astutely observes:

DOJ prosecutors have at times been spectacularly creative in devising legal theories to extend the range of congressional enactments. The legislators who enacted the Federal mail fraud statute, for example, probably did not imagine that the provision would be used to prosecute a limitless variety of breaches of fiduciary duty . . . .<sup>49</sup>

To the pragmatist well schooled in federal enforcement power, the mail and wire fraud statutes’ elasticity serves as a necessary tool in the war on white-collar crime.<sup>50</sup> To those more skeptical of federal criminal power, the honest services fraud theory underscores the collapse of certain boundaries, between state and federal criminal jurisdiction, and between legislative and executive power.<sup>51</sup>

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<sup>47</sup> For a useful history of the honest services fraud concept and its evolution throughout lower courts, see *Skilling v. United States*, 561 U.S. 358, 399–402 (2010). For an extensive catalogue of trial and appellate court cases that applied and affirmed the application of the honest services fraud theory to various instances of kickbacks, private-sector bribery and self-dealing, see *United States v. Rybicki*, 354 F.3d 124, 139–41 (2d Cir. 2003). In *Skilling*, the Supreme Court excised the self-dealing cases in order to save the honest services fraud statute (18 U.S.C. § 1346) from vagueness claims. 561 U.S. at 411–12 (limiting honest services to bribery and kickbacks).

<sup>48</sup> See, e.g., Mills & Weisberg, *supra* note 9, at 1438 (“Section 1348, with all its tools of inchoateness, might suggest a way for prosecutors to use mail and wire fraud even more expansively as a substitute for SEC laws, with the only necessary linkage being the arguably minimal connection with a security.”).

<sup>49</sup> Richman, *supra* note 43, at 90.

<sup>50</sup> “To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love.” Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980).

<sup>51</sup> Mills & Weisberg, *supra* note 9 **Error! Bookmark not defined.**, at 1399, 1401. Professor William Stuntz has offered one of the strongest reasons for rejecting federal criminal law’s expansion, particularly in regard to wire and mail fraud:

So the public gets its symbolic condemnation, and the justice system enforces a defensible set of standards for criminal dishonesty. What could be wrong with that? The answer lies in three features of the case selection process. First, prosecutors are the ones defining what counts as core fraud or perjury. Those definitions are unwritten and unreviewable, and they vary from place to

Where fraud was concerned, the Supreme Court partially restored these boundaries in two stages. First, in the 1987 *McNally v. United States*, it held that prosecutors and lower courts had stretched the mail and wire fraud statutes too thin.<sup>52</sup> The scheme to defraud someone still had to be grounded in *property*, and the right to another person's "honest services" was far too "ethereal" to serve as the property described by the mail and wire fraud statutes.<sup>53</sup> If Congress wanted to devise a statute that punished bribery and kickback schemes, it needed to clearly say so.<sup>54</sup> And that is exactly what Congress did. In 1988, Congress enacted 18 U.S.C. § 1346, which simply states that "honest services fraud" is among the schemes criminalized by the mail and wire fraud statutes.<sup>55</sup> That obtuse language eventually necessitated the Supreme Court's second foray into this area, wherein the Court held that "honest services fraud" applied only to bribery and kickback schemes and not to undisclosed conflicts of interest or self-dealing.<sup>56</sup> Unlike *McNally*, the Court's later announcement triggered no response by Congress. Accordingly, the honest services fraud concept remains tethered to bribery and kickback law.

## 2. *Intangible Property Fraud: The Right to Control . . . Something*

As courts were grappling with honest services fraud cases, a related but distinct "square peg" became an issue, namely those cases where fraud's subject was *intangible* property.<sup>57</sup> The intangible property case features a

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place and from time to time, because they are wholly discretionary. That is a scandal: it means criminal law is not, in any meaningful sense, law at all.

William J. Stuntz, *Reply: Criminal Law's Pathology*, 101 MICH. L. REV. 828, 833 (2002).

<sup>52</sup> 483 U.S. 350, 361 (1987).

<sup>53</sup> The "ethereal" language actually arose in a companion case: "The [*Wall Street Journal*], as Winans' employer, was defrauded of much more than its contractual right to his honest and faithful service, an interest too ethereal in itself to fall within the protection of the mail fraud statute . . ." *Carpenter v. United States*, 484 U.S. 19, 25 (1987) (contrasting a misuse of an employer's confidential information with the "honest services" theory, which the *McNally* court had rejected as too far afield of the mail and wire fraud statutes). For a helpful rationalization of the *McNally*, *Carpenter*, and *Skilling* cases, see *United States v. Hager*, 879 F.3d 550, 553–55 (5th Cir. 2018), which summarizes the trajectory of the honest services concept, from *McNally* to § 1346, to *Skilling*, and explaining that the *Carpenter* and *Skilling* cases both "establish the same, fundamental distinction between property rights and the right of honest services."

<sup>54</sup> *McNally*, 483 U.S. at 360.

<sup>55</sup> "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

<sup>56</sup> *Skilling v. United States*, 561 U.S. 358, 409 (2010).

<sup>57</sup> See, e.g., *Carpenter*, 484 U.S. at 25 (noting that a journalist's unauthorized disclosure of the *Wall Street Journal*'s confidential information interfered with the *Journal*'s intangible property right, which could serve as the basis of a mail or wire fraud prosecution). "The *Carpenter* case, coming mere months after *McNally*, allowed the Court to reexamine *McNally* to determine what constitutes 'property' for



type of “property” that the victim values but that is neither money, nor real or personal property.<sup>58</sup>

For certain types of intangibles, the analogy to tangible property fraud is straightforward. If I lie to my employer in order to deprive it of its confidential information so that I may use it for my personal benefit, I have deprived the employer of “intangible property,” a conclusion that jurists have reached in many cases.<sup>59</sup>

Taking the analogy a few steps further (though perhaps too many), if I lie to a bank on a mortgage application, thereby depriving the lending institution of its opportunity to accurately price and allocate risk, I also have deprived the bank of an intangible property right (at least in some courts), as I have also placed it at risk of a very tangible future loss.<sup>60</sup> The same could be said for a life insurance company were I to withhold information regarding my penchant for cigarette smoking or unhealthy behaviors. In each of the preceding instances, I have defrauded an institution that is already steeped in the business of analyzing and pricing risk; the loss in these cases therefore feels more far more concrete than rank speculation.<sup>61</sup>

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purposes of mail fraud.” Ellen S. Podgor, *Carpenter v. United States: Did Being Gay Matter?*, 15 TENN. J.L. & POL’Y 116, 122 (2020) (examining *Carpenter*’s factual and social context and theorizing ways in which feelings about gay rights impacted the prosecution and its outcome).

<sup>58</sup> For a useful discussion of the differences between tangible and intangible property (as well as intangible property and honest services), see Brette M. Tannenbaum, Note, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud After Skilling*, 112 COLUM. L. REV. 359, 393 (2012).

<sup>59</sup> *Carpenter*, 484 U.S. at 28; see also *United States v. Shanshan Du*, 570 F. App’x 490, 504 (6th Cir. 2014) (discussing theft of trade secrets as the basis of wire fraud prosecution); *United States v. Poirier*, 321 F.3d 1024, 1030 (11th Cir. 2003) (“The object of the scheme in this case, like the one in *Carpenter*, was to take the victim’s confidential information by disclosing it early to those who could profit from that disclosure.”); *Belt v. United States*, 868 F.2d 1208, 1213 (11th Cir. 1989) (“We see little difference in the character of the confidential information involved in this case and that involved in *Carpenter*. In both cases, the confidentiality of the information was integral to the proper operation of the employer’s business and to its reputation.”); *United States v. Czubinski*, 106 F.3d 1069, 1074 (1st Cir. 1997) (“The government correctly notes that confidential information may constitute intangible ‘property’ and that its unauthorized dissemination or other use may deprive the owner of its property rights.”); *United States v. Miller*, 997 F.2d 1010, 1017 (2d Cir. 1993) (“[A] contract right can constitute § 1341 property.”).

<sup>60</sup> See, e.g., *United States v. Conti*, No. CR-08–05, 2010 WL 4613798, at \*1, \*5 (W.D. Pa. Nov. 5, 2010) (discussing fraudulent bank loan applications in the context of intangible property rights). For a discussion of *Conti*, see Tannenbaum, *supra* note 58 **Error! Bookmark not defined.**, at 402. For a rejection of the “accurate information” theory as it relates to the pricing of risk, see *United States v. Lewis*, 67 F.3d 225, 233 (9th Cir. 1995), where the court refuses to recognize “intangible right to make an informed lending decision.” Other than the right to control confidential information, it is questionable that any of the rights described in this paragraph survive the Court’s decision in *Ciminelli*.

<sup>61</sup> “[S]uppose that the applicant falsely claims not to own or ride a motorcycle, or to engage in some other similarly dangerous activity. Surely such misrepresentations would deprive the insurer of ‘potentially valuable economic information.’” *United States v. Bunday*, 804 F.3d 558, 565–66, 576 (2d

For other intangibles, the “property” claim appears outlandish. Consider several of the broader applications of the “right to control” theory,<sup>62</sup> which are likely foreclosed by the Supreme Court’s decision in *Ciminelli*.<sup>63</sup> The Second Circuit initially articulated the “right to control” case as one in which the fraudster deprives an actor of the relevant information needed to make a “discretionary economic decision” to control her resources or property.<sup>64</sup> Even before its demise under *Ciminelli*, it was unclear whether any material interference with one’s discretionary economic decisions produced a deprivation of property or whether only some incursions fit the bill.<sup>65</sup> The judiciary’s difficulty in answering these questions does not bode well for a legislative effort, should Congress decide to enact a statute in response to the Supreme Court’s latest decision.<sup>66</sup>

*Ciminelli* was a bid-rigging case that very explicitly struck down the Second Circuit’s “right to control” theory without addressing additional theories of intangible property.<sup>67</sup> Thus, it is unclear how and whether it implicates intangible property theories that have arisen in the educational context, such as those that treat a school’s credential or credentialing decisions as a form of property in the hands of the institution.

Numerous courts have recognized a property interest in an educational institution’s credential. Thus, the graduate student whose dissertation

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Cir. 2015) (quoting *United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991)) (affirming sophisticated bait-and-switch scheme involving life insurance brokers); *United States v. Viloski*, 557 F. App’x 28, 33 (2d Cir. 2014) (“The intangible property theory of mail fraud recognizes the economic value in the nondisclosure of information that would impose a risk of loss, regardless of whether loss is actually suffered.”).

<sup>62</sup> Jennifer Bouriat, *The Right to Control Theory—What It Is, How It Is Used, and How to Defend Against It*, 44 CHAMPION 38, 39 (2020) (“In right to control theory prosecutions, the intangible property at issue is ‘potentially valuable economic information’ and its resulting effect on the control of assets.” (quoting *United States v. Finazzo*, 850 F.3d 94, 108 (2d Cir. 2017))).

<sup>63</sup> *Ciminelli v. United States*, 143 S. Ct. 1121, 1127 (2023). Whether certain control theory cases could be recast or defended on other grounds remains to be seen.

<sup>64</sup> *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021) (“[C]ognizable harm occurs where the defendant’s scheme denies the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions.” (quoting *Binday*, 804 F.3d at 570)), *rev’d sub nom. Ciminelli*, 142 S. Ct. at 2901.

<sup>65</sup> Tai H. Park, *The “Right to Control” Theory of Fraud: When Deception Without Harm Becomes a Crime*, 43 CARDOZO L. REV. 135, 182 (2021) (“[N]otably absent from the [Second Circuit’s discussion in one of its major right to control precedents] is any analysis of how or in what sense right to control assets becomes a ‘property’ interest . . .”). Park goes on to catalogue the circuits that have followed the Second Circuit’s lead and those that have rejected the “right to control” theory. *Id.* at 182–83.

<sup>66</sup> See discussion *infra* Part IV.

<sup>67</sup> “[T]he wire fraud statute reaches only traditional property interests. The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. Accordingly, the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes.” *Ciminelli*, 143 S. Ct. at 1128.

includes plagiarism can be charged with the federal crime of fraud, insofar as she has deprived the degree-granting school of control over its decision regarding whom to award doctorates.<sup>68</sup> Students who dream up an ingenious scheme to have someone impersonate them and take the Test of English as a Foreign Language (TOEFL), the standardized test administered to foreign students wishing to study at American degree-granting institutions, can be charged with scheming to deprive the Educational Testing Service (ETS) of the right to control *both* its confidential information (the test questions themselves) and the “credential” ETS provides (the test score).<sup>69</sup>

When courts find property rights in either an educational institution’s control of information or its credentialing services, they effectively enable prosecutors to transform everyday *cheating* into federal criminal *fraud*.<sup>70</sup> To some, this expansiveness may be a feature, cabined by the prosecutor’s discretion to exclude cases that appear too frivolous. To others, the concept’s porosity is a bug that has been overdue for intervention and correction.<sup>71</sup> Professors David Mills and Robert Weisberg, for example, have argued that the effort to treat all “corruption” as federal fraud empowers prosecutors to punish any individual who happens to diverge from some unarticulated baseline.<sup>72</sup> Other scholars worry that the enlarged definition of intangible property “federalizes” what should be treated as purely local

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<sup>68</sup> See Blair A. Rotert, Note, *Was “Varsity Blues” Actually a Crime? The Supreme Court’s Crusade Against the Federal Mail and Wire Fraud Statutes*, 64 B.C. L. REV. 415, 442–44 (2023) (discussing *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997)). The student who fraudulently submits a plagiarized dissertation might also be guilty of depriving the federal government of *tangible* property, insofar as she relies on government loans and grants to pay her tuition. *Frost*, 125 F.3d at 362 (“The government helped to pay for the advanced degrees of its employees, the student defendants, by paying to UTSI their fees. No student, however, wrote his or her own thesis or dissertation, the primary component of the advanced degree program.”).

<sup>69</sup> *United States v. Al Hedaithy*, 392 F.3d 580, 601 (3d Cir. 2004).

<sup>70</sup> *Frost* and *Al Hedaithy* are two of the most commonly discussed cases in the educational context. See, e.g., Rotert, *supra* note 68, at 442–46. For other cases, see *United States v. Barrington*, 648 F.3d 1178, 1184 (11th Cir. 2011), which highlights a cheating scandal involving the assignment of grades, and *United States v. Gray*, 96 F.3d 769, 772 (5th Cir. 1996), which highlights a scheme involving ineligible college basketball players.

<sup>71</sup> See Petition for a Writ of Certiorari, *Ciminelli v. United States*, 2022 WL 566444 (No. 21-1170). The *Ciminelli* case was argued before the Supreme Court on November 28, 2022, in which several of the Justices voiced concern with the “control of information” theory. See David Kwok, *In New York Bid-Rigging Case, Justices Are Dubious of the “Right to Control” Theory of Fraud*, SCOTUSBLOG (Nov. 28, 2022, 5:05 PM), <https://www.scotusblog.com/2022/11/in-new-york-bid-rigging-case-justices-are-dubious-of-the-right-to-control-theory-of-fraud/> [<https://perma.cc/CD3D-QNYQ>].

<sup>72</sup> Mills & Weisberg, *supra* note 9, at 1438. Mills and Weisberg have raised the concern that courts and prosecutors have harnessed the fraud laws to create a quasi, ill-defined law of corruption. “The public law doctrines punishing supposed injuries to honest government have begun to blend with, or morph into, doctrines punishing actions alleged to cause diffuse harms to the honesty of the capital markets.” *Id.*

offenses.<sup>73</sup> Finally, critics also contend that the “control” theory and its ilk are flawed insofar as they rest on an expansive theory of property rights unknown to legislators when they enacted the current mail fraud’s precursor statute in 1872.<sup>74</sup>

Unfortunately, unwinding the intangible property concept is more easily said than done. One day before *Ciminelli* was released, the First Circuit announced its decision in *United States v. Abdelaziz*.<sup>75</sup> The case involved two of the few Varsity Blues parents who elected to take their cases to trial and appeal their convictions. Unlike other prosecutions, the government had failed to prove that the parents in *Abdelaziz* knew that their “charitable” donations had been directed as a private bribe to a coach or athletic administrator.<sup>76</sup>

The First Circuit overturned the lower court’s determination that “admission slots” categorically constituted property for purposes of mail and wire fraud.<sup>77</sup> In a regrettable passage, the First Circuit all but invited chaos in future admissions-fraud prosecutions:

We do not hold that admissions slots cannot ever be property. Nor do we hold that the jury instruction given by the district court could never be appropriate. The resolution of these questions will require much more detail, both legal and factual, on the nature of the purported property interest at issue. It may well be that there must be resolution of disputed facts by a jury and resolution of the ultimate legal question by the court.<sup>78</sup>

How a scrupulous prosecutor (or lower court) should treat admissions slots in future cases is a mystery.

## II. THE EMERGENCE AND NECESSITY OF CONSTRAINTS

*“The question presented is whether the defendants committed property fraud.”*

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<sup>73</sup> Richard H. McAdams, *The Political Economy of Criminal Law and Procedure: The Pessimists’ View*, in *CRIMINAL LAW CONVERSATIONS* 517, 517 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2011).

<sup>74</sup> See Petition for Writ of Certiorari, *Ciminelli*, 2022 WL 566444, at \*14–25 (No. 21-1170) (arguing that the “right-to-control theory” violates the mail and wire fraud statutes because it impermissibly extends federal criminal jurisdiction beyond the protection of “traditional property interests”).

<sup>75</sup> No. 22-1129, 2023 WL 3335870 (1st Cir. May 10, 2023).

<sup>76</sup> “[T]he government acknowledged at trial that Singer ‘told the parents,’ . . . ‘that the money would go to the athletic program at the schools.’” *Id.* at \*7.

<sup>77</sup> “[W]e do not accept the government’s argument that admissions slots always qualify as property for purposes of the mail and wire fraud statutes merely because they may bear some hallmarks of traditionally recognized forms of property.” *Id.* at \*21.

<sup>78</sup> *Id.* at \*20.

—Justice Elena Kagan<sup>79</sup>

In recent years, jurists have made clear that “property” must serve as the basis of a federal fraud prosecution. In this Part, I discuss the emergence of this constraint, along with several of its practical and expressive benefits.

#### A. *Property as the Target*

Even prior to the Court’s decision in *Ciminelli*, the story of federal fraud was never a simple one of expansion. As certain courts and Congress paved the way for honest services and intangible fraud prosecutions, other courts found ways to constrain what they viewed as executive overreach. Trial and appellate courts cited different fraud elements to justify this truncation, but their decisions evinced a single concept, which is that the deceptive conduct in question should enjoy a sufficient nexus with an identifiable property right.<sup>80</sup>

At the Supreme Court level, one of the more notable contemporary cases was the so-called Bridgegate case, wherein officials within New Jersey Governor Chris Christie’s office attempted to punish the mayor of Fort Lee for failing to support the Governor’s reelection effort.<sup>81</sup> Fort Lee is located off an exit ramp to the George Washington Bridge. Deputy Chief of Staff Bridget Kelly and several other officials in Governor Christie’s administration decided to tie up Fort Lee’s traffic by closing several lanes on the bridge. To cover up their political payback scheme, Kelly and others claimed they were conducting a traffic study and even paid a consultant to produce a (relatively meaningless) report. All told, Bridgegate reportedly cost New Jersey taxpayers approximately \$14,300.<sup>82</sup>

Despite this ostensible loss of money (i.e., property), the Supreme Court overturned Kelly’s conviction.<sup>83</sup> Justice Elena Kagan, who has penned several opinions interpreting federal fraud statutes, emphasized the need to ground fraud law in property loss.<sup>84</sup> A scheme whose target was the

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<sup>79</sup> Kelly v. United States, 140 S. Ct. 1565, 1568 (2020).

<sup>80</sup> To that end, the fraud “nexus” cases evince useful parallels with the Supreme Court’s obstruction of justice cases. United States v. Aguilar, 515 U.S. 593, 600 (1995); Marinello v. United States, 138 S. Ct. 1101, 1104 (2018).

<sup>81</sup> Kelly, 140 S. Ct. at 1569.

<sup>82</sup> Mike Kelly, *Mike Kelly: The Elusive Costs of Bridgegate*, NORTHJERSEY.COM (Mar. 30, 2017, 8:07 AM), <https://www.northjersey.com/story/news/columnists/mike-kelly/2017/03/29/mike-kelly-elusive-costs-bridgegate/99748280/> [<https://perma.cc/37GU-T2LZ>].

<sup>83</sup> Kelly, 140 S. Ct. at 1574.

<sup>84</sup> “The question presented is whether the defendants committed property fraud. The evidence the jury heard no doubt shows wrongdoing—deception, corruption, abuse of power. But the federal fraud

deprivation of orderly traffic (an inherently public function) or political payback could not possibly be mail or wire fraud, even if it caused its public victims to tangentially spend some money. The *target* of the villains' scheme had to be property or money. The fact that the scheme triggered some remote or coincidental financial loss could not qualify it as mail or wire fraud.<sup>85</sup>

Even when the prosecutor identifies money as a target, she must demonstrate a tight relationship between the deceptive conduct and the victim's actual or potential property loss. *Loughrin v. United States*, a bank fraud case in which the defendant tricked Target into allowing him to purchase merchandise with stolen checks and return it for cash, highlights this point.<sup>86</sup> There was plenty of fraud in *Loughrin*, but the government had to at least demonstrate that the bank's harm (i.e., a loss of money) was the natural consequence of Loughrin's scheme:

[I]t is not enough that a fraudster scheme to obtain money from a bank and that he make a false statement. The provision as well includes a relational component: The criminal must acquire (or attempt to acquire) bank property "by means of" the misrepresentation. . . . [N]ot every but-for cause will do.<sup>87</sup>

Accordingly, a person commits bank fraud when his "false statement is the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control."<sup>88</sup> *Loughrin*'s "natural inducement" rule arose under the bank fraud statute, but its nexus requirement could have just as easily surfaced under a mail or wire fraud prosecution, as all three statutes contain identical relational language.<sup>89</sup>

Notice, then, how *Kelly* and *Loughrin* work in tandem. The former tells us that the object of the mail or wire fraud scheme should be *property*, and

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statutes at issue do not criminalize all such conduct." *Id.* at 1568. This limitation, Justice Kagan explained, "prevents these statutes from criminalizing all acts of dishonesty by state and local officials." *Id.* at 1571; see also *Loughrin v. United States*, 573 U.S. 351, 362 (2014) (explaining that "[u]nless the text requires," the Court "should not construe § 1344(2) as a plenary ban on fraud" because it would "effect a significant change in the sensitive relation between federal and state criminal jurisdiction" (quoting *Bond v. United States*, 572 U.S. 844, 858–59 (2014))).

<sup>85</sup> *Kelly*, 140 S. Ct. at 1573 ("[P]roperty must play more than some bit part in a scheme . . . a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.").

<sup>86</sup> 573 U.S. at 353 ("Loughrin would leave the store, then turn around and walk back inside to return the goods for cash.").

<sup>87</sup> *Id.* at 362–63.

<sup>88</sup> *Id.* at 363.

<sup>89</sup> Compare 18 U.S.C. § 1341 (criminalizing mail fraud carried out "by means of false or fraudulent pretenses, representations, or promises"), with § 1344 (criminalizing bank fraud carried out "by means of false or fraudulent pretenses, representations, or promises"). "The government correctly points out that *Loughrin* interpreted the bank fraud statute, while this case involves the separate prohibition on mail fraud. But, for aught that appears, this is a distinction without a difference." *United States v. Berroa*, 856 F.3d 141, 150 (1st Cir. 2017).

the latter reminds us that the scheme must be one that would *naturally cause* someone to part with that property. In other words, there must be a tight *nexus* between the scheme and the property loss. This relational component is satisfied when the false statements are the kinds that would “*naturally induc[e]*” someone to part with her money (or presumably other property) in her control.<sup>90</sup>

*Kelly* and *Loughrin* are hardly outliers in demanding a “natural” connection between the lies underlying a given scheme and the victim’s potential loss of money or property.<sup>91</sup> Lower courts have overturned wire and mail fraud convictions in numerous instances in which the link between the scheme and someone’s eventual property loss appears too tenuous.<sup>92</sup> Some courts declare the fraudulent part of the transaction too tangential to the underlying deal.<sup>93</sup> Others contend that the defendant intended only to “deceive” but not to defraud.<sup>94</sup> Still others adopt *Loughrin*’s causative approach, contending the lies and misrepresentations must have the natural effect of causing someone to lose their property.<sup>95</sup> Regardless of how the limitation is couched, the overriding principle is the same: the federal fraud statutes require a tight nexus between the fraud and the property loss.

Those familiar with these cases will also point out that the resulting standard differs quite a bit from an argument that the victim “would have done something differently” had she been aware of all pertinent information. There may be many things I, as a victim, would have done differently had I known a certain fact, but if I am unable to demonstrate a tight relationship between that fact and my loss of property, my moral claim fails to justify a legal mail fraud prosecution—at least in those instances in which courts

<sup>90</sup> *Loughrin*, 573 U.S. at 362–64 (emphasis added).

<sup>91</sup> *See, e.g.*, *United States v. Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999) (“[T]o be guilty of mail fraud, defendants must also cause or intend to cause actual harm or injury, and in most business contexts, that means financial or economic harm.”); *see also* *United States v. Kinney*, 211 F.3d 13, 18 (2d Cir. 2000) (explaining that “there must be some harm contemplated to the victim of the fraud that goes to the nature of the bargain itself”).

<sup>92</sup> *See, e.g.*, *United States v. Yates*, 16 F.4th 256, 265 (9th Cir. 2021) (overturning bank fraud conviction premised on the defendants’ conspiracy to deprive their employer-bank of accurate financial information in the bank’s books and records). “Although a property right in trade secrets or confidential business information can constitute ‘something of value,’ . . . ‘the right to make an informed business decision’ and the ‘intangible right to make an informed lending decision’ cannot.” *Id.*

<sup>93</sup> *See, e.g.*, *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1182 (2d Cir. 1970) (finding that the deception to gain access to buyer was both temporally and conceptually distinct from subsequent transaction).

<sup>94</sup> *See, e.g.*, *United States v. Takhalov*, 827 F.3d 1307, 1313 (11th Cir. 1997) (finding that the defendants intended to “deceive” but not to defraud).

<sup>95</sup> *See, e.g.*, *United States v. Berroa*, 856 F.3d 141, 148–50 (1st Cir. 2017) (lying to obtain medical license did not have the natural effect of causing financial harm to later patients, who otherwise received appropriate care).

faithfully apply the nexus and property requirements. Moreover, courts have also rejected the view that *anything* of value can count as “property” under the mail and wire fraud statutes: “Intangible property can qualify for [protection under the federal code], . . . but the indictment must still allege that the injured party has been deprived of something that fairly deserves the label of property under traditional usage.”<sup>96</sup>

In that vein, courts have rejected fraud claims when the government acts in a pure “regulatory” or sovereign mode, as opposed to a purchaser of good or services.<sup>97</sup> Defrauding a city agency by selling it defective garbage cans is fraud. Lying on an application for a gambling license obstructs regulatory processes, but it is not mail or wire fraud.<sup>98</sup> The state is no “seller” of licenses; although those licenses may be valuable to a defendant, they are not *property* in the hands of the government, the putative victim. The state might not have extended a casino operator a gambling license had it known of its CEO’s prior conviction, but it is not a victim of *property fraud*.

Finally, as discussed in Section I.A.2, in *Ciminelli*, the Court unanimously and decisively extinguished the “control of assets” theory that had been adopted by the Second Circuit and many other appellate and lower courts.<sup>99</sup> Under this theory, the government could pursue criminal fraud cases against actors who had corrupted an individual or institution’s discretionary decisions about tangible or intangible property, without showing any actual or future loss of money or property. The “loss” inhere is the defendant’s interference with the victim’s intangible right to make properly informed decisions.

The problem with equating “control” of property with property itself, the Court explained, was twofold. First, the control theory enjoyed no basis in traditional definitions of property, upon which the mail and wire fraud statutes were premised.<sup>100</sup> Second, it contained no logical end point: “Because the theory treats mere information as the protected interest, almost any deceptive act could be criminal.”<sup>101</sup>

As the *Ciminelli* decision demonstrates, critics of overcriminalization can take comfort in the knowledge that the Supreme Court is unwilling to cede the definition of the mail and wire fraud statutes to ingenious prosecutors and sympathetic courts. Instead, its members—both liberal and

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<sup>96</sup> *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990) (holding that a bus license was not “property” for purposes of fraud statute).

<sup>97</sup> *Cleveland v. United States*, 531 U.S. 12, 20 (2000).

<sup>98</sup> *Id.* at 17 (citing *United States v. Dadanian*, 856 F.2d 1391, 1392 (1988)).

<sup>99</sup> *Ciminelli v. United States*, 143 S. Ct. 1121, 1127 (2023).

<sup>100</sup> *Id.* at 1127–28.

<sup>101</sup> *Id.* at 1128.



conservative alike—seem quite devoted to erecting and maintaining limitations on mail and wire fraud’s application.

Concededly, one might prefer Congress to be the source of such clarification and constraint. Still, there are good reasons to applaud the Supreme Court’s latest decisions regarding criminal fraud. First, they help the federal code’s fraud laws maintain their conceptual coherence and meaning. Second, they alleviate the concern that fraud law will eventually evolve into an all-purpose anticorruption regime, enabling prosecutors to intervene in marginal situations whenever they see fit. Third, they paternalistically guide the executive branch in its use of limited enforcement resources. All things being equal, society benefits more from an enforcement regime that features fewer Bridgewater cases and more conventional fraud prosecutions. This point becomes particularly clear once one considers the purpose served by the conventional fraud prosecution, as opposed to bribery or obstruction cases dressed up in fraud’s clothing.

#### *B. Fraud and the Protection of Markets: Why Labels Matter*

When a prosecutor charges a crime, she does not charge someone with violating *any* crime, or *any federal* crime, or even *any white-collar federal* crime. Instead, she charges the offender with violating a series of statutes, whose elements she will have to prove to a jury beyond a reasonable doubt.<sup>102</sup> Insofar as statutes include different elements and punishments, it matters quite a bit—to the defendant and most certainly to the judge presiding over the case—which crimes a charging instrument alleges and which statutes it claims were violated. The charging instrument helps frame the guilty plea (if there is one), the trial, the jury charge, and the eventual sentence and appeal.<sup>103</sup>

Beyond the practical questions of proof and punishment, the charging instrument also matters because it tells us which crimes have occurred. It *labels* the offense. If we believe that these labels matter, that some crimes convey different types of violations than others, then we should care when a

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<sup>102</sup> It is of course the grand jury who votes on an indictment and issues a “true bill” enabling the case to move forward to trial. See FED. R. CRIM. P. 7(a)–(b) (requiring indictment for felony offense unless waived).

<sup>103</sup> “[A]n indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.” *Hamling v. United States*, 418 U.S. 87, 117 (1974); see also 5 WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 19.2(a) (4th ed. 2015) (discussing the functional analysis for testing pleading sufficiency adopted by the Supreme Court in *Hamling*).

label becomes diluted of meaning or is used improperly to designate a different type of wrongdoing.<sup>104</sup>

To determine if a label has been inappropriately diluted or stretched, we must first locate a prohibition's purpose. If the "new" crime attached to that label has little to do with the statute's purpose, we might conclude that the "new" crime should be charged separately or under a new statute. This is, in effect, an expressive argument for unbundling disparate types of wrongdoing that have fallen under the same statute.<sup>105</sup> We can see how this argument works by examining the practical distinctions between fraud and bribery.

The paradigmatic fraud—inducing someone to hand over her money or property in exchange for something she never receives—strikes at the heart of free market transactions. If I cannot trust those with whom I engage in arm's-length transactions to be honest about the most essential aspects of a deal, I may severely curtail the field of people with whom I conduct business.<sup>106</sup> I may also adopt outrageously expensive self-help protections, whose costs I will pass onto downstream consumers or investors. One need not be an economist to see the allocative inefficiencies inherent in such a situation. Fraud is undesirable precisely because it undermines our ability to engage in value-enhancing trades.<sup>107</sup>

That is why, in addition to declaring its moral depravity, our society bluntly prohibits fraud by punishing it under multiple regimes and statutes, and by devoting substantial private and public resources to enforcing those anti-fraud regimes. Through our overlapping enforcement regimes, we protect the market and its participants. Auditors, compliance personnel, lawyers, and government regulators all provide some degree of assurance that the goods and services we purchase (and which government institutions also purchase) perform roughly as advertised. For the residual cases, where

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<sup>104</sup> Cf. Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 230–32 (2018) (analyzing the relationship between labeling and offense-grading).

<sup>105</sup> See BAER, *supra* note 17, chs. 7–8.

<sup>106</sup> This fear—that people might exit the market absent a notably working enforcement system—forms the backbone of securities and financial fraud's regulation and enforcement. See, e.g., Michael H. Hurwitz, *Focusing on Deterrence to Combat Financial Fraud and Protect Investors*, 75 BUS. LAW. 1519, 1543 (2020) (arguing that "financial fraud can—and often does—have widespread repercussions, threatening investors' capital and employees' retirement savings, costing jobs, and less quantifiably, shaking confidence in the fairness and even stability of the financial markets"); Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511, 518 (2011) (observing that the maintenance of investor confidence is the "prime function of regulation" in the securities context); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes–Oxley Act of 2002*, 28 J. CORP. L. 1, 10 (2002) ("If the market cannot distinguish efficient from inefficient firms, investors may, at least at first, put too many resources in the inefficient firms, and ultimately may stay out of the market because they cannot spot the 'lemons,' with the result that the economy becomes less productive.").

<sup>107</sup> David Kwok, *Underestimating Fraud*, 109 KY. L.J. 359, 370 (2021); Urska Velikonja, *The Cost of Securities Fraud*, 54 WM. & MARY L. REV. 1887, 1902 (2013).

self- and government-help mechanisms fail, we rely on civil and administrative liability, as well as criminal law's condemnation and punishment.<sup>108</sup> We can never eliminate fraud, but with some effort, we can do our best to keep it to a minimum.

Bribing public officials undermines self-rule and democracy while also driving up the costs of public goods.<sup>109</sup> To be clear, bribery and corruption are immoral and harm our society. But they are distinct and operate differently from fraud. Moreover, the harms that arise from bribery (particularly in the public context) and *private* corruption (which might arguably encompass activities such as cheating on standardized tests and lying on applications to study at academic institutions) are also conceptually distinct from each other.

*Private* corruption of the type we see in the higher education context generates a very specific set of problems. It does not *directly* threaten democratic values (as in the case of the governor who accepts bribes), and it does not *directly* undermine free markets (as when Enron lies to its shareholders about its financial health).<sup>110</sup> Instead, the behaviors that pervade the higher education sector instantiate anxieties that America's most important driver of social mobility is built upon little more than chimerical claims of diligence and desert. This is undoubtedly "bad," but it is undesirable for reasons distinct from fraud and even public bribery.

If criminal law's expressive message matters, we should be particularly careful of the labels we attach to prohibited conduct.<sup>111</sup> Fraud signifies a social problem distinct from theft, which in turn means something far

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<sup>108</sup> Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1204–05 (1985).

<sup>109</sup> Susan Rose-Ackerman, *The Law and Economics of Bribery and Extortion*, 6 ANN. REV. L. & SOC. SCI. 217, 220 (2010); Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1391 (2009).

<sup>110</sup> A distinction could be made between one like Fox and the so-called scam schools that promise services that do not in fact exist—e.g., fake classes, made-up professors, nonexistent career services and the like. See, e.g., Robert F. Muth, *Scam Schools: The Cyclical Abuse of Veterans by For-Profit Institutions*, 90 UMKC L. REV. 597, 598 (2022) (describing deceptive practices aimed at veterans); John Patrick Hunt, *Bankruptcy as Consumer Protection: The Case of Student Loans*, 52 ARIZ. ST. L.J. 1167, 1193 (2020) (summarizing predatory practices aimed at members of marginalized communities); see also Matthew Adam Bruckner, *The Forgotten Stewards of Higher Education Quality*, 11 U.C. IRVINE L. REV. 1, 4 (2020) (tracking, among institutions of higher education, "high-profile failures that ha[ve] caused serious harm to [their] student population"); Blake Shinoda, Note, *Enabling Class Litigation as an Approach to Regulating For-Profit Colleges*, 87 S. CAL. L. REV. 1085, 1095–96 (2014) (identifying fraud and information symmetries as particularly pervasive in the for-profit education sector).

<sup>111</sup> On the importance of "fair" labeling, see Andrew Cornford, *Beyond Fair Labelling: Offence Differentiation in Criminal Law*, 42 OXFORD J. LEGAL STUD. 985, 986 nn.9 & 10, 987 n.15 (2022), which cites authorities, and James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 MOD. L. REV. 217, 218–22 (2008), which examines this concept.

different from robbery or extortion.<sup>112</sup> Intangible fraud's drawback is not simply the power it invests in government enforcers, but also the expressive messages it sends the general public. I revisit this issue in Parts III and IV.

### III. TWO SCANDALS, MANY SQUARE PEGS

The Varsity Blues and Fox prosecutions comprised several schemes, most of which were pursued as violations of the federal wire fraud statute, 18 U.S.C. § 1343. For the sake of clarity, I will not consider Varsity Blues' other statutory violations, such as tax evasion, money laundering, or RICO, as these violations incorporate conduct that overlaps with the government's wire fraud prosecutions.

The sprawling Varsity Blues case revolved around a single consultant, William Singer, and over fifty families who sought his guidance in applying to college.<sup>113</sup> Singer devised multiple schemes to help the children of wealthy lawyers, financiers, and celebrities gain acceptance to top schools such as Georgetown, the University of Southern California (USC), and Stanford.<sup>114</sup> To achieve this feat, Singer engaged in a series of deceptive scams, including:

- (1) *Standardized testing*: having students exaggerate or falsely claim disabilities in order to secure special testing accommodations allowing them to supply their own proctor, who in turn would fill in the answers on the test form.<sup>115</sup>
- (2) *False athletic profiles*: creating false athletic profiles of student applicants.<sup>116</sup>
- (3) *Bribery*: bribing athletic coaches at specific schools, who would agree to select Singer's clients, in exchange for gifts, payments, or donations to the school or directly to the coach.<sup>117</sup>

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<sup>112</sup> For a useful discussion along these lines, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 4 (2012), which argues that theft law's reformers eliminated "key moral distinctions concerning the means by which theft is committed and the kinds of property stolen."

<sup>113</sup> Information ¶ 27, *United States v. Singer*, No. 1:19-cr-10078-RWZ (D. Mass. Mar. 5, 2019) [hereinafter *Singer Information*] (criminal information filed against Singer); Class Action Amended Complaint ¶ 1, *Tamboura v. Singer*, No. 5:19-cv-03411-EJD, 2020 WL 2793371 (N.D. Cal. May 29, 2020) [hereinafter *Varsity Blues Civil Complaint*].

<sup>114</sup> *Varsity Blues Civil Complaint* ¶ 2; Antoine Gara, *Financiers Play Prominent Role in College Admissions Cheating Scandal*, FORBES (Mar. 12, 2019), <https://www.forbes.com/sites/antoinegara/2019/03/12/financiers-play-prominent-role-in-college-admissions-cheating-scandal/?sh=64077b6347ae> [<https://perma.cc/BA67-LJ5R>].

<sup>115</sup> *Singer Information* ¶ 31.

<sup>116</sup> *Id.* ¶¶ 39, 59.

<sup>117</sup> *Id.* ¶¶ 27, 37.

- (4) *Evasion*: masking the bribery payments as contributions to Singer’s charity.<sup>118</sup>

The scheme that impacted Fox featured different forms of cheating.<sup>119</sup> Over a period of years, Moshe Porat reportedly directed his subordinates to provide false or misleading information to the *U.S. News and World Report* rankings survey, which involved:

- (1) *Misleading U.S. News about Fox’s online program*: Fox reported several years in a row that 100% of its enrolled students had taken the GMAT, a false claim that boosted its online business program’s ranking in *U.S. News* to number one several years in a row.
- (2) *Misleading U.S. News about students’ work experience*: Fox reported an inflated “years of work experience” metric to *U.S. News* by including in that metric both part-time and online students.
- (3) *Retaliation*: Moshe Porat reportedly retaliated against employees who questioned the veracity and integrity of the school’s reporting practices.<sup>120</sup>

Both cases concluded with numerous convictions but relatively modest sentences of punishment notwithstanding the longer terms of imprisonment suggested by the U.S. Sentencing Guidelines.<sup>121</sup> The state attorney general and U.S. Attorneys whose offices were responsible for these cases insisted that these prosecutions heralded the emergence of a new higher education

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<sup>118</sup> *Id.* ¶ 27.

<sup>119</sup> *United States v. Porat*, No. CR 21-170, 2022 WL 685686, at \*1 (E.D. Pa. Mar. 8, 2022) (sentencing memorandum stating that “Fox’s responses to *U.S. News* surveys were riddled with falsehoods and fabrications”).

<sup>120</sup> “First, Fox falsely reported one hundred percent of its online MBA students had taken the GMAT in each of the four years the program was ranked first in the nation. Second, during the same four years, it combined its online, part-time and executive MBA cohorts when reporting the number of students in its part-time program and calculating the average work experience of those students.” *Id.* Regarding Porat’s role, see *id.* at \*1, which cites Porat’s emails with subordinates and “lies he told his superiors and subordinates to conceal the nature of the inaccurate submissions and their impact on Fox’s ranking.” On Porat’s subtle threats against an employee who was reluctant to provide false information, see *id.* at \*16–18, which recalls Porat’s pressure on various employees, including an incident in which Porat stated that “maybe this isn’t the right place” for an employee who was concerned with veracity of submissions to the *Financial Times*.

<sup>121</sup> See U.S. SENT’G GUIDELINES MANUAL § 2B1.1 (U.S. SENT’G COMM’N 2021) (setting forth the fraud guidelines). For more on the gap between the range of imprisonment the Guidelines recommended and the sentences ultimately received by most Varsity Blues defendants, see Steven Witzel & Renee E. Turner, *Handicapping the ‘Varsity Blues’ Sentencing*, N.Y. L.J., Sept. 5, 2019; William L. Drake, *Federal Judge Sentences Financier to Six Months in Varsity Blues Scandal*, STEPTOE (Aug. 3, 2020), <https://www.step toe.com/en/news-publications/investigations-and-enforcement-blog/federal-judge-sentences-financier-to-six-months-in-varsity-blues-scandal.html> [https://perma.cc/6NDX-2Q3W].

sheriff, who would ensure greater transparency and truthfulness from parents and schools alike.<sup>122</sup>

Commentators were more skeptical in their assessments. Some wondered if criminal prosecution represented a proper use of the government's limited resources.<sup>123</sup> Others lamented the short prison terms that arose from such prosecutions.<sup>124</sup> Several argued that the government's theories of property and honest services fraud were weak and vulnerable to appeal.<sup>125</sup>

The path to finding "property fraud" in either of the aforementioned cases requires one to stretch the meaning of the terms "victim" and "property." None of the children who were the subject of the Varsity Blues prosecutions, for example, defrauded institutions of their requisite fees for testing, tuition, or housing. By the same token, those who attended Fox in 2021 encountered roughly the same school as advertised, at least in terms of accreditation, number of faculty, courses offered, and job opportunities and placements. It seems doubtful that any students cared in the abstract that fewer of their classmates than advertised had taken the GMAT. These factors became material only because they triggered an algorithm that boosted Fox's online MBA ranking to number one. Thus, these "control losses" (namely, the lost opportunity to choose where one places one's tuition) paled in

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<sup>122</sup> See Press Release, Pa. Off. of Att'y Gen., Attorney General Shapiro Announces Settlement with Temple University over MBA Ranking Misrepresentation (Dec. 12, 2019), <https://www.attorneygeneral.gov/taking-action/attorney-general-shapiro-announces-settlement-with-temple-university-over-mba-ranking-misrepresentation/> [<https://perma.cc/UWV5-RUCB>]; Press Release, U.S. Att'y's Off., Architect of Nationwide College Admissions Scheme Sentenced to More than Three Years in Prison (Jan. 4, 2023), <https://www.justice.gov/usao-ma/pr/architect-nationwide-college-admissions-scheme-sentenced-more-three-years-prison> [<https://perma.cc/MRX5-62LB>].

<sup>123</sup> See, e.g., Ellen Podgor, *More Varsity Blues - Privilege and Perspective*, WHITE COLLAR CRIME PROF BLOG (Sept. 14, 2019), [https://lawprofessors.typepad.com/whitecollarcrime\\_blog/2019/09/more-varsity-blues-privilege-and-perspective.html](https://lawprofessors.typepad.com/whitecollarcrime_blog/2019/09/more-varsity-blues-privilege-and-perspective.html) [<https://perma.cc/D222-8SLE>] ("The 14 days is a token to society that only costs the taxpayer money with no benefit.").

<sup>124</sup> See, e.g., JENNIFER TAUB, BIG DIRTY MONEY: MAKING WHITE COLLAR CRIMINALS PAY 112 (2020) (highlighting the light sentences thus far received by Varsity Blues defendants).

<sup>125</sup> See, e.g., Randall Eliason, *Varsity Blues Appeal Heads to the First Circuit*, SIDEBARS (Oct. 18, 2022), <https://www.sidebarsblog.com/p/varsity-blues-appeal-legal-issues> [<https://perma.cc/VM2C-N5PW>] ("It may be true that Vavic violated USC rules about how water polo slots were supposed to be awarded and lied to his employer. But not every form of misconduct is bribery. To allow the government to prosecute this case as honest services fraud would effectively overrule *Skilling* and return to the days when that sweeping theory was used to prosecute all kinds of employee misbehavior."). Eliason has filed an appellate brief on behalf of one of the Varsity Blues defendants. See Brief of Amici Curiae Law Professors in Support of Defendant-Appellant and Reversal, *United States v. Wilson*, No. 22-1138 (1st Cir. May 11, 2022).

comparison to the losses suffered by students who paid thousands of dollars to attend predatory institutions of higher learning.<sup>126</sup>

The remainder of this Part analyzes the various square-peg theories that predominated each scandal, and the ways in which those theories treated certain organizations and individuals as “victims” while all but ignoring and excluding others who experienced undeniable harm. If criminal law is meant to function as a morality play that teaches and reflects society’s norms and values,<sup>127</sup> the prosecutions described in these pages conveyed dissonant signals to higher education’s insiders and stakeholders.

### A. *Institutional Victims*

Let’s start with Varsity Blues. Two of its most well-known schemes relied on the intangible property and honest services theories of the mail and wire frauds statutes. The reliance on these statutes led to the formal and informal designation of institutions such as the College Board and USC as the scheme’s victims, a narrative that seemed designed to protect the status quo rather than improve it.

#### 1. *Standardized Testing Organizations*

The standardized testing scheme in the Varsity Blues cases called for the test taker to falsely claim a disability, request a specific accommodation from the standardized testing organization (the ability to take a test in a specific location by oneself), and then use a test “administrator” who would in fact substitute correct answers for the inaccurate answers supplied by the test taker.<sup>128</sup>

The standardized testing scheme was conceptualized as a form of intangible property fraud because it deprived the standardized testing organization (the College Board for the SAT and the American College Testing company for the ACT), of the ability to (a) control its confidential information and (b) protect the credential value of its score. The Third Circuit’s testing fraud case, *United States v. Al Hedaithy*, remains the leading

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<sup>126</sup> Daniel Siegal, *Trump U’s \$25M Fraud Settlement Gets Final Nod*, LAW360 (Mar. 31, 2017, 4:57 PM), <https://www.law360.com/articles/908615?scroll=1&related=1> [<https://perma.cc/6ZRK-BG4B>]. On the proliferation of such schools and the profound harms they have caused students, see DAN E. MOLDEA, MONEY, POLITICS, AND CORRUPTION IN U.S. HIGHER EDUCATION: THE STORIES OF WHISTLEBLOWERS 169–220 (2020), and Verified Petition, *People v. Trump Entrepreneur Initiative LLC*, No. 451463, 2014 WL 5241483, at \*1–3 (N.Y. Sup. Ct. Aug. 24, 2013).

<sup>127</sup> William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1882 (2000) (“Criminal trials are morality plays. Their public nature, and the rituals that surround them, seem designed for sending messages, both about the system’s care not to punish the underserving and about the deserved nature of the punishment the system imposes.”).

<sup>128</sup> Singer Information ¶ 29.

authority in this area.<sup>129</sup> Citing *Al Hedaithy*, one of the major Varsity Blues cases concluded that “ACT and SAT scores, and by logical extension the score reports . . . are the intellectual and physical property of the testing companies.”<sup>130</sup> Thus, the effort to fraudulently induce the testing institutions to issue inflated test scores was seen as a theft of “intellectual and physical property” akin to the money sitting in their bank accounts.

The College Board and American College Testing company also retained a property interest in the value of their “credential,” which relied on the integrity of their testing service: “A testing company’s business depends almost entirely upon the integrity of its testing process and the goodwill it has developed. If that process is corrupted, or is viewed as corruptible, the product, i.e. its tests and the resulting scores, become valueless.”<sup>131</sup> Thus, the two institutions were additionally victims insofar as the Varsity Blues defendants’ behavior threatened to degrade the credentialing value of their test scores.

These two theories—that confidential information is property and that a credential can hold property value to the credentialing institution—sound quite plausible in the abstract. Nevertheless, the minute one tries to apply them, one encounters a thicket of policy concerns. First, if it is truly the case that the College Board and American College Testing company maintain a property right in test questions, then that would mean every student who memorizes a question and repeats it to her friend via email is potentially guilty of wire fraud.<sup>132</sup> Prosecutors might scoff at this hypothetical as unworthy of anyone’s time or worry, but nothing in the mail or wire fraud statutes themselves would exclude such a prosecution. To be sure, the “confidential information as property right” concept has always been overly broad, but in this context it all but invites arbitrary treatment. Who decides whether a case of standardized test cheating becomes the basis of a cancelled score or instead the impetus for a federal criminal prosecution?

The second theory—that cheating deprives the testing institution of its credential’s reputation and validity—rests upon several contestable premises. Although many (but not all) educators agree that standardized tests such as the ACT and SAT are valuable predictors of future college success,

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<sup>129</sup> 392 F.3d 580, 582 (3d Cir. 2004).

<sup>130</sup> *United States v. Sidoo*, 468 F. Supp. 3d 428, 442 (D. Mass. 2020) (citing *Al Hedaithy*, 392 F.3d at 600).

<sup>131</sup> *Id.* at 443.

<sup>132</sup> Concededly, the “intent to defraud” prong does some work here, but one could easily see a “friend” trading exam questions with another friend for a modest sum of money. Presumably, the receipt of even a small amount of money (e.g., \$1,000 for a few test questions), paired with the test taker’s furtive actions to memorize test questions, would easily demonstrate a defendant’s specific intent to defraud the College Board.



many disagree on *how* valuable they are and how valuable they are in predicting the success of certain populations.<sup>133</sup> For all those reasons, the impact of a single, limited fraud scheme on a standardized test’s “credential value” would be all but impossible to gauge. Indeed, if the fear is that a tarnished credential eventually triggers a loss in a test’s market share, that too would be difficult to measure or predict in the standardized testing sphere, where there exist primarily two major standardized tests that colleges accept to show general preparedness for college-level work. (Admittedly, many schools have gone “test-optional,” but the ACT and SAT still dominate standardized precollege testing.)<sup>134</sup> Even now, we have *no idea* how often cheating occurs or *is even suspected* by the American College Testing company or College Board on an annual basis; neither organization is required to disclose their internal cheating statistics to the public.

Thus, the “too ethereal” criticism that has at times dogged the honest services concept appears just as amenable to the credential-as-property theory.<sup>135</sup> Although it is quite clear that *a series* of Varsity Blues-type schemes would undermine the SAT and ACT’s use as a signifier of college readiness, it is impossible to know *how much* Varsity Blues-style cheating moves the needle, especially when one takes into account the numerous other confounding factors (access to tutors; differences in class, wealth, and testing conditions) that impact the credential’s underlying value to college admissions offices.<sup>136</sup> And it is even more difficult to know how that loss of confidence would impact the standardized testing institution’s revenue, given the lack of competition in this area. The ultimate property loss is not just intangible, it is downright unknowable.

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<sup>133</sup> Indeed, many colleges (especially the ones that were the targets of the Varsity Blues parents) rely on additional criteria, such as the applicant’s transcript and performance in subject-matter specific tests, to determine future success.

<sup>134</sup> See Nick Anderson, *SAT Reclaims Title as Most Widely Used College Admission Test*, WASH. POST (Oct. 23, 2018, 8:00 PM), <https://www.washingtonpost.com/education/2018/10/23/sat-reclaims-title-most-widely-used-college-admission-test/> [https://perma.cc/T2E3-8DA6] (citing millions of students who take either the SAT or ACT in advance of applying to college); DIVER, *supra* note †, at 131–41 (describing the SAT’s history and importance).

<sup>135</sup> The First Circuit went out of its way to distinguish the credential-as-property theory from the admissions-slots-as property theory. *United States v. Abdelaziz*, No. 22-1129, 2023 WL 3335870, at \*22 (1st Cir. May 10, 2023) (opining that “unissued degrees are meaningfully different from admissions slots, at least insofar as the government has described such slots”).

<sup>136</sup> Apart from its informational value, the SAT and ACT credential is valuable to a college or university because it affects its *U.S. News* ranking. On the connection between the credential, its educational and informational use, and its distortion by *U.S. News* and other rankings, see DIVER, *supra* note †, chs. 12–13.

## 2. *Colleges and Universities*

The colleges and universities to which the Varsity Blues students sought admittance—many of them elite and highly sought-after institutions—were also denominated victims, as they were deprived of two types of property.<sup>137</sup> First, they were arguably deprived of their employees’ honest services.<sup>138</sup> Coaches who should have provided their employers “honest” assessments of the students best inclined for limited slots on competitive athletic teams instead chose students because of personal bribes and kickbacks.<sup>139</sup> That behavior bluntly violated 18 U.S.C. § 1346, as later clarified by the Supreme Court in *Skilling v. United States*.

Second, the colleges and universities were deprived of the intangible property right of controlling their athletic admission slots. That is, the slots were themselves intangible property and therefore something of value that the Varsity Blues scheme subverted. One of the lower court Varsity Blues cases, *United States v. Sidoo*, explicitly upheld the government’s claim that admissions slots constituted intangible property in the hands of a higher education institution: “This Court holds that application slots to universities are property interests owned by the university cognizable under the mail and wire fraud statutes.”<sup>140</sup> Later in the opinion, the court wrote: “Admission slots at competitive universities, such as USC, are both limited and highly coveted. The ability to grant admission is an asset of the university subject to its control.”<sup>141</sup>

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<sup>137</sup> *United States v. Ernst*, 502 F. Supp. 3d 637, 647 (D. Mass. 2020) (“[T]he government alleges both types of fraud: that Defendants fraudulently deprived the universities of their money or property; and that Defendants deprived the universities of their intangible rights to the honest services of their employees.”).

<sup>138</sup> In at least one of the Varsity Blues cases, where contributions (i.e., bribes) were made solely to the school and not the coach, this argument has been challenged on appeal. *See* Eliason, *supra* note 125 (describing as “shaky” the government’s legal theories of honest services fraud in cases brought against a parent who made contributions to USC’s water polo team but did not divert money to its coach).

<sup>139</sup> Several coaches have denied they acted in response to bribes. *See, e.g.*, *United States v. Vavic*, No. 1:19-cr-10081-IT, 2022 WL 4276377, at \*24–25 (D. Mass. Sept. 15, 2022) (detailing the USC water polo coach’s contention that payments made to a private school for his son’s tuition in return for assisting with admission of a student to USC did not constitute bribery).

<sup>140</sup> 468 F. Supp. 3d 428, 441 (D. Mass. 2020) (citing *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997)) (holding that “the definition of ‘property’ extends readily to encompass admission slots”). *Sidoo* was joined by *United States v. Khoury*, No. 20-cr-10177-DJC, 2021 WL 2784835, at \*2 (D. Mass. July 2, 2021), which also held that admissions slots were property. The court in another Varsity Blues case took the position that slots were *not* property. *Ernst*, 502 F. Supp. 3d at 647–49. The issue will ultimately be decided by the First Circuit.

<sup>141</sup> *Sidoo*, 468 F. Supp. 3d at 441. Courts have also treated a university’s allocation of scholarships as property. *See, e.g.*, *United States v. Gatto*, 986 F.3d 104, 126 (2d Cir. 2021) (relying on similar control-based arguments as the *Sidoo* court).

The First Circuit questioned this reasoning in its *Abdelaziz* opinion, holding that admissions slots were not “categorical[ly]” property.<sup>142</sup> Still, even if one is a strong critic of the “control” theory and its corollaries, it is difficult to deny the logic underlying *Sidoo* and its predecessor cases. Admission slots *are* indeed “limited and highly coveted,” so much so that universities have been known to dole them out to the highest bidder, provided the bidder proceeds through the requisite channels by promising a new library or swimming pool.<sup>143</sup>

And there lies the rub: the university property interest threatened by the Varsity Blues scheme ultimately had very little to do with the school’s supposed desire to educate the brightest or most athletically gifted students. If the universities were most worried about property, or a concrete loss of money, then the interest at issue was the university’s right to control its slots and grant admission to the bidder willing to hand over the highest amount of money, usually in the form of a seven-figure donation. This was the high-cost alternative the Varsity Blues parents themselves elected not to take.<sup>144</sup>

Notice, then, the perverse but intellectually coherent narrative the prosecution effectively conveyed: *You parents deprived a top-tier institution of the ability to sell slots to a higher bidder*. Or, to paraphrase Judge Richard Posner’s words, the Varsity Blues parents *bypassed* the university-administered donations-for-admissions market.<sup>145</sup> If this is the morality story the government’s prosecution has communicated to the public, it is a fairly tragic one.

I have no doubt that the Varsity Blues cases’ prosecutors would vehemently deny this narrative and insist that they—and the university

<sup>142</sup> United States v. Abdelaziz, No. 22-1129, 2023 WL 3335870, at \*20 (1st Cir. May 10, 2023).

<sup>143</sup> On the infamous Z list, which the deans at Harvard allegedly used to make “development” based admissions decisions and offers of admission contingent on the recipient delaying entry by a year or semester, see *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126, 138 (D. Mass. 2019), and GOLDEN, *supra* note 3, at 21–48. As Colin Diver facetiously deadpans in his recent book:

I have sometimes kiddingly suggested that elite colleges should just capture their parental wealth more directly and openly—by auctioning off, say, 10 percent of the places in their entering classes. After all, if that is the best way to sell rare and valuable works of art, such as Van Gogh paintings, why isn’t it also the best way to allocate rare and valuable seats in elite colleges?

DIVER, *supra* note †, at 101. “Jokes about ‘buying a building’ at universities in exchange for acceptance are pervasive throughout popular culture. . . . The unsettling truth of the matter is that this practice does in fact happen, and it is perfectly legal.” Gabrielle Wilson, Note, *The Legal College Admissions Scandal: How the Wealthy Purchase College Admissions to the Nation’s Elite, Private Universities Through Donations*, 2021 BYU EDUC. & L.J. 143, 144 (2021).

<sup>144</sup> See Eliason, *supra* note 125 (comparing the scheme’s “side door” payment—of as much as \$200,000—with the university’s “back door” for admission, which required a far higher donation).

<sup>145</sup> Posner, *supra* note 108, at 1195 (“The major function of criminal law in a capitalist society is to prevent people from bypassing the system of voluntary, compensated exchange . . .”).

officials who testified—never said anything like it. They would say instead that the university-victims were deprived of the right to choose the “best” applicant, however that university chose to define “best.” Nevertheless, if one is to take the “admissions slots are property” claim at face value, one must also conclude that the *reason* they are property is that they allow the university to optimize the scarcity of admissions offers. None of the fake athletes in the Varsity Blues cases took up spots on the competitive teams that make universities millions of dollars in television royalties, such as football or basketball. Accordingly, if one were searching for lost property, the most concrete manifestation would be that a college was deprived of the right to use its limited slots to maximize donations.

In sum, the government’s prosecution of fifty or so parents for admissions fraud was not a reformatory exercise designed to revive a naïve vision of admissions merit. Rather, it was constructed precisely to protect the status quo and the organizations who have benefitted from it.

Should anyone doubt this conclusion, consider the civil cases that were filed in the wake of the Varsity Blues cases’ arrests and indictments.<sup>146</sup> Students who had applied to competitive institutions and received rejections subsequently filed lawsuits seeking civil remedies on the grounds they had been subject to a rigged process. The *Tamboura v. Singer* complaint explained, “Plaintiffs contend that as a result of this fraud, unqualified students were accepted into highly selective universities while students who ‘played by the rules’ were denied admission.”<sup>147</sup>

Whereas the criminal cases treated schools such as Georgetown and USC as victims, the civil complaints—which were arguably more in tune with the public’s intuitions—portrayed these institutions as only slightly less condemnable than Singer and his coconspirators.<sup>148</sup> Perhaps these cases, had they been permitted to proceed, would have revealed embarrassing details about one or more college administrators. At the very least, they might have

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<sup>146</sup> See *Tamboura v. Singer*, No. 5:19-CV-01405-EJD, 2020 WL 2793371, at \*1 (N.D. Cal. May 29, 2020).

<sup>147</sup> *Id.* at \*1. The intuition that the real victims of the Varsity Blues scam were prospective students who had been deprived of an opportunity to compete on an even playing field has been voiced by students in my own classes on white-collar crime. See, e.g., Mollie Hamel, *Varsity Blues and Intangible Property Fraud 2* (2021) (unpublished manuscript) (on file with author) (“The item sought after is not necessarily the education itself, but rather the opportunity to receive the education at the school. The thing of value is the admission into the university and the chance to pay for a college degree.”).

<sup>148</sup> *Varsity Blues Civil Complaint*, *supra* note 113, ¶¶ 3–4.

documented a lack of internal controls and a culture among the educational institutions that encouraged the coaches' behavior.<sup>149</sup>

But the discovery would never take place because the courts repeatedly found a lack of standing among the students and parents who filed civil claims. The civil complainants were not athletes, the courts reasoned, and there was no indication they would have received offers of admission absent the fraud.<sup>150</sup> Accordingly, they could demonstrate no specific loss or stake in the case. Lacking standing, their cases were thrown out. Discovery and disclosure would have to await another day.

Consider the expressive juxtaposition of these criminal and civil cases. To place a prosecution within criminal law's fraud boundaries, the government had no choice but to portray well-endowed universities as "victims." These were extremely wealthy universities, institutions whose officers *could* have implemented stronger internal controls, who indirectly benefitted from the hype that their schools were "impossible" to get into, and whose coffers swelled from the donations of irrationally hopeful applicants and their parents. But the government denominated USC a "victim," not because it was a morally deserving actor but because that was what the doctrinal fraud framework dictated.<sup>151</sup> Meanwhile, the applicants who were denied admission to these institutions—the very persons many laypeople would likely label "real victims"—found themselves locked out of the courthouse.<sup>152</sup>

It is difficult to measure how much this mismatch in victimhood impacted the public's view of the Varsity Blues prosecutions. If one were to keep a box score, one would likely conclude the government performed quite well—at least in the near term. Nearly all the defendants entered guilty pleas, and of those who sought trials, all but one were convicted.<sup>153</sup> The government has already lost a case on appeal, but it is doubtful such a loss will register in the public's mind, particularly so many years after the showy announcements of arrests and convictions.<sup>154</sup>

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<sup>149</sup> A Netflix movie on the Varsity Blues cases implies as much, but a court case would have provided the avenue for documentation and further accountability. OPERATION VARSITY BLUES: THE COLLEGE ADMISSIONS SCANDAL (Netflix 2021).

<sup>150</sup> *Tamboura*, 2020 WL 2793371, at \*4.

<sup>151</sup> Hamel, *supra* note 147, at 11 ("The running theory of the Varsity Blues cases is that the schools themselves are the victims deprived of their own property rights.")

<sup>152</sup> *Id.*

<sup>153</sup> *Investigations of College Admissions and Testing Bribery Scheme*, U.S. ATT'Y'S OFF., DIST. OF MASS., <https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme> [<https://perma.cc/SJW5-FQKX>].

<sup>154</sup> Several of the parents who entered guilty pleas preserved their rights of appeal. See Rotert, *supra* note 68, at 419–20.

Notwithstanding the government's successes on paper, its prosecution produced a curious backlash.<sup>155</sup> The celebrities and wealthy parents received modest, short sentences of imprisonment in most cases.<sup>156</sup> Even Rick Singer's sentence, reduced to reflect his cooperation with the government, was a comparatively mild three-and-a-half years.<sup>157</sup> Admissions offices and standardized testing institutions reportedly tightened their internal controls, but one has no way of verifying such claims or determining how evenly or equitably these new controls will be imposed on future applicants. From the perspective of a child applying to college today, the "system" is no fairer and no more transparent than it was five or ten years ago, when Rick Singer was in the prime of his college guidance career.

In his book, *Comeuppance*, William Flesch explains society's tendency towards altruistic punishment (that is, the urge to punish, even at net cost to oneself) as the result of "our desire to see the good rewarded and the evil punished."<sup>158</sup> One cannot help but wonder if the slightly bitter taste left by Varsity Blues is that it came up short on both counts.

### B. *Prestige as Property*

Varsity Blues features one type of fraud—in which applicants (and their parents) construct misleading and fraudulent profiles that are then embedded in college applications. The mirror image of this behavior is what one might call "rankings fraud," whereby an institution of higher learning lies to a rankings organization to enhance its selectivity and attract more money through tuition and alumni donations. That, of course, is the behavior that served as the core of Moshe Porat's prosecution.

Porat was the Dean of Fox. The government charged that Porat's illicit schemes were deliberately constructed to raise the business school's online and part-time rankings in the annual *U.S. News* survey and other ranking programs. Although the scheme persisted for years, in hindsight the behavior looks almost clumsy: Fox increased the ranking of its online program from number nine to number one, and then kept it there several years in a row, by

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<sup>155</sup> See, e.g., Podgor, *supra* note 123 (arguing that Felicity Huffman's fourteen-day sentence was problematic for various reasons).

<sup>156</sup> See Mark Pratt, *CEO Who Bribed Kids into USC, Harvard, Stanford Tries to Delay 15-Month Prison Sentence*, L.A. DAILY NEWS (Mar. 18, 2022, 1:32 PM) <https://www.dailynews.com/2022/03/18/parent-convicted-in-college-bribery-case-asks-to-remain-free/> [https://perma.cc/VKL7-ZB2T].

<sup>157</sup> Anemona Hartocollis, *Rick Singer, Mastermind of Varsity Blues Scandal, Is Sentenced to 3½ Years in Prison*, N.Y. TIMES (Jan. 4, 2023), <https://www.nytimes.com/2023/01/04/us/rick-singer-sentenced-college-admissions-scandal.html> [https://perma.cc/9EPA-G8Y7].

<sup>158</sup> WILLIAM FLESCHE, *COMEUPPANCE: COSTLY SIGNALING, ALTRUISTIC PUNISHMENT, AND OTHER BIOLOGICAL COMPONENTS OF FICTION* 4 (2009).

falsely claiming all of its students had taken the GMAT. It also inflated its students' work experience for its part-time program by submitting information pertaining to all of its students, part-time and otherwise.<sup>159</sup>

As was the case with Varsity Blues, the defendants in the Fox case were far from sympathetic. The government drew on a cache of emails, deposition testimony, and other evidence to argue that Porat's behavior was persistent, deliberate, and at times, retaliatory. The standard critiques of fraud prosecutions—that they federalize minor matters of local concern or serve as traps for the unwary—is difficult to make with a straight face in Porat's case. Fox drew student applicants from all over the country and beyond. Porat was a sophisticated actor who was feted and remunerated handsomely for engineering the school's rise in the *U.S. News* rankings.<sup>160</sup> He pressured employees to enter incorrect (perhaps he would say "aggressive") data and reportedly threatened at least one of them with retaliation.<sup>161</sup> If any rankings case should have become the focus of a criminal prosecution, Porat's was as good a choice as any.

Spend a bit more time with the case, however, and difficult questions emerge. Consider the property interest at stake. Regardless of what the courts concluded, it was not simply tuition. Unlike a diploma mill, Fox provided a legitimate education to its students. None of Fox's ranking manipulations pertained to its academic program or even its job placement statistics, a common concern among graduate and professional school applicants. The student who paid \$50,000 for a Fox education received roughly what Fox promised in terms of its classes, its amenities, and even its immediate work opportunities.<sup>162</sup> That presumably posed a problem for the government, as cases have long held that merely tricking someone into a transaction she might not otherwise wish to undertake is not a federal "fraud" violation unless the scheme contemplates *harm* to the victim's property interest.<sup>163</sup>

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<sup>159</sup> *United States v. Porat*, No. CR 21-170, 2022 WL 802158, at \*1 (E.D. Pa. Mar. 16, 2022) ("At Porat's direction, [an administrator] (1) falsely reported that one hundred percent of incoming students in Fox's online MBA program had taken the GMAT and (2) fraudulently combined the online, part-time and executive MBA programs when answering questions related to the percentage of Fox students enrolled in its part-time program and the average work experience of those students. The fraudulent submissions continued until Porat's scheme was discovered in early 2018.").

<sup>160</sup> *United States v. Porat*, No. CR 21-170, 2022 WL 685686, at \*19 (E.D. Pa. Mar. 8, 2022); Scott Jaschik, *Ex-Dean at Temple Convicted*, *INSIDE HIGHER ED* (Dec. 5, 2021), <https://www.insidehighered.com/admissions/article/2021/12/06/former-dean-temple-convicted-rankings-scandal> [<https://perma.cc/6Z92-BL2A>].

<sup>161</sup> *United States v. Porat*, No. CR 21-170, 2022 WL 802158, at \*1-2 (E.D. Pa. Mar. 16, 2022).

<sup>162</sup> I will discuss more on the projected employment costs of the fraud later.

<sup>163</sup> "[A] schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick." *United States v. Takhalov*, 827 F.3d 1307,

What, then, was the property loss the Fox student suffered? According to the government, it was the opportunity to allocate one's tuition dollars to a *legitimately* highly ranked school, with all its prestige and attendant glory. Several students testified that Fox's false high ranking had imbued the school with a chimerical degree of prestige that wrongfully persuaded them to choose Fox over its competitors:

[T]he Government presented testimony from two students who had enrolled in Fox's online MBA specifically because of its number one ranking. [Student F] liked "the education or the quality [of] the program better" at Syracuse, his second-choice school, but ultimately chose to attend Fox "specifically because of the rankings." (Trial Tr. Day 2 at 125:6–7, ECF 130.) For him, the value of an MBA lay "not just [in] the quality of education," but in its brand. (*Id.* at 124:17–20.) He believed that "having a good brand" on his resume would make him a more competitive applicant for the types of jobs he wanted. (*Id.* at 124:19–21.) While he acknowledged that he received an education and degree from Fox, he was adamant he "didn't get what [he paid] for." (*Id.* at 133:8.) *He "didn't get the brand and the prestige that was promised to [him] in the beginning.["]* (*Id.* at 130:9–10.)

[Student S] also chose Fox because of its number one ranking. (Trial Tr. Day 8, Morning Session, at 56:17–18, ECF 126.) He chose it over the University of Maryland despite his ties and proximity to that school. (*Id.* at 60:3–6.) *Indeed, Fox would not have "been on [his] radar had [it] not been ranked Number 1."* (*Id.* at 60:6–8.)

When [Student S] learned Fox had been stripped of its ranking, he was upset because he had been "promised one thing and then delivered another." (*Id.* at 59:11–12.) While he "still received an accredited MBA," he maintained that *there was "a difference between . . . any online MBA" and the top ranked program in the county.["]* (*Id.* at 59:15–16.) If all he wanted was an MBA from an accredited school, he "could have just gone to Ball State for \$20,000 and gotten the same piece of paper." (*Id.* at 61:10–13.) Without its ranking, Fox's online MBA was "a great MBA program, but . . . just another . . . regular MBA program." (*Id.* at 61:24–62:1.) "[T]here [were] plenty of other, cheaper . . . MBA programs [he] could have gone to and saved . . . thousands of dollars." (*Id.* at 62:6–8.)<sup>164</sup>

The students' testimony—that they chose Fox because of a ranking and that they felt cheated because the brand with which they graduated was not the one they thought they were buying—certainly accords with literature

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1313 (11th Cir.), *as revised* (Oct. 3, 2016), *opinion modified on denial of reh'g*, 838 F.3d 1168 (11th Cir. 2016). To put it another way, the fact that the number one ranking was valuable to Fox is irrelevant under the mail and wire fraud statutes. The thing of value must constitute a property interest *in the victim*.

<sup>164</sup> Porat, 2022 WL 802158, at \*2 (emphases added).



studying student choices in higher education. Students seek prestigious institutions both for instrumental reasons (to get better jobs) and for purely psychological ones.<sup>165</sup> As Professor Colin Diver, a former law school dean, college president, and well-known rankings critic, nicely puts it, “There is a deep psychological yearning to be perceived as a winner, not only financially, but also socially.”<sup>166</sup> It does not take much to see that a number one ranking conveys a bump in well-being to an admitted student, and that a number nine ranking delivers less pride, especially if the student was eager to attend (and tell everyone else he was attending) the “number one” school.

But prestige is not the same thing as property. Even if prestige enhances one’s well-being, it is doubtful anyone could easily place a monetary value on it in the educational context.<sup>167</sup> The trial court itself encountered this difficulty at Porat’s sentencing when it rejected the government’s request for what would have amounted to a multiyear sentence in prison, based solely on the government’s back-of-the-envelope calculation of tuition payments made over the life of the scheme.<sup>168</sup> Students choose schools for multiple reasons, and unlike an orange at the supermarket, they choose from the limited number of schools to which they have been accepted. The jury had every right to accept the students’ testimony that Fox’s number one ranking was a deciding factor, but the court had no principled method of determining how *much* of a factor it was for either student; thus, the difficulty with devising an appropriate sentence.

Second, it is doubtful that in any other context a court would consider the school’s ranking (much less its “brand”) anything approaching a property interest in the hands of a *student* or *prospective student*.<sup>169</sup> Imagine Fox’s ranking had fallen because Porat or another administrator had been negligent (or morally principled) in filling out *U.S. News* information by a given date, and that the *U.S. News* ranking consequently fell several (or many) slots. Would any court recognize a *property* loss in the students who attended the school during that time? Would a court have forced a school to refund a

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<sup>165</sup> On the instrumental value of prestige, see FRANK & COOK, *supra* note 8, at 148, which argues that “[i]f access to the top jobs depends more and more on educational credentials, we would expect [students] to do everything in their power to improve their credentials.”). Regarding the psychological need to best others (and the harms caused by that need), see *id.* at 128–29, which describes irrational behavior to “win” an unwinnable auction.

<sup>166</sup> DIVER, *supra* note †, at 83.

<sup>167</sup> For a discussion of the value of education at prestigious universities, see DIVER, *supra* note †, at 239–40.

<sup>168</sup> *Porat*, 2022 WL 802158, at \*2.

<sup>169</sup> For mail or wire fraud to apply, the intangible harm must constitute property in the *victim*’s possession. See *Cleveland v. United States*, 531 U.S. 12, 15 (2000); *United States v. Berroa*, 856 F.3d 141, 148–49 (1st Cir. 2017).

portion of a student's tuition on account of a diminution of the school's prestige or brand value? It seems fanciful. Rankings, as academic pundits are quick to remind, are highly *unreliable* indicators of actual quality.<sup>170</sup>

The best one can say about the testimony excerpted above is that prestige *can* serve as a proxy for other things of value, including money and property. As Diver explains, *at least* two mechanisms explain prestige's value, such as human capital theory and signaling.<sup>171</sup> Human capital theory tells us that people benefit from acquiring skills, information, and access to peer networks.<sup>172</sup> If a school is perceived as prestigious, the peers it attracts will arguably enjoy stronger skills, motivations, and abilities than a less prestigious school. Thus, by attaining a false ranking of "number one," Fox's online program likely attracted a stronger student peer group than it otherwise would have.<sup>173</sup>

Even if we accept the "better peer group" claim as true, it does not prove a property loss to Fox's students, particularly those who testified at Porat's trial. Fox's peer group did not disappear in a puff of smoke the day after its machinations were revealed. Unlike a highly liquid stock, education is a sticky good.<sup>174</sup> People cannot abandon their school on a moment's notice. For students and professors alike, the transition costs of applying to another school and moving to another city are quite high. Accordingly, even if a school's ranking falls twenty places in a single year, the vast majority of its

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<sup>170</sup> See DIVER, *supra* note †, at 239–40. Concededly, the Third Circuit distinguished "normal course" events that cause ranking drops from by the discovery of "deceit or misrepresentation." *United States v. Porat*, No. 22-1560, 2023 WL 5009238, at \*6 (3d Cir. Aug. 7, 2023). But that seems to suggest that many changes – not just ranking drops-- due to the revelation of prior misconduct could serve as the basis for a wire fraud prosecution. If the revelation of fraud led to a subsequent loss of prestige, students and prosecutors could say they the school's undeserved prestige was a core part of the bargain and that the loss of said prestige resulted in a loss of tuition money. It is difficult to imagine many constraints on this "core part of the bargain" concept were it to be tied to something as transitory and ephemeral as prestige.

<sup>171</sup> See *id.* at 236–39 (surveying selection bias, human capital, and signaling theories as explanations for why graduates of elite schools make more money).

<sup>172</sup> *Id.* at 236–37. On the differences between "general purpose" human capital and "firm-specific" human capital (a concept developed with employment markets in mind), see David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1589–90 (1998).

<sup>173</sup> By the same token, competitor schools that played by the rules likely attracted a *less* competitive peer group. But the mail and wire fraud statutes divert attention *away* from this group because they are not victims of anything that could be denominated "property."

<sup>174</sup> It is also an "associative good" as in it is one that derives its value from one's access and interaction with peers of certain abilities and interests. See generally Henry Hansmann, *Higher Education as an Associative Good* (Yale L. Sch. Program for Stud. in L., Econ., & Pub. Pol'y, Working Paper No. 99-15, 1999), <https://papers.ssrn.com/a=192576> [<https://perma.cc/VJ7S-NT9Q>] ("The essential characteristic of an associative good is that, when choosing which producer to patronize, a consumer is interested not just in the quality and price of the firm's products, but also in the personal characteristics of the firm's other customers.").

student body and faculty will stay put. A loss in prestige accordingly does not immediately translate into a loss of human capital. Thus, for Fox's students, their peer and professional networks remained identical the day before and after Porat's scheme became public. The revelation of Fox's scheme may well have translated into losses later on (especially, in light of the heavy fine it was forced to pay the Department of Education), but those losses likely were not visited on the particular students who testified and served as the representative victims at Porat's trial.

Perhaps the prestige argument fares better under the second theory of prestige-as-value, known as signaling. Signaling theory tells us that employers use rankings as a proxy for ability and promise among future employees.<sup>175</sup> The signal from a school's ranking, however, is only one component of an employer's decision-making process. Other qualities, such as the student's personality and grade point average, matter as well. Moreover, although rankings and employment outcomes correlate strongly in certain segments of higher education, their relationship is weaker in others. And there are good reasons for that. Law schools, unlike business schools, offer a fairly standardized first-year curriculum. Thus, it is not surprising that, among BigLaw firms, attending a school in the *U.S. News's* top fourteen confers some additional signaling benefit. But business schools—especially online programs—are not law schools, and students might very well focus on specific programs within those schools. Thus, a *U.S. News* ranking's instrumental proxy value to a single student in a given employment market may be weaker than many of us presume.

Finally, even if Fox's number one *U.S. News* ranking conferred a benefit to its students, one would have to engage in quite a few mental leaps to properly isolate and quantify the value of this benefit, especially because it becomes less valuable after a student attains her first postgraduation job. To the extent Fox's false prestige produced marginally better outcomes for its students, neither the court nor Porat's prosecutors determined how large or small that property value was to its victims. So much, then, for a tight nexus between deception and property loss. The doctrinal constraints that proved pivotal in other cases were absent from the Fox case.

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<sup>175</sup> DIVER, *supra* note †, at 239. Frank and Cook explain:

Imagine the problem confronting the hiring officers of Wall Street investment banking firms, which attract literally thousands of ostensibly well qualified applicants for each entry-level position. . . . Given the costs of sorting through the deluge of résumés, it was inevitable that firms would come to rely heavily on educational credentials.

FRANK & COOK, *supra* note 8, at 147. On signaling in law firm hiring, see Wilkins & Gulati, *supra* note 172, at 1589–90.

C. *Columbia University's Pullout and the U.S. News Law School "Collapse"*

Months after Moshe Porat was sentenced, Columbia University announced it would not participate in the 2023 undergraduate *U.S. News* ranking.<sup>176</sup> The reason? One of its mathematics professors had posted online an analysis from which one might easily infer that Columbia had been submitting inaccurate information to *U.S. News*.<sup>177</sup> One could call this a positive consequence of Porat's prosecution, but one must keep in mind that Columbia did not withdraw from the *U.S. News* survey until one of its professors posted a scathing critique questioning its rise in the rankings.<sup>178</sup> Consistent with deterrence theory, the prospect of imminent detection influenced Columbia's actions far more than the remote possibility of criminal prosecution and criminal sanction.<sup>179</sup> In any event, *U.S. News* responded by assigning Columbia a ranking based on publicly available information, enabling it to "fall" to a ranking of eighteen.<sup>180</sup>

A few months after Columbia withdrew from the undergraduate rankings, Harvard and Yale Law Schools made news by announcing their withdrawal from the *U.S. News* law school rankings.<sup>181</sup> Numerous elite schools followed suit, contending that *U.S. News* distorts decision-making by students and employs secret and arbitrary metrics.<sup>182</sup> *U.S. News*, in turn,

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<sup>176</sup> Michael Elsen-Rooney, *Columbia University Withdraws from U.S. News Rankings After Math Professor Questions #2 Spot*, N.Y. DAILY NEWS (July 1, 2022, 5:20 PM), <https://www.nydailynews.com/new-york/education/ny-columbia-withdraws-us-news-data-accuracy-best-colleges-20220701-u5dbyay2enc6zjdholq6twnpui-story.html> [https://perma.cc/8N5X-MDL2].

<sup>177</sup> Anemona Hartocollis, *U.S. News Ranked Columbia No. 2, but a Math Professor Has His Doubts*, N.Y. TIMES (Mar. 17, 2022, 10:46 PM), <https://www.nytimes.com/2022/03/17/us/columbia-university-rank.html> [https://perma.cc/PS8Z-M4LY]; Aimee Picchi, *Columbia University Drops from No. 2 to No. 18 in U.S. News Ranking After Admitting Mistake*, CBS NEWS (Sept. 12, 2022, 12:08 PM), <https://www.cbsnews.com/news/columbia-university-drops-to-no-18-in-u-s-news-ranking-after-admitting-mistake/> [https://perma.cc/GUC6-APC9].

<sup>178</sup> Anemona Hartocollis, *Columbia Won't Participate in the Next U.S. News Rankings*, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/2022/06/30/us/columbia-us-news-rankings.html#:~:text=Columbia%20University%20will%20not%20participate,university%20announced%20on%20Thursday%20night> [https://perma.cc/29QW-DU3J].

<sup>179</sup> Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201–02 (2013).

<sup>180</sup> Anemona Hartocollis, *U.S. News Dropped Columbia's Ranking, but Its Own Methods Are Now Questioned*, N.Y. TIMES (Sept. 12, 2022), <https://www.nytimes.com/2022/09/12/us/columbia-university-us-news-ranking.html> [https://perma.cc/8ALG-ANAJ].

<sup>181</sup> Anemona Hartocollis, *Yale and Harvard Law Schools Withdraw from the U.S. News Rankings*, N.Y. TIMES (Nov. 16, 2022, 11:21 AM), <https://www.nytimes.com/2022/11/16/us/yale-law-school-us-news-rankings.html> [https://perma.cc/7Z2Y-NVTH].

<sup>182</sup> Debra Cassens Weiss, *Which Law Schools Are Now Boycotting US News Rankings? Some Say They're Staying In*, ABA J. (Nov. 28, 2022, 12:24 PM), <https://www.abajournal.com/news/article/law-school-outside-t14-boycotts-rankings-others-say-they-are-staying-in> [https://perma.cc/57Z7-7RN4]. In

announced that it would shake up its formula and rely more heavily on publicly available information.<sup>183</sup> Although the change in formula has dramatically altered certain parts of the rankings, it is doubtful that the rankings themselves will disappear, much less the winner-take-all markets to which the rankings contribute and continue to reflect. Thus, students and higher education institutions alike will continue to feel pressure to “game the system,” “market aggressively,” or outright lie and deceive.

#### IV. ALTERNATIVES AND OPPORTUNITIES

Scholars have long written of the costs of relying too heavily on the criminal justice system to govern complex social issues.<sup>184</sup> Show trials and severe punishments are an insufficient, costly, and independently harmful substitute for thoughtfully crafted regulatory interventions.<sup>185</sup> Moreover, as Professor William Stuntz warned years ago, our criminal justice system suffers when it is saddled with self-defeating crimes, defined by punitive statutes that generate outcomes at odds with society’s intuitions.<sup>186</sup>

Is the square-peg fraud a self-defeating crime? Certainly not in all cases. One can plausibly defend intangible property cases whose outcomes coincide with society’s intuitions. If fraud law’s doctrines can deter and punish wrongdoing, and do so in an expressively coherent way, we ought to lean on them. Moreover, we should be grateful for criminal law’s expressive and practical powers when other actors are legally or politically stymied from acting in the public interest.

Nevertheless, the effort to pound a square peg into a round hole can ultimately tell a story that does not quite make sense. It casts as “victims” organizations and individuals who might otherwise be described as morally complicit. It creates property rights in abstract concepts that look and feel

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the spirit of full disclosure, I note that my employer, Brooklyn Law School, was one of the sixty-odd schools that participated in the “boycott” of *U.S. News*.

<sup>183</sup> Melissa Korn, *U.S. News & World Report to Revamp Parts of Its Law-School Ranking*, WALL ST. J. (Jan. 2, 2023, 9:00 AM), <https://www.wsj.com/articles/u-s-news-world-report-to-revamp-parts-of-its-law-school-ranking-11672667620> [https://perma.cc/S8XS-RT9X].

<sup>184</sup> See, e.g., JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) (discussing the consequences of relying on the criminal justice system to control complex social problems).

<sup>185</sup> “[I]n a limited resources world, sustained regulatory intervention is better than a few criminal show trials.” Eithan Y. Kidron, *Systemic Forum Selection Ambiguity in Financial Regulation Enforcement*, 53 AM. CRIM. L. REV. 693, 728 (2016) (citing Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 280 (2014)). In the wake of the 2008 financial crisis, “a focus on [criminal] headhunting will only distract from, and reduce the pressure for, efforts to explain the collapse and prevent its recurrence.” Richman, *supra*, at 265.

<sup>186</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 528 (2001); Stuntz, *supra* note 127, at 1873.

nothing like property. It punishes the right people, but it does so instrumentally and at a steep expressive cost. These are the concerns I have attempted to illuminate throughout this Essay. If we care about criminal law's legitimacy, we ought to be just as concerned by the square peg's expressive shortfalls as we are by prosecutors who pursue marginal misconduct or unwary actors.

In this final Part, I discuss the alternatives a policymaker might adopt in response to this critique. In doing so, I assume the policymaker wishes to (a) hold wrongdoers accountable, (b) deter future wrongdoing, and (c) enable self-protection by putative victims. Below, I sketch several responses.

#### A. *Criminal Legislation*

When the Supreme Court in *McNally* blanched at the idea of expanding the mail and wire fraud statutes to punish honest services fraud, Congress responded by enacting a statute. Nearly five decades later, one might wonder if the time has come for Congress to do the same for "intangible property," and if so, whether Congress should specify what does and does not fall within this category.

If advanced notice and overcriminalization were the primary harms that arose from square-peg prosecutions, legislation would be a welcome remedy. A specific statute punishing and defining "intangible property" could better guide courts, reinforce the government's prosecution of a wide variety of schemes, and place putative criminals on notice that certain schemes were indisputably illegal.

Then again, we have learned from the post-*McNally* period that legislation is no panacea. If tomorrow Congress were to enact a law simply announcing that "intangible property" was covered by the mail and wire fraud laws, we would remain just as confused about doctrines such as the right to control theory as courts and commentators are as of this writing.

More importantly, legislation cannot undo the square-peg fraud's expressive costs. If, in the wake of the Varsity Blues scandal, the law treats USC as a victim while ignoring the student competitors whose applications were consigned to the rejection pile, then the problem lies with the law's content and not with the body that happens to generate it.

#### B. *A "Sarbanes–Oxley" for Higher Education*

If the admissions and ranking fraud cases teach us anything, it is that higher education remains underregulated insofar as admissions and rankings are concerned. To the extent the two prosecutions illuminated corruption in undergraduate admissions fraud (Varsity Blues) and graduate-level business

school rankings (Fox), they were indeed valuable. Their exposure of the problem, however, was incomplete. We did not learn if other educational institutions had engaged in schemes like the ones featured in *Varsity Blues*. Nor did we learn anything about the extent of rankings fraud at the graduate or undergraduate level.

If probability of detection is the variable that most motivates white-collar offenders, then enhanced and aggressive regulation of the higher education space would appear to be the best solution.<sup>187</sup> We know from the corporate context that well-designed government policies can incentivize institutions to monitor and report wrongdoing, usually with the goal of seeking the government's leniency and forbearance in punishment.<sup>188</sup> Under the Sarbanes–Oxley Act, for-profit corporations are required, among other things, to affirm the presence of internal controls to ensure financial reporting is accurate.<sup>189</sup> Corporate officers are further required to certify they have read their auditors' internal reports and are cognizant of their company's controls.<sup>190</sup> One could imagine a similar set of obligations for university chancellors and provosts (at least in regards to institutions larger than a certain size) regarding all admissions information and disclosures

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<sup>187</sup> On the importance of probability of detection, see Nagin, *supra* note 179. For arguments in favor of increasing the probability of detection through enhanced enforcement efforts, see Brian Galle & Murat Mungan, *Predictable Punishments*, 11 U.C. IRVINE L. REV. 337, 365–66 (2020), which explains, by reference to information costs and enforcement variance, why it is ultimately a better strategy to increase the probability of detection and thereby reduce the severity of punishment. For earlier arguments favoring “high detection/lower sanction” strategies, see Kahan, *supra* note 15, at 379, which argues that “[a] high-certainty/low-severity strategy, in contrast, is more likely to generate a low crime-rate equilibrium.”

<sup>188</sup> On the promises and practical difficulties of devising and monitoring organizational leniency programs, see generally Miriam H. Baer, *Designing Corporate Leniency Programs*, in *THE CAMBRIDGE HANDBOOK ON COMPLIANCE* (Benjamin van Rooij & D. Daniel Sokol eds., 2021), and Miriam H. Baer, *When the Corporation Investigates Itself*, in *RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING* (Jennifer Arlen ed., 2018).

<sup>189</sup> As Professor Jim Park points out, the law builds on earlier obligations set in motion by the Foreign Corrupt Practices Act, which required companies to implement a set of internal controls. “[T]he Sarbanes–Oxley Act built upon this foundation to mandate the yearly assessment and certification of the effectiveness of such internal controls.” James J. Park, *Do the Securities Laws Promote Short-Termism?*, 10 U.C. IRVINE L. REV. 991, 1003 (2020).

<sup>190</sup> “Section 302 of SOX requires the CEO and CFO to certify that the company’s periodic reports do not contain material misstatements or omissions and ‘fairly present’ the firm’s financial condition and the results of operations.” Roberta Romano, *The Sarbanes–Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1540 (2005) (citing Pub. L. No. 107-204, § 302, 2002 U.S.C.A.N. (116 Stat.) 745, 777–78 (codified at 15 U.S.C. § 7241)). Professor Romano was the most famous of Sarbanes–Oxley’s critics. Notwithstanding her concerns—that Congress acted too precipitously in response to the Enron and Worldcom financial accounting scandals—there is much to recommend in a model that systemically addresses organization-wide incentives to lie and mislead in search of short-term gains. See JAMES PARK, *THE VALUATION TREADMILL: HOW SECURITIES FRAUD THREATENS THE INTEGRITY OF PUBLIC COMPANIES 3* (2022) (“Public corporations now have a structural incentive to issue misleading disclosures to recreate the appearance that their economic prospects are brighter than they really are.”).

made not just to the government directly but also to all third-party ranking services.

More broadly, one could imagine a statute empowering the Department of Education to demand—of colleges and universities of a certain size—certifications and self-funded audits attesting to internal controls governing admissions practices. As part of this effort, the government could demand that colleges and universities pay for and disclose third-party audits of their internal admissions and reporting processes, including information they routinely provide third-party ranking companies.<sup>191</sup> Regulations such as these would shine far more sunlight on higher education’s disclosure gaps than the occasional celebrity criminal prosecution. Moreover, these regulations would force schools to expend resources to ensure better reporting and swifter detection of fraudulent activity.<sup>192</sup>

### C. Whistleblower Bounties, Qui Tam, and Civil Enforcement Lawsuits

Academics have long argued that the key to reducing fraud’s harm is to detect and dismantle schemes early, before they become too large, too sophisticated, and impact too many people.<sup>193</sup> Accordingly, although they have their own limitations, one could imagine a combination of programs that either mimicked the SEC’s whistleblower bounty program (e.g., paying the whistleblower a portion of the fees recovered by the government using the whistleblower’s information) or the qui tam lawsuit that individuals might file under the False Claims Act.<sup>194</sup>

To be sure, these tools would require quite a bit of reframing in order to adapt them to higher education, particularly because the “fees” owed to a whistleblower or qui tam plaintiff could be difficult to tabulate. If one could devise a recovery schedule and pair it with a centralized auditing and disclosure program, however, such programs might be of use. One could imagine, for example, a series of high fines (personal and organizational) that would become payable in the event an institution of higher education submitted materially false data to third parties (and not just government actors), or recklessly failed to create the internal controls necessary to detect

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<sup>191</sup> Higher education institutions already submit to the Department of Education audited statements pertaining to their financial health. DIVER, *supra* note †, at 104.

<sup>192</sup> Park, *supra* note 189, at 1011 (“[Sarbanes–Oxley] requires public companies to devote significant resources to ensure the integrity of their periodic reports.”).

<sup>193</sup> See generally IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 110–16 (1992) (developing the argument that it is better to identify and adjudicate administrative violations early and often).

<sup>194</sup> David Freeman Engstrom, *Public Regulation of Private Enforcement: Empirical Analysis of DOJ Oversight of Qui Tam Litigation Under the False Claims Act*, 107 NW. U. L. REV. 1689, 1750–54 (2013) (comparing programs).



admissions fraud and misconduct. The possibility of such fines (and an attendant bounty) might either convince whistleblowers to file a confidential report with the Department of Education or enable them to file *qui tam* lawsuits on behalf of the government. To be sure, the creation of such a program would be complex, time consuming, and the subject of intense lobbying efforts. That is, however, the nature of all complex regulatory enforcement programs.

#### CONCLUSION

If the purpose of the Varsity Blues prosecutions was to restore confidence in the admissions system for top-tier colleges and universities, it clearly failed. Some onlookers no doubt appreciated the *schadenfreude* of dispatching celebrities and wealthy elites to jail, but the defendants in nearly all these cases received modest sentences of imprisonment. The outcome was upsetting to *them*, to be sure, but hardly serves as evidence of organizational reform.

One of criminal law's features is that it condemns as it shames. Square-peg frauds appear poorly designed to complete this mission, particularly when the property interest in question is fuzzy and difficult to quantify. Nor are they likely to heal victims or assure them of their moral worth. The prosecutor's (and judge's) frantic search for some variation of "property" perversely forces the government to ignore certain actors and favor others.

Even if criminal enforcement's primary purpose is to shine a light on a problem and prevent further wrongdoing, the square-peg fraud still falls short of the mark. If we want to reform a system that we know to be prone to corruption, we would do better to focus on its determinants and structure, and to devise regulatory rules and procedures that make cheating less desirable, less successful, and ultimately less endemic.<sup>195</sup>

This Essay opened with a dual mission. On a pragmatic level, it seems quite clear that higher education's fraud problem is unlikely to be solved by eye-catching celebrity prosecutions. Many will find this conclusion uncontroversial but shy away from expensive and uncertain regulatory alternatives.

On a deeper level, this Essay introduces the square-peg concept, whose lessons are generalizable beyond the higher education context. Scholars have long bemoaned the government's deployment of broadly worded criminal statutes to punish innocent and unwary citizens. That is indeed a problem. But it is not criminal law's *only* problem. Even when the defendant's corrupt purpose is beyond question, criminal prosecutions can still send faulty and

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<sup>195</sup> Alschuler, *supra* note 22, at 465 (advancing a similar argument for political corruption).

counterproductive messages. They can transmute morally complicit organizations into hapless victims. They can imply that certain systems are reliable and deserving of protection when in fact those systems are unreliable and unworthy of protection. Square-peg prosecutions are harmful, exactly because the effort to pound a “square” case into a round statutory hole sends errant signals and reinforces the status quo instead of fixing it. Having identified this phenomenon in one context, we should take extra care not to encourage it in others.