A

Memoir

HOW FRANK EASTERBROOK KEPT GEORGE RYAN IN PRISON

Albert W. Alschuler*

TABLE OF CONTENTS

I. INTRODUCTION 7
II. THE EYE OF THE BEHOLDER: TWO VIEWS OF JUDGE EASTERBROOK 8
III. THE GOALS OF THIS MEMOIR AND HOW IT WILL PROCEED 16
IV. THE PROSECUTION AND CONVICTION OF GEORGE RYAN 20
A. The "Intangible Right of Honest Services" 20
B. Indictment and Trial 24
C. Jury Deliberations, Verdict, and Appeal 27
V. THE ROUTE BACK TO THE SEVENTH CIRCUIT 31
A. The Supreme Court Decides Skilling 31
B. Ryan Returns to the District Court 32
VI. THE ARGUMENT FROM HELL 38
A. Judge Easterbrook Emerges 38
B. I Get Hit by a Truck 40
C. The Government Gets Hit by the Truck 49
VII. JUDGE EASTERBROOK OPINES 53
A. Concocting Something Else: A Fantasy Forfeiture 53
B. Disregarding and Concealing the Government's Waiver 58
C. Possible Explanations 63
VIII. A MINI-VICTORY IN THE SUPREME COURT AND A NEW ARGUMENT 65
IX. JUDGE EASTERBROOK OPINES AGAIN 67
A. Another Concocted Waiver 67
B. Poor at Counting 70
C. At Long Last: The Court Addresses the Issues Briefed by the Parties 75
X. LARGER LESSONS AND SOME PROPOSALS FOR REFORM 81
A. Decent Procedure in an Adversary System 81
B. Correcting Errors 85
XI. CONCLUSION 87

Alschuler is genteel enough here (and elsewhere) to use euphemisms like "concoct" — but we all know the right word is "BULLSHIT" ("B.S.", and by a pompous ass, no less)

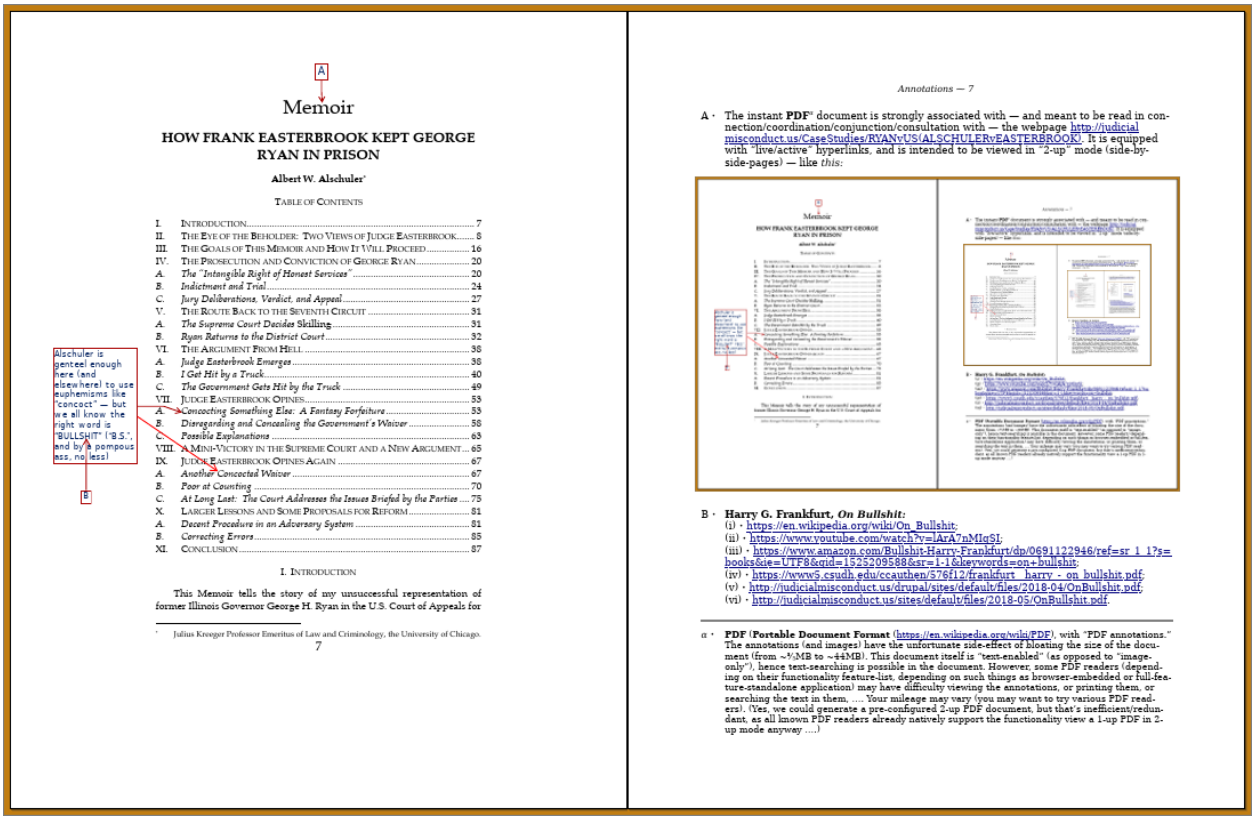
B

I. INTRODUCTION

This Memoir tells the story of my unsuccessful representation of former Illinois Governor George H. Ryan in the U.S. Court of Appeals for

* Julius Kreeger Professor Emeritus of Law and Criminology, the University of Chicago.

A • The instant **PDF**$^{\alpha}$ document is strongly associated with — and meant to be read in connection/coordination/conjunction/consultation with — the webpage http://judicialmisconduct.us/CaseStudies/RYANvUS(ALSCHULERvEASTERBROOK). It is equipped with "live/active" hyperlinks, and is intended to be viewed in "2-up" mode (side-by-side-pages) — like *this:*



B • **Harry G. Frankfurt, *On Bullshit:***
(i) • https://en.wikipedia.org/wiki/On_Bullshit;
(ii) • https://www.youtube.com/watch?v=lArA7nMIqSI;
(iii) • https://www.amazon.com/Bullshit-Harry-Frankfurt/dp/0691122946/ref=sr_1_1?s=books&ie=UTF8&qid=1525209588&sr=1-1&keywords=on+bullshit;
(iv) • https://www5.csudh.edu/ccauthen/576f12/frankfurt__harry_-_on_bullshit.pdf;
(v) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/OnBullshit.pdf;
(vi) • http://judicialmisconduct.us/sites/default/files/2018-05/OnBullshit.pdf.

α • **PDF** (**Portable Document Format** (https://en.wikipedia.org/wiki/PDF), with "PDF annotations." The annotations (and images) have the unfortunate side-effect of bloating the size of the document (from ~⅗MB to ~44MB). This document itself is "text-enabled" (as opposed to "image-only"), hence text-searching is possible in the document. However, some PDF readers (depending on their functionality feature-list, depending on such things as browser-embedded or full-feature-standalone application) may have difficulty viewing the annotations, or printing them, or searching the text in them, …. Your mileage may vary (you may want to try various PDF readers). (Yes, we could generate a pre-configured 2-up PDF document, but that's inefficient/redundant, as all known PDF readers already natively support the functionality view a 1-up PDF in 2-up mode anyway ….)

not only were these six rulings UNSOUGHT (hence violating PPP, see p.83 infra), but also they were even FALSE (though, the counted "FALSEHOODS" are tallied separately from the "UNSOUGHTS")

All-in-all, these (provable) misdeeds amount to ethichal breaches, Judicial Misconduct, OBSTRUCTION/ MISCARRIAGE OF JUSTICE, fraud upon the court (by a judge), and related/similar offenses — many of them CRIMINAL.

the Seventh Circuit. It describes how, in opinions authored by Judge Frank Easterbrook, the court made six rulings in favor of the government the government had not sought. All of these rulings were questionable or worse, and the court afforded Ryan no opportunity to address most of them until after Judge Easterbrook's opinions had been published. A B C

In addition, this Memoir documents eight falsehoods told by Judge Easterbrook in written opinions and statements from the bench. These falsehoods included statements that the trial court gave instructions it did not give, that both the defendant and the government made arguments they did not make, that litigants in the Supreme Court made arguments they did not make, that the defendant and the government waived or forfeited arguments they did not waive or forfeit, that the Supreme Court said things it did not say, and that several of the defendant's sentences had expired when they had not expired.

or nine, if you count the one on p.53 infra

#7p.12

#2p.41,46, #3p.51, #5p.68, #8p.77

#4p.54,55, #9p.53

#1p.44, #2p.41,46

#1p.44, #2p.46

#6p.74

This Memoir notes that Judge Easterbrook's appearance on the panel that heard Ryan's appeal was not the result of random assignment. It shows that the government played no part in producing his falsehoods. It describes his bullying of counsel on both sides and urges his colleagues to recognize the problem his conduct poses for their court. D E F G

II. THE EYE OF THE BEHOLDER: TWO VIEWS OF JUDGE EASTERBROOK

academics vs. practioners

Judge Frank Easterbrook's reputation is a paradox. Widely praised by legal academics, he is often disparaged by the lawyers who practice before him. Legal scholars have written that there are only two "superstars" among active American judges not on the Supreme Court—Easterbrook and his colleague on the U.S. Court of Appeals for the Seventh Circuit, Richard Posner.[1] Two of these scholars ranked Easterbrook and Posner with the late Henry Friendly and Learned Hand, declaring that these judges' opinions "dominate and define the legal 'canon.'"[2] With Justice Scalia in attendance, Judge Easterbrook recently gave the first Scalia Lecture at the Harvard Law School.[3] When

---

[1] *See* Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 74 (2004); Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141, 1143 (2002); Margaret V. Sachs, *Superstar Judges as Entrepreneurs: The Untold Story of Fraud-on-the-Market*, 48 U.C. DAVIS L. REV. 1207, 1211 (2015) ("Within the ranks of sitting federal circuit judges, Frank Easterbrook and Richard Posner stand out as the 'superstars' in multiple respects."). H I J

[2] Gulati & Sanchez, *supra* note 1, at 1143.

[3] Lana Birbrair, *Judge Easterbrook Delivers Inaugural Scalia Lecture: Interpreting the Unwritten Constitution*, HARVARD LAW TODAY (Nov. 20, 2014), http://today.law.harvard.edu/judge-easterbrook-delivers-inaugural-scalia-lecture-interpreting-unwritten-constitution-video/ [http://perma.cc/9AY5-S2DB]. K

A • **Six unsought (false) rulings:** ℘83B *infra.* (These violate **"PPP,"** see ℘83D *infra.*)

B • **No opportunity to argue/address (denying right to be heard):** ℘53H,70,73 *infra.*

C • **Eight[Nine] knowing falsehoods/misrepresentations/lies:** ℘44;46;51;55;68;74;12, 75;77[;53] *infra.* These 8[9] items are the only misdeeds *explicitly* cited in our **Complaint of Judicial Misconduct,** http://judicialmisconduct.us/sites/default/files/2017-07/JudicialMisconductComplaint%3DEasterbrook.pdf. **But:** it is *expected/demanded* that ***all*** judicial misdeeds described in the Memoir (items A–G, this page) will/should/must *implicitly* come under the scrutiny/aegis of the Judicial Council, pursuant to:
(i) • JDCA[α] 28 USC §332(d)(1) ("Each judicial council **shall** make **all** necessary and appropriate orders for the effective and expeditious **administration of justice** within its circuit," emphasis added);
(ii) • JCDR[β] 3(c)(2) ("**[I]nformation from any source** … that gives a chief judge **probable cause** to believe that a covered judge … has engaged in misconduct," emphasis added) and 21(b) ("**errors of law, clear errors of fact, or abuse of discretion,**" emphasis added).

D • **Non-random assignment:** ℘38–40 *infra.*

E • **No government misbehavior:** *passim.*

F • **Bullying of (both) counsel:** ℘12,18,41,44,49,53,57,61,70 *infra.*

G • **Urge Easterbrook's colleagues:** *passim.*

H • **Choi & Gulati:**
(i) • https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2075&context=faculty_scholarship;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Choi%2CGulati%3DEmpiricalRankingOfJudges.pdf.

I • **Gulati & Sanchez:**
(i) • https://scholarship.law.duke.edu/faculty_scholarship/1307;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Gulati%2CSanchez%3DGiantsInAWorldOfPygmies.pdf.

J • **Sachs:**
(i) • https://lawreview.law.ucdavis.edu/issues/48/4/Articles/48-4_Sachs.pdf;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Sachs%3DSuperstarJudges.pdf.

K • **Birbrair:**
(i) • https://today.law.harvard.edu/judge-easterbrook-delivers-inaugural-scalia-lecture-interpreting-unwritten-constitution-video;
(ii) • http://perma.cc/9AY5-S2DB;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Easterbrook%3DHarvardLecture.pdf;
(iv) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Easterbrook%3DHarvardLecture.pdf;
(v) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Easterbrook%3DHarvardLecture.webm.

α • **Judicial Conduct and Disability Act,** see http://judicialmisconduct.us/Introduction#jcda.

β • **Judicial Conduct and Disability Rules,** see http://judicialmisconduct.us/Introduction#jcdr.

Swarthmore awarded him an honorary degree in 2012, the college's president proclaimed, "[Y]our wise leadership of the seventh-circuit Court of Appeals has made you one of the nation's most influential and respected judges."[4] The *Wikipedia* entry about Judge Easterbrook notes that one University of Chicago lecturer referred to him as "the world's greatest living jurist."[5]

The only bar association evaluation ever conducted of Seventh Circuit judges is now getting old.[6] It occurred in 1994 when Judge Easterbrook had been on the bench for nine years.[7] This evaluation by the Chicago Council of Lawyers criticized Judge Easterbrook more severely than any other judge on the court.[8] Although the report praised his intelligence, breadth of knowledge, writing style, and work ethic, it faulted his treatment of lawyers, his willingness to decide cases on grounds not addressed by the parties, and his misstatements of law and fact.

On the first point (mistreatment of lawyers), the Council declared that Judge Easterbrook "has consistently displayed a temperament that is improper for a circuit judge."[9] It noted:

> Lawyers reported that Judge Easterbrook goes well beyond asking pointed questions; rather, he "attacks" lawyers in an attempt to establish that the advocate has not understood the case or that the judge's knowledge is superior to that of the advocate. Such behavior often continues well after the judge has made his point; Judge Easterbrook has gone so far as to cause attorneys to break down, unable to continue effectively.[10]

D

the right word here is "bullies"

A

B

C

---

[4] *Easterbrook Awarded Honorary Degree by Swarthmore College*, U. OF CHICAGO NEWS (June 4, 2012), http://www.law.uchicago.edu/news/easterbrook-awarded-honorary-degree-swarthmore-college [http://perma.cc/S3HM-LRP4].

[5] *Frank H. Easterbrook*, WIKIPEDIA, https://en.wikipedia.org/wiki/Frank_H._Easterbrook [https://perma.cc/9YG6-ZNSL] [hereinafter *Easterbrook*, WIKIPEDIA].

[6] *See* Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673 (1994).

[7] *See id.* at 747.

[8] The Council saw "no point in rating judges with life tenure" in the same way it rated candidates for the bench. It offered "only a narrative description of their performance." *Id.* at 676. On my reading, however, the Council viewed twelve of the fifteen judges it evaluated positively and most of these judges very positively. It sharply criticized only three—Judges Coffee, Posner, and Easterbrook. The Council's criticism of Judge Easterbrook was more severe than that it offered of Judges Coffee and Posner.

[9] *Id.* at 760.

[10] *Id.*

A • **U. of Chicago News:**
(i) • https://www.law.uchicago.edu/news/easterbrook-awarded-honorary-degree-swarthmore-college;
(ii) • http://perma.cc/S3HM-LRP4;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Easterbrook%3DSwarthmoreHonoraryDegree.pdf;
(iv) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Easterbrook%3DSwarthmoreHonoraryDegree%2C2.pdf.

B • **Wikipedia entry on Easterbrook:**
(i) • https://en.wikipedia.org/wiki/Frank_H._Easterbrook;
(ii) • https://perma.cc/9YG6-ZNSL;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Easterbrook%3DWikipedia%2C2015-11-08.pdf (captured Nov 8 2015);
(iv) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Easterbrook%3DWikipedia%2C2018-04-18.pdf (captured Apr 18 2018, containing a mention of the Memoir).

C • **Chicago Council of Lawyers:**
(i) • http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1869&context=law-review;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/DePaul%3DEvaluationOf7thCirJudges.pdf.

D • See ℘8F *supra.*

Lawyers described Easterbrook as "arrogant and intolerant"[11] and contended that he "displays a contempt for attorneys and, to some extent, the litigants as well."[12] Lawyers said that they "rarely feel like they have received a fair hearing."[13] Complaints about the judge's demeanor were "resounding"[14] and "consistent,"[15] proceeding even from attorneys who praised other aspects of his work.[16]

a species of "denial of the right to be heard"

A

On the second point (disregard of the parties' presentations), the Council noted, "Judge Easterbrook is one of the court's chief practitioners of deciding issues that have not been briefed by the parties."[17] His dicta are "extensive and free-wheeling," and he invokes them as authority in later decisions.[18]

a.k.a.: "mischaracterizing," "falsification," "dissembling," "lying," etc.

B

On the third point (misrepresenting facts and law), attorneys described Judge Easterbrook's use of precedent as "unreliable and inappropriate."[19] They also claimed that he "mischaracteriz[es] the record below in order to reach certain results."[20] Judge Easterbrook "can communicate a lack of respect for the facts of a case and for precedent."[21] The Council concluded, "[P]articularly when he disregards the facts or the law, [Judge Easterbrook] acts like the worst of judges."[22]

My sense is that Judge Easterbrook's reputation among practitioners is no better today than it was in 1994. A blogger still insists that Easterbrook "makes advocates appearing before him wet themselves in fear."[23] The judge himself told an interviewer in 2013 that he has in his chambers "a little political cartoonish thing that was given to me by my law clerks that has me, on the bench, pressing 'the button,' which I sometimes use metaphorically, that opens a trapdoor under the lawyer,

---

11 *Id.*

12 Chicago Council of Lawyers, *supra* note 6, at 747.

13 *Id.* at 760.

14 *Id.* at 747.

15 *Id.* at 709.

16 *Id.* at 760.

17 *Id.* at 756.

18 Chicago Council of Lawyers, *supra* note 6, at 758.

19 *Id.* at 757.

20 *Id.* at 758.

21 *Id.* at 747.

C

22 *Id.* at 761. *See also* Anthony D'Amato, *The Ultimate Injustice: When a Court Misstates the Facts*, 11 CARDOZO L. REV. 1313, 1325–47 (1990) (complaining that Judge Easterbrook repeatedly misrepresented the record in *Branion v. Gramly*, 855 F.2d 1256 (7th Cir. 1988)).

D

23 David Lat, *Star Witnesses: Judges Posner, Easterbrook and Bauer Testify Against Hal Turner*, ABOVE THE LAW (Mar. 3, 2010, 7:00 PM), http://abovethelaw.com/2010/03/star-witnesses-judges-posner-easterbrook-and-bauer-testify-against-hal-turner/ [http://perma.cc/X9V9-SDHW].

A • See ℘8A,B *supra.*

B • See ℘8C *supra.*

C • **D'Amato:**
(i) • https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1061&context=facultyworkingpapers;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2017-06/DAmato%3DUltimateInjustice%2CWhenCourtMisstatesFacts_0.pdf;
(iii) • for more references, see http://judicialmisconduct.us/CaseStudies/RYANvUS(ALSCHULERvEASTERBROOK) footnote α.

D • **Lat:**
(i) • https://abovethelaw.com/2010/03/star-witnesses-judges-posner-easterbrook-and-bauer-testify-against-hal-turner;
(ii) • http://perma.cc/X9V9-SDHW;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/AboveTheLaw%3DStarWitnesses.pdf.

and shooting a lawyer down the 27 floors . . . ."[24] As this Memoir will show, the characteristics that prompted the bar's criticism of Judge Easterbrook—his disdain for lawyers, for the principle of party presentation, and for truth telling—have not abated.

Efforts to explain why academics and practitioners view Judge Easterbrook differently may suggest that the two groups have different outlooks.[25] My guess, however, is that the values of the two groups do not differ much or explain much. More significant is the fact that some lawyers feel the sting of Judge Easterbrook's abuse personally. Even when academics are aware of Judge Easterbrook's conduct on the bench and have reservations about it, they can imagine that it reflects the judge's unwillingness to suffer fools gladly.

The principal reason for the differing perceptions of practitioners and academics may be neither differing outlooks nor differing personal experiences. It may be instead that practitioners know things academics do not know. An academic who is impressed by an engaging, well-written opinion cannot easily determine whether this opinion misrepresents the record of the case before the court or the arguments of counsel. He is also unlikely to know whether the opinion falsifies precedent. Most cases cited by a court of appeals are unfamiliar to most academic readers, although they are usually well known to the lawyers who filed the briefs.

and: falsification of public records, fraud upon the court (by a judge), etc. are CRIMES (18 USC §1519, etc.)

This Memoir will dissect two opinions by Judge Easterbrook that on first reading might strike you as convincing and nicely done.[26] It will tell the story of my representation of George H. Ryan, a former Illinois governor serving a sentence for mail fraud who sought a new trial following the Supreme Court's decision in *Skilling v. United States*.[27] The Memoir will describe six rulings in favor of the government set forth in Judge Easterbrook's opinions although the government had not sought them. Violating standards articulated by the Supreme Court, the Seventh Circuit gave Ryan no opportunity to address several of these rulings until after the opinions had been published. I hope to convince you that the government had good reason for not endorsing these rulings; all of them were preposterous.

B, C

This quest-for-new-trial is the basis of this Memoir.

E

F

or nine: p.8C supra, p.53 infra

G

This Memoir will also describe eight falsehoods told by Judge Easterbrook in written opinions and in statements from the bench. By

---

[24] *Interviews with United States Court of Appeals Judges: Judge Frank H. Easterbrook*, 5 SCRIBES J. LEGAL WRITING 1, 1 (2013).

[25] The practitioners' explanations may imply that professors are pedants, and the professors' may imply that practitioners are plumbers.

[26] *See* Ryan v. United States, 688 F.3d 845 (7th Cir. 2012); Ryan v. United States, 645 F.3d 913 (7th Cir. 2011), *vacated and remanded*, 132 S. Ct. 2099 (2012).

[27] 561 U.S. 358 (2010).

A

B

C

D

H

the Skilling case is the main driver of this Memoir; it is also is the leading decision of a trio of "honest-services (mail/wire) fraud" cases, all decided on the same day (Jun 24 2010): Skilling/Black/Weyhrauch (see p.11,18,31 infra)

I

A • **Interviews With Judges** *{not freely available online}:*
(i) • https://www.scribes.org/the-journal-of-legal-writing;
(ii) • http://heinonline.org/HOL/LandingPage?handle=hein.journals/scrib15&div=1&src=home;
(iii) • https://docs.wixstatic.com/ugd/3eec74_65441716cf6c4c4ba5a5e43df7cfd1a5.pdf;
(iv) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ScribesJournal%3DContentsPage.pdf).

B • **Easterbrook's Second Opinion:**
(i) • https://www.leagle.com/decision/infco20120806086;
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3D688F3d845.pdf.

C • **Easterbrook's First Opinion:**
(i) • https://www.courtlistener.com/pdf/2011/07/06/George_Ryan_v._United_States.pdf;
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3D645F3d913.pdf.

D • ***Skilling v. U.S.*** (see also *U.S. v. Skilling,* ℘56E *infra*):
(i) • Skilling v. U.S. (2010); *note:* a number of items (Petition, Briefs) are inadvertently missing from that webpage at this writing; in particular, the Petition for Writ of Certiorari is missing (I have informed ScotusBlog of this bug);
(ii) • 561 US (Syllabus ℘358–366; Opinion ℘367–475), https://www.supremecourt.gov/opinions/boundvolumes/561BV.pdf ℘403–520;
(iii) • http://judicialmisconduct.us/sites/default/files/2018-04/Skilling-v-US.pdf;
(iv) • Wagoner, *Honest-Services Fraud: The Supreme Court Defuses the Government's Weapon of Mass Discretion in Skilling v. United States,* South Texas Law Review, Vol. 51 No. 4 ℘1087 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734551;
(iv′) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Wagoner%3DHonestServicesFraud%2CWeaponOfMassDestruction.pdf;
(v) • Burrell, *The Right-to-Honest-Services Doctrine — Enron's Final Victim: Pure Void-for-Vagueness in Skilling v. United States,* 44 Loy. L.A. L. Rev. 1289 (2011), http://digitalcommons.lmu.edu/llr/vol44/iss3/19;
(v′) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Burrell%3DRightToHonestServicesDoctrine.pdf.

E • **Unsought (False) Rulings,** see ℘8A *supra.*

F • **No opportunity to address,** see ℘8B *supra.*

G • **Falsehoods,** see ℘8C *supra.*

H • **Vacated and Remanded** (**GVR**, https://en.wikipedia.org/wiki/Grant,_vacate,_remand_order):
(i) • https://casetext.com/case/ryan-v-united-states-27;
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3D132SCt2099.png;
(iii) • https://www.leagle.com/decision/insco20120430403;
(iv) • http://judicialmisconduct.us/sites/default/files/2018-04/PetWritCert%3D11-499%2CGVR.pdf.

I • See also:
(i) • Beale, http://moritzlaw.osu.edu/students/groups/osjcl/files/2012/05/Beale.pdf;
(ii) • Zlatnik, https://www.bu.edu/rbfl/files/2013/09/HonestServicesFraud.pdf.

falsehoods, I do not mean minor misunderstandings or misinterpretations; I mean *whoppers*. Anyone who checks can confirm that these statements were false, and I encourage skeptical readers to check. This Memoir will also describe Judge Easterbrook's abusive demeanor on the bench.

For the most part, my narrative will proceed chronologically, but I will take *Falsehood Number Seven* out of order and tell you about it now. I offer this example out of order (1) so that you can see what I'm talking about and (2) so that I can discuss at the outset whether the judge's misrepresentations should be regarded as innocent, negligent, grossly negligent, reckless, or deliberate. Describing this falsehood will inform you not only about one of Judge Easterbrook's misstatements of the record but also about one of the legal rulings he concocted—a ruling Ryan had no opportunity to address until he filed a petition for rehearing.

The misrepresentation I am about to describe appeared in Judge Easterbrook's second opinion in the *Ryan* case. By the time of this opinion, it was clear that the instructions given to the jury at Ryan's trial were flawed. These instructions marked several paths to conviction. They told the jury to convict if Ryan failed to disclose a conflict of interest, if he violated any of a number of state laws, or if he accepted bribes. After Ryan's conviction, the Supreme Court held in *Skilling* that failing to disclose a conflict of interest is no crime and that state-law violations do not establish the federal crime of depriving the public of its right to honest services. The statute that Ryan allegedly violated outlawed only schemes to give or receive bribes or kickbacks.[28]

The erroneous jury instructions did not automatically entitle Ryan to a new trial. The error would be harmless if the jury found that Ryan had in fact accepted bribes. Judge Easterbrook's opinion for the Seventh Circuit concluded that the jury must have found bribery, and it offered three reasons for this conclusion. The first one was:

> Ryan was convicted on four tax counts, which involved omitting income from tax returns. Bribes are "income" under the Internal Revenue Code; gifts from friends are not income. The jury was so instructed. The jury also was told that it should acquit Ryan if he believed that the money he received was a gift, rather than a payment for favors delivered in return, even if his belief was wrong. By convicting on the tax counts, the jury found that Ryan knowingly accepted payment in exchange for official

[28] *See Skilling*, 561 U.S. at 411–12.

reflecting the word "whopper" used in 498 F3d 666 (p.27 infra), at 705

A

B

C

FALSEHOOD #7: MISREPRESENTATION THAT JURY "MUST" HAVE FOUND BRIBERY

invented, fabricated, falsified

D

K

E

F

M

this so-called "bribes-and-kickbacks" standard (for the duty of "honest services," 28 USC §1346), promulgated by Skilling, was in fact propounded by Alschuler; p.57 infra

J

L

falsely

H

I

false

should read "concluded" and "must" (with quote-marks); as will be seen, there is no principle of law or logic that supports such a "must/conclusion;" indeed, if such a must/conclusion WERE valid, why didn't the Supreme Court (in Skilling) simply acknowledge/ratify it, rather than explicitly denying it?

G

A • This "checking" is precisely the purpose of this Annotated version!

B • **Bullying of counsel,** see ℘8F *supra.*

C • See also ℘75 *infra.*

D • That is, not only about **falsehood,** but also about **unsought (false) ruling** and **no opportunity to argue** (℘8A,B,C *supra,* simultaneously).

E • ℘11B *supra.*

F • See ℘13B *infra.*

G • See ℘11D *supra,* and ℘12J *infra.*

H • Easterbrook actually emphasized the word *must.* ℘11B *supra,* http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3D688F3d845.pdf#page=8.

I • Three reasons:
(i) • ℘11B *supra;*
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3D688F3d845.pdf#page=8;
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3D688F3d845.pdf#page=10.

J • See ℘21Efα *infra.*

K • ℘14A *infra.*
• ***Note:*** The (rather involved) **travel of the underlying District Court criminal case, and of this Appellate civil action** (the latter being the case we're interested in, because that's where Easterbrook appears), are indicated via the ordered list (with end-dates) given at http://judicialmisconduct.us/CaseStudies/RYANvUS(ALSCHULERvEASTERBROOK).

L • **Harmless-Or-Not Error (of the Jury Instructions, ℘13B *infra*):**
(i) • Justin Murray, https://harvardlawreview.org/2017/05/a-contextual-approach-to-harmless-error-review;
(ii) • Brandon Garrett, https://harvardlawreview.org/2017/05/patterns-of-error.

M • **IN A NUTSHELL** (this nutshell/paraphrase-of-the-case, *Ryan v. U.S.,* is expanded in great detail throughout the remainder of this Memoir, *passim*):
• It is of signal importance (else, *miscommunication* can/will happen) to understand what "**flawed/defective** [jury instructions]" means in this case/Memoir, namely:
(i) • It does **NOT** mean that the instructions were "wrong-at-the-time-issued (pre-*Skilling*)," because they weren't. Namely, the instructions (correctly) specified to "convict if you find evidence of 'violation of 18 USC §1346, i.e., the duty of 'honest-services' (= (α) conflict-of-interest, (β) state-law-violation, (γ) bribery/kickback)'."
(ii) • Rather, it **DOES** mean that (post-*Skilling,* with the benefit of greater light being shed by *Skilling*) what the instructions **SHOULD** have said was to "convict if you find evidence of 'violation of 18 USC §1346, i.e., (γ) bribes/kickbacks'."
(iii) • In other words, while the "jury instructions *per se*" were OK, the INTERPRETATION/UNDERSTANDING OF THE UNDERLYING LAW (18 USC §1346) CHANGED.
(iv) • With the result that Ryan was convicted *then,* and was in prison *now,* because of CONDUCT/BEHAVIOR (namely, *non*-bribery/kickback) THAT WAS NOT ILLEGAL/CRIMINAL. Which is UNCONSTITUTIONAL (denial of Due Process).

> acts—that he was bribed, rather than just that he failed to disclose gifts to the public.[29]

false/ misleading

That reads well, don't you think? It seems entirely convincing. But every statement is a fabrication. The government never claimed that Ryan failed to pay taxes on the payments it alleged were bribes. Ryan was indeed convicted of tax violations, but they concerned other payments entirely. The alleged bribes had nothing to do with the tax counts. When Judge Easterbrook noted that bribes are income and gifts are not and then declared, "The jury was so instructed," he made it up. No instruction resembling the instruction he described had been given. When Judge Easterbrook added that the jury was told to acquit if Ryan mistakenly believed the money he received was a gift rather than payment for services rendered, he again deceived his readers.[30]

The government had not misled Judge Easterbrook. It had not claimed that Ryan's tax convictions bore on whether the jury found that he took bribes.

only the mail-fraud charges are discussed in this Memoir; the reason is that if the mail-fraud charges fell, the racketeering (RICO) charges would automatically fall as well; to quote from Easterbrook's first opinion (p.11B supra): "The indictment [p.14C infra] alleged that mail frauds constituted the predicate crimes; thus a defect in the mail fraud convictions could[/would] vitiate the RICO conviction as well."

Judge Easterbrook's misrepresentation was especially astonishing because this was not the first time he had made it, and my co-counsel and I had complained to him and his colleagues about his earlier fabrication. In his first *Ryan* opinion, he wrote:

> The record shows . . . that [Ryan] received substantial payments from private parties during his years as Secretary of State and Governor. The failure to report and pay tax on this income underlies the tax convictions. The debate at trial on the racketeering and mail-fraud charges was whether these payments were campaign contributions, plus gifts from friends and well-wishers, or were instead bribes . . . .[31]

E

This statement had no bearing on the issues Judge Easterbrook discussed in his first *Ryan* opinion. My co-counsel and I nevertheless decided to note its falsity in our petition for rehearing *en banc*, hoping (foolishly) that underlining the judge's penchant for confabulation would make his colleagues more attentive to other, more consequential misstatements. Quoting the passage recited above, we wrote, "The panel

A

---

[29] *See Ryan*, 688 F.3d at 849–50.

should read 23922

[30] *See* Trial Transcript at 22922–27 (Mar. 10, 2006), United States v. Warner (N.D. Ill. 2006) (No. 02 CR 505) (the trial court's tax instructions). A full transcript of the instructions in Ryan's case is available from the author.

B

[31] Ryan v. United States, 645 F.3d 913, 918 (7th Cir. 2011), *vacated and remanded*, 132 S. Ct. 2099 (2012).

C

D

A • (i) • ℘11B *supra;*
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3D688F3d845.pdf#page=8.

B • **Trial Transcript, Jury Instructions, Pallmeyer** (volume 94 of the Transcript of Proceedings, Mar 10 2006), obtained from Alschuler, are here: http://judicialmisconduct.us/drupal/sites/default/files/2017-06/Ryan-v-US%3DJuryInstructions.pdf; see also PetWritCertApx at ℘215a = http://judicialmisconduct.us/sites/default/files/2018-04/Ryan-v-US%3DPetWritCertAppendix.pdf#page=216.
(i) • The actual formal jury instructions (read by Judge Pallmeyer from hard-copy, supplied to the jurors) are at ℘23870ℓ11–℘23892ℓ8 and ℘23895ℓ8–℘23940ℓ6. The instructions most relevant to the Memoir are at ℘23922ℓ24–℘23927ℓ18.
(ii) • To fully understand/appreciate these jury instructions requires knowledge of the exact charges, for which see ℘14C *infra.*
(iii) • A study of the jury instructions indicates that the Memoir is indeed correct about its assertions of Easterbrook's "fabrications" regarding the instructions, in the last three sentences of the first full paragraph on Memoir ℘13: "When Judge Easterbrook noted that bribes are income and gifts are not and then declared, "The jury was so instructed," he made it up. No instruction resembling the instruction he described had been given. When Judge Easterbrook added that the jury was told to acquit if Ryan mistakenly believed the money he received was a gift rather than payment for services rendered, he again deceived his readers."
(iv) • Further study indicates the three sentences preceding those three (in (iii)), are also correct: "The government never claimed that Ryan failed to pay taxes on the payments it alleged were bribes. Ryan was indeed convicted of tax violations, but they concerned other payments entirely. The alleged bribes had nothing to do with the tax counts."
(v) • Yet further study indicates the two sentences succeeding those three (in (iii)) are also correct: "The government had not misled Judge Easterbrook. It had not claimed that Ryan's tax convictions bore on whether the jury found that he took bribes."
(vi) • More generally (than (iii)–(v)), our exhaustive study has not yet turned up even a *single* factoid upon which the Memoir is mistaken.

C • ℘11C *supra.*

D • ℘11H *supra.*

E • **RICO (Racketeer and Corrupt Organizations Act, 18 USC §1961–1968),** https://en.wikipedia.org/wiki/Racketeer_Influenced_and_Corrupt_Organizations_Act, requires a "*pattern*" ("two or more acts of racketeering activity"). https://www.law.cornell.edu/uscode/text/18/part-I/chapter-96.
Racketeering Activity is defined at 18 USC §1961(1), https://www.law.cornell.edu/uscode/text/18/1961.

exhibited as little regard for the facts as it did for the law."[32] We then explained:

> In fact, the tax charges focused on Ryan's alleged use of campaign funds for personal expenses (a use that was lawful but that constituted income), his receipt of a consulting fee from the Phil Gramm presidential campaign, and a few other alleged payments . . . . None of these payments were alleged to be bribes. All of the mail fraud charges of which Ryan remains convicted concern benefits he and others (mostly others) received from Lawrence Warner and Harry Klein. . . . Only these benefits are now alleged to be bribes, and none played any part in the tax charges.[33]

The sentence preceding this one read: "[T]he panel opinion was contrary to well- settled law in every respect."

If someone accused you of falsifying facts in a document circulated to your co-workers, you might feel chagrined (especially if the accusation was accurate), but you are not Judge Easterbrook. When Ryan's case returned to him a year later, he concocted the same nonsense. Judge Easterbrook probably had forgotten the correction, if he ever noticed it, and this time his misstatement constituted the court's leading argument on the central issue in the case. Our petition for rehearing following the second opinion complained about this misstatement and others,[34] but the court denied the petition without correcting any of its errors.

invented, fabricated, falsified

What could Judge Easterbrook have been thinking? The most charitable and most likely explanation is that, because Ryan had not challenged his tax convictions after *Skilling*, Judge Easterbrook knew nothing at all about the tax charges. Without bothering to check, he imagined that these charges concerned the payments alleged to be bribes, and, again without checking, he guessed what jury instructions the court would have given if the charges had concerned these payments.

E

On these assumptions, I consider the word "falsehood" appropriate. Judge Easterbrook did not write: "Here's my guess," or "Here's what I think probably happened." An appellate judge is in a position to know what charges have been filed and what instructions have been given, and a tentative or qualified statement concerning these facts would have tipped readers off that something was amiss. So Judge Easterbrook made

B

C

D

A

---

[32] Ryan's Petition for Rehearing with Suggestion of Rehearing En Banc at 5, Ryan v. United States, 645 F.3d 918 (7th Cir. 2011) (No. 10-3964), *vacated and remanded*, 132 S. Ct. 2099 (2012).

[33] *Id.*

[34] *See* Ryan's Petition for Rehearing with Suggestion of Rehearing En Banc at 5–9, Ryan v. United States, 688 F.3d 845 (7th Cir. 2012) (No. 10-3964).

A • **Ryan's (First) Petition for Rehearing with Suggestion of Rehearing En Banc:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DPetForReh%2C2011_0.pdf.

B • As in "Falsehoods #1–8[9]" (this one being #7), see ℘8C,12C *supra.*

C • **Indictment (Second Superseding):**
(i) • http://www.ipsn.org/indictments/warner_ryan.htm;
(ii) • http://judicialmisconduct.us/sites/default/files/2018-04/US-v-Ryan%3DIndictment.pdf.

D • See ℘13B *supra.*

E • ℘11D *supra.*

the sort of firm pronouncement one expects in a judicial opinion. This pronouncement would have led readers to believe he had examined the record himself or else had relied on a party's uncontested description of this record. By offering an unqualified statement when he knew he was guessing, Judge Easterbrook deliberately deceived his readers.

Preceding paragraph

Perhaps, on the assumption I've made about his mental state, one could characterize Judge Easterbrook's misstatements as reckless rather than purposeful.[35] If one is extremely charitable, one might even call these misstatements grossly negligent rather than reckless.[36] Whatever the appropriate label might be, this Memoir will show that Judge Easterbrook persistently presents wildly inaccurate, made-up statements as unquestionable statements of fact.[37]

C

D

The *Wikipedia* entry about Judge Easterbrook mentions the Chicago Council of Lawyers' criticism of his demeanor, but it observes that "the Council did not specify authorship, so the criticism is anonymous."[38] The entry adds:

> [T]his review by the Council was never repeated, lending partial support to the defenders of Easterbrook and Posner that the report was an opportunity for anonymous venting by lawyers who were unhappy with the results of Seventh Circuit decisions, in no small part thanks to the decisions of Reagan appointees Easterbrook and Posner. Posner has recently commented about the report, "You have here some anonymous people who are talking to the Chicago Council of Lawyers. How much credence should we put on these people? They can be sore losers. They can be crybabies."[39]

---

[35] Judge Easterbrook probably did not *know* when he insisted that certain jury instructions had been given that they had not been given. He probably imagined that they had been. If believing that a made-up statement is *likely* to be true makes a charge of lying inappropriate, you might prefer a different word—perhaps "confabulating." *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (declaring that a reckless disregard for the truth can qualify as "actual malice").

A

[36] *Cf.* MODEL PENAL CODE § 2.02 (AM. LAW INST., Proposed Official Draft 1962) (defining recklessness and criminal negligence). If Judge Easterbrook failed even to advert to the possibility that his guesses might be wrong, one could plausibly describe him as grossly negligent. If he realized that his guesses might be wrong and nevertheless offered them as fact, "reckless" would be a better word.

B

[37] Even if one were to characterize Judge Easterbrook's misstatements as grossly negligent at the time he made them, these misstatements would have become something worse when he left them uncorrected after lawyers noted them in petitions for rehearing.

[38] *Easterbrook*, WIKIPEDIA, *supra* note 5.

[39] *Id.*

A • ***Times v. Sullivan:***
(i) • https://en.wikipedia.org/wiki/New_York_Times_Co._v._Sullivan;
(ii) • https://supreme.justia.com/cases/federal/us/376/254/case.html, at ℘279–280.
• In the context of defamatory falsehood made against a public official, to say that "the statement was made with 'actual malice' [means] with knowledge that it was false or with reckless disregard of whether it was false or not."

B • **Model Penal Code:**
(i) • https://www.ali.org/publications/show/model-penal-code;
(ii) • https://www.ali.org/media/filer_public/23/5d/235db86d-f32c-4b7a-b441-b714a53c7981/mpc-culpability-requirements-202.pdf;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ALI-MPC%3DCulpabilityRequirements202.pdf.

C • See ℘9B *supra.*

D • See ℘9C *supra.*

Because a judge must pick a winner and a loser in every case, the lawyers who criticized Judge Easterbrook probably had lost as many cases before the judges they praised as they had before him. They evidently did not cry whenever they lost. Eight of the fifteen judges they evaluated had been appointed by President Reagan, and the lawyers reviewed most of these judges favorably. The reason these critics remained anonymous was apparent: they suspected that revealing their identities would lead to unprovable retaliation against them and their clients.

I.e., the tyranny of "Fear of Speaking Truth to Power."

I am in a different position from these critics. I have retired, and I can be sure that I will never again appear before the United States Court of Appeals for the Seventh Circuit. I can afford to say out loud what practicing lawyers can only whisper. To the charge of being a sore loser and a crybaby, I plead guilty. I think that lawyers should be sore losers and whiners when judges cheat.

No longer subect to the tyranny of "Fear of Speaking Truth to Power."

III. THE GOALS OF THIS MEMOIR AND HOW IT WILL PROCEED

This Memoir may contribute to the study of judicial reputation by showing how a judge whose reputation in the academy is ace-high can in fact be a terrible judge. The Memoir also will draw some general lessons about fair procedure in an adversary system, and it will propose some reforms. My main purpose, however, is not to contribute to the study of judicial reputation, to draw general lessons about the adversary system, or to propose institutional reforms. It is to tell the truth about Judge Easterbrook.

according to the first paragraph of Easterbrook's second opinion (p.11B supra), Ryan "was convicted of violating [i] RICO [see p.13E supra], the [ii] mail-fraud statute, the [iii] Internal Revenue Code, and [iv] a law forbidding lies to federal investigators ... [h]e d[oes] not contest the lying or tax convictions but d[oes] challenge the mail-fraud and RICO convictions;" in the collateral action reported here ("Ryan v. U.S."), only [i–ii] are challenged, not [iii–iv]

I have several reasons for complaining publicly about this judge's conduct. First, I hope that this Memoir will bring a pardon closer for George Ryan. Ryan deserves a pardon, not because he's a saint, but because his government has treated him badly. Senator Dick Durbin encouraged President Bush to release Ryan from prison after he had been there less than a year,[40] and the case for clemency is much stronger now. Ryan is eighty-one, and he's completed his sentence. As this Memoir will show, he was ~~almost~~ certainly punished for conduct that is not a crime.

should read "very"

In my fantasy world, Judge Easterbrook himself might recognize that his work in Ryan's case was imperfect, and he might write the President to support a pardon. The judges who joined Judge Easterbrook's opinions, Judges Diane Wood and John Tinder, might join him or else write letters of their own. But I know that the odds of such judicial redemption in the real world are probably negligible.

just as Ryan himself was a major proponent of the pardon power, p.20f.45 infra

A

[40] *See Durbin to Ask Bush to Commute Ryan Sentence*, HUFF. POST (May 25, 2011), http://www.huffingtonpost.com/2008/12/01/durbin-to-ask-bush-to-com_n_147485.html [http://perma.cc/6ZMW-XCZX].

A • **Durbin:**
(i) • https://perma.cc/6ZMW-XCZX;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Durbin%3DCommuteRyanSentence.pdf.

Even if a pardon for Ryan is a pipe dream, this Memoir may lead Judge Easterbrook to hesitate before making up law, facts, and grounds of decision that no one else has imagined. At a minimum, it may prompt him to check some citations.

Most importantly, I hope that this Memoir will encourage Judge Easterbrook's colleagues to rein him in. Like almost everyone else, these colleagues sometimes seem intimidated by Judge Easterbrook's personal forcefulness and apparent intellectual power. When the judge speaks with confidence and an apparent mastery of detail about a subject one knows nothing about, one is likely to assume that he knows what he's talking about. The odds, however, are that he doesn't. If questioned or challenged, he is likely to double down and push his bluff farther ("Right. I understand that. That's what the D.C. Circuit held in *Frady* and which the Supreme Court reversed."[41]), but the questioner should not yield. Judge Easterbrook's colleagues should view everything he says with skepticism and should recognize the serious problem his conduct poses for their court.

TRUE: This (bluffing, being questioned/ challenged, doubling-down) is EXACTLY what the judges have done in the case of Tuvell v. IBM — all the way to the Judicial Conference.

Even if this Memoir produces no change in Judge Easterbrook's behavior or the performance of his court, the taxpayers who pay Judge Easterbrook's salary should know the kind of service he provides in return. Although the Constitution guarantees an Article III judge life tenure,[42] it is instructive to consider how falsehoods like his would fare in professions other than his. Would a journalist who made similar misstatements keep his job? Would an academic who showed no greater regard for the truth get tenure? Would a corporate executive who misstated crucial facts in a business report be given a second chance?

"Brandeis Sunlight" B

Before I review Judge Easterbrook's conduct, I will describe the principal crime with which Ryan was charged and the course his case took before it reached Judge Easterbrook. This Memoir will proceed for twenty pages before Judge Easterbrook appears at center stage again, but it would be difficult to compress into less space a case that began with a 114–page indictment and continued through a six-month trial, eighteen days of troubled jury deliberations, a Seventh Circuit decision that led three judges to dissent from the court's denial of rehearing *en banc*, a transformation of the applicable law by the Supreme Court after Ryan began serving his sentence, and a post-conviction proceeding that generated a fifty-eight page opinion in the district court.

until p.38 infra

D

E

F

G

---

[41] *See* Oral Argument at 3:19, Ryan v. United States, 688 F.3d 845 (7th Cir. 2012) (No. 10-3964), *vacated and remanded*, 132 S. Ct. 2099 (2012), http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3964_05_31_2011.mp3 [http://perma.cc/S247-27LF].

[42] *See* U.S. CONST. art. III, § 2.

A

C

should read §1

A • **Oral Argument Audio** (the quote cited by ℘17ƒ41 occurs at 3:19):
(i) • http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3964_05_31_2011.mp3;
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DOralArg%2C2011-05-31.mp3.
Oral Argument Transcript (the quote cited by ℘17ƒ41 occurs at ℘2):
(iii) • http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApltPostArgApx.pdf#page=3.

B • **Brandeis Sunlight:**[α]
(i) • **"The Duty of Publicity:"** I have talked about the wickedness of people shielding wrongdoers and passing them off (or allowing them to pass themselves off) as honest men. If the **broad light of day** could be let in upon men's actions, it would **purify them as the sun disinfects.** You see my idea; I leave you to straighten out and complete that sentence.
(ii) • *Letters of Louis D. Brandeis, Vol III, 1913–1915: Progressive and Zionist,* David W. Levy and Melvin I. Urofsky, *ed*. (1971), ℘100, letter to his fiance Alice Goldmark, Feb. 26, 1891 (https://books.google.com/books?id=Q7bviBd4w18C&pg=PA100&dq=brandeis+letter+feb+26+1891&hl=en&sa=X&ved=0ahUKEwij_bCOmqPRAhXBSyYKHUxjC90Q6AEIHDAA#v=onepage&q=brandeis%20letter%20feb%2026%201891&f=false). Twenty-two years later, Brandeis elaborated upon this idea in Harper's Weekly, Dec. 20, 1913, ℘10–13, *Other People's Money, Chapter V: What Publicity Can Do* (http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1910/1913_12_20_What_Publicity_Ca.pdf), beginning with the *more famous rendition:* **"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."**

C • **U.S. Constitution:**
(i) • https://www.gpo.gov/fdsys/pkg/CDOC-110hdoc50/pdf/CDOC-110hdoc50.pdf;
(ii) • http://judicialmisconduct.us/sites/default/files/2018-04/USConstitution.pdf.
U.S. Constitution, Annotated:
(iii) • https://www.congress.gov/constitution-annotated;
(iv) • https://www.congress.gov/content/conan/pdf/GPO-CONAN-2017.pdf;
(v) • http://judicialmisconduct.us/sites/default/files/2018-04/USConstitution%3DAnnotated.pdf.
Article III Section 1 (emphasis added): "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, *shall hold their Offices during good Behaviour,* and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

D • ℘14C *supra.*

E • See ℘30f105 *infra.*

F • The "transformation" factor was *Skilling v. U.S.,* see ℘11D *infra.*

G • See ℘37A *infra.*

α • From: Twilight Zone Essay, http://judicialmisconduct.us/sites/default/files/2017-04/08_JudicialTwilightZone_0.pdf, at ℘11f‡ and ℘14*e*57 (emphasis added). See also: Brandeis, *What Publicity Can Do,* http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Brandeis%3DWhatPublicityCanDo.pdf.

This Memoir will note Judge Easterbrook's unexpected appearance on the panel that decided Ryan's post-*Skilling* appeal—an appearance that was not the product of random assignment. It will describe an oral argument that consisted in large part of Judge Easterbrook's demand that counsel discuss four Supreme Court decisions that neither party had cited and that I, at least, could not recall.

Judge Easterbrook declared that these decisions precluded Ryan from challenging in post-conviction proceedings the instructions that had directed his conviction for non-criminal conduct. In fact, none of the decisions offered any support for this proposition; they bore no resemblance to his description. In dozens of cases, the Supreme Court, the Seventh Circuit, and other courts have allowed post-conviction challenges to instructions directing conviction for non-criminal conduct.

Judge Easterbrook similarly browbeat the government's lawyer at argument for failing to notice that Ryan's post-conviction petition was barred by the statute of limitations. He evidently overlooked a Seventh Circuit decision holding that petitions like Ryan's are not barred. That decision was directly on point, and its author was Judge Easterbrook.

After recounting the argument in Ryan's case, this Memoir will describe Judge Easterbrook's first opinion. This opinion offered a ground of decision that not only had not been advanced by the government but that no judge had mentioned at argument. Judge Easterbrook declared that Ryan had forfeited his objections to the undisclosed-conflicts instruction and the other instructions directing his conviction for non-criminal conduct. He did not mention that Ryan had objected to these instructions at every stage of the proceedings. He also did not mention the government's express waiver of any claim that Ryan had forfeited his objections.

As we pointed out at the earliest opportunity (in our petition for rehearing), disregarding the government's express waiver was unlawful, but the court did not correct its error. In an effort to distinguish Ryan's case from *Skilling* and another case decided the same day, *Black v. United States*,[43] Judge Easterbrook made a series of statements about how the defendants in *Skilling* and *Black* had preserved their claims. Like most of what Judge Easterbrook said in his initial opinion, these statements had no element of truth.

The Supreme Court vacated Judge Easterbrook and his colleagues' first *Ryan* decision and remanded the case for reconsideration in light of *Wood v. Milyard*.[44] In *Wood*, the Supreme Court declared once again that

---

[43] 561 U.S. 465 (2010).

[44] Ryan v. United States, 132 S. Ct. 2099 (2012) (remanding for reconsideration in light of Wood v. Milyard, 132 S. Ct. 1826 (2012)).

A
B
falsely
This mantra is the crux of this case.
falsely
C
D
E
F
G
H
I
K
J
L
M

A • **Non-random assignment,** ℘8D *supra.*

B • **Bullying of counsel,** ℘8F *supra.*

C • ℘11C *supra.*

D • **No opportunity to address,** ℘8B *supra.*

E • **No opportunity to address,** ℘8B *supra.*

F • **Falsehoods,** ℘8C *supra.*

G • **Falsehoods,** ℘8C *supra.*

H • **Falsehoods,** ℘8C *supra.*

I • ℘11D *supra.*

J • ***Black v. U.S.*** (see also ℘31E, *U.S. v. Black* ℘56H):
(i) • https://en.wikipedia.org/wiki/Black_v._United_States;
(ii) • https://www.supremecourt.gov/opinions/09pdf/08-876.pdf;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Black-v-US.pdf.

K • **Falsehoods,** ℘8C *supra;* falsehood #4, ℘8C *infra.*

L • ℘11H *supra.*

M • ***Wood v. Milyard:***
(i) • https://www.supremecourt.gov/opinions/11pdf/10-9995.pdf;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Wood-v-Milyard%2C Warden.pdf.

an appellate court may not disregard the government's waiver of a procedural defense. In his opinion on remand, however, Judge Easterbrook did not acknowledge his improper disregard of the government's concession that Ryan had made appropriate objections to the district court's instructions. Instead, he falsely attributed to the government a sweeping waiver it had not made.

Judge Easterbrook's second opinion announced that the court would refuse to review four of Ryan's mail fraud convictions at all (convictions that at least one member of the panel apparently was unwilling to affirm). Again, Ryan was afforded no opportunity to address the court's ruling until after it was made; neither the government nor any judge at either of the two arguments in Ryan's case had indicated that the court might refuse to review his convictions. Judge Easterbrook justified his refusal to review the four convictions by declaring that Ryan's sentences on these convictions had expired, but they had not expired. Even if they had, none of the three doctrines Judge Easterbrook mentioned would have supplied even arguable justification for refusing to review his convictions.

Because the court agreed to review three other mail fraud convictions, Judge Easterbrook turned at last to the question the parties had briefed in the Seventh Circuit more than a year before—the question of harmless error. In addressing this question, however, Judge Easterbrook once more disregarded the parties' arguments and confronted Ryan with a ruling that the government had not sought and that neither Judge Easterbrook nor any other judge had mentioned at argument. This Memoir already has noted his ruling that, by convicting on the tax counts, the jury must have found that Ryan took bribes. Judge Easterbrook set forth two additional reasons for judging the instructional errors in Ryan's case harmless, but in presenting these reasons, he continued to misstate the record.

Unless you represent prisoners or the government in post-conviction proceedings, this Memoir is likely to teach you lots of law you don't know. You will learn about direct review, collateral review, § 2255, waiver, forfeiture, harmless error, plain error, cause and prejudice, retroactivity, mootness, vested good time, the custody requirement, the concurrent sentence doctrine, and the different statutes of limitations that apply to first and second post-conviction petitions. In other words, this Memoir will inundate you with "lawyers' law," defined as "law of no interest to anyone but lawyers." Even if you are a lawyer, you may find some of this law challenging. Challenging law provides the best opportunity for judicial flimflam. Examining Judge Easterbrook's falsehoods about such things as whether one party waived or forfeited another party's waiver or forfeiture can get tedious, but, in criticizing the performance of a widely

B
C
D
A
E
oral (p.17A,66F infra)
F
G
p.72–73 infra
"at long last," p.75 infra
p.76f.310 infra
H
I
J
shouild read "must" (with quote-marks
false
M
K
"default rule," p.45–48 infra
N
p.40C infra
p.53E infra
p.50–52 infra
p.72 infra
p.73 infra
p.72 infra
L
and their wronged cllient/litigants!
or, to quote p.73f.296 infra: "federal criminal law and procedure are horribly complicated and arcane"

A • ℘11C *supra.*

B • See ℘18G *supra.*

C • **Falsehood,** ℘8C.

D • **Unsought (false) ruling,** ℘8A.

E • **No opportunity to address,** ℘8B.

F • **Falsehood,** ℘8C.

G • **Falsehood,** ℘8C.

H • **Unsought (false) ruling,** ℘8A.

I • **No opportunity to address,** ℘8B.

J • See ℘12H *supra.*

K • **Falsehood,** ℘8C.

L • Cf. ℘34A *infra.*

M • Easterbrooks' three (false) "reasons" (in quote-marks) — that the jury "must" (in quote-marks) have "found guilt for bribery" (in quote-marks) — are (cf. ℘75,76,79 *infra*):
(i) • "because" the jury convicted on the tax counts [false "reason," because the tax counts were unrelated to the alleged bribes];
(ii) • "because" both sides argued the case as if it were one only about bribery, solely [false "reason," because the sides did not do so, and the jury instructions offered the option that the jury could convict for failure to disclose a conflict of interest (as opposed to bribery)];
(iii) • "because" of earlier/prior gifting coupled with later/subsequent favoritism [false "reason," because the later/subsequent favoritism was independent, without contemporaneous cause-and-effect relationship, which is required of bribery].
• As argued/proved herein, all three of these "reasons" are *false:* as stated in the bracketed remarks above, none of these "reasons" holds any logico-legal-factual water. ℘75,76,79 *infra.*

N • ℘33A *infra.*

respected judge, I think it prudent to be thorough and to leave as little as possible to rebuttal. This Memoir will quote at length from Judge Easterbrook's opinions and from the oral argument in Ryan's case, and it will describe in some detail the precedents Judge Easterbrook falsified.

The Memoir will conclude by arguing for two propositions: (1) that a judge should never rest a decision in whole or in part on a ground the parties have had no prior opportunity to address and (2) that whenever a judge learns before his court issues its mandate that an opinion he has joined contains a clear error, he should act to correct this error. He should do so even if the error does not seem outcome-determinative or important.

A

B

IV. THE PROSECUTION AND CONVICTION OF GEORGE RYAN

At the end of a six-month trial, a federal jury convicted George Ryan of tax violations, false statements to the F.B.I., mail fraud, and racketeering.[45] The racketeering conviction depended on the mail fraud convictions; if they fell, it would too. In the proceedings that came before Judge Easterbrook, we did not challenge Ryan's tax and false statement convictions but focused on the racketeering and mail fraud charges.

A. The "Intangible Right of Honest Services"

18 USC §1346

18 USC §1341–1351

Honest services fraud is a type of mail fraud. The mail fraud statute forbids devising any scheme to defraud and then placing something in the mail for the purpose of executing the scheme.[46] This statute, enacted in 1872, was aimed, not at dishonest government officials, but at swindlers who used the mails to peddle things like phony western mining stock.[47]

---

[45] Apart from his legal troubles, Ryan is best remembered for declaring a death penalty moratorium in 2000 and then emptying Illinois' death row in 2003. He pardoned four death-row inmates on grounds of innocence and commuted the sentences of 167 others. Before Ryan became Governor, he had been Secretary of State, Lieutenant Governor, Speaker of the Illinois House of Representatives, a five-term member of the House, and Chair of the Kankakee County Board. Altogether Ryan held elective office for thirty-six years and statewide elective office for twenty. He never lost an election and was the longest serving elected official in Illinois history. *See* JAMES L. MERRINER, THE MAN WHO EMPTIED DEATH ROW: GOVERNOR GEORGE RYAN AND THE POLITICS OF CRIME 1, 7 (2008); *Illinois Governor George H. Ryan*, NAT'L GOVERNORS ASS'N, http://www.nga.org/cms/home/governors/past-governors-bios/page_illinois/col2-content/main-content-list/title_ryan_george.html [http://perma.cc/JRT6-P8FX].

C

G

[46] *See* 18 U.S.C. § 1341 (2012).

D

[47] The sponsor of the statute declared that it would "prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country." *See* McNally v. United States, 483 U.S. 350, 356 (1987) (quoting CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth)).

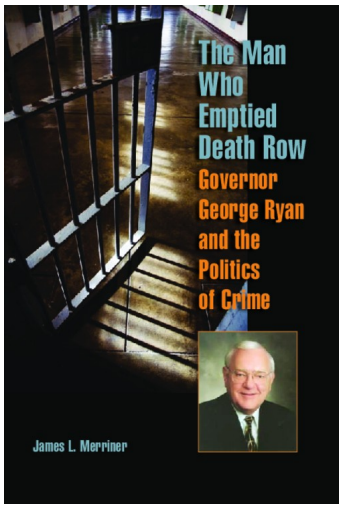
E

F

A • **No opportunity to address,** ℘8B.

B • **Falsehoods,** ℘8C.

C • **Merriner, Book** *{not freely available online}:*
(i) • http://www.jamesmerriner.com/;
(ii) • https://www.amazon.com/Man-Who-Emptied-Death-Row/dp/0809328658;
(iii) • https://books.google.com/books?id=PiV6CgAAQBAJ&pg=PT23&source=gbs_toc_?r&cad=3#v=onepage&q&f=false.



Merriner, Book Review:
(iv) • http://articles.chicagotribune.com/2008-10-11/news/0810100266_1_governor-george-ryan-capital-punishment-death-row;
(v) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Merriner-Book Review.pdf.
See also, **George Ryan Peace Prize Nomination:**
(vi) • http://thenobelpeaceprizetoryan.blogspot.com;
(vii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/GeorgeRyan%3D NobelPeacePrizeNomination.pdf.

D • **Mail Fraud Statute, 18 USC §1341:**
(i) • https://www.law.cornell.edu/uscode/text/18/1341;
(ii) • https://www.justice.gov/usam/criminal-resource-manual-940-18-usc-section-1341-elements-mail-fraud;
(iii) • https://en.wikipedia.org/wiki/Mail_and_wire_fraud.

E • ***McNally v. U.S.:***
(i) • https://supreme.justia.com/cases/federal/us/483/350/case.html;
(ii) • https://en.wikipedia.org/wiki/McNally_v._United_States.

F • **Cong. Globe:** https://memory.loc.gov/ammem/amlaw/lwcglink.html#anchor41.

G • (i) https://www.nga.org/cms/home/governors/past-governors-bios/page_illinois/col2-content/main-content-list/title_ryan_george.html;
(ii) http://judicialmisconduct.us/drupal/sites/default/files/2018-05/NGA%3DGeorgeRyan Bio.pdf.

Federal prosecutors pressed courts to stretch the statute, and, particularly in the 1970s, they did. By 1987, nearly every federal court of appeals held that the statute outlawed deprivations of the intangible right of honest services.[48] In 1987, however, the Supreme Court held in *McNally v. United States*[49] that the statute outlawed only deprivations of property, not of an ill-defined intangible right to honest services.

Defendants who had been convicted of mail fraud in the years before *McNally* then sought post-conviction relief. They noted that the juries that convicted them had been directed to convict on the basis of conduct that was not a crime. The prosecutors who had pleaded for honest-services instructions before *McNally* then maintained that the erroneous instructions had made no difference. In almost every case, they argued that it would have been impossible to deprive the alleged victim of honest services without also depriving this person of property.[50]

While the Justice Department argued to the courts that honest-services instructions made no difference, it complained to Congress that *McNally* had deprived it of an important tool in its fight against government corruption.[51] Congress promptly responded by enacting a new section of the mail fraud statute that read in full, "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."[52] The federal courts of appeals rejected arguments that this statute was unconstitutionally vague.[53] They agreed that accepting a bribe or kickback deprived the public of its right to honest services, and they said that other things did too. As the Supreme Court later observed in *Skilling*, however, the courts were in "considerable disarray" about what the other things were.[54]

---

[48] *See id.* at 362–64 (Stevens, J., dissenting).

[49] 480 U.S. 350 (1987).

[50] Examples include *United States v. Mandel*, 862 F.2d 1067, 1073–74 (4th Cir. 1988), in which the Fourth Circuit set aside the conviction of a former governor of Maryland because the court could not say "'with a high degree of probability' that the jury did not rely on the legally incorrect theory" and *Messinger v. United States*, 872 F.2d 217, 221 (7th Cir. 1989), in which the Seventh Circuit concluded that "the jury necessarily had to convict Messinger for defrauding Cook County of its property right . . . notwithstanding any intangible rights theory employed."

[51] *See Mail Fraud: Hearing on H.R. 3089 and H.R. 3050 Before the Subcomm. on Crim. Just. of the House Comm. on the Judiciary*, 100th Cong. 8–11 (1988) (statement of John C. Keeney, Acting Assistant Att'y Gen. for the Crim. Division of the Dep't of Just.).

[52] 18 U.S.C. § 1346 (2012).

[53] *See, e.g.*, United States v. Hausmann, 345 F.3d 952, 958 (7th Cir. 2003); United States v. Gray, 96 F.3d 769, 776–77 (5th Cir. 1996); United States v. Bryan, 58 F.3d 933, 941 (4th Cir. 1995).

[54] *See* Skilling v. United States, 561 U.S. 358, 405 (2010).

A

should read 483

B

C

D

jury

E

should read 1988

F

G

A • ℘20E *supra.*

B • ***U.S. v. Mandel:*** https://openjurist.org/862/f2d/1067/united-states-v-mandel-w-w-iii-a-n.

C • ***Messinger v. US:*** https://openjurist.org/872/f2d/217/messinger-v-united-states.

D • **Mail Fraud Hearing:** https://babel.hathitrust.org/cgi/pt?id=pst.000014984792;view=1up;seq=1.
See also Todd Molz, *The Mail Fraud Statute: An Argument for Repeal by Implication:*
(i) https://chicagounbound.uchicago.edu/uclrev/vol64/iss3/7;
(i′) http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Molz%3DMailFraudStatute.pdf;
See also Thomas Miles, *Dupes and Losers in Mail Fraud:*
(ii) https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2660&context=journal_articles;
(ii′) http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Miles%3DDupesAndLosersInMailFraud.pdf;
See also Craig M. Bradley, *Foreword: Mail Fraud After McNally and Carpenter: The Essence of Fraud:*
(iii) • https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1858&context=facpub;
(iii′) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Bradley-EssenceOfMailFraud.pdf.

E • **Intangible Right of Honest Services, 18 USC §1346** (given a narrow interpretation[α] by *Skilling,* ℘11D *supra,* to avoid being "unconstitutionally void for vagueness" — which really means **"denial of due process,"** Fifth and Fourteenth Amendments, see https://en.wikipedia.org/wiki/Due_Process_Clause):
(i) • https://www.law.cornell.edu/uscode/text/18/1346;
(ii) • https://en.wikipedia.org/wiki/Honest_services_fraud.

F • ***U.S. v. Hausmann:*** https://www.leagle.com/decision/20031297345f3d95211206.
U.S. v. Gray: https://openjurist.org/96/f3d/769/united-states-v-gray.
U.S. v. Bryan: https://casetext.com/case/us-v-bryan-15.
See also Courts Struggle with Honest Services Fraud: http://judicialmisconduct.us/drupal/sites/default/files/2018-04/CourtsStruggleWithHonestServicesFraud.pdf.

G • ℘11D *supra.*

α • Namely, the Supreme Court in *Skilling* interpreted the statute to cover only "fraudulent schemes to deprive another of honest services through **bribes or kickbacks** supplied by a third party who ha[s] not been deceived" (emphasis added).

An opinion by Judge Easterbrook supplied the Seventh Circuit's basic standard. He wrote in *United States v. Bloom*,[55] "An employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain."[56]

Judge Easterbrook might have regarded *Bloom*'s "personal gain" requirement as a significant limitation, but a doctrine that would allow a dishonest employee to avoid conviction by saying, "Please pay the money to my sister," could not last long. After *Bloom*, the Seventh Circuit changed the operative word from "personal" to "private."[57] It explained, "By 'private gain' we simply mean illegitimate gain, which usually will go to the defendant, but need not."[58] In *Ryan*, an instruction told the jury to convict if the defendant "misus[ed] his official position . . . for private gain for himself or another."[59] It thus directed conviction if Ryan misused his official position to benefit any friend or political supporter. The *Bloom* standard found no favor outside the Seventh Circuit.[60]

"expansive" = "broad, inclusive, wide-ranging" (as opposed to "constrictive" = "narrow, exclusive, cabined"); as noted on p.12, the Skilling case (p.11D supra) codifies the current very-constrictive interpretation of honest-services fraud, namely, the so-called "bribes-and-kickbacks" standard

The First Circuit took an especially expansive view of honest services fraud, one that the government successfully urged the district court to approve in Ryan's case. In *United States v. Woodward*[61] and *United States v. Sawyer*,[62] the First Circuit upheld the convictions of a legislator and a lobbyist who had lavishly entertained him. The well-entertained legislator had supported almost all of the lobbyist's agenda. The court explained:

> A public official has an affirmative duty to disclose material information to the public employer . . . . When an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision

A

55 149 F.3d 649 (7th Cir. 1998).

B

56 *Id.* at 656–57.

57 *See* United States v. Sorich, 523 F.3d 702, 707–08 (7th Cir. 2008).

58 *Id.* at 709.

G

59 *See* Separate App'x of Pet'r-Appellant, Vol. 2 at A-000421, Ryan v. United States, 645 F.3d 913 (7th Cir. 2011) (No. 10-3964), *vacated and remanded*, 132 S. Ct. 2099 (2012) (transcript of jury instructions).

C

D

60 *See, e.g.*, United States v. Inzuna, 638 F.3d 1006, 1017–18 (9th Cir. 2009) (declining to follow *Bloom*); United States v. Welch, 327 F.3d 1081, 1107 (10th Cir. 2003) (declining "to become the first court [outside the Seventh Circuit] to embrace *Bloom*'s pleading requirements"); United States v. Panarella, 277 F.3d 678, 691–93 (3d Cir. 2001) (complaining that Judge Easterbrook's opinion falsely described Seventh Circuit precedent and substituted one ambiguous standard for another).

E

61 149 F.3d 46 (1st Cir. 1998).

F

62 85 F.3d 713 (1st Cir. 1996).

A • ***U.S. v. Bloom:***
(i) • https://openjurist.org/149/f3d/649/united-states-v-s-bloom;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/US-v-Bloom.pdf.

B • ***U.S. v. Sorich*** (and Scalia's dissent to Petition for Writ of Certiorari, 129 S.Ct. 1308 (2009)):
(i) • https://www.courtlistener.com/opinion/1443380/united-states-v-sorich;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/U.S.-v-Sorich%3DScaliaDissent.pdf;
(iii) • https://www.leagle.com/decision/20091437129zsct130851412;
(iv) • https://www.americanbar.org/publications/blt/2009/09/04_abbott.html;
(v) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ABA%3DHonestServicesFraud.pdf;
(vi) • http://apps.americanbar.org/buslaw/blt/2009-01-02/razzano.shtml;
(vii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ABA%3DUncertaintySurroundingHonestServicesFraud.pdf.

C • ℘13B, transcript instructions at ℘23911ℓ5–6.

D • ***U.S. v. Inzuna:*** https://www.courtlistener.com/opinion/2360234/united-states-v-inzunza.
U.S. v. Welch: https://law.justia.com/cases/federal/appellate-courts/F3/327/1081/625610.
U.S. v. Panarella: https://casetext.com/case/us-v-panarella-2.

E • ***U.S. v. Woodward:*** https://www.courtlistener.com/opinion/198059/united-states-v-woodward.

F • ***U.S. v. Sawyer:*** https://openjurist.org/85/f3d/713/united-states-v-f-sawyer.

G • **Separate Appendix:** ℘40B *infra.*

> making itself or, as the case may be, to full disclosure as to the official's potential motivation . . . .[63]

The court acknowledged that the entertainment it criminalized "may not be very different, except in degree, from routine cultivation of friendship in a lobbying context."[64]

Punishing officials who have failed to disclose conflicts of interest may sound like a fine idea. When an official makes a decision despite a conflict of interest, shouldn't he at least make the conflict known? But the idea's appeal may fade as one examines it.

The jury instructions in *Ryan* told the jury that it was unlawful for an official to fail to disclose "a material personal or financial interest, also known as a conflict of interest, in a matter over which he has decision-making power,"[65] and they defined materiality as having "the natural tendency to influence or [being] capable of influencing [a] decision."[66] They thus defined a conflicting interest in the only way it can be defined — as any interest that might divert an official from faithful service to the public.

When a public official's decision will benefit a member of his family, he has a conflict of interest. When his decision will benefit a business partner or good friend, he again has a conflict. When his decision will benefit an important political supporter, he has a conflict. When his decision will benefit a lobbyist who has taken him on golf outings, he once more has a conflict. When this official's action will benefit anyone at all who has done any favor for which he is grateful, he has a conflict of interest. Conflicts are ubiquitous. Show me a public official without conflicts of interest, and I will show you an official without any social life, work life, family life, religious life, or political life.

No official could compile a list of all his conflicts, and, if he could, he would not know where to post it. How does one go about disclosing a conflict of interest to a disembodied public employer? Would a "my conflicts" section on the official's Facebook page be sufficient? When no official ever has or ever could disclose every conflict, criminalizing undisclosed conflicts looks like a way to enable prosecutors to pick their targets.[67] Campaign finance laws, gratuities prohibitions, and ethical

A

B

F

C

D

E

---

63 *Id.* at 724 (internal citation omitted).

64 *Woodward*, 149 F.3d at 55.

65 Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000420 (jury instructions).

66 *Id.*

67 *Cf.* United States v. Kincaid-Chauncey, 556 F.3d 923, 949–50 (9th Cir. 2009) (Berzon, J., concurring) ("The conflict of interest theory, unhinged from an external disclosure standard, places too potent a tool in the hands of zealous prosecutors who may be guided by their own political motivations . . . [and who] might also feel political pressure to pursue certain state

A • ℘22F *supra.*

B • ℘22E *supra.*

C • ℘13B, transcript instructions at ℘23905ℓ19–21.

D • ℘13B, transcript instructions at ℘23904ℓ9–10.

E • ***U.S. v. Kincaid-Chauncey:*** https://www.courtlistener.com/opinion/1466012/united-states-v-kincaid-chauncey.

F • ℘40B *infra.*

codes forbidding the creation of some conflicts of interest offer a better way of minimizing corruption.[68] In *Skilling*, the Supreme Court would repudiate every lower court's view of honest services fraud, but when George Ryan's trial began on September 19, 2005, *Skilling* lay almost five years in the future.

5 years in the future! Ay, there's the rub!

C

B. Indictment and Trial

D

Prosecutors regard the mail fraud statute as "our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart."[69] The trial of George Ryan shows why. An early section of the indictment in Ryan's case was headed "Laws, Duties, Policies and Procedures Applicable to Defendant RYAN."[70] None of the laws and policies listed in this section were federal laws. They included provisions of the Illinois Constitution, Illinois criminal laws, non-criminal state regulations, a policy memorandum of the Illinois Secretary of State's office, and George Ryan's announced personal policy of not accepting gifts worth more than $50. An instruction in Ryan's case declared that any violation of law by the defendant to produce private gain for himself or another established the central element of honest services fraud.[71] Any law violation constituted the "misuse of office" required by *Bloom*. As interpreted in the Seventh Circuit, the mail fraud statute thus transformed minor state misdemeanors and non-criminal regulatory violations into federal felonies.

and not just the types of frauds enumerated in 18 USC §1341–1351 (mail/postal, carrier, wire/radio/TV, bank, health care, securities/commodities, intangible right of honest services, ...)

H

cf. harangue on preceding page

one "grand," long-lived, continuing plot (see next page)

The indictment alleged a single scheme to defraud that began when Ryan was elected Secretary of State and ended when he left the Governor's office twelve years later.[72] One hundred twenty-eight numbered paragraphs set forth the scheme. Paragraph after paragraph began with the words "[i]t was a further part of the scheme" and recited unattractive conduct.[73] Ryan was said to have known that state facilities were being used for political purposes, to have been present when an associate told

unreasonably, cf. harangue on preceding page

it's not entirely clear where this number comes from; there are many more than 128 paragraphs in the indictment (p.14C supra), and the highest number is 149, while the Counts are numbered 1–22 ...

---

or local officials."). Even when prosecutors are not partisan and are not subject to outside pressure, they are likely to view a governor in the same way a big game hunter views a cape buffalo.

A

[68] *See* ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO *CITIZENS UNITED* 284–87 (2014); Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 FORDHAM L. REV. 463, 484–85 (2015).

B

E

[69] Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980).

I

[70] Separate App'x of Pet'r-Appellant, Vol. 1 at A-000068–71, Ryan v. United States, 645 F.3d 913 (7th Cir. 2011) (No.10-3964), *vacated and remanded*, 132 S. Ct. 2099 (2012) (second superseding indictment).

F

[71] *Id.* at A-000421 (jury instructions).

G

[72] *See id.* at A-000075 (second superseding indictment).

F

[73] *Id.*

A • **Zephyr Teachout, Corruption in America** *{not freely available online}:*
Book: https://www.amazon.com/Corruption-America-Benjamin-Franklins-Citizens/dp/0674659988.
Book Review:
(i) • https://www.nytimes.com/2014/10/19/books/review/zephyr-teachouts-corruption-in-america.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ZephyrTeachout%3DCorruptionInAmerica.pdf.

B • **Albert W. Alschuler:**
(i) • https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1951&context=public_law_and_legal_theory;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Alschuler%3DCriminalCorruption.pdf.

C • **Ay, there's the rub!:** Shakespeare, *Hamlet*'s soliloquy (1603) (https://en.wikipedia.org/wiki/To_be,_or_not_to_be).[α]

D • ℘24D *supra.*

E • **Rackoff** (then, U.S. District Attorney and in private practice; later/now, federal judge):
(i) • http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/duqu18&div=49&id=&page= *(not freely available online),* which begins (internal references omitted): "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 ['Swiss Army Knife' works well, too; so does 'Weapon of Mass Destruction,' ℘11D *supra.*]. … [W]e always come home to the virtues of 18 USC §1341, with its simplicity, adaptability, and comfortable familiarity.";
(ii) • https://www.nytimes.com/1987/11/19/us/law-s-stradivarius-inside-trader-ruling-saves-mail-law-key-tool-for-federal.html;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/NYT%3DMailFraudStradivarius.pdf.

F • ℘14C *supra,* at ℘6; for "single/grand scheme," see ℘13B *supra* at ℘23903ℓ3–8.

G • ℘13B *supra,* esp. ℘23903ℓ3–8.

H • ℘22A *supra.*

I • ℘40B *infra.*

α • To die — to sleep.
To sleep — perchance to dream: ay, there's the rub!
For in that sleep of death what dreams may come
When we have shuffled off this mortal coil,
Must give us pause.

Hamlet here means a difficulty, obstacle, obstruction — in this case to his committing suicide ("shuffling off this mortal coil"). The word *rub* originates from the ancient game of *bowls* (which Americans may know as *lawn bowling;* nothing to do with tenpin bowling). A *rub* is some fault in the surface of the green that stops a bowl or diverts it from its intended direction. The term is recorded first a few years before Shakespeare's time, and is still in use. It appears, too, in *golf,* in the expression *rub of the green,* which refers to an accident that stops a ball in play — hitting an obstacle or a bystander perhaps — and for which no relief is allowed under the rules. Both *rub* and *rub of the green* later became broader terms for an abstract impediment or hindrance, or even just bad luck that can't be helped, or what is known in military circles as **OBE (Overcome By Events, pronounced "Obie").** http://www.worldwidewords.org/qa/qa-the3.htm.

employees to "clean up" these facilities before an investigation, to have awarded low-digit license plates to campaign contributors, to have favored friends and benefactors in the award of government contracts, to have reassigned or dismissed employees investigating misconduct by drivers-license examiners, to have violated his personal pledge not to accept gifts worth more than $50, to have shared confidential information about the location of a new state prison with a friend who used this information to make a profit, and to have accepted a secret political consulting fee. Some of Ryan's alleged misconduct would have violated criminal or civil regulations, and some would not.[74]

The trial judge rejected Ryan's argument that the indictment alleged many schemes rather than one,[75] and her judgment that everything done during Ryan's time in office was part of one grand plot guided her in conducting the trial and receiving evidence. For four and one-half months of a trial that lasted almost six months, the government presented evidence to support its allegations.[76] Then, at the end of the trial, the judge held that proving all the alleged aspects of the grand scheme was unnecessary.

Formally, the act forbidden by the mail fraud statute is *mailing*. The Supreme Court has held that any mailing by anyone "incident to an essential part of the scheme" is sufficient.[77] The mailer need not be the defendant or any of his confederates.[78] Prosecutors generally can multiply the number of charges and convictions indefinitely. After setting forth

---

[74] This list of charges might affect you in the same way it might have affected the jury. It might cause you to think poorly of George Ryan and make you care less about whether the courts treated him fairly. As you continue to read this Memoir, however, notice how many of the charges fade away. The district court held the evidence insufficient to support two mail fraud charges. *See* United States v. Warner, No. 02-CR-506, 2006 WL 2583722, at *12–13 (N.D. Ill. Sept. 7, 2006). The Seventh Circuit ultimately refused to review three more—apparently because at least one member of the panel doubted they could be sustained. The jury was not asked to make a yes-or-no judgment about most of the charges, and you will see how insubstantial the surviving charges are. George Ryan probably did not banish from his thoughts and actions the impulse to aid friends and supporters, but there is little reason to believe he took bribes or sacrificed the public interest. Of course George Ryan's virtue or lack of it is irrelevant to the issues discussed in this Memoir. Few Americans excuse or minimize police brutality because its victims were lawbreakers themselves, and this Memoir is about Judge Easterbrook, not Governor Ryan.

[75] *See* United States v. Warner, No. 02-CR-506, 2004 WL 1794476, at *21 (N.D. Ill. Aug. 11, 2004).

[76] The presentation of evidence by Ryan and his co-defendant took less than one month. The remainder of the trial consisted of closing argument, jury instructions, and jury deliberations.

[77] Schmuck v. United States, 489 U.S. 705, 710–11 (1989).

[78] *See id.* at 707, 714–15 (holding that mailings by an unwitting car dealer were enough).

E

C

and not just "any violation of law"

the best overall summaries of the case are in the Appeals Briefs, p.40B(i,iii)

trying to make some "dirt stick to the wall," see next page

discussed in context infra passim, hence not elaborated upon here

G

A

should read *20–21

B

e.g., only 3 mail-fraud charges ultimately survived (post-Skilling), see p.74ff infra.

jury instructions, p.13B supra

D

F

but of course only the defendant would be guilty, not the unwitting/oblivious participant

A • ***U.S. v. Warner,* №02-CR-506, Pallmeyer Ruling of Sep 7 2006:**
(i) • https://www.gpo.gov/fdsys/granule/USCOURTS-ilnd-1_02-cr-00506/USCOURTS-ilnd-1_02-cr-00506-6;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/US-v-Warner%2CRyan%3DPallmeyerRuling%2C2006-09-07.pdf.

B • The closest ref I can find is 688 F3d 845 (℘11B *supra*) at ℘15 = http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3D688F3d845.pdf#page=15, but it seems there should be a better ref than this somewhere.

C • ℘20D *supra*.

D • ***U.S. v. Warner,* №02-CR-506, Pallmeyer Ruling of Aug 11 2004:**
(i) • http://il.findacase.com/research/wfrmDocViewer.aspx/xq/fac.20040811_0001524.NIL.htm/qx (partial);
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/US-v-WarnerRyan%3DPallmeyerRuling%2C2004-08-11.pdf (partial);
• *{Complete copy not freely available online.}*

E • E.g., jury instructions (℘13B *supra*), ℘23884ℓ20–25.

F • ***Schmuck v. U.S.:***
(i) • https://supreme.justia.com/cases/federal/us/489/705/case.html;
(ii) • https://en.wikipedia.org/wiki/Schmuck_v._United_States.

G • 498 F3d 666 (℘27E *infra*) at 674, and Appellee Brief at ℘11 = http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApleBrief.pdf#page=11. See also ℘29 *infra*.

one scheme to defraud, the indictment presented nine mail-fraud charges. Each of these charges alleged a mailing in furtherance of the scheme.

Although every mailing charged in the indictment was alleged to have furthered the grand scheme, it also allegedly furthered a small part of this scheme. One count concerned Ryan's alleged sharing of confidential information concerning the new state prison. Another concerned his approval of a state lease of property from Harry Klein, who had hosted Ryan and his wife during a number of one-week stays at Klein's vacation home in Jamaica. The other seven counts all concerned leases and contracts that benefited Ryan's co-defendant Lawrence Warner. Warner was a long-time family friend and political supporter who had done favors for Ryan and members of his family. (I offer a list of Warner's favors in a footnote.)[79] The trial judge told the jury that finding any of these "included" schemes would be enough. The issue would be whether some of the dirt thrown at the wall had stuck.[80]

---

[79] Warner hosted two political fundraisers for Ryan, which raised $75,000 and $175,000. In *McCormick v. United States*, the Supreme Court held that campaign contributions may be treated as bribes only when "the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 500 U.S. 257, 273 (1991). The government did not claim that Ryan made an explicit promise to Warner, and none of its evidence suggested that he did. *But see* United States v. Blagojevich, 794 F.3d 729, 735 (7th Cir. 2015) (Easterbrook, J.) (apparently rejecting the argument that *McCormick* requires an explicit *quid pro quo* while ignoring that decision's explicit statement to the contrary). Warner, an insurance adjuster, adjusted an insurance claim for free after Ryan's apartment flooded on Christmas Day. The two fundraisers and the insurance adjustment were the only benefits Warner provided to Ryan himself.

But Warner did several favors for people close to Ryan. He adjusted an insurance claim for a Ryan son-in-law, shared lobbying fees with two people who were friends of Ryan, lent money to a business partly owned by Ryan's brother, lent money to Ryan's son's cigar business, lent money to a Ryan son-in-law, and paid for the band at the wedding of one of Ryan's daughters. I believe I've now listed everything.

You can see why the government did not mention Warner's supposed bribes in its tax charges. *See supra* Part II. If a friend adjusted an insurance claim for you, would you recognize the value of his services as income? If he lent $6,000 to your son's cigar business, would you pay income taxes on the loan? If he gave your daughter a wedding present, would you report the value of the gift as income on your return?

[80] Here's the relevant instruction. See (a) whether you can make sense of it; and (b) whether you think my paraphrase is fair:

> Proof of several separate or independent schemes will not establish the single scheme alleged in Counts 2 through 10 unless one of the schemes which is proved is included within the single scheme alleged in those counts. If, therefore, you find beyond a reasonable doubt that there were two or more schemes to defraud and that the defendant was a member of one or more of these schemes to defraud, and you further find beyond a reasonable doubt that the proved scheme to defraud was included within the charged scheme to defraud, you should find that defendant guilty of the particular count you are considering, provided that all other elements of the mail fraud charge have been proved.

A

as mentioned on the preceding page

B

C

D

more colloquially: "throw shit against the wall to see what sticks"

see preceding page

E

"quid pro quo"

F

falsely (contrary to the rule of precedent, stare decisis)

because such favors to third parties aren't taxable

about "dirt sticking to wall"

"little", or "sub-"

at least

little

big

little

little

little

big

RICO requires this "multi-part single (or 'big') scheme (pattern)," see p.71 infra

2–10

RICO requires a multi-part big scheme/pattern, but Ryan didn't need to be involved in all the little sub-schemes, only in one of them

A • See indictment, ℘14C *supra*. RICO was Count One, at ℘1; the mail-fraud Counts were Two,Three–Ten, at ℘14,50–54.

B • We don't review this Count, as it's not interesting for our purposes.

C • We don't review this Count, as it's not interesting for our purposes.

D • We don't review these Counts, as they're not interesting for our purposes. (Anyway, it's not entirely clear what "the other seven Counts" even means, since the reviewed Counts in items A–C add up to 11; with these7 Counts we get up to 19; which leaves 3 of the 22 Counts unaccounted for …)

E • ***McCormick v. U.S.:*** https://www.law.cornell.edu/supct/html/89-1918.ZS.html.

F • ***U.S. v. Blagojevich:*** https://www.leagle.com/decision/infco20150721130.

The indictment's allegations concerning the use of state facilities for political purposes, the cover-up of their political use, the award of low-digit license plates to contributors, the re-assignment of employees investigating misconduct by license examiners, and the receipt of a secret political consulting fee were not the subject of specific mail-fraud charges. The jury had no opportunity to render a yes-or-no verdict on any of these allegations.

American courts ordinarily exclude "other acts" evidence.[81] This evidence is rejected because jurors should not be tempted to convict the defendant for being a bad person; they should judge the accusation of a particular wrongful act at a particular time.[82] In separate trials of the schemes alleged in the individual mail fraud counts, evidence of the other little schemes would have been inadmissible. But evidence of the schemes on which the jury was not asked to render a verdict hovered over the jury's deliberations. By throwing a mass of charges of unattractive conduct into a churning cauldron, prosecutors invited jurors to judge Ryan's character rather than his guilt or innocence of particular charges.

non-mail-fraud

"dirt sticking to walls"

falsely

C. Jury Deliberations, Verdict, and Appeal

D

FRE 404(b), just discussed

Despite a conflict of interest instruction broad enough to convict almost anyone and a cauldron of disparaging evidence, the jury in Ryan's case had difficulty reaching a verdict. After a week of deliberations, Juror Ezell sent the judge a note "complaining that other jurors were calling her derogatory names and shouting profanities."[83] The note was co-signed by the jury's foreperson. The judge responded by directing the jurors to treat each other with respect.[84] Two days later, a note signed by eight jurors asked whether Ezell could be removed from the jury because she was refusing to engage in meaningful deliberation. Again the judge advised the jurors to treat each other with respect.[85]

> If, on the other hand, you find that there were two or more schemes to defraud and that the defendant was not a member of any proved scheme included within the charged scheme to defraud, you should find that defendant not guilty of that count.

F

Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000419–20.

A

81 *See* FED. R. EVID. 404(b).

B

82 *See* Edward J. Imwinkelreid, *Undertaking the Task of Reforming the American Character Evidence Prohibition: The Importance of Getting the Experiment Off on the Right Foot*, 22 FORDHAM URB. L.J. 285, 289–92 (1994).

C

83 *See* United States v. Warner, 498 F.3d 666, 675 (7th Cir. 2007).

84 *Id.*

E

85 *See id.* at 676.

A • ℘13B, transcript instructions at ℘23903ℓ16–23904ℓ7.

B • **FRE 404:** https://www.law.cornell.edu/rules/fre/rule_404.
• See esp. FRE 404(b)(1) (emphasis added): "Evidence of a crime, wrong, or other act is *not admissible* to prove a *person's character* in order to show that on a particular occasion the person acted in accordance with the character" (except that it is admissible for certain other, non-character, purposes, see FRE 404(b)(2)).

C • **Imwinkelried:**
(i) • https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1420&context=ulj;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Imwinkelried%3DCharacterEvidenceProhibition.pdf.

D • See ℘12,23 *supra.*

E • ***U.S. v. Warner, Ryan,* 498 F.3d 666:**
(i) • https://www.courtlistener.com/opinion/1289923/united-states-v-warner;
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/US-v-Warner%3D498F3d666.pdf.

F • ℘ 40B *infra.*

Following Ryan's conviction, Juror Peterson acknowledged that she had violated the court's instructions by bringing a published article into the jury room and reading part of it aloud. The article declared that any juror unwilling to "meaningfully deliberate" could be removed from the panel.[86]

footnote 85, preceding page

A few hours after the court's second admonition of the need for respect, the *Chicago Tribune* reported to court officials that Juror Pavlick had given untruthful answers on his jury questionnaire by concealing two criminal convictions. The judge halted the jury's deliberations, conducted an investigation, and removed Pavlick from the panel.[87]

Further investigation by the *Tribune* and the U.S. Attorney's Office revealed that five other jurors and two alternates had given false responses on their questionnaires. One alternate had not revealed a D.U.I. conviction; another alternate and three sitting jurors, including Ezell, had not revealed arrests; and two jurors had not revealed that they had filed for bankruptcy.[88] After questioning the suspected jurors individually, the judge dismissed Ezell and the alternate who had not disclosed his D.U.I. conviction. The judge concluded that the information withheld by the other five would not have warranted their exclusion from the jury for cause if this information had been known before trial.[89] No one was surprised when, after the reconstituted jury convicted Ryan, Ezell told the press that the result would have been different if she had remained on the panel.[90]

The jury that convicted Ryan included four jurors who might have feared prosecution for making false statements to the government and for perjury.[91] These jurors had been subjected to interrogation by the judge in the presence of the lawyers. The judge said of one of the jurors who

A

---

[86] *See id.* at 677–78.

[87] *See id.* at 681.

[88] *See id.* at 676.

B

[89] *See Warner*, 498 F.3d at 666–67, 684–85.

C

[90] *See* David Heinzmann & Richard Wronski, *Different View, Different Result?: Disappointment and Frustration*, CHI. TRIB. (April 18, 2006), http://articles.chicagotribune.com/2006-04-18/news/0604180301_1_fellow-jurors-george-ryan-jury [http://perma.cc/C8H5-4CNZ].

?!

[91] Before questioning the jurors, the trial judge asked counsel for their views on whether the jurors should be given the *Miranda* warnings. The chief prosecutor then consulted the U.S. Attorney and reported that his office would not use against the jurors any statements they made during the judge's interrogation. The prosecutor did not, however, grant the jurors immunity from prosecution for the apparently false statements on their questionnaires, and the jurors were not advised of the limited immunity the prosecutor had afforded. *See Warner*, 498 F.3d at 708–09 (Kanne, J., dissenting). The jurors tried Ryan for an offense that several of them were suspected of committing themselves. Moreover, the jurors' statements, unlike Ryan's, were made under oath so that their false answers could have been prosecuted as perjury. *See id.* at 707.

D

WTF?!

A • ℘27E, *supra*.

B • ℘27E, *supra*.

C • (i) • http://articles.chicagotribune.com/2006-04-18/news/0604180301_1_fellow-jurors-georgeryan-jury;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ChicagoTribune%3DGeorgeRyanJury.pdf.

D • ℘27E, *supra*.

remained on the panel, "Grilling Mr. Casino is one of the most distasteful things I have done in this job."[92] The jurors had seen a juror whom they knew to be pro-defense dismissed. The reconstituted jury had two new members and ten who already had deliberated for eight days. After the judge instructed them to disregard the prior deliberations and begin anew, they deliberated for ten days before convicting Ryan on all counts.[93]

mentioned at p.25 supra

The trial judge set two of the jury's mail fraud convictions aside. One concerned a lease upon which Lawrence Warner had received a commission, and the judge wrote, "[T]here is no evidence that Ryan steered this contract to Warner."[94] The other vacated conviction concerned Ryan's disclosure of confidential information about the new state prison to a friend. The judge concluded that the government's evidence was "equally consistent with the inference that the disclosure was inadvertent as it is with the inference that it was purposeful."[95]

The jurors' conviction on counts for which the evidence was weak or nonexistent suggested that they might not have carefully analyzed the mail fraud charges one-by-one. The statements of some jurors and the prosecutor reinforced this impression. When a newspaper reporter asked which allegations had been most influential, Juror James Cwick replied, "There was a whole lot of stuff out there. You could pretty much take your pick."[96] He added, "Each box, each piece of evidence was a brick. . . . And if you put all the evidence together, it was a house."[97] Juror Kevin Rein explained, "It wasn't a smoking gun. . . . [I] went into deliberations with a feeling something was probably not on the up-and-up—and after 5½ months [of trial] you have an idea."[98] Patrick Collins, the chief prosecuting attorney,[99] told the press, "This case was tried witness by witness, piece of evidence by piece of evidence, and it was only by looking at the totality of

A

B

should read *20

should read *23

C

D

---

92 *Id.* at 708.

93 *Id.* at 706.

94 United States v. Warner, No. 02-CR-506, 2006 WL 2583722, at *12 (N.D. Ill. Sept. 7, 2006).

95 *Id.* at *13.

96 James Janega & Tom Rybarczyk, *Small Details Painted Picture of Corruption*, CHI. TRIB. (Apr. 18, 2006), http://articles.chicagotribune.com/2006-04-18/news/0604180302_1_two-jurors-deliberations-lawrence-warner [http://perma.cc/88V7-AWPJ].

97 Susan Kuczka, Tom Rybarczyk & Ted Gregory, *Inside the* Ryan *Jury Room: Cooped Up for Weeks, Strangers Became a Team*, CHI. TRIB. (Apr. 19, 2006), http://articles.chicagotribune.com/2006-04-19/news/0604190208_1_deliberations-jurors-george-ryan [http://perma.cc/LT26-5H29].

98 Janega & Rybarczyk, *supra* note 96.

99 And, I am proud to say, a former student of mine.

A • ℘27E, *supra.*

B • ℘25A, *supra.*

C • (i) • http://articles.chicagotribune.com/2006-04-18/news/0604180302_1_two-jurors-deliberations-lawrence-warner;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ChigagoTribune%3DSmallDetailsPaintedPictureOfCorruption.pdf.

D • (i) • http://articles.chicagotribune.com/2006-04-19/news/0604190208_1_deliberations-jurors-george-ryan;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ChicagoTribune%3DInsideTheRyanJuryRoom.pdf.

the case that the true picture could be shown to this jury."[100] At the end of the trial, the wall looked muddy.[101]

The Seventh Circuit affirmed Ryan's conviction.[102] Most of Judge Diane Wood's opinion for the court concerned the irregular jury deliberations. As the opinion drew to a close, however, it rejected Ryan's argument that the honest-services statute was unconstitutionally vague and his argument that, even if valid, the statute did not criminalize undisclosed conflicts of interest and state-law violations.[103] A dissenting opinion by Judge Michael Kanne focused on the improper jury deliberations.[104]

Judge Richard Posner and Judge Ann Williams joined Judge Kanne in dissenting from the Seventh Circuit's denial of rehearing *en banc*.[105] These judges jointly wrote an opinion declaring that "a cascade of errors" had

throwing "dirt against the wall," see p.26 supra

(before Skilling)

(though Ryan's argument was determined to be correct, later, by Skilling)

cf. p.21E supra

A

[100] Matt O'Connor & Rudolph Bush, *Ryan Guilty: A Juror's View*, CHI. TRIB. (Apr. 18, 2006), http://articles.chicagotribune.com/2006-04-18/news/0604180306_1_probe-of-judicial-corruption-guilty-verdicts-ryan [http://perma.cc/Y2DX-5K5Y].

[101] The trial judge, however, dismissed the suggestion that the dirt might have influenced the jury. While the trial was underway, and before I became one of Ryan's lawyers or had any communication with him or members of his defense team, I published a short article critical of the prosecution. *See* Albert W. Alschuler, *The Mail Fraud & RICO Racket: Thoughts on the Trial of George Ryan*, 9 GREEN BAG 2D 113, 113 (2006). After *Skilling*, the trial judge gently criticized my article as well as my later argument in her court:

B

(before Skilling)

> Four years ago, in writing about Ryan's prosecution, Professor Alschuler (who was not then one of Ryan's lawyers) asserted that "the mail fraud and RICO statutes unfairly stack the deck" in large part because the Government was allowed to present "every allegation of criminal and non-criminal misconduct by Ryan and Warner that prosecutors have collected," and if "some of the dirt they have thrown as the wall has stuck, [the jury] is likely to find the defendants guilty of the principal charges against them." . . . At oral argument on the motions before this court, Alschuler argued again that "[a]ll of this evidence went into one churning cauldron." *Skilling*, however, did not invalidate the honest services mail fraud statute, nor did it invalidate RICO. *Skilling* limited prosecutions under these statutes to bribery and kickback schemes—the very theory of prosecution under which Ryan was convicted. . . . Ryan's prosecution . . . . targeted conduct that remains at the core of honest services fraud.

C

Ryan v. United States, 759 F. Supp. 2d 975, 980 (N.D. Ill. 2010). Neither the jurors nor the prosecutor seemed to see the trial in the same way before *Skilling* that the trial judge did afterwards.

i.e., the judge was exercising "20/20 hindsight" …

D

[102] United States v. Warner, 498 F.3d 666 (7th Cir. 2007).

[103] *See id.* at 698–99.

[104] *See id.* at 705 (Kanne, J., dissenting). Judge Kanne wrote, "I have no doubt that if this case had been a six-day trial, rather than a six-month trial, a mistrial would have been swiftly declared. It should have been here." *Id.* at 715.

E

[105] United States v. Warner, 506 F.3d 517, 518 (7th Cir. 2007) (Posner, Kanne, & Williams, JJ., dissenting from denial of rehearing *en banc*).

A • (i) • http://articles.chicagotribune.com/2006-04-18/news/0604180306_1_probe-of-judicial-corruption-guilty-verdicts-ryan;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ChicagoTribune%3DRyanGuilty.pdf.

B • **Alschuler, Green Bag:**
(i) • http://www.greenbag.org/v9n2/v9n2_articles_alschuler.pdf;
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/Greenbag%3DAlschulerEasterbrook.pdf.

C • ***Ryan v. U.S.,* District Judge's (Pallmeyer) Ruling of Dec 21 2010 (denying motion to vacate, set aside, or correct Ryan's sentence), 759 F.Supp.2d 975 (N.D. Ill. 2010):**
(i) • *{not freely available online under its F.Supp. title};*
(ii) • available at ℘37E(iii) *infra.*

D • ℘27E, *supra.*

E • ***U.S. v. Warner,* 506 F.3d 517, Denial of Rehearing:**
(i) • https://www.courtlistener.com/opinion/1290415/united-states-v-warner;
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/US-v-Warner%3D506F3d517.pdf.

rendered Ryan's trial "a travesty."[106] The Supreme Court denied certiorari.[107] On November 7, 2007, Ryan entered prison to begin serving his six-and-one-half year sentence.[108]

V. THE ROUTE BACK TO THE SEVENTH CIRCUIT

A. *The Supreme Court Decides* Skilling

Congress enacted the honest services statute in 1988, but the Supreme Court did not consider its meaning or constitutionality until twenty-one years later. In 2009, the Court heard arguments in two cases that presented issues under the statute.[109] In one of these cases, *Weyhrauch*, I submitted an *amicus curiae* brief arguing for the standard the Court later adopted in *Skilling*.[110] No party had proposed this standard, and no court had yet endorsed it. In the other case, *Black*, the defendant's lawyer argued that the statute was unconstitutionally vague, but the government objected that he had not properly raised this question.[111] *Skilling*, which was argued three months later, did present the issue.

as a neutral/ nonpartisan friend of the court

When the Court decided *Skilling* in June 2010, three justices declared that they would hold the statute unconstitutionally vague,[112] and the remaining justices acknowledged that the defendant's "vagueness challenge has force."[113] The majority concluded, however, that the statute could be saved from a "vagueness shoal" by confining it to a "solid core" that every lower court had recognized.[114] It declared, "[H]onest-services fraud does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks."[115] "[N]o other misconduct falls within [the statute's] province."[116] The Court not only rejected the

rather than clarifying it non-vaguely, as Skilling v. U.S. did do

A

B

C

D

E

F

H

I

G

---

106 *Id.* at 520.

107 Warner v. United States, 553 U.S. 1064 (2008).

108 Catrin Einhorn, *Ex-Gov. Ryan of Illinois Reports to Prison*, N.Y. TIMES (Nov. 8, 2007), http://www.nytimes.com/2007/11/08/us/08ryan.html?_r=0 [http://perma.cc/G3BS-MD4E].

109 Tr. of Oral Arg., Weyhrauch v. United States, 561 U.S. 476 (2010) (No. 08-1196), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1196.pdf [http://perma.cc/ZQD2-MKF5]; Tr. of Oral Arg., Black v. United States, 561 U.S. 465 (2010) (No. 08-876), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-876.pdf [http://perma.cc/4UWZ-VUVE].

110 *See* Brief of Albert W. Alschuler as *Amicus Curiae* at 19–20, Weyhrauch v. United States, 561 U.S. 476 (2010) (No. 08-1196). *Skilling* quoted this brief. *See* Skilling v. United States, 561 U.S. 358, 411 (2010).

111 Tr. of Oral Arg., Black v. United States, *supra* note 109, at 24–28.

112 *See Skilling*, 561 U.S. at 415 (Scalia, J., joined by Thomas and Kennedy, JJ., concurring).

113 *Id.* at 405 (majority opinion).

114 *Id.* at 407.

115 *Id.* at 411.

116 *Id.* at 412.

A • ℘30E, *supra.*

B • **Cert denied:**
(i) • https://www.supremecourt.gov/opinions/boundvolumes/553bv.pdf#page=1033;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Ryan-v-US%3DCertDenied.pdf.

C • **Einhorn:**
(i) • https://www.nytimes.com/2007/11/08/us/08ryan.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/NYT%3DRyanReportsToPrison.pdf.

D • ***Weyhrauch v. U.S.,* Transcript:**
(i) • http://perma.cc/ZQD2-MKF5;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Weyhrauch-v-US%3DTranscript.pdf.

E • ***Black v. U.S.,* Transcript** (see also ℘18J, *U.S. v. Black* ℘56H):
(i) • http://perma.cc/4UWZ-VUVE;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Black-v-US%3DTranscript.pdf.

F • **Alschuler, *Weyhrauch v. U.S.,* Amicus:**
(i) • https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_07_08_08_1196_NeutralAmCuAlschuler.authcheckdam.pdf;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Alschuler%3DWeyhrauch-v-US%2CAmicus.pdf.

G • ℘11D, *supra.*

H • ***Weyhrauch v. U.S.:***
(i) • https://supreme.justia.com/cases/federal/us/561/476;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Weyhrauch-v-US.pdf.

I • ℘18J, *supra.*

government's argument that the statute criminalized failing to disclose a conflict of interest but also warned Congress that a statute embracing this standard might be held unconstitutional.[117]

B. Ryan Returns to the District Court

The Winston & Strawn law firm in Chicago had represented Ryan at trial and on appeal without charge.[118] The firm's CEO, former governor James R. Thompson, was close to Ryan,[119] and although the firm's *pro bono* representation of a defendant without funds[120] who faced complex, wide-ranging charges was in the best tradition of the legal profession, it brought Thompson and his firm considerable criticism.[121] According to the press, representing Ryan cost Winston & Strawn $20 million in expenses and lawyers' time.[122]

After *Skilling*, the defense team at Winston asked me to take the lead in representing Ryan in a post-conviction proceeding under 28 U.S.C. § 2255, a statute that enables federal prisoners to obtain relief from unlawful

---

[117] *Id.* at 411 n.44.

[118] *See* Susan Chandler, *Ryan a Pro Bono Problem*, CHI. TRIB. (July 19, 2006), http://articles.chicagotribune.com/2006-07-19/business/0607190154_1_winston-strawn-illinois-governor-firm [http://perma.cc/C4ZA-CLYQ].

[119] Ryan had been Lieutenant Governor for eight of the fourteen years of the Thompson administration. *Illinois Governor George H. Ryan*, *supra* note 45.

[120] Ryan's only significant asset was the house in Kankakee he and his wife had purchased in 1965 for $34,000. *See* Jodi Wilgoren, *Trial Shows Former Illinois Governor in Two Lights*, N.Y. TIMES (Sept. 29, 2005), http://www.nytimes.com/2005/09/29/us/trial-shows-former-illinois-governor-in-two-lights.html?_r=0 [http://perma.cc/L3UW-HKJQ]. This house still had its Formica countertops and avocado kitchen appliances. Ryan's conviction caused the loss of his pension, including the portion he had earned before his alleged criminal conduct. *See* Ryan v. Bd. of Trs. of Gen. Assembly Ret. Sys., 924 N.E.2d 970, 975 (Ill. 2010). He did recover the $235,500 he had contributed to the pension fund over the years, and he did retain the pension payments he had received before his conviction. Ray Long, *Ex-Gov. Ryan Denied Pension*, CHI. TRIB. (Feb. 19, 2010), http://articles.chicagotribune.com/2010-02-19/news/ct-met-george-ryan-pension-20100219_1_state-and-governor-ex-gov-pension [http://perma.cc/WJ7S-KSNP]. Ryan was seventy-three at the time he entered prison. Michael Conlon, *Former Illinois Governor Ryan Enters Prison*, REUTERS (Nov. 7, 2007), http://www.reuters.com/article/2007/11/07/us-illinois-governor-idUSN0754401620071107 [http://perma.cc/2M8G-JTEP].

[121] *See, e.g.*, Eric Zorn, *Ryan Comedown Takes Thompson Too*, CHI. TRIB. (Nov. 8, 2007), http://articles.chicagotribune.com/2007-11-08/news/0711071146_1 [http://perma.cc/L9NG-W83V] (declaring that a "misguided display of loyalty has deeply tarnished Thompson's legacy" and that "a new generation knows Thompson best as the chief defender and supporter of a man who personifies the cozy and crooked way politics is too often practiced in Illinois").

[122] Chandler, *supra* note 118; *see also* MERRINER, *supra* note 45, at 21.

A • ℘11D, *supra.*

B • (i) • http://articles.chicagotribune.com/2006-07-19/business/0607190154_1_winston-strawn-illinois-governor-firm;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Chicago/Tribune%3DRyanProBonoProblem.pdf.

C • ℘20C, *supra.*

D • (i) • http://perma.cc/L3UW-HKJQ;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/NYT%3DTrialOfRyan.pdf.

E • *{not freely available online}*

F • (i) • http://perma.cc/WJ7S-KSNP;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ChicagoTribune%3DRyanDeniedPension.pdf.

G • (i) • http://www.reuters.com/article/2007/11/07/us-illinois-governor-idUSN07544016220071107;
(ii) • https://perma.cc/2M8G-JTEP;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Reuters%3DRyanEntersPrison.pdf.

H • (i) • http://articles.chicagotribune.com/2007-11-08/news/0711071146_1;
(ii) • http://perma.cc/L9NG-W83V;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/ChicagoTribune%3DRyanAndThompson.pdf.

I • ℘20C *supra.*

J • ℘33A *infra.*

confinement after their appeals have been concluded.[123] I readily agreed to do so.[124]

The jurors' statements to the press indicated that they might not have paid close attention to the phrasing of particular instructions, but a federal rule of evidence would have made even an abject confession of disregarding the instructions inadmissible.[125] Any suggestion that jurors might not have followed their instructions to the letter seems to cause judges to bristle.[126] But the presumption (or fiction) that the jury parsed the instructions with care and followed them perfectly gave Ryan a strong case.

With rare exceptions, new rulings on issues of criminal procedure cannot be the basis for setting aside a conviction after the appellate process has been concluded. These rulings do not apply retroactively.[127] The Supreme Court has said, however, "New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute [*i.e.*, decisions like *Skilling*] . . . . Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'"[128]

That the jury found Ryan guilty of noncriminal conduct was not merely a significant risk; it was a near certainty. Some instructions did invite the jury to convict Ryan if he took bribes (although Ryan contended that these instructions also directed conviction for things that were not bribes).[129] The bribery instructions, however, did not stand alone. A

B

B

Catch-22 (in Ryan's favor)!

as required by Skilling

THIS IS THE CRUX OF THE ARGUMENT: the bribery(/kickback) instructions (compatible with Skilling) were inextricably/inseparably intertwined with certain non-bribery instructions (incompatible with Skilling) — hence, inherent/inextricable confusion/indeterminism with respect to exactly the instructions meant, and how the jury interpreted them (QED)

A

---

123 *See* 28 U.S.C. § 2255 (2012) ("A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.").

124 I was surprised when the host of a Chicago talk radio program asked me about my fee, but I saw no reason not to answer the question. I advised the Winston team that, although I believed in the justice of Ryan's case, I hesitated to devote the amount of time the case would require without compensation. I proposed to cut my customary fee of $500 per hour in half, noting that $250 per hour was less than the amount Winston billed for the work of a first-year associate. Governor Thompson agreed to this proposal. I kept track of my hours and submitted statements, and, for a time, some friends of George Ryan paid these charges. I ultimately collected $25,000, all of it for services in the district court. By then, however, Ryan's friends had done their share. My subsequent representation in the Seventh Circuit and the Supreme Court was *pro bono*. Although the Ryan family invited me to send them a bill at the conclusion of the case, I declined to do so.

C

125 *See* FED. R. EVID. 606(b).

D

126 *See, e.g.*, Shannon v. United States, 512 U.S. 573, 585 (1994) (referring to "the almost invariable assumption of the law that jurors follow their instructions").

E

127 *See* Teague v. Lane, 489 U.S. 288, 310 (1989).

F

128 Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004).

G

129 *See* Ryan v. United States, 759 F. Supp. 2d 975, 986–90 (N.D. Ill. 2010). In retrospect, although the bribery instructions were defective, raising the issue was a mistake. The judges of the Seventh Circuit have little patience for arguments that appear to be secondary, and

the art of lawyering ...

H

A • **28 USC §2255:**
(i) • https://www.law.cornell.edu/uscode/text/28/2255;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/28USC2255.pdf.
• Since the case-at-bar (*Ryan v. U.S.*) in this Memoir is predicated/brought under 28 USC §2255, we take this opportunity to quote its leading clauses here (emphasis added):
(a) • A prisoner **in custody under sentence** of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed **in violation of the Constitution [esp. "denial of due process," such as "void for vagueness," see ℘21E *infra*] or laws of the United States [that is, "behavior which the law does not make illegal/criminal"],** or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is *otherwise subject to collateral attack [see ℘40C infra],* **may move** the court which imposed the sentence to **vacate, set aside or correct the sentence.**
(b) • Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was **not authorized by law** or *otherwise open to collateral attack,* or that there has been such a **denial or infringement of the constitutional rights** of the prisoner as to render the judgment *vulnerable to collateral attack,* the **court shall vacate and set the judgment aside** and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

B • ℘29 *supra.*

C • **FRE 606:** https://www.law.cornell.edu/rules/fre/rule_606.

D • ***Shannon v. U.S.:*** https://caselaw.findlaw.com/us-supreme-court/512/573.html.

E • ***Teague v. Lane:*** https://supreme.justia.com/cases/federal/us/489/288/case.html.

F • ***Schriro v. Summerlin:*** https://www.law.cornell.edu/supct/html/03-526.ZS.html.

G • ℘30C *supra.*

H • The argument became too twisty/gnarly (so-to-speak, "epicycles upon epicycles," https://en.wikipedia.org/wiki/Deferent_and_epicycle#Bad_science).

I • "Catch-22:" https://en.wikipedia.org/wiki/Catch-22_(logic).

general instruction based on *Bloom* told the jury to convict if Ryan misused his office for private gain for himself or anyone else.[130] Other instructions told the jury to convict if Ryan violated any of a number of Illinois laws to produce gain for himself or another.[131] Finally, an instruction told the jury to convict if Ryan failed to disclose a material conflict of interest.[132]

If no one could tell which of the various grounds for conviction the jury had chosen, Ryan would have been entitled to a new trial under any of the possible standards of review.[133] But Ryan's case was much stronger than that. From before the trial began until it ended, Ryan's case had a recurring theme. Ryan insisted that the government had no evidence of bribery, and the government insisted that it did not need any.

Before jury selection began, the government exhibited some newspaper clippings to the court.[134] These clippings quoted Ryan as saying, "[T]hey haven't got one witness that said they gave me a corrupt dollar . . . ."[135] The government asked the court to preclude the defense from arguing that corrupt dollars were necessary: "What is clearly improper would be for the defense to argue or suggest to the jury that 'corrupt dollars' for contracts or other specific quid pro quo evidence is a prerequisite to a finding of guilt on the particular mail fraud charges here."[136] "Specific quid pro quo evidence" is what defines bribery under federal law.[137] Citing the First Circuit's rulings in *Sawyer* and *Woodward*, the government declared, "Other circuits . . . have upheld public corruption prosecutions rooted in . . . the failure of a public official to disclose a financial interest or relationship affected by his official

---

our claim that Ryan could be excused for failing to object to two of the bribery instructions led to some remarkable Easterbrook flimflam. *See infra* Part VII.

130 Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000421 (jury instructions).

131 *Id.*

132 *Id.* at A-000420.

133 The appropriate standard was disputed. *See infra* Part IX.A.

134 *See* Separate App'x of Pet'r-Appellant, Vol. 1, *supra* note 70, at A-000163–67 (exhibits attached to United States Motion for Pretrial Ruling on Jury Instructions).

135 *Id.* at A-000163 (a photocopy of *Ryan Confident He Will be Exonerated at Upcoming Trial*, CHICAGO SUN-TIMES, July 22, 2005).

136 *Id.* at A-000157 (United States Motion for Pretrial Ruling on Jury Instructions).

137 *See* United States v. Sun-Diamond Growers, 526 U.S. 398, 404–05 (1999) ("[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange for* an official act."); Evans v. United States, 504 U.S. 255, 268 (1992) ("[T]he offense is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts."); McCormick v. United States, 500 U.S. 257, 273 (1991) (declaring that campaign contributions may be treated as bribes only when "the payments are made in return for an explicit promise or undertaking . . . to perform or not to perform an official act"); *id.* at 283 (Stevens, J., dissenting) (agreeing that "the crime does require a '*quid pro quo*'").

THE CRUX: "bribery (/kickback) instructions did not stand alone" (hence, violated Skilling), in these three ways — because, these three are NOT "bribery/ kickback" (whew!)

A

C

even though this (bribery/kickbacks) is exactly what Skilling would end up REQUIRING (5 years later, "there's the rub," p.24 supra)

WTF (recalling that bribery/kickbacks are REQUIRED, at least after Skilling)?! Read on, gentle reader ...

N

M

L

incorrect standards, following Skilling (5 years later)

D

G

E

B

F

G

H

H

I

J

K

A • See ℘33H *supra(!)* (now we're seeing how/why this is "lawyer's law," for both sides, cf. ℘19L *supra* ...).

B • ℘22C *supra;* and generally, ℘13B (jury instructions).

C • ℘22A *supra.*

D • Jury instructions (℘13B), ℘23911ℓ5–6.

E • Jury instructions (℘13B), ℘23904ℓ24–℘23905ℓ2.

F • Jury instructions (℘13B), ℘23905ℓ20–21.

G • ℘ 40B *infra.*

H • **Motion for Pretrial Ruling:** ℘40B *infra,* at ℘A-155–A-167.

I • ***U.S. v. Sun-Diamond:*** https://www.law.cornell.edu/supct/html/98-131.ZS.html.

J • ***Evans v. U.S.:*** https://www.law.cornell.edu/supct/html/90-6105.ZS.html.

K • ***McCormick v. U.S.:*** https://www.law.cornell.edu/supct/html/89-1918.ZS.html.

L • ℘22F *supra.*

M • ℘22E *supra.*

N • ***Quid Pro Quo:*** https://en.wikipedia.org/wiki/Quid_pro_quo.
• A verbatim translation from the Latin of this legal phrase ("this for that," "tit for tat") evokes a "one-to-one match-up," and that's basically what it means in contract law (where it originated). But in the context of public corruption ("'official acts,' as defined in *Skilling,* say, don't get enacted except in exchange for money"), the translation is more along the lines of: "these for those;" "one hand washes the other;" "you scratch my back, I'll scratch yours;" "pay-for-play;" etc. — all meaning "but-for causation" (if one set of things doesn't happen, then another set of things won't happen).
• In this case/Memoir *(Ryan v. U.S.),* the interpretation of *quid pro quo* actually (crazily, because of Easterbrook's perfidy) became a bone of contention (see ℘76–78 *infra*).
• More recently, it has become even a hotter legal topic due to another jury-instruction corruption post-trial case, *McDonnell v. U.S.* (https://en.wikipedia.org/wiki/McDonnell_v._United_States:
(i) • Zephyr Teachout, *How the Supreme Court Gets Corruption Totally Wrong,* Washington Post, May 5 2016, https://www.washingtonpost.com/news/in-theory/wp/2016/05/05/how-the-supreme-court-gets-corruption-totally-wrong/?utm_term=.d1027e9d2b60);
(ii) • Jacob Eisler, *McDonnell and Anti-Corruption's Last Stand,* U.C. Davis Law Review, vol. 50, 2017, https://lawreview.law.ucdavis.edu/issues/50/4/Articles/50-4_Eisler.pdf;
(iii) • Adam Minchew, *Who Put the Quo in Quid Pro Quo?,* Fordham Law Review, vol. 85 issue 4 art. 10, 2017, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5307&context=flr.

actions."[138] Although Ryan responded that the other circuits' rulings did "not conform to the controlling Seventh Circuit law on honest services mail fraud as articulated in *Bloom*,"[139] he lost.

which, of course, a District court "cannot" do, by principle of stare decisis (precedent) — it cannot overrule its own Circuit

C

At trial, Ryan's counsel cross-examined prosecution witnesses by asking such questions as: "[W]ere you ever aware of anybody ever giving any money to George Ryan to affect his decisions as secretary of state?" and "[D]id you ever observe or see George Ryan do anything that indicated to you that he had ever received any money or benefit from anyone to influence or affect his judgment?" Every witness answered "no."[140] Of the eighty-three witnesses the government called, none "testified that George Ryan took anything from anybody to perform his official acts."[141]

misleadlingly

Occasional passages of the government's argument to the jury seemed to accuse Ryan of bribery. The prosecutor said that he "sold his office" and that he "might as well have put up a 'for sale' sign."[142] He declared that the "type of corruption here" was like a meal plan or open bar.[143] The prosecutor, however, did not refer to the bribery instructions even once and never asked the jury to convict on the basis of these instructions. Instead, he quoted the conflict of interest instruction in full and called it "the heart of the matter."[144]

thus making it clear that the jury convicted on the basis of "conflict of interest" (NOT bribery/kickbacks), which would turn out to be insufficient ("convicting for behavior that was not a crime"), in light of Skilling, 5 years later

Ryan's former chief-of-staff, Scott Fawell, testified that Ryan purported to pay for his Jamaican vacations by writing checks to his host and taking cash back. Fawell explained that the host, Harry Klein, owned currency exchanges regulated by Ryan's office and that Ryan did not want Klein's hospitality known.[145] Of all the evidence the government presented over the course of Ryan's lengthy trial, the "cash back" testimony seemed to me the most damaging.[146]

to hide a (potential) confict of interest — but a conflict of interest, potential or real, is NOT A CRIME (after Skilling), see p.12 supra

---

[138] Separate App'x of Pet'r-Appellant, Vol. 1, *supra* note 70, at A-000158 (United States' Motion for Pretrial Ruling on Jury Instructions); *see also supra* notes 61–64 and accompanying text (describing the rulings in *Sawyer* and *Woodward*).

A

B

[139] Separate App'x of Pet'r-Appellant, Vol. 1, *supra* note 70, at A-000173 (Ryan's Response to United States' Motion for Pretrial Ruling on Jury Instructions).

D

[140] *See, e.g.*, Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000369, A-000371, A-000376, A-000377, A-000378, A-000380–81 (trial transcript).

[141] *Id.* at A-000413 (closing argument of Ryan's counsel).

[142] *Id.* at A-000392 (closing argument of government counsel).

[143] *Id.* at A-000396.

[144] Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000417.

[145] *See id.* at A-000417 (trial transcript).

E

[146] The chief prosecutor apparently took the same view. *See* MERRINER, *supra* note 45, at 174 ("[Patrick] Collins mentioned again what particularly seemed to stick in the craw of the U.S. attorney's office, Ryan's getting cash back from Harry Klein for his bogus checks for Jamaican vacations. 'As a prosecutor, when you get somebody falsifying information, that's your bread and butter to show the jury that they knew what they were doing is wrong.'").

"wrong," maybe, according to some definition, but not "illegal," at least no under the mail fraud "honest services" clause after Skilling

A • ℘40B *infra.*

B • ℘34H *supra.*

C • ℘22A *supra.*

D • It is worth quoting from ℘A-173 here, to demonstrate how explicit and clear-headed the defense states its case (here and elsewhere) to the District judge, but the judge falsely ignored it (internal cite omitted, emphasis added):
  • "*Bloom* was an interlocutory appeal affirming the **dismissal of an honest services mail fraud charge** [18 USC §1346, ℘21e *supra*] precisely because the government failed to 'charge that [Bloom] misused his office for private gain.' The legal deficiency in the *Bloom* indictment is the same deficiency that pervades the government's proposed instructions here: they fail to instruct the jury that an **honest services violation exists** *only* if the government proves beyond a reasonable doubt a **misuse of public office for private gain.**"

E • ℘20C *supra.*

which is OK

such as bribe/ kickback

Fawell's testimony gave the government a strong case that Ryan had concealed a conflict of interest, and no one claimed the testimony showed more than that.[147] Although the government emphasized Ryan's approval of a lease of one of Klein's properties, it argued only that the cash-back arrangement concealed "a classic conflict of interest," not that it concealed a bribe:

> That's what this instruction is about, folks. And that is the heart and soul not only of the South Holland [Klein] situation, but each and every Warner situation, because [of] that flow of benefits I talked to you about. George Ryan was operating under a conflict of interest every time he dealt with Larry Warner, because benefits were flowing from Larry Warner. He had a duty to disclose them . . . and he didn't.[148]

only (not bribes/ kickbacks)

but again, breach of "duty to disclose" isn't illegal

The Supreme Court has said, "[F]or bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange for* an official act."[149] The government acknowledged that it had not shown any *quid pro quo*:

> How did George Ryan reciprocate this longtime friendship [with Warner]? Government business is how he did it. . . . Was it a quid pro quo? No, it wasn't. Have we proved a quid pro quo? No, [we] haven't. Have we charged a quid pro quo? No, we haven't. We have charged an undisclosed flow of benefits back and forth. And I am going to get to the instructions in a minute, folks, but that's what we have charged. . . . We have charged an undisclosed flow of benefits, which, under the law, is sufficient . . . .[150]

"mere" (as opposed to, say, gain from bribery/kickback, or harm to others, or conflict of interest)

or at least it was, before Skilling

---

[147] Fawell was among the government witnesses who testified that he had never seen Ryan accept anything from anyone to influence or affect his judgment. *See* Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000368 (trial transcript).

A

[148] *Id.* at A-000417–18.

[149] United States v. Sun-Diamond Growers, 526 U.S 398, 404–05 (1999).

B

[150] Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000416. The government in fact conceded its failure to show a *quid pro quo* several times:

> [I]t's important to remember that it is not necessary for us to prove a quid pro quo. I used that term before, I think. In other words that was I give you this, you give me that; it doesn't have to be that sort of relationship.

as was proper

A • ℘40B *infra.*

B • ℘34I *supra.*

In the Seventh Circuit, Judge Kanne noted that Ryan's case was "the most high profile case in Chicago in recent memory."[151] My co-counsel and I recognized that media hostility and public opinion could affect even the august federal courts. On the merits, however, it was difficult to imagine a stronger case for post-conviction relief than Ryan's. There was no reason for the jury ever to have considered whether Ryan took bribes. The instructions marked an easier path to conviction; the government had urged the jury to take this path; and there was no reason to doubt that the jury took it.

When, however, our post-conviction petition returned the case to the judge who had presided over Ryan's six-month trial, we lost.[152] Judge Rebecca Pallmeyer's fifty-eight page typescript opinion argued in essence that, because the only remaining charges against Ryan concerned his relationships with Lawrence Warner and Harry Klein, his convictions must have rested on the "stream of benefits" they gave him. Rejecting Ryan's claim that the bribery instructions were defective, it said that the jury could not have convicted Ryan of receiving these benefits from Warner and Klein improperly without finding that they were bribes. The jury might indeed have found that Ryan failed to disclose a conflict of interest, but it could not have made this finding without concluding at the same time that he took bribes.[153]

> The defense . . . has repeatedly attempted to focus you on corrupt payments of money or cash bribes, but that's not the case that we have charged here. What the government's case is about is that George Ryan received these financial benefits for himself and steered other benefits to third parties, benefits that were not disclosed to the public.

Id. at A-000407.

> Now, did Ryan have a conversation with Anthony DeSantis in which they discussed: Well, you pay me for this, and I'll give a low-digit plate? No, they didn't do that. However, when Ryan had the opportunity to help DeSantis, a man who was interested in a low-digit plate, did he do it? Yes, he did. . . . You don't have to have a quid-pro-quo conversation here.

Id. at A-000400.

[151] United States v. Warner, 498 F.3d 666, 705 (7th Cir. 2007) (Kanne, J., dissenting).

[152] *See* Ryan v. United States, 759 F. Supp. 2d 975, 978 (N.D. Ill. 2010) (denying motion to vacate, set aside, or correct Ryan's sentence). Dissenting from the Seventh Circuit's earlier denial of rehearing *en banc*, Judges Posner, Kanne, and Williams wrote:

> Imagine how a district judge who has spent six months presiding at a trial . . . feels about the prospect of granting a mistrial and thus condemning herself . . . to the agony of trying the same case over again. . . . [C]an a defendant who moves for a mistrial at the end of a six-month trial hope for a fair shake?

United States v. Warner, 506 F.3d 517, 524 (2007) (Posner, Kanne, & Williams, JJ., dissenting from the denial of rehearing *en banc*).

[153] *See* Ryan, 759 F. Supp. 2d at 999.

"no reason" under the prevailing instructions, that is (recalling the Catch-22 on p.33 supra)

the "easier path" (and the only one urged by the prosecution/ instructions) was to convict on the basis of "honest serivces" fraud — which was now nonviable/ invalidated by Skilling

E

A

that is, after removing the charges now-invalidated by Skilling

Huh?? Sure sounds like magical double-talk to me (see first paragraph, next page).

should read "must" (with quote-marks)

B

C

D

F

A • ℘30C *supra.*

B • ℘40B *infra.*

C • ℘27E *supra.*

D • ℘30C *supra.*

E • **Post-Conviction Petition (in District Court):**
(i) • **Motion:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DDistrictCourtRecord.pdf#page=13.
(ii) • **Memorandum of Law:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DDistrictCourtRecord.pdf#page=24.
(iii) • **Denial thereof:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DDistrictCourtRecord.pdf#page=321.

F • ℘30E *supra.*

In our view, Judge Pallmeyer's reasoning was fallacious. A rabbit went into the hat when she said that the jury must have convicted Ryan of *receiving* benefits improperly. Under the instructions, Ryan would have been obliged to disclose the conflicts of interest created by these benefits even if they were legitimate, unconditional gifts. What mattered under the instructions was not that the benefits were received as bribes but that the conflicts they created were undisclosed when Ryan later acted to benefit Warner and Klein. We expected to discuss the merits of Judge Pallmeyer's ruling when we argued the case to the Seventh Circuit, but it was not to be.

VI. THE ARGUMENT FROM HELL

A. *Judge Easterbrook Emerges*

In the Seventh Circuit, when a panel of judges has heard a defendant's direct appeal from his conviction, that panel ordinarily hears any appeal growing out of a post-conviction proceeding brought by the same defendant.[154] Judge Easterbrook was not a member of the panel that had heard Ryan's direct appeal, and our post-*Skilling* appeal was assigned initially to the panel that had. This panel denied an emergency motion requesting Ryan's release on bond or, in the alternative, an order transferring him to a facility near his home where he could be released during the day. Doctors had concluded that Lura Lynn Ryan, Ryan's wife of fifty-five years and the mother of his six children, had only weeks to live, and the order would have enabled him to be by her bedside.[155]

---

[154] *See* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 10 (2014), https://www.ca7.uscourts.gov/Rules/handbook.pdf [http://perma.cc/AJ8L-GDZD] ("An exception to this procedure [of randomly assigning panels] occurs when a previously argued case is on the docket for a subsequent hearing. In this situation the original panel may be reconstituted to hear the second appeal."); OPERATING PROCEDURES FOR THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 110 (2015), https://www.ca7.uscourts.gov/Rules/rules.pdf [http://perma.cc/9MV4-PQSW] ("Briefs in a subsequent appeal in a case in which the court has heard an earlier appeal will be sent to the panel that heard the prior appeal . . . unless there is no overlap in the issues presented."). Technically, our petition under 28 U.S.C. § 2255 began a new civil action challenging the legality of George Ryan's imprisonment; it was not a part of the original criminal proceedings. Nevertheless, Collins T. Fitzpatrick, the Circuit Executive of the Seventh Circuit, confirmed that a panel that has heard a defendant's direct appeal ordinarily hears any subsequent appeal from a ruling in a § 2255 proceeding brought by the same defendant. Telephone Interview with Collins T. Fitzpatrick (Mar. 24, 2015) [hereinafter Fitzpatrick Interview].

[155] *See* Sophia Tareen, *Ex-Ill. Gov. George Ryan's Wife Dies at Age 76*, SEATTLE TIMES (June 29, 2011), http://www.seattletimes.com/nation-world/ex-ill-gov-george-ryans-wife-dies-at-age-76/ [http://perma.cc/2HM4-6GUG].

A

should read "must" (with quote marks)

illogical

B

in order for the jury to convict (recalling the Catch 22 on p.33 supra)

undisclosed conflict-of-interest, "honest services," and all that were now invalid jury instructions (non-criminal acts), thanks to Skilling

Taking the "easier path" (mentioned on the preceding page) does NOT imply the jury "must" have taken the "harder path" (via kickbacks/bribery)! The opposite implication (harder-to-easier) makes logical sense, but this direction is illogical. This is the "no reason" argument on the preceding page.

C

non-randomly

same, original panel (consisting of Manion, Kanne, Wood)

original

F

D

E

beause 28 USC §2255 hadn't been at issue in the original case (original case was criminal, this is civil)

but, it seems no law or rule of court was violated (just "informal guidance")

G

A • **Rabbit went into the hat:** Magically producing something from nothing. https://en.wikipedia.org/wiki/Hat-trick_(magic_trick).

B • ℘13B *supra.*

C • We elaborate(/clarify), by **axiomatizing** ("⇒" = "implies") ("∴" = "therefore"):
Definitions:
AA = **Abuse of Authority** (vague/ill-defined concept; "I know it when I see it")
HS = Breach of *vague/intangible* duty of **Honest Services,** "whatever that is" (℘21E *supra*), but we stipulate it ***includes*** "mere" **CI** = **Conflict of Interest**
BK = **Bribery/Kickback** (well-defined; non-vague; see https://en.wikipedia.org/wiki/Kickback_(bribery))
ILL = **Illegal** (properly so-called, by law/statute or court ruling)
Axioms (these are well-understood/agreed-to/"true," by general/universal consent):
AA ⇏ ILL — Ill-defined, "touchy/feelly," concepts don't necessarily define/imply "illegality" (only laws/statutes do that)
ILL ⇒ AA — Anything illegal is an abuse of authority (in the present context)
HS ⇒ AA — Breach of honest services is abuse of authority
BK ⇒ AA — Bribery/kickbacks is abuse of authority
BK ⇒ HS — Bribery/kickback is breach of "honest services" (however defined)
BK ⇒ ILL — Bribery/kickback is illegal (by statute, both before & after *Skilling*)
HS ⇏ ILL ("Skilling Axiom") — "Ordinary" (i.e., **sub-BK,** such as **CI**) "honest-services fraud" (in the sense post-*Skilling*) is *NOT ILLEGAL* [*Note:* "HS ⇒ ILL" **was** "sort-of *true*" (common-law axiom, in *some/few* Circuits, ℘22f60 *supra*) pre-*Skilling,* but **not** now/afterwards ("*Skilling* axiom," HS ⇏ ILL).]
Theorems (logically follow from the axioms):
HS ⇏ BK — "Honest services" is *strictly broader* than "bribery/kickback")
Proof: If "HS ⇒ BK" were true, then HS ⇔ BK (by the BK ⇒ HS axiom), which is a contradiction (because HS and BK are *not equivalent:* they're *different concepts,* as is obvious, and nobody anywhere has ever proposed differently).
CI ⇏ ILL — Conflict of interest (in the **"mere"/sub-BK** sense) is *NOT ILLEGAL*
• The two boxed passages here mark the flawed/illogical/false thinking of the judges in *Ryan v. U.S.* For, what those judges do is posit/assert the proposition (non-theorem) "HS ⇒ BK" (∴ "CI ⇒ HS ⇒ BK ⇒ ILL") — which is **false** for two reasons (in two senses): (i) • it's AXIOMATICALLY FALSE (as shown/proved above, by the theorem "HS ⇏ BK"); (ii) • it can't be a correct/logical deduction/conjecture concerning what the "jury '*must*' have thought" (℘12H,19J,37 *supra*), because of the assumption the jury was "doing its job correctly" which is what the judges do/must assume/insist (else, perhaps mistrial, possibly with "jury nullification," https://en.wikipedia.org/wiki/Jury_nullification); 498 F3d 666 (℘27E *supra*) at ℘683; *cf.* the Catch-22 on ℘33 *supra.*

D • **Seventh Circuit Practitioner's Handbook** (2014 Edition):
(i) • https://perma.cc/AJ8L-GDZD;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/7thCirPractionersHandbook%2C2014ed.pdf.

E • **Seventh Circuit Rules and Operating Procedures** (2014 Edition):
(i) • https://perma.cc/9MV4-PQSW;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/7thCirRulesAndOperatingProcedures%2C2014ed.pdf.

F • http://chicago.cbslocal.com/2011/01/10/appeals-court-no-bail-for-george-ryan.

G • http://perma.cc/2HM4-6GUG.

A

On the morning of my argument, the clerk's office revealed that the panel had changed. It would include only one of the judges who had heard Ryan's direct appeal—Diane Wood, a long-time colleague of mine on the University of Chicago Law School faculty and a former student. The other judges would be John Tinder and Frank Easterbrook, who was then Chief Judge of the Seventh Circuit. Although Judge Easterbrook was also a long-time colleague on the Chicago faculty, his appearance on the panel did not come as a welcome surprise. In a later telephone interview, Collins T. Fitzpatrick, the Circuit Executive of the Seventh Circuit, confirmed that when a vacancy occurs in a previously selected panel, he selects a replacement without using a randomized process.[156]

B

it's only partially randomized, see footnote 156

---

[156] Fitzpatrick Interview, *supra* note 154. Fitzpatrick also confirmed that Ryan's bail motion would have been considered by the panel assigned to his case rather than by the court's motions panel.

esp. in the 7th Circuit

Lawyers and scholars have questioned whether the assignment of judges to cases in the courts of appeals is as random as the courts say it is. *See* Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals* 4 (Dec. 17, 2014);

D

E

Sachs, *supra* note 1, at 1208 (noting that, after Rule 23(f) of the Federal Rules of Civil Procedure became effective, every one of the Seventh Circuit's first seventeen opinions interpreting the rule was authored by either Judge Easterbrook or Judge Posner); Petition for a Writ of Certiorari at 33, Motorola Mobility LLC v. AU Optronics Corp., 135 S. Ct. 2837 (No. 14-1122) ("The Court Should Grant Review to Disapprove of the Seventh Circuit's Non-Random Assignment Process");

F

G

J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1041–42 (2000) ("[A]ll federal circuits purport to rely on the random assignment of judges to panels. In fact, however, substantial amounts of discretion erode the randomness of those systems."). *Cf.* Dane Thorley, *Randomness Pre-considered: Recognizing and Accounting for "De-Randomizing" Events When Utilizing Random Judicial Assignment* (July 9, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628782 [http://perma.cc/H7GF-4ZWD] (explaining why nominally random systems may not produce random assignments).

H

Apart from cases in which earlier arguments have occurred, the Seventh Circuit claims to assign judges to panels randomly. *See* PRACTITIONER'S HANDBOOK, *supra* note 154, at 10. Judges, however, seem able to game the system. Fitzpatrick, the Circuit Executive, reported that he examines the briefs in every case, determines how much time to allow for argument, and prepares the argument calendar. After he circulates the calendar to the judges, the judges advise him of disqualifying conflicts of interest and of times they are unavailable to hear argument. After that, a computer randomly assigns the judges to panels. A judge who wishes to avoid a particular case apparently can do so by reporting his unavailability on the day argument is scheduled, and a judge who wishes to hear a particular case apparently can increase the chance of hearing it by reporting, "The only day I'm available that week is Friday."

C

p.38 footnote 154 supra

I do not claim that Seventh Circuit judges steer cases to or from themselves by inventing scheduling conflicts; I merely note that they have the ability to do it. Fitzpatrick observes that judges are advised long in advance of the weeks when arguments will occur, that they are discouraged from scheduling other activities during these weeks, and that scheduling conflicts are in fact infrequent. When conflicts arise sufficiently in advance, moreover, judges typically advise Fitzpatrick of these conflicts before he prepares the argument calendar. Fitzpatrick Interview, *supra* note 154.

A • ℘17A *supra* (May 31 2011).

B • In the interim, Judge Manion had assumed senior status (https://en.wikipedia.org/wiki/Senior_status) (on Dec 18 2007), and was succeeded by Judge Tinder. Judge Kanne still remained in active service. But note: "vacancies" can also occur for various "soft" "unavailability" reasons, not just "hard" reasons such as senior status, retirement, or health/death, etc. (see ℘39f156).

C • ℘38D *supra.*

D • ***Chilton & Levy:*** https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=4682&context=clr.

E • ℘8J *supra.*

F • ***Motorola Mobility v. AU Optronics:*** http://www.scotusblog.com/case-files/cases/motorola-mobility-llc-v-au-optronics.

G • ***Brown & Lee:*** https://papers.ssrn.com/sol3/papers.cfm?abstract_id=957650.

H • **Thorley:** https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628782.

Might Chief Judge Easterbrook have discouraged the judges initially assigned to the case from continuing with it? Might he have indicated that he was available as a replacement? Judge Easterbrook has written a surprisingly high proportion of the Seventh Circuit's opinions in both mail fraud cases and cases presenting issues of post-conviction procedure. Perhaps our case interested him, and perhaps he saw it as a vehicle for making a point.

or by a hobby-horse — see definition, bottom of this page: "evidence" vs. "jury-instruction" as exemplars of types of "trial errors"

B. I Get Hit by a Truck

i.e., Easterbrook immediately (with aforethought) hijacked the whole proceeding (falsely)

A

Before I reached the second sentence of my argument, Judge Easterbrook announced that the government, Judge Pallmeyer, and I had missed the boat entirely:

which is now (post-conviction), in the wake of Skilling, NOT ILLEGAL (noting that bribes/ kickbacks were never alleged

cf. p.22–27 supra

Mr. Alschuler: Good morning and may it please the court. The jury instructions in this case marked four paths to conviction for honest services fraud, and three of them told the jury to convict for conduct that is not criminal.

B

Judge Easterbrook: Mr. Alschuler, I am puzzled why we are talking about jury instructions in this case. Your brief proceeds as if this were a re-run of the direct appeal, but of course it isn't. It's a collateral attack and my understanding of the Supreme Court's opinions in *Davis* and *Bousley* is that they don't allow challenges to jury instructions — belated challenges to jury instructions. They allow the person in prison to argue that he has been convicted of something the law does not make criminal. In other words that on the evidence at trial in light of the later statutory interpretation the only proper judgment is a judgment of acquittal. But I don't understand you to be arguing that on the evidence at trial the only proper judgment was a judgment of acquittal so I wonder what we have got here if anything.

C

D

E

the point is, of course, that the instructions COULD NOT have been objected-to at the time of the trial, because they were valid/proper AT THAT TIME (pre-Skilling); they have only SINCE become invalid/improper POST-SKILLING (because, the behavior the instructions described — on the basis of which the jury convicted — is NO LONGER ILLEGAL, according to Skilling); Easterbrook pretends not to even grasp this straightforward/proper proposition, much less honor/ credit it

that's right: the EVIDENCE DID support conviction (on the basis of the law and instructions AT THE TIME) — the problem is that the INSTRUCTIONS THEMSELVES (not the EVIDENCE), while valid-at-the-time (pre-Skilling), specified "something the law does not [later] make criminal" (post-Skilling); BUT SEE p.44 infra, where Easterbrook's ramarks here are proved FALSE, and labeled "FALSEHOOD #1"

Mr. Alschuler: First, the government has not suggested that these issues are not properly before this court. I think it has waived any point based on the cases cited by the court and, second, it is a

because not raised in its appellate brief, p.40B(iii) supra

throughout, we refer to Easterbrook's (false) fixation/fetishization of "evidence vs. jury-instructions" as his (fake) "HOBBY-HORSE" (see p.44,64,67 infra)

A • ℘17A *supra.*

B • **APPELLATE BRIEFS:** As with any appellate proceeding, to fully follow the appellate arguments (such as this "3" and "4"), one should **first peruse the all-important input appellate documents/briefs:**
(i) • **Appellant Brief (with Required Short Appendix):** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApltBrief.pdf.
(ii) • **Appellant Separate Appendix** (Vol. 1 & 2): http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApltApx.pdf.
(iii) • **Appellee Brief:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApleBrief.pdf.
(iv) • **Appellant Reply Brief:** http://judicialmisconduct.us/sites/default/files/2017-06/ApltReplyBrief.pdf.
(v) • **Appellant Additional Authority:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApltAdditionalAuthority.pdf.
(vi) • **Appellant Post-Argument Supplemental Memorandum:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApltPostArgMemo.pdf.
(vii) • **Appellant Post-Argument Supplemental Appendix:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApltPostArgApx.pdf.
(viii) • **Appellee Post-Argument Supplemental Memorandum:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApleSuppMemo.pdf.
(ix) • **District Court Record:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DDistrictCourtRecord.pdf.

C • **"Collateral,"** in the context of this Memoir, simply means indirect/supplementary/non-mainline. A **collateral attack (or review)** is an attack/argument concerning *another* case (i.e., *other* than the current case-at-bar).
• Collateral attacks have their place in law (this case, *Ryan v. U.S.,* is an example), but are generally frowned upon. In particular, the **doctrine of collateral estoppel** (a.k.a. **issue preclusion,** and paraphrased as "a judgment from 'that' case cannot be attacked in 'this' case") asserts an affirmative defense barring a party from relitigating an issue determined against the party in a different/earlier action[α] — which is, in fact, at the root of the Fifth Amendment's Double Jeopardy Clause. See also ℘42D *infra.*
• And, Easterbrook is right here — this *is* a collateral attack (of the rare/justified sort), explicitly brought under 18 USC §2255 (℘33A *supra*); Ryan/Alschuler's Appellant Briefs (℘40B *supra*) don't portray it otherwise (*don't* "proceed as if this is a re-run of the direct appeal").

D • ***Davis v. U.S.:***
(i) • https://supreme.justia.com/cases/federal/us/417/333/case.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Davis-v-U.S.pdf.

E • ***Bousley v. U.S.:***
(i) • https://supreme.justia.com/cases/federal/us/523/614/case.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Bousley-v-US.pdf.

α • Black's Law Dictionary, 7th ed.

as explicitly stated in 28 USC §2255 itself

constitutional violation—Section 2255 affords relief to anyone who is in prison in violation of the Constitution or laws of the United States.

B

Judge Easterbrook: Well, Mr. Alschuler do you disagree with what I have said, I believe, is the holding of *Bousley* and *Davis*?

Falsehood #1, analyzed at p.44–46 infra

Mr. Alschuler: Well, I don't recall the holding of *Bousley* and *Davis*, and they were not cited by the government and I—

this is re-addressed at p.50 infra

not only is Easterbrook brow-beating (bullying) counsel, but he shows he hasn't the least conception what this case is about ("denial of right to be heard"); and he turns out to be totally WRONG/FALSE; this is labeled "FALSEHOOD #2," p.46 infra

Judge Easterbrook: No, oddly—oddly they haven't been. The argument you're making is an argument that the Supreme Court rejected nine to nothing in *United States v. Frady*, which said that collateral attack absolutely cannot be used to challenge the jury instructions.

A

Mr. Alschuler: Well, we are not simply challenging the jury instructions, Your Honor.

Judge Easterbrook: No, you are challenging the rulings on evidence too.

Mr. Alschuler: No, we are saying that George Ryan was convicted—

Judge Easterbrook: Look, Mr. Alschuler,

Mr. Alschuler: —in violation of the Constitution.

Judge Easterbrook: Mr. Alschuler—Mr. Alschuler, trying to talk over a question from the bench won't do you any good. The arguments that you are making look like the kind of arguments that the Supreme Court squarely said in *Frady* cannot be raised on collateral attack. Now, am I misunderstanding *Frady*?

yes, he is (with "misunderstanding" in quote-marks)

Mr. Alschuler: My recollection—I read *Frady* once upon a time and my recollection of the case is dim. We are saying that George Ryan was convicted in violation of the Constitution. It is—

right: he's currently incarcerated for behaivor that is not (post-Skilling) illegal

A • ***U.S. v. Frady:***
(i) • https://supreme.justia.com/cases/federal/us/456/152/case.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/US-v-Frady.pdf.

B • ℘33A *supra.*

Judge Easterbrook: Right. I understand that. That's what the D.C. Circuit held in *Frady* and which the Supreme Court reversed.

Mr. Alschuler: No, the Supreme Court has said—

Judge Easterbrook: It has said that incorrect jury instructions are not themselves a violation of the Constitution. They are a violation of a statute maybe but not of the Constitution. And the Supreme Court has said more often than I care to remember that just getting the law wrong does not entitle one to collateral attack.

Mr. Alschuler: Again, we are suggesting more than that the District Court got the law wrong. The law is that if the jury instructions permitted conviction on the basis of an invalid theory—permitted conviction of somebody who may be innocent—then that is a constitutional violation. It is a violation—

Judge Easterbrook: Okay, if that is your argument, it is inconsistent with both *Frady* and *Engle v. Isaac*. Now, if you have got an argument that your position is compatible with those cases, I'd love to hear it.

Judge Wood: Which I think means if you are arguing in fact that going beyond details like jury instructions is this a situation where the record simply could not under any circumstance support finding that George Ryan has committed the offense that the Supreme Court has now recognized in *Skilling*. Maybe that is where you need to go.[157]

I then did as I was told. Abandoning my effort to explain why instructions directing conviction for noncriminal conduct differ from

[157] Oral Argument at 0:28-4:50, Ryan v. United States, 645 F.3d 913 (7th Cir. 2011) (No. 10-3964), *vacated and remanded*, 132 S. Ct. 2099 (2012), http://media.ca7.uscourts.gov/sound/2011/migrated.orig.10-3964_05_31_2011.mp3 [http://perma.cc/S247-27LF] [hereinafter Oral Argument]. All citations of the argument in this Memoir are to the recording on the Seventh Circuit website. An unofficial written transcript of the argument appears as Appendix H in Petition for a Writ of Certiorari at 186a–214a, Ryan v. United States, 132 S. Ct. 2099 (2012) (No. 11-499).

it is not being suggested that the jury instructions were "wrong" (indeed, they were "right," pre-Skilling) — the point is that the instructions/trial have incarcerated a man for behavior that is not (now, post-Skillinig) a crime

D

no matter how correct at-the-time (as they were, pre-Skilling)

B

no: Easterbrook is lying

A

Judge Wood "invites" a different path

again, bullied and "denied the right to be heard," Alschuler is forced to address issues that had nothing to do with his case/briefs, and make up random stuff on-the-fly

C

E

A • ***Engle v. Isaac:***
(i) • https://supreme.justia.com/cases/federal/us/456/107/case.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Engle-v-Isaac.pdf.

B • Again, look at the exact wording of 28 USC §2255 (℘33A *supra*).

C • ℘17A *supra.*

D • **Issue/Claim Preclusion, a.k.a. (approx.) Collateral Estoppel, *Res Judicata*, Law of the Case** (see also ℘40C *supra*) —
The "General Rule" (quoting from *Restatement (Second) of Judgments* (1982) §27) puts it this way:

> "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment ["on-the-merits"], the determination is conclusive in a subsequent [i.e., *collateral,* as opposed to *direct/linear/appellate,* where this estoppel is inapplicable] action between the parties, whether on the same or a different claim."

• In other words: "Use it or lose it, at '*first opportunity.*'" — If an "issue of fact or law" is raised at trial/District court phase, you'd better/must challenge it there (or at the immediately ensuing Appellate/review stage), rather than attempting(/failing) to do so later, at a separate/subsequent/collateral proceeding.
• And, in turn, invoking preclusion/estoppel of this sort *itself* should/must be raised at counsel/litigant's *"first opportunity:"* Preclusion is normally considered (i) an affirmative defense (FRCP 8(c)(i)), and is considered (ii) waived if not raised.

E • ***Ryan v. U.S.,* Petition for Writ of Certiorari:**
(i) • http://sblog.s3.amazonaws.com/wp-content/uploads/2011/10/Ryan-Cert-Petition-FINAL.pdf;
(ii) • http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DPetWritCert.pdf.

other erroneous instructions, why they do violate the Constitution, and why they plainly are subject to challenge in post-conviction proceedings, I spent the remainder of my argument explaining why "the record simply could not under any circumstance support finding that George Ryan has committed the offense that the Supreme Court has now recognized in *Skilling*." Judge Wood, however, did not invite me to argue the insufficiency of the evidence because she had any sympathy for this argument. She soon declared, "I don't see why it was not entirely permissible for the jury to infer that there was an exchange going on."[158] At the conclusion of my argument, feeling like a law student who has totally botched his first moot court argument, I followed the textbook advice every first-year law student receives and requested permission to address the seemingly decisive cases in a supplemental brief.[159]

One can understand why instructions misstating the elements of a crime might seem at first glance to raise only a question of statutory construction, but a judge would have three ways of correcting this misunderstanding. First, he could recognize that the constitutional requirement of proof of guilt beyond a reasonable doubt demands proof of guilt of a *crime*.[160] Instructing a jury to convict someone of grand larceny upon proof beyond a reasonable doubt that he entered a store with a shopping bag would not satisfy the constitutional requirement. Second, the judge could look up the law. The Supreme Court, the Seventh Circuit, and other courts have held in countless cases that directing conviction for noncriminal conduct violates the Constitution. Third, the judge could ask a question at argument and allow counsel to answer it.

I cannot fully describe the jumble of thoughts that raced through my mind as I stood helpless at the podium before the onrushing truck. Among them were:

> What on earth is this man talking about? I've read dozens of cases in which the Supreme Court, the Seventh Circuit, and other courts have considered in post-conviction proceedings (*i.e.*, in "collateral attacks") whether

this foreshadows the "must" (in quote-marks) noted on p.12,19,37,38 — with the big difference of "what the jury infers" vs. "what the judges 'infer' (in quote-marks) about what the jury infers"

that wonderful bullied feeling

B

as Easterbrook mentioned on p.42 supra

jury instructions

what a radical concept!

per p.18 supra

A

C

D

E

---

158 Oral Argument, *supra* note 157, at 6:22.

159 *Id.* at 16:19.

160 *See* United States v. Gaudin, 515 U.S. 506, 510 (1995) (noting that the Constitution "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"); Whalen v. United States, 445 U.S. 684, 690 (1980) (noting the "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress"); In re Winship, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

A • ℘17A *supra*.

B • ℘40B(vi) *supra*.

C • ***U.S. v. Gaudin:***
(i) • https://supreme.justia.com/cases/federal/us/515/506/case.pdf;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/US-v-Gaudin.pdf.

D • ***Whalen v. U.S.:***
(i) • https://supreme.justia.com/cases/federal/us/445/684/case.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Whalen-v-US.pdf.

E • ***In re Winship:***
(i) • https://supreme.justia.com/cases/federal/us/397/358/case.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/InReWinship.pdf.

whether or not the instructions are erroneous (either at the time of issuance, or later invalidated), the point is not that, but "whatever it was" that "produced conviction for noncriminal conduct" (because, that's all 28 USC §2255, p.33A supra, cares about, not necessarily anything to do with jury instructions)

erroneous instructions produced convictions for noncriminal conduct. What about all those cases after *McNally*? What about all those cases after other Supreme Court decisions narrowing the scope of criminal statutes? None of those cases said that the prisoner was limited to arguing the insufficiency of the evidence. Had I missed something? When the Supreme Court held that rulings narrowing the scope of criminal statutes apply retroactively because of the risk that a defendant might have been convicted of noncriminal conduct, what did it mean? Could it have meant anything other than that prisoners may object in post-conviction proceedings to instructions that produced their imprisonment for conduct that isn't a crime? Why would it matter that the evidence was sufficient to convict the defendant of a genuine crime if the jury had in fact convicted him of something else? Didn't *Skilling* itself say that allowing a jury to convict for noncriminal conduct violates the Constitution? I have a dim recollection of *Bousley*, *Davis*, *Frady*, and *Engle v. Isaac*, but weren't those cases about the defendants' procedural defaults—their failures to make objections at the right time? I guess they weren't. There was no procedural default in our case, and Judge Easterbrook says the cases are about what issues are cognizable in post-conviction proceedings. Should I say something about procedural default? This can't be happening.

A

B

C

which is not the case here at all

self-doubt; I'm going crazy; PTSD

identity-crisis; sure sounds like bullying-induced like PTSD to me!

Research after the argument quickly transformed my panic and confusion to indignation. All of Judge Easterbrook's overbearing assertions were false.

FALSEHOOD #1: MISREPRESENTING THE HOLDINGS OF DAVIS AND BOUSLEY

Falsehood Number One:

re-quoted from p.40 supra

Davis and *Bousley* . . . don't allow challenges to jury instructions—belated challenges to jury instructions. They allow the person in prison to argue that he has been convicted of something the law does not make criminal. In other words that on the evidence at trial in light of the later statutory interpretation the only proper judgment is a judgment of acquittal.[161]

it is especially reprehensible that Easterbrook would falsify the holdings of Davis and Bousley, after pre-preparing his remarks on the subject in secrecy, not sharing with the parties/lawyers that he'd be ambushing them like he did

this is Easterbrook's "evidence" vs. "jury instructions" hobby-horse, see p.40,64,67

[161] Oral Argument, *supra* note 157, at 1:03–1:27.

A • ℘20E *supra.*

B • ℘11D *supra.*

C • *Bousley v U.S.:* ℘40E *supra.*
Davis v. U.S.: ℘40D *supra.*
U.S. v. Frady: ℘41A *supra.*
Engle v. Isaac: ℘42A *supra.*

There is nothing in either of the opinions cited by Judge Easterbrook that a rational reader could construe or misconstrue as precluding challenges to jury instructions in post-conviction proceedings. Neither case involved or mentioned jury instructions at all.

In *Bousley v. United States*,[162] a prisoner pleaded guilty to using a firearm during a drug transaction. The Supreme Court later held in *Bailey v. United States*[163] that "use" required active employment of the firearm. Chief Justice Rehnquist's opinion for the Supreme Court included two holdings. The Court first held that *Bailey* applied retroactively. The prisoner's claim could be heard in a § 2255 proceeding because "decisions of this Court holding that a substantive federal statute does not reach certain conduct . . . necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'"[164]

The Court then considered the significance of the prisoner's procedural default. He had not argued at trial or on appeal that "use" meant active use. Instead, he had pleaded guilty. Such a procedural default ordinarily precludes post-conviction relief, but the Court held that one of two recognized exceptions to the procedural default rule might apply. If the prisoner could show that "the constitutional error" in his case (note those words) had "probably resulted in the conviction of one who is actually innocent," the procedural default would be excused.[165]

Unlike the prisoner in *Bousley*, Ryan had argued at trial and on appeal that the honest services statute did not reach the conduct that the Supreme Court later held it did not reach. The government had never suggested a default of his claim that the statute did not reach undisclosed conflicts or state regulatory violations. The procedural default ruling in *Bousley* did not bear at all on whether a prisoner who has *not* defaulted may challenge jury instructions directing his conviction for noncriminal conduct. (Indeed, *Bousley* did not require even a prisoner who *had* defaulted to show that "on the evidence at trial in light of the later statutory interpretation the only proper judgment is a judgment of acquittal." *Probable* conviction of one who was actually innocent was enough to excuse the default.) How anyone could read *Bousley* as saying that Ryan could not challenge the jury instructions in his case and could argue only the insufficiency of the evidence is beyond me.

---

[162] 523 U.S. 614 (1998).

[163] 516 U.S. 137 (1995).

[164] *Id.* at 620 (quoting Davis v. United States, 417 U.S. 333, 334 (1974)).

[165] *Id.* at 623. The Supreme Court also excuses a default when a prisoner can show "cause" for his default and "actual prejudice" resulting from the asserted error. *See* United States v. Frady, 456 U.S. 152, 167 (1982); Wainwright v. Sykes, 433 U.S. 72, 84 (1977).

A

in 1990

B

in 1995

(Bousley)

"procedural DEFAULT" rule in absence of timely/ contemporaneous objection" = forfeiture/waiver, i.e., "you snooze, you lose"

H

F

G

the accepted terminology is: "inadvertent forfeiture" vs. "affirmative waiver"

i.e., FALSE

C

D

E

A • ℘40E *supra*.

B • ***Bailey v. U.S.:***
(i) • https://en.wikipedia.org/wiki/Bailey_v._United_States;
(ii) • https://supreme.justia.com/cases/federal/us/516/137/case.html;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Bailey-v-US.pdf.

C • ℘44C *supra*.

D • ℘41A *supra*.

E • ***Wainwright v. Sykes:***
(i) • https://supreme.justia.com/cases/federal/us/433/72/case.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Wainwright-v-Sykes.pdf.

F • 28 USC §1346 (℘21E *supra*).

G • *Skilling v. U.S.*, ℘11D *supra*.

H • See Appellant Brief, http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApltBrief.pdf.

Judge Easterbrook mentioned *Davis* in the same breath as *Bousley*, and my first guess was that *Davis* was a "procedural default" case too. But I was thinking of the *Davis v. United States* that appears in volume 411 of the United States Reports.[166] That *Davis* is in fact a procedural default case arising under § 2255. At the end of the argument, however, when Judge Easterbrook agreed that the parties could file supplemental briefs, he revealed that he had in mind a different *Davis v. United States*—one that also arose under § 2255 and that the Supreme Court decided a year later. This *Davis* appears in volume 417 of the United States Reports.[167]

In the *Davis* case Judge Easterbrook had in mind, the prisoner was serving a sentence for failing to report for induction into the armed forces when a ruling by the Ninth Circuit in another defendant's case made clear that the order requiring him to report was invalid. The prisoner had consistently maintained that the order in his case was invalid; he had not defaulted this claim. The government nevertheless maintained that the prisoner was not entitled to relief under § 2255 because his claim was "not of constitutional dimension."[168]

Without considering whether the prisoner's claim was of constitutional dimension, the Supreme Court ruled in his favor.[169] The Court noted that § 2255 authorizes relief when a sentence was imposed "in violation of the Constitution *or laws* of the United States,"[170] and it held that Davis was entitled to relief even if the error in his case was non-constitutional. If the order requiring him to report was invalid, his "conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice."[171] Not a word of *Davis* suggests that instructions directing conviction for noncriminal conduct cannot be considered in post-conviction proceedings. Not a word suggests that prisoners are limited to arguing the insufficiency of the evidence to support their convictions under an appropriate standard.

Falsehood Number Two: Although Judge Easterbrook initially invoked *Bousley* and *Davis*, he soon began talking about *Frady* and *Engle v. Isaac*.

---

[166] Davis v. United States, 411 U.S. 233 (1973).

[167] Davis v. United States, 417 U.S. 333 (1974). I knew that Judge Easterbrook did not have in mind the *Davis v. United States* that appears in volume 512 of the United States Reports or the *Davis v. United States* that appears in volume 160. *See* Davis v. United States, 512 U.S. 452 (1994); Davis v. United States, 160 U.S. 469 (1895).

[168] *Davis*, 417 U.S. at 342.

[169] *See id.* at 341–42 ("The sole issue before the Court in the present posture of this case is the propriety of the Court of Appeals' judgment that a change in the law of that Circuit after the petitioner's conviction may not be successfully asserted by him in a § 2255 proceeding.").

[170] *Id.* at 342–43 (quoting 28 U.S.C. § 2255) (emphasis added by the Court).

[171] *Id.* at 346.

at oral argument, quoted at p.40,44 supra

as on p.45 supra

wrong

D

C

right

explicitly cited

cf. p.45 supra

FALSEHOOD #2: MISREPRESENTING THE HOLDINGS OF FRADY AND ENGLE

A

B

E

F

A • **(Wrong) *Davis v. U.S.:*** https://supreme.justia.com/cases/federal/us/411/233/case.html.

B • ℘40D *supra.*

C • ℘40B(vi–viii) *supra.*

D • ℘17A *supra* (transcript at ℘14).

E • **(Wrong) *Davis v. U.S.:*** https://supreme.justia.com/cases/federal/us/512/452/case.html.

F • **(Wrong) *Davis v. U.S.:*** https://supreme.justia.com/cases/federal/us/160/469/case.html.

The judge declared, "The argument that you're making is an argument that the Supreme Court rejected nine to nothing in *United States v. Frady* which said that collateral attack absolutely cannot be used to challenge the jury instructions." When I stubbornly persisted, "[W]e are saying that George Ryan was convicted . . . in violation of the Constitution," Judge Easterbrook replied, "Right. I understand that. That's what the D.C. Circuit held in *Frady* and which the Supreme Court reversed. . . . It has said that incorrect jury instructions are not themselves a violation of the Constitution. They are a violation of a statute maybe but not of the Constitution."[172] And when I still insisted, "The law is that if the jury instructions permitted conviction of the basis of an invalid theory—permitted conviction of somebody who may be innocent—then that is a Constitutional violation," he answered, "Okay, if that is your argument, it is inconsistent with both *Frady* and *Engle v. Isaac*. Now, if you have got an argument that your position is compatible with those cases, I'd love to hear it."[173]

re-quoted from p.41–42 supra

should read "on"

right, he pre-prepared this ambush

Judge Easterbrook appeared to know *United States v. Frady*[174] very well. He recalled the Supreme Court's vote (nine to nothing) and which court the Supreme Court reversed (the D.C. Circuit). Apparently the D.C. Circuit had said just what I was saying—that directing conviction for noncriminal conduct violated the Constitution—but it had been unanimously reversed by the Supreme Court. The Supreme Court had declared both that invalid jury instructions "are not themselves a violation of the Constitution" and that "collateral attack absolutely cannot be used to challenge the jury instructions."[175] Judge Easterbrook seemed so familiar with *Frady* and was so sure of his position that I did not think he could be wrong. But he was—strangely and totally wrong.

Alschuler was guessing here, in real-time, during the oral argument

(Frady)

Unlike *Bousley* and *Davis*, *Frady* did concern jury instructions. A prisoner alleged in a § 2255 proceeding that the instructions at his murder trial improperly directed the jury to presume malice.[176] The difficulty was that the prisoner had not presented this claim at trial; like the prisoner in *Bousley*, he had defaulted. The D.C. Circuit held that the prisoner's default could be excused because the instructional error was plain, but the Supreme Court reversed. It held that the standard for excusing procedural default in a § 2255 proceeding is not "plain error." Instead, the

that is, the jury instruction was plainly erroneous, invalid from the get-go; relying on Rule 52(b) of FedRCrP, which establishes the plain error standard on direct (as opposed to collateral) appeal

cf. discussion of "default," p.45 supra

that is, set aside, ignored

saying the default could not be excused: "To obtain collateral relief, a prisoner must clear a significantly higher hurdle than would exist on direct appeal" (Frady at p.153).

A

B

---

172 Oral Argument, *supra* note 157, at 2:17–3:35.

173 *Id.* at 3:50–4:21.

174 456 U.S. 152 (1982).

175 Oral Argument, *supra* note 157, at 2:21.

176 *Frady*, 456 U.S. at 157–58.

A • ℘17A *supra.*

B • ℘41A *supra.*

that is, it wasn't enough that the instruction was erroneous (plain or not), some damage had to be pled/shown

prisoner must show "cause" for his default and "actual prejudice" resulting from the error.[177]

That was all there was to *Frady*. The Court did not indicate that it would have had any difficulty at all considering the prisoner's claim if his default could have been excused or if, like Ryan, he had never defaulted.

contrary to Easterbrook's lie

It did not say or in any way hint that invalid "jury instructions are not themselves a violation of the Constitution" and "that collateral attack absolutely cannot be used to challenge the jury instructions."[178]

contrary to Easterbrook's lie

(Incidentally, the vote in *Frady* was not nine to nothing. Only five justices joined the majority opinion.[179] Judge Easterbrook gets almost nothing right.)

contrary to Easterbrook's gratutitous lie

that is, default, and no actual damage

Engle v. Isaac[180] was similar. A state prisoner alleged in a federal habeas corpus proceeding that jury instructions had improperly imposed on him the burden of establishing his claim of self-defense by a preponderance of the evidence. The Supreme Court acknowledged that the prisoner had stated "a colorable constitutional claim"[181] but held that he had defaulted by failing to challenge the allegedly erroneous instructions at trial. Moreover, this prisoner had not established "cause" for his default. Nothing in *Engle v. Isaac* remotely suggested that instructions directing conviction for noncriminal conduct do not violate the Constitution or that prisoners may not challenge these instructions in § 2255 proceedings. In fact, the Supreme Court has clearly and repeatedly held that instructions directing conviction for noncriminal conduct do violate the Constitution and may be considered in post-conviction proceedings.[182]

(Engle)

again, cf. discussion of "default" at p.45 supra

"dozens" of times, per p.18 supra

A

B

C

D

E

---

[177] *See id.* at 167–68.

[178] Oral Argument, *supra* note 157, at 2:15–3:26

[179] Justice Blackman concurred in the result; Justice Brennan dissented; and Chief Justice Burger and Justice Marshall did not participate.

[180] 456 U.S. 107 (1982).

[181] *Id.* at 122.

[182] For example, in *O'Neal v. McAninch*, a prisoner claimed in a federal habeas corpus proceeding that confusing jury instructions might have led to his conviction without the state of mind required by an Ohio statute. 513 U.S. 432, 432–33 (1995). The Supreme Court reversed the Sixth Circuit's denial of relief because that court had required the prisoner to assume the burden of showing that the instructional error was prejudicial. *Id.* at 435–36. The proper harmless error standard, the Court said, was whether there was "grave doubt" about whether the error was injurious. *Id.* at 436.

Middleton v. McNeil was a federal habeas corpus proceeding in which three jury instructions had correctly stated the California doctrine of "imperfect self defense" while a fourth misstated it. 541 U.S. 433, 438 (2004). The Supreme Court noted that the prisoner had a constitutional right to proof beyond a reasonable doubt of every element of the offense charged and that instructions misstating a state's substantive criminal law could violate that right. *Id.* at 437. After reviewing the record, however, it held that there was no "reasonable

A • ℘41A *supra.*

B • ℘17A *supra.*

C • ℘42A *supra.*

D • ***O'Neal v. McAninch:*** https://supreme.justia.com/cases/federal/us/513/432/case.html.

E • ***Middleton v. McNeil:*** https://www.law.cornell.edu/supct/html/03-1028.ZPC.html.

ambushing (a form of bullying)

Judge Easterbrook is the kind of judge who cites twenty- and thirty-five-year-old cases that neither party mentioned, and even after a lawyer has conceded that he is unprepared to discuss these cases, he demands to know "if you have got an argument that your position is compatible with those cases."[183] Additionally, he asks questions that he refuses to allow a lawyer to answer and then declares, "Mr. Alschuler, trying to talk over a question from the bench won't do you any good."[184] What is worse, Judge Easterbrook's bullying rests on stuff he just makes up. The truth is not in him.

bullying

bullying

less elegantly: he's a liar

When I returned to the counsel table, the argument in *Ryan* was not over. Judge Easterbrook was about to demonstrate that he is an equal-opportunity bully.

C. *The Government Gets Hit by the Truck*

A

Here's how the government's argument began:

> Ms. Barsella: May it please the court. I'll begin by just saying that the government did not make a specific reference at all to the issue that Judge Easterbrook brought up, and we do apologize for that. Obviously any forfeiture on our part does not bind the court and, if the court does want to

the "apologies," here and on the next 2 pages, are unnecessary — they're just kowtowing/kissing-up to Easterbrook's bullying ("fear of standing up to authority")

---

likelihood" that the jury had applied the instructions in a way that violated the Constitution. *Id.* at 437–38.

B

In *Hedgpeth v. Pulido*, a federal habeas corpus petitioner claimed that a misstatement of California law permitted his felony murder conviction even if he joined the felony after the murder had been committed. 555 U.S. 57, 59 (2008). A federal district court agreed, holding that the constitutional error was not harmless. *Id.* Although the Ninth Circuit affirmed, it declared that there was no need even to inquire whether the error was harmless because the error was "structural." *Id.* at 59–60. The Supreme Court concluded that the error was not structural and was subject to harmless error review. *Id.* at 62.

C

In *Waddington v. Sarausad*, the Supreme Court once more resolved a claim on federal habeas corpus that a misstatement of state criminal law violated the Constitution by directing conviction for noncriminal conduct. 555 U.S. 179, 191 (2009). It held that there was no "'reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Id.*; *see also* Henderson v. Kibbe, 431 U.S. 145, 147 (1977); Buggs v. United States, 153 F.3d 439, 444 (7th Cir. 1998) (Because "this court has stated numerous times that a conviction for engaging in conduct that the law does not make criminal is a denial of due process," a pre-*Bailey* instructional error "had consequences of constitutional magnitude . . . [and] is cognizable on collateral review.").

D

E

F

[183] Oral Argument, *supra* note 157, at 4:14.

A

[184] *Id.* at 2:44.

A • ℘17A *supra*.

B • ***Hedgpeth v. Pulido:*** https://www.supremecourt.gov/opinions/08pdf/07-544.pdf.

C • ***Waddington v. Sarausad:*** https://www.law.cornell.edu/supct/html/07-772.ZS.html.

D • ***Henderson v. Kibbe:*** https://supreme.justia.com/cases/federal/us/431/145/case.html.

E • ***Buggs v. U.S.:*** https://openjurist.org/153/f3d/439/buggs-v-united-states.

F • Cf. ℘21E *supra*.

have additional briefing on those points, we will be happy to submit them.

Judge Easterbrook: Ms. Barsella, I have a question not only about this subject which the government seems quite mysteriously to have forfeited, and it is very strange because this is a subject that was important enough to the United States that the Solicitor General took it to the Supreme Court in *Frady*, and now, the United States having won *Frady*, the U.S. Attorney in Northern Illinois just ignores it. But I don't understand why we are here at all. This petition was filed more than two years after Ryan's conviction became final and appears to be untimely. But with respect to that issue it seems like the United States has not forfeited. The United States has waived, and I don't get it. 2255(f)(3) says that the time restarts if the Supreme Court makes a new decision and "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." What decision of the Supreme Court has made *Skilling* retroactively applicable to cases on collateral review?

Ms. Barsella: I believe below we did look at that issue, and it was determined that when a statute is now newly interpreted so as to make one interpretation no longer law that we believe that (f)(3) did allow the 2255—

Judge Easterbrook: But that's not what the statute says. The statute says that the decision has to be made "retroactively applicable to cases on collateral review." Now what you seem to have thought, and I won't press this further because this is something the government—untimeliness is an affirmative defense which seems to have been waived. What you seem to be thinking here is that, if you're confident that the Supreme Court will declare it retroactive, then we just don't bother with details like the Supreme Court

A

that is, "not only" about the "default" stuff thumped above (p.45–48), but also about this new timeliness issue Easterbrook is now raising

referring to Easterbrook's "oddly they haven't" comment, at p.41 supra, regarding Bousley and Davis (and Frady and Engle), and Alschler's "waived" observation at the bottom of p40 supra

28 USC §2255(f) (cf. p.33A supra) specifies "1 year," with an explanatory list

Easterbrook is wrong; see next pages

A・ ℘40B(vi-viii) *supra.*

actually declaring it retroactive. And that is certainly not how this court has interpreted 2255(f)(3) in the past.

Easterbrook is wrong; keep reading

Ms. Barsella: I do apologize for the fact that we misinterpreted that. We thought that in light—

Judge Easterbrook: Did you misinterpret it, or is this just a Department of Justice wide position?

Ms. Barsella: No, it isn't. When we analyzed this below in the District Court, we were satisfied he could raise it in light of the Supreme Court's decision in *Skilling*, and we were obviously mistaken.[185]

i.e, that Ryan/Alschuler have a valid argument, without worrying about Easterbrook's timeliness pickiness

FALSEHOOD #3: MISREPRESENTING THE INTERPRETATION OF TIMELINESS IN 28 USC §2255

Falsehood Number Three: "[T]hat is certainly not how this court has interpreted § 2255(f)(3) in the past."[186]

The government was not mistaken. Ryan's petition was timely. A Seventh Circuit decision was directly on point, and it said just what Ms. Barsella said it did. This decision had been written by Judge Easterbrook. His confident assertions were flatly inconsistent with one of his own opinions.

what the f'ing f??

28 USC §2255

A federal statute permits a prisoner who has never before filed a federal post-conviction petition to file such a petition within a year of a Supreme Court decision recognizing a new right if this right has been "made retroactively applicable to cases on collateral review."[187] When the prisoner has previously filed a federal post-conviction petition, however, it is not enough that a new right has been "made retroactively applicable to cases on collateral review." Rather, to file a second, third, or fourth petition, "a new rule of constitutional law" must have been "made retroactive to cases on collateral review *by the Supreme Court*."[188]

judge Wood was on that panel, too, so she knew all this well

Judge Easterbrook's opinion for the Seventh Circuit in *Ashley v. United States*[189] italicized the words *by the Supreme Court* just as I have. The court held that, although a prisoner who files a *second* post-conviction petition must show that a new rule of constitutional law has been made retroactive *by the Supreme Court*, a prisoner filing a *first* petition need not.[190] "To treat

A

B

C

---

185 *Id.* at 16:51–19:45.

186 *Id.* at 19:12.

187 28 U.S.C. § 2255(f)(3) (2012).

188 *Id.* § 2255(h)(2) (emphasis added).

189 266 F.3d 671 (7th Cir. 2001).

190 *See id.* at 673 ("[A]n *initial* petition may be filed within a year of a decision that is 'made retroactively applicable to cases on collateral review[.]' A *second* petition, by contrast,

A • ℘17A *supra*.

B • ℘33A *supra*.

C • ***Ashley v. U.S.:***
(i) • https://openjurist.org/266/f3d/671/billy-ray-ashley-v-united-states-of-america;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Ashley-v-US.pdf.

the first formulation as identical to the second is not faithful to the difference in language. . . . District and appellate courts, no less than the Supreme Court, may issue opinions 'holding' that a decision applies retroactively to cases on collateral review."[191] Moreover, a district court may make its determination of retroactivity in the same proceeding in which it considers whether a prisoner is entitled to relief.[192] Ryan's post-conviction petition was his first (and only) petition. It clearly was timely.[193]

Judge Easterbrook berated the government for overlooking two apparently dead-bang winning arguments. It was "odd,"[194] "strange,"[195] and "mysterious"[196] that it had mentioned neither *Frady* nor the statute of limitations. On both points, he reduced the government's apparently bungling counsel to abject apology. And on both points, Judge Easterbrook had made up the law, had seen no need to check the authorities on which he relied, had assumed the incompetence of the lawyers on both sides (and of the district judge), and had gotten every proposition wrong.

As the argument proceeded, Judge Easterbrook continued to browbeat the government's lawyer: "Why are you back to arguing harmless error? That's the approach that both *Engle v. Isaac* and *Frady* expressly reject."[197] "You're contradicting *Frady* again, but go ahead."[198]

Then it was time for my rebuttal. Despite the court's direction to address only the sufficiency of the evidence, I decided to give our principal argument one last shot. During the badgering of Ms. Barsella, I had paged through our brief and found the place where it quoted a statement of *Skilling* that was clearly inconsistent with Judge Easterbrook's bluster. I began my rebuttal by reading this sentence to the court: "*Skilling* says that '*Constitutional* error occurs when a jury is

both (i) default rule and (ii) timeliness

falsely, bullingly

that is, the gov't was dead-bang correct (to overlook these irrelevant arguments), but Easterbrook falsely berated them anyway (pretending they could have "won" their side's arguments by making these arguments)

falsely

as opposed to jury-instruction stuff

"did as I was told," p.42 supra

"abandoning my effort," p.42 supra

---

depends on 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court.'").

A

191 *Id.*

192 *See id.* at 673–74 (explaining that "[j]ust as a district court possesses jurisdiction to determine its own jurisdiction, it must possess the authority to determine a precondition to the timeliness of an action").

193 An early draft of our brief for the Seventh Circuit included a footnote that cited *Ashley* and explained why Ryan's petition was timely. When we sought permission to file a brief of 20,000 words, however, declaring that fewer words would not allow us to present Ryan's case adequately, the Court allowed us a brief of 17,000 words. We then eliminated the footnote on timeliness along with other explanatory material that might have been helpful to the court but that did not bear on any contested issue.

B

194 Oral Argument, *supra* note 157, at 2:16.

195 *Id.* at 17:25.

196 *Id.* at 17:30.

197 *Id.* at 20:18.

198 *Id.* at 21:54.

A • ℘51C *supra.*

B • ℘17A *supra.*

Easterwood's First Opinion, p.11C supra

instructed on alternative theories of guilt and returns a verdict that may rest on an invalid theory.'"[199] I will not soon forget the look of contempt on Judge Easterbrook's face as I read this sentence.

yet more bullying, silent this time

VII. JUDGE EASTERBROOK OPINES

"FALSEHOOD #9:" MISREPRESENTING THAT RYAN FORFEITED, AND GOV'T DIDN'T WAIVE

A. *Concocting Something Else: A Fantasy Forfeiture*

Jun 14 2011

The prosecutors and Ryan's lawyers submitted their supplemental briefs to the Seventh Circuit at the same time. Ours concluded:

D

correctly, properly

mooning the giant (Easterbrook) ...

> The parties have fairly and responsibly briefed and argued this case, focusing on the sorts of instructional issues that this Court and others have addressed in countless post-conviction proceedings. The Court should decide this case on the basis of the issues they have presented. Instructions that direct conviction without proof beyond a reasonable doubt of conduct that the legislature has made criminal violate the Constitution, and allegations of this sort are cognizable in section 2255 proceedings. The "cause and prejudice" standard has no application to non-defaulted objections. When instructions have directed conviction for noncriminal conduct and the petitioner has not defaulted his objections, the question before a *habeas corpus* court is whether the instructional error was harmless.[200]

universally well-known

the parties, that is, not the court

H

E

as here

F

G

Disregarding our plea to decide the case on the basis of the issues submitted by the parties, Judge Easterbrook invented a new ground of decision—one that not only had not been advanced by the parties but that neither he nor anyone else had mentioned during argument. Judge Easterbrook's opinion for the Seventh Circuit concluded that Ryan had defaulted his objection to the undisclosed-conflicts instruction and the state-law instruction.[201]

regarding the abject impropriety of this, see the side-comment accompanying p.59f.230 infra

again (as on p.51 supra), what the f'ing f??

"default" as on p.45–48 supra

and yet again, what the f'ing f??

Ryan, however, had objected to these instructions at trial and on appeal.[202] The Seventh Circuit had considered his arguments and had

---

C

[199] *Id.* at 32:34 (quoting Skilling v. United States, 561 U.S. 358, 414 (2010) (emphasis added)).

D

[200] Supplemental Memorandum of Pet'r-Appellant George H. Ryan at 29–30, Ryan v. United States, 645 F.3d 913 (7th Cir. 2011) (No. 10-3964), *vacated and remanded*, 132 S. Ct. 2099 (2012).

I

[201] *See* Ryan v. United States, 645 F.3d 913, 915 (7th Cir. 2011), *vacated and remanded*, 132 S. Ct. 2099 (2012).

A

[202] *See, e.g.*, Separate App'x of Pet'r-Appellant, Vol. 1, *supra* note 70, at A-000174-A000183 (Ryan's Response to United States' Motion for Pretrial Ruling on Jury Instructions);

B

A • ℘40B *supra.*

B • ℘34H *supra.*

C • ℘17A *supra.*

D • ℘40B(vi,viii) *supra.*

E • **"Cause and Prejudice" Standard:**
(i) • The proper standard for review … is the **"cause and actual prejudice" standard,** under which, to obtain collateral relief based on trial errors to which *no contemporaneous objection was made* [i.e., "procedural default rule, see ℘45–48 *supra* — i.e., this "cause-and-prejudice standard" *does not apply to non-defaulted objections,* as Alschuler writes], a convicted defendant must show both **"cause"** excusing his … procedural default and **"actual prejudice"** resulting from the errors of which he complains. — *U.S. v. Frady* (℘41A *supra*), Syllabus (emphasis added).
(ii) • Martin Kent, *Beyond Wainwright v. Sykes: Expanding the Role of the Cause-and-Prejudice Test in Federal Habeas Corpus Actions,* Notre Dame Law Review vol. 59 issue 5 article 10 (1984), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2386&context=ndlr.
(iii) • John Wolak, *Application of the Cause and Prejudice Standard to Petitions Under 28 U.S.C. § 2255 by Guilty Plea Defendants,* Fordham Law Review vol. 56, issue 6, article 4 (1988), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2795&context=flr.

F • ***Habeas Corpus:*** https://en.wikipedia.org/wiki/Habeas_corpus. Unlawful detention/imprisonment (as Ryan was).

G • **Harmless Error:** https://en.wikipedia.org/wiki/Harmless_error. In Ryan, the jury instructions, while they may have been *harmless-at-the-time* (pre-*Skilling*), were now (post-*Skilling*) *clearly harmful* (see axiomatization, ℘38C).

H • **General Rule vs. Gorilla Rule:** The so-called **General Rule (a.k.a. Party-Presentation Rule)** is the judge/court-made rule-of-thumb (which is widely/generally observed, hence the name "rule") that *"new issues may not be introduced at appeal-time"* (we're talking about judges/courts here, though the principle is applicable to parties as well, where the General Rule is better known as the **Raise-or-Waive/Forfeit Rule**) — and especially not unless all parties are well-advised in advance, and "invited" to argue/prepare (else, denial of the **Right to Be Heard,** which is violation of Constitutional **Due Process,** see ℘8B,21E *supra*). The converse is called, semi-(in)formally, the **Gorilla Rule** (especially when judges/courts do it ***sua sponte,*** https://en.wikipedia.org/wiki/Sua_sponte … because, you know, "800-lb. gorillas" …). For more discussion and list of references, see ℘83 *infra.*

I • ℘11B *supra.*

upheld the challenged instructions.[203] The government had not claimed any default. Indeed, its supplemental brief declared, "[I]n the government's view, Ryan has not procedurally defaulted his claim that he was convicted for conduct that is not a crime."[204] It added, "In order to obtain review of his claim in a § 2255 proceeding, Ryan does not have to establish 'cause' because his claim was not defaulted."[205] The government did maintain, however, that Ryan had failed to object to two of the instructions he said defined bribery incorrectly.

Judge Easterbrook's opinion did not mention Ryan's objections to the improper instructions and did not mention the government's express concession that there was no default. The opinion described Ryan's supposed default this way:

> [Ryan] never made the argument that prevailed in *Skilling*: that § 1346 is limited to bribery and kickback schemes. . . . The forfeiture as we see it is that Ryan never made in the district court or on appeal an argument that § 1346 is best understood to be significantly more limited than *Bloom* held. . . . [W]hile Ryan's lawyers proposed instructions based on *Bloom*—which was more favorable to defendants than the law in some other circuits—Skilling's lawyers contended that § 1346 is much narrower if not unconstitutionally vague. Skilling asked the Supreme Court to disapprove *Bloom*. That Court ruled in his favor. If Ryan's lawyers had done what Skilling's lawyers did, the controlling decision today might be *Ryan* rather than *Skilling*. (Ryan's petition for certiorari beat Skilling's to the Supreme Court.)
>
> Nothing prevented Ryan from making the arguments that Skilling did. Many other defendants in this circuit contended that *Bloom* was wrongly decided. Conrad Black was among them. . . . The Supreme Court heard Black's case along with Skilling's. . . . Because Black had preserved an objection to *Bloom*'s understanding of

C
falsely
falsely
i.e., had defaulted on this issue, in the sense of p.45–48 supra, but this is not germaine to the issues at bar
read this whole excerpt with a very large grain of salt, followed up by the extensive/incisive commentary, next page, footnote 206 and FALSEHOOD #4
cf. discussion of the "default rule" at p.45–48 supra
D
discussed at p.22 supra
E
false: p.56 infra
false: p.56 infra
F
false: p.56 infra
G

Consolidated Brief and Required Short App'x of the Defendants-Appellants Lawrence E. Warner and George H. Ryan, Sr. at 61, United States v. Warner, 498 F.3d 666 (7th Cir. 2007) (Nos. 06-3517 & 06-3528).

A

[203] *See* United States v. Warner, 498 F.3d 666, 698–99 (7th Cir. 2007).

B

[204] Government's Supplemental Memorandum at 6, Ryan v. United States, 645 F.3d 913 (7th Cir. 2011) (No. 10-3964), *vacated and remanded*, 132 S. Ct. 2099 (2012).

[205] *Id.* at 7 (emphasis removed).

A • ℘27E *supra.*

B • ℘40B(viii) *supra.*

C • ℘11C *supra.*

D • ℘22A *supra.*

E • ℘11D *supra.*

F • (i) • *Warner, Ryan v. U.S.* PetWritCert was case №07-977 (https://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/07-977.htm);
(ii) • *Skilling v. U.S.* (℘11D *supra*) was case №08-1394;
(iii) • the later *Ryan v. U.S.* PetWritCert №11-499 was GVR'd, see ℘11H *supra.*

G • ℘18J *supra.*

§ 1346, we inquired on remand from the Supreme Court whether the errors were harmless.[206]

Falsehood Number Four: "Skilling asked the Supreme Court to disapprove *Bloom*. That Court ruled in his favor. . . . Nothing prevented Ryan from making the arguments that Skilling did. Many other defendants in this circuit contended that *Bloom* was wrongly decided. Conrad Black was among them."[207]

---

[206] *Ryan*, 645 F.3d at 915–16. Although this passage includes everything the Seventh Circuit said about Ryan's asserted default, the ellipses in the passage mark substantial omissions. Interspersed with the court's description of the supposed default was its discussion of whether this default could be excused. Judge Easterbrook wrote, "Ryan sees 'cause' in this circuit's pre-*Skilling* law." *Id.* at 915. He did not reveal, however, that Ryan had mentioned "cause" only in response to the government's argument that he had waived or forfeited his objection to two bribery instructions. The opinion made it seem that Ryan had acknowledged his failure to object to any of the invalid instructions, including the undisclosed-conflicts instruction.

Judge Easterbrook's deception on this point probably was deliberate. After reading our supplemental brief and the government's, he certainly knew that Ryan had objected throughout the proceedings to the undisclosed-conflicts instruction. Without mentioning Ryan's objections or the government's concession that there had been no default, he spoke only of Ryan's argument that the default could be excused. And he did that by transposing an argument for excusing a lack of objection to two bribery instructions into an argument for excusing a larger default that the parties agreed had not happened.

Judge Easterbrook misled his readers again when he described the content of Ryan's argument concerning "cause" (the argument Ryan made to excuse his failure to object to the two bribery instructions). According to Judge Easterbrook, Ryan maintained that "cause" existed simply because it would have been "pointless" to challenge *Bloom* in the Seventh Circuit. *Id.* at 916–17. Judge Easterbrook responded that it would not have been pointless and, more importantly, "[t]hat the argument seems likely to fail is not 'cause' for its omission." *Id.* at 916. Ryan, however, had made no such argument. In language Judge Easterbrook quoted, the Supreme Court has said that, although the "futility" of an argument is not "cause" for failing to make it, "cause" does exist when a claim "is so novel that its legal basis is not reasonably available to counsel." *Id.* at 916–17 (quoting Bousley v. United States, 523 U.S. 614, 622–23 (1998)). In language Judge Easterbrook did not quote, the Supreme Court has also said that "cause" exists when the Court has issued a decision "'overturn[ing] a longstanding and widespread practice to which [the Court] has not spoken, but which a near-unanimous body of lower court authority has expressly approved.'" Reed v. Ross, 468 U.S. 1, 17 (1984). Ryan observed that in the twenty-two years between the enactment of the honest services statute and *Skilling*, no court had endorsed a construction limiting this statute to bribery and kickback schemes. Reply Brief of Pet'r-Appellant at 19–20, Ryan v. United States, *vacated and remanded*, 132 S. Ct. 2099 (2012) (2011) (No. 10-3964). He noted that, after *McNally*, which similarly departed from uniform lower court precedent, the Seventh Circuit and other courts had excused the procedural defaults of § 2255 petitioners. *See id.* (citing, *e.g.*, Bateman v. United States, 875 F.2d 1304, 1308 (7th Cir. 1989)). Ryan asked the court to approve a recent district court ruling that "*Skilling* represents just the sort of 'clear break with the past' that the United States Supreme Court contemplated as giving rise to 'cause.'" *See id.* (citing Stayton v. United States, 766 F. Supp. 2d 1260, 1266 (M.D. Ala. 2011)).

[207] *See Ryan*, 645 F.3d at 916.

FALSEHOOD #4: MISREPRESENTATION OF THIS CASE (RYAN) VIS-À-VIS SKILLING, BLOOM, BLACK

repeating quote from Easterbrook, p.54 supra

cf. discussion of the "default rule" at p.45–48 supra

A

really, "intertwined," confusingly

falsely

falsely

actually, "twisting/ transforming", falsely

p.53E supra

p.22A supra

p.40E supra

this is what Skilling (p.11D supra) did

B

C

D

E

F

G

A • ℘11C *supra.*

B • ℘11H *supra.*

C • ***Reed v. Ross:*** https://supreme.justia.com/cases/federal/us/468/1/case.html.

D • ℘40B(iv) *supra.*

E • ℘20E *supra.*

F • ***Bateman v. U.S.:*** https://openjurist.org/875/f2d/1304/bateman-v-united-states.

G • ***Stayton v. U.S.:*** https://www.courtlistener.com/opinion/2473613/stayton-v-united-states.

Jeffery Skilling did not ask the Supreme Court to disapprove *Bloom*. To the contrary, in both the Supreme Court and the Fifth Circuit, he cited *Bloom* in support of his arguments.[208] Similarly, Conrad Black never contended that *Bloom* was wrongly decided. His briefs in the Supreme Court did not mention the case.[209] In the Seventh Circuit, he cited *Bloom* frequently—but only in support of his arguments.[210] Perhaps "[m]any other defendants in [the Seventh] circuit contended that *Bloom* was wrongly decided," but my research has not revealed even one.

Judge Easterbrook must have known after reading our supplemental brief and the government's that Ryan had objected throughout the proceedings to the undisclosed-conflicts and other invalid instructions. A forthright judge would have acknowledged Ryan's objections and, if he thought these objections inadequate, explained why. Judge Easterbrook's discussion implied, however, that Ryan had not made the *proper* objection. Just what the proper objection would have been was unclear, but it apparently would have been either "overrule *Bloom*" or "limit honest-services fraud to bribery and kickback schemes."

Judge Easterbrook did not explain why Ryan should have said either of these things. Although the judge apparently regarded Ryan's argument as inconsistent with *Bloom*, *Bloom* had said nothing about undisclosed conflicts.[211] It had merely held that "an employee deprives his employer of his honest service[] . . . if he misuses his position . . . for personal gain,"[212] and the idea that an official "misuses his position" whenever he fails to disclose any past favor that is "capable of influencing" one of his different

---

[208] *See* Reply Brief for Pet'r at 21, Skilling v. United States, 561 U.S. 358 (2010) (No. 08-1394); Brief of Defendant-Appellant Jeffrey K. Skilling at 65, United States v. Skilling, 554 F.3d 529 (5th Cir. 2009) (No. 06-20885).

[209] *See* Brief for the Pet'rs, Black v. United States, 561 U.S. 465 (2010) (No. 08-876).

[210] *See* Opening Brief of Defendants-Appellants at 47, 51–52, 55, 86, United States v. Black, 530 F.3d 596 (7th Cir. 2008) (Nos. 07-4080, 08-1030, 08-1072, 08-1106).

[211] Recall the phrasing of the government's pretrial argument: "*Other circuits* . . . have upheld public corruption prosecutions rooted in . . . the failure of a public official to disclose a financial interest or relationship affected by his official actions." Separate App'x of Pet'r-Appellant, Vol. 1, *supra* note 70, at A-000158 (United States' Motion for Pretrial Ruling on Jury Instructions Related to Mail Fraud Allegations) (emphasis added). Even the government did not claim that *Bloom* had criminalized undisclosed conflicts.

Judge Easterbrook remarked that *Bloom* "was more favorable to defendants than the law in some other circuits." *Ryan*, 645 F.3d at 916. This statement might have been true when *Bloom* was decided. By the time the Seventh Circuit read *Bloom* ~~to forbid undisclosed conflicts and to make federal felonies of minor state regulatory violations and violations of civil consent decrees,~~ however, no court anywhere had interpreted the honest-services statute more expansively. The Seventh Circuit remained "the mail fraud capital of America." *See* Borre v. United States, 940 F.2d 215, 226 (7th Cir. 1991) (Easterbrook, J., concurring in part and dissenting in part).

[212] United States v. Bloom, 149 F.3d 649, 656–57 (7th Cir. 1998).

contrary to what Easterbrook (falsely) asserted, p.54 supra

C

approvingly

contrary to what Easterbrook (falsely) asserted, p.54 supra

approvingly

contrary to what Easterbrook (falsely) asserted, p.54 supra

J

K

contrary to what Easterbrook (falsely) asserted ("Ryan never made"), p.54 supra

falsely

typical Easterbrook obfuscation; who knows what Easterbrook wanted (since he already refused/ ignored the (correct/proper) objections that Ryan did proffer)?

since Easterbrook harped so much on Bloom in his decision on Ryan, p.54 supra

rather than just ignoring ("Ryan never made")

Ryan's argument was (echoing Skilling) that "undisclosed conflicts are not made illegal by 28 USC §1346;" but Bloom said nothing about "undisclosed conflicts;" so why raise Bloom at all when ruling on Ryan??

different

D

E

F

that is, Bloom said "personal gain => dishonest services (a.k.a misuse position);" but it didn't say "undisclosed conflicts => dishonest services" generally

G

I

H

B

A

L

i.e., "undisclosed conflicts"

that is, OTHER circuits (than the 7th) made undisclosed conflicts criminal, but not the 7th (where Bloom was the ruling precedent); so, again, why was Easterbrook blathering on so much about Bloom (obfuscatingly)?

recall discussion of Bloom at p.22 supra

in 1998

C

M

that is, UNfavorably to defendants, see comment about 1st circuit "expansiveness" at p.22 supra

that is, before Bloom

confusingly phrased; should say/clarify something like: Bloom DID (in the 7th circuit) "forbid (made criminal) 'undisclosed conflicts-of-interest;' and also 'forbade (made criminal) minor state regulatory violations, and minor violations of civil consent decrees'" — but Skilling de-supported this (at federal level, hence all Circuits)

A • ℘34H *supra.*

B • ℘40B *supra.*

C • ℘22A *supra.*

D • ℘11D *supra.*

E • ***U.S. v. Skilling*** (see also *Skilling v. U.S.,* ℘11D *supra*):
(i) • https://www.courtlistener.com/opinion/64496/united-states-v-skilling;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/US-v-Skilling.pdf.

F • {*not freely available online}* See ℘11D(i) *supra*.

G • *{not freely available online}*

H • ***U.S. v. Black*** (see also *Black v. U.S.,* ℘18J,31E *supra*):
(i) • https://casetext.com/case/us-v-black-85;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/US-v-Black.pdf.

I • *{not freely available online}*

J • ℘40B(vi) *supra.*

K • ℘40B(viii) *supra.*

L • ℘11C *supra.*

M • ***Borre v. U.S.:*** https://openjurist.org/940/f2d/215/borre-v-united-states.

decisions is a stretch. ~~When~~ Ryan had a strong argument that the undisclosed-conflicts instruction was inconsistent with *Bloom*, why should he have asked the Seventh Circuit to overrule this decision?

Requiring litigants to anticipate the precise standard the Supreme Court approved in *Skilling* would make post-conviction relief available only to soothsayers. Until I proposed a bribes-and-kickbacks standard in my *amicus* brief in *Weyhrauch*, no litigant anywhere appears to have argued for this standard.[213] Ryan objected to the unconstitutional thing that happened to him—directing the jury to convict him of a nonexistent crime. That should have been enough.

Judge Easterbrook's suggestion that Ryan's name could have replaced Skilling's on the leading Supreme Court decision if only his lawyers had been as capable as Black's or Skilling's[214] was not only obnoxious but wrong. Conrad Black had said none of the things Judge Easterbrook apparently thought necessary to obtain relief on the basis of *Skilling*. Just as Black did not ask any court to disapprove *Bloom*, he never argued that honest-services fraud should be limited to bribery and kickback schemes. His principal argument was: "Section 1346 May be Applied to Private Sector Relationships Only if the Jury Finds that Defendants Contemplated Economic Harm to the Party to Whom 'Honest Services' Were Owed."[215] In its supplemental brief to the Seventh Circuit, the government observed that "Black was given the benefit of *Skilling*," reviewed the arguments Black presented, and declared that Ryan had "similarly preserved his claim."[216] Judge Easterbrook apparently paid no attention.

Like Black, Jeffrey Skilling did not argue in the court of appeals or in his petition for certiorari that honest-services fraud should be limited to bribery and kickback schemes. After I had proposed a bribes-and-kickbacks standard in my *amicus* brief, however, and after some justices

---

[213] *See* Skilling v. United States, 561 U.S. 358, 423 (2010) (Scalia, J., concurring) ("Until today, no one has thought . . . that the honest-services statute prohibited only bribery and kickbacks."); Brief of Albert W. Alschuler as *Amicus Curiae*, *supra* note 110, at 19–20. Ryan in fact came close to anticipating *Skilling*—closer than Black, Skilling, or anyone else I know of. He maintained: "A *Quid Pro Quo* Is Required Where Mail Fraud Charges Are Predicated On the Receipt of A Campaign Contribution" and "A Quid Pro Quo is Required Where Federal Charges Are Predicated on The Receipt of a Gift." Separate App'x of Pet'r-Appellant, Vol. 1, *supra* note 70, at A-000175, A-000179 (Ryan's Response to United States' Motion for Pretrial Ruling on Jury Instructions) (argument headings).

[214] *See Ryan*, 645 F.3d at 916.

[215] Brief for the Pet'rs, *supra* note 209, at 22 (argument heading). The Supreme Court did not accept Black's argument. Black v. United States, 561 U.S. 465, 474 (2010). Although the Court held specifically that the honest-services statute does not reach undisclosed conflicts and so accepted the argument Ryan made, post-*Skilling* honest-services fraud still proscribes private-sector bribes and kickbacks that have neither produced nor were expected to produce economic harm.

[216] Government's Supplemental Memorandum, *supra* note 204, at 6.

that is: Ryan (/Alschuler) were arguing that Pallmeyer's jury instruction to convict on the basis of (plain) undisclosed conflict-of-interest (absent bribery/ kickback) was inconsistent with Bloom (see p.22, first paragraph)

as just explained by this paragraph

should read "since"

ans: he didn't (Easterbrook just falsely made it up)

pre-Skilling

this addresses the comments on p.56 supra, about Easterbrook's discussion implying that Ryan "had not made 'the proper' objection" (whatever that might be)

E

contrary to what Easterbrook (falsely) asserted, p.54,56 supra

bullying

as opposed to public service relationships

as opposed to economic gain for themelves (via bribery/kickback)

because it was Alschuler, in fact, who propounded the bribes-and-kickbacks standard

C

see p.26,34f.137, 36 supra

B

A

D

F

(Black)

G

Black at footnote 7: "[Skilling] renders the honest-services instructions give in this case incorrect. The schrme to defraud alleged here did not involve any bribes or kickbacks."

A • ℘34H *supra.*

B • ℘40B *supra.*

C • ℘31F *supra.*

D • ℘11C *supra.*

E • ℘54F *supra.*

F • ℘18J *supra.*

G • ℘40(B)(viii) *supra.*

had expressed interest in my proposal during the argument in *Black*,[217] Skilling argued in the alternative for a bribes-and-kickbacks standard in his merits brief.[218] Litigants in the Supreme Court, however, may not raise issues for the first time in their merits briefs.[219]

The Supreme Court ignored Skilling's belated effort to propose a bribes-and-kickbacks standard. It noted instead his principal argument—that "the honest-services statute . . . is unconstitutionally vague."[220] It declared that, in the absence of a narrowing construction, this statute would encounter the "vagueness shoal" that Skilling had protested from the outset.[221] The statute apparently would have been unconstitutional in the un-narrowed form applied to him. Skilling's objection to the statute's vagueness entitled him to the benefit of the narrowing construction the Court approved.[222]

Like Skilling, Ryan had consistently objected that the honest-services statute was unconstitutionally vague. Judge Easterbrook, however, declared this objection insufficient. He wrote, "Ryan contended at trial and on appeal . . . that § 1346 is unconstitutionally vague, an argument that *Skilling* rejected. He never made the argument that prevailed in *Skilling*: that § 1346 is limited to bribery and kickback schemes."[223] But *Skilling* did not reject the argument that the honest-services statute was unconstitutional in the sprawling form it took when Ryan was convicted. Judge Easterbrook and his colleagues refused to give Ryan the benefit the Court gave Skilling although Ryan had made precisely the same objection. They left Ryan's conviction under the un-narrowed statute in place despite his persistent objection that this statute was unconstitutional.[224]

B. *Disregarding and Concealing the Government's Waiver*

Judge Easterbrook's claim that Ryan defaulted his objection to the undisclosed conflicts and other instructions was especially odd because

---

[217] *See* Tr. of Oral Arg. at 5, 8–10, 12–13, 33–34, 42, Black v. United States, 561 U.S. 465 (2010) (No. 08-876), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-876.pdf [http://perma.cc/4UWZ-VUVE].

[218] *See* Brief of Defendant-Appellant Jeffrey K. Skilling, *supra* note 208, at 61–63.

[219] *See* SUP. CT. R. 24(1)(a). Even if Skilling had proposed a bribes-and-kickbacks standard in his petition for certiorari, he would not have proposed it in the courts below. In the world of Judge Easterbrook, he would have forfeited any claim to the benefit of that standard.

[220] Skilling v. United States, 561 U.S. 358, 399 (2010).

[221] *Id.* at 368.

[222] *See id.* at 413–14.

[223] Ryan v. United States, 645 F.3d 913, 915 (7th Cir. 2011).

[224] *Skilling* and *Black* came before the Supreme Court on direct appeal, and a direct appeal differs in many ways from a collateral attack. In determining *whether* a forfeiture or procedural default has occurred, however, the two sorts of proceedings do not differ at all.

28 USC §1346, see p.21E

even though the Supreme Court in Skilling declared it sufficient, falsifying Easterbrook's stupid "wrong/obnoxious" proclamation, p.57 supra

exactly the opposite, the Supreme Court accepted that argument

bribes/kickbacks, p.21Ef.(α) supra

that is, the 7th circuit "goofed" (in addition to all the outright lying/ "falsehoods" Easterbrook does in his opinions, and in which his panel concurs/accepts)

i.e., forfeited, see discussion of procedural default, p.45–48 supra

i.e., a monstrous lie

A

B

C

B

D

as opposed to Ryan's collateral appeal

p.45 supra

this footnote #224 is essentially the same as footnote #8 of the petition for rehearing (p.14A supra)

A • ℘31E *supra.*

B • ℘11D *supra.*

C • **Supreme Court Rules:** https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf (2017 version).

D • ℘11C *supra.*

removing the superfluous negative constructions: "if we (the court) are going to sua sponte penalize a party for waiving objection, then we need to look at why the other party didn't already do so (i.e., deliberately declined to cite/demand the waiver)"

the government acknowledged expressly that Ryan did not default.[225] Judge Easterbrook once wrote, "Claims of waiver may be waived in turn; claims of forfeiture may be forfeited (or waived). . . . We could hardly penalize [one party] for forfeiture while overlooking [the opposing party's] decision not to make forfeiture an issue."[226] Why, then, did Judge Easterbrook penalize Ryan's supposed forfeiture while overlooking the government's deliberate decision not to make forfeiture an issue?

(Ameritech, Indiana Bell)

(EEOC)

as distinguished from direct appeal, p.40C supra

sua sponte

Judge Easterbrook explained, "On collateral review . . . a court may elect to disregard a prosecutor's forfeiture, because the Judicial Branch has an independent interest in the finality of judgments."[227] The judge cited only one authority in support of this statement, *Day v. McDonough*.[228] In *Day*, the Supreme Court held that, in some circumstances, a court may advance an objection a prosecutor has not made, but *Day* also said, "[W]e would count it an abuse of discretion to override a State's deliberate waiver of a limitations defense."[229] It added, "[S]hould a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice."[230]

sua sponte

hence, even moreso, an appellate court

The Supreme Court's distinction between inadvertent forfeiture and deliberate waiver is one that Judge Easterbrook knows well. In our case, he declared, "Ryan himself proposed some of the instructions that the judge gave . . . and with respect to them he has waived and not just forfeited the line of argument he makes now."[231] In a case involving another Illinois governor, he wrote, "[A]t oral argument counsel for the United States represented that the prosecutor is not invoking any doctrine of forfeiture to block appellate review. The possibility of forfeiture thus has been waived, and as the subject is not jurisdictional the prosecutor's waiver is conclusive."[232]

falsely

Recall the unequivocal language of the government's supplemental brief: "[I]n the government's view, Ryan has not procedurally defaulted his claim that he was convicted for conduct that is not a crime."[233] And: "In order to obtain review of his claim in a § 2255 proceeding, Ryan does not have to establish 'cause' because his claim was not defaulted."[234] How

A

B

C

D

---

225 *See* Government's Supplemental Memorandum, *supra* note 204, at 6.

226 EEOC v. Indiana Bell Tel. Co., 256 F.3d 516, 526–27 (7th Cir. 2001).

227 *Ryan*, 645 F.3d at 917–18.

228 547 U.S. 198 (2006).

229 *Id.* at 202.

230 *Id.* at 211 n.11.

clearly

231 *Ryan*, 645 F.3d at 915. Although he did not say so, Easterbrook spoke only of Ryan's supposed waiver of objections to two challenged bribery instructions.

(non-existent)

232 United States v. Blagojevich, 612 F.3d 558, 560 (7th Cir. 2010).

E

233 Government's Supplemental Memorandum, *supra* note 204, at 6.

234 *Id.* at 7 (emphasis removed).

And, just earlier in the same paragraph containing said footnote 11, the Court wrote: "Of course, before acting on its own initative [sua sponte], a court must accord the parties fair notice and an opportunity to present their position [i.e., 'to be heard']" (see p.53H supra). Else: UNCONSTITUTIONAL BREACH OF DUE PROCESS (5th & 14th Amend).

A • ℘40B(viii) *supra*.

B • ***EEOC v. Indiana Bell:***
(i) • https://scholar.google.com/scholar_case?case=6638161308497910144&hl=en&as_sdt=6&as_vis=1&oi=scholarr;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/EEOC-v-Indiana Bell.pdf.

C • ℘11C *supra*.

D • ***Day v. McDonough:***
(i) • https://en.wikipedia.org/wiki/Day_v._McDonough;
(ii) • https://www.law.cornell.edu/supct/html/04-1324.ZO.html;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Day-v-McDonough.pdf.

E • ***U.S. v. Blagojevic:*** https://www.leagle.com/decision/infco20100715132.

could Judge Easterbrook have disregarded the government's express waiver of any argument that Ryan had defaulted?

Certainly Judge Easterbrook could not have missed this waiver after our petition for rehearing complained loudly about his disregard of *Day*.[235] By then, however, Judge Easterbrook's opinion had been released to the public. Because the government's waiver occurred in the supplemental brief it filed at the same time we filed ours and because these briefs were the parties' last filings in the case, we couldn't have flagged the government's waiver earlier.[236] After examining our petition, Judge Easterbrook must have known that finding a procedural default despite the government's waiver was contrary to *Day*. I imagine, however, that he was unwilling to lose face by withdrawing his opinion and starting over.

Judge Easterbrook's disregard of the government's waiver was not only insupportable but also out of character. No one has pounced on waivers, forfeitures, and defaults by government lawyers more eagerly than he.[237] In a habeas corpus case brought by a state prisoner, for example, a lawyer for the state contended that no error had occurred in the prisoner's trial. Until this lawyer filed his reply brief, however, he did not argue that, if any error had occurred, it would have been harmless. A Seventh Circuit rule then in effect provided, "A reply brief shall be limited

A

A(i)

the opinion affirming Pallmeyer's denial to vacate, p.30E supra

B

C

Jun 14 2011

in other words, a "default forfeiture" (see p.45–48 supra) isn't happening here, because issue is raised at first opportunity

that is, biased

---

[235] *See* Petition for Rehearing *En Banc*, *supra* note 32, at 1, 11–13 (emphasizing *Day*'s holding that it is "an abuse of discretion to override a State's deliberate waiver").

[236] We previously emphasized the government's *forfeiture* of any claim of default. *See* Supplemental Memorandum of Pet'r-Appellant George H. Ryan, *supra* note 200, at 1, 4–5. I was relieved when the government elevated its earlier forfeiture to an express waiver. I feared that Judge Easterbrook might try to invent a procedural default on Ryan's part once he realized what *Bousley*, *Frady*, and *Engle v. Isaac* were really about, and I was confident that the government's concession would prevent him from doing so. But I underestimated Judge Easterbrook.

[237] *See, e.g.*, Buchmeier v. United States, 581 F.3d 561, 563 (7th Cir. 2009) (Easterbrook, J.) ("The United States thus has forfeited, if it has not waived, any contention that the overall performance of Buchmeier's lawyer was adequate; it has effectively consented to treating this collateral attack as a rerun of the direct appeal."); Taylor v. United States, 287 F.3d 658, 660 (7th Cir. 2002) (Easterbrook, J.) ("As is common, the prosecutor ignored this shortcoming, forfeiting any entitlement to dismissal of the appeal for noncompliance with § 2253(c)(1)(B)."); Carter v. Litscher, 275 F.3d 663, 665 (7th Cir. 2001) (Easterbrook, J.) ("[T]he certificate of appealability fails to identify a substantial constitutional issue and thus does not satisfy 28 U.S.C. § 2253(c)(2) . . . [but] the state has made nothing of this problem and thus has forfeited the benefits of that statute."); United States v. Patterson, 215 F.3d 776, 785 (7th Cir. 2000) (Easterbrook, J.) ("[T]he United States did not argue forfeiture in its appellate brief. It raised forfeiture for the first time in the memorandum submitted after argument, and by that delay it forfeited any right to assert Robert's potential forfeitures at an earlier stage."); Owens v. Boyd, 235 F.3d 356, 358 (7th Cir. 2000) (Easterbrook, J.) ("Because the state has ignored the limitations that § 2253(c)(2) places on a court's power to issue a certificate of appealability, it has forfeited the benefits of that statute.").

A

as discussed at p.59 infra

that is, inadvertent forfeiture, as opposed to deliberate waiver (discussed on p.59 supra)

C

D

that is, underestimated his capacity for perfidy

E

F

G

H

I

A • ℘14A *supra.*
• The "loud" title of the cited section of the Petition for Rehearing (℘11) is: "THE PANEL IMPROPERLY REJECTED THE GOVERNMENT'S EXPRESS WAIVER OF A CLAIM OF PROCEDURAL DEFAULT."

B • ℘40B(viii) *supra.*

C • ℘40B(vi) *supra.*

D • *Bousley:* ℘40E *supra.*
Frady: ℘41A *supra.*
Engle v. Isaac: ℘42A *supra.*

E • ***Buchmeier v. U.S.:*** https://www.courtlistener.com/opinion/1266413/buchmeier-v-united-states.

F • ***Taylor v. U.S.:*** https://law.justia.com/cases/federal/appellate-courts/F3/287/658/533154.

G • ***Carter v. Litscher:*** https://law.justia.com/cases/federal/appellate-courts/F3/275/663/592381.

H • ***U.S. v. Patterson:*** https://openjurist.org/215/f3d/776/united-states-of-america--v-andrew-patterson.

I • ***Owens v. Boyd:*** https://openjurist.org/235/f3d/356/shawn-owens-v-william-e-boyd-warden-western-illinois-correctional-center.

to matter in reply."[238] Because the prisoner had been convicted of an especially monstrous rape, Judge Easterbrook warned that there might soon be blood on the lawyer's hands:

> Astoundingly, the state did not mention harmless error in its opening brief. . . . It got 'round to harmless error at page 19 of its reply brief. . . . The state has not offered a reason for omitting this question from its opening brief. We find it inexplicable. Procedural rules apply to the government as well as to defendants. Illinois has forfeited what would have been its best argument. If as a result a violent offender goes free, the Attorney General of Illinois must understand where the responsibility lies—with his own staff.[239]

"pounced on forfeitures by gov't lawyers," p.60 supra

just as he should have (but didn't) quietly accepted the gov't waiver in Ryan instead of disregarding it, p.60 supra

eerily

post-McNally vs. post-Skilling

but with a diametrically opposite outcome (a flagrant contradiction)

B

C

In a § 2255 proceeding very similar to Ryan's, Judge Easterbrook held the government's forfeiture decisive. The petitioner in *Toulabi v. United States*[240] was convicted of mail fraud before the Supreme Court held in *McNally v. United States*[241] that the mail fraud statute proscribed only deprivations of property, not deprivations of the intangible right of honest services. When the petitioner argued that the indictment in his case charged him with conduct that is not a crime, the government responded as it did in almost every other post-*McNally* case: The jury could not have convicted the petitioner without finding a deprivation of property.[242]

D

post-McNally

just like Ryan, post-Skilling

contractive interpretation, similar to Skilling

just like Easterbrook's "must" (in quote-marks), p.12 supra

Judge Easterbrook noted that the petitioner and the government might have made the same arguments if the case had come before the court on direct appeal. Without offering an answer to the "contentious issue" of what the difference between direct and collateral review might be, he declared that *McNally* "[s]urely" could not be taken into account "by giving the defendant what amounts to a second appeal of his conviction."[243] Judge Easterbrook criticized some earlier Seventh Circuit decisions for failing "even [to] mention[] the difference between direct and collateral review," and he wrote:

which would be a Bag Thing

in the Toulabi decision

A

[238] Wilson v. O'Leary, 895 F.2d 378, 384 (7th Cir. 1990) (quoting what was then Seventh Circuit Rule 28(f)).

[239] *Id.* Perhaps the lawyer who forfeited what would have been the state's best argument for keeping a vicious rapist off the streets immediately left the profession and enrolled in dental school. I think I would have.

gratuitous bullying by Easterbrook

[240] 875 F.2d 122 (7th Cir. 1989).

[241] 483 U.S. 350 (1987).

[242] *Toulabi*, 875 F.2d at 123–24; *see supra* Part IV (describing *McNally* and its aftermath).

[243] *Toulabi*, 875 F.2d at 124.

p.20 supra

A • ***Wilson v. O'Leary:*** https://openjurist.org/895/f2d/378/wilson-v-oleary.

B • ℘33A *supra.*

C • ***Toulabi v. U.S.:***
(i) • https://law.justia.com/cases/federal/appellate-courts/F2/875/122/179284;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Toulabi-v-US.pdf.

D • ℘20E *supra.*

Toulabi

the court proceeding as-if the case were a second appeal or a collateral attack, depending on how the litigants frame the issues

> Our case shows why this might occur. . . . The prosecutor . . . briefed the issues just as if this were a direct appeal, and Toulabi responded in kind. This is a common sequence in *McNally* cases on collateral attack, and it is then not surprising when the court—without mentioning the difference between direct and collateral attack—proceeds to conduct a full review. The prosecutor's curious choice precludes us from deciding in today's case how far an appellate court should inquire into the record and instructions of a case on collateral review after *McNally*. We accept the case as the parties have presented it, examining the record and instructions as we would on direct appeal.[244]

Because the prosecutor had not made the arguments Judge Easterbrook wanted him to make and because "the jury did not necessarily find that Toulabi's scheme deprived Chicago of . . . property," the court reversed a trial court's denial of post-conviction relief.[245]

appellate

of Toulabi

In a concurring opinion, Judge Kenneth Ripple insisted that neither the Seventh Circuit nor the vilified prosecutor had done anything wrong. He wrote:

the District Court

> [T]he government argued that the indictment sufficiently charged an offense and that the jury instructions did not render the trial fundamentally unfair since it was impossible for the jury to find the existence of a scheme to deprive the City of intangible rights without also finding the existence of a scheme to deprive the City of property interests. . . . This is essentially the same analysis that this court's cases have employed in reviewing section 2255 attacks on pre-*McNally* mail fraud convictions. It is the analysis we should expect to see from the government in future cases as well.[246]

as said at p.61 supra

A

[244] *Id.* at 124–25.

[245] *Id.* at 126.

[246] *Id.* at 128 (Ripple, J. concurring). Like Judge Easterbrook, Judge Ripple was a conservative appointed to the Seventh Circuit by President Reagan. In subsequent cases, the U.S. Attorney's Office and the court appeared to disregard Judge Easterbrook's dicta and to follow Judge Ripple's advice. *But see* Young v. United States, 124 F.3d 794, 797, 803 (7th Cir. 1997) (Easterbrook, J.) (taking a position later rejected by the Supreme Court in *Bousley* and declaring that defendants who had pleaded guilty prior to *Bailey* could not challenge their convictions for noncriminal conduct, criticizing two Seventh Circuit decisions for allowing defendants to challenge their pre-*Bailey* guilty pleas, criticizing the U.S. Attorney's Office for

B

C

D

forfeiture, waiver

A • ℘61C *supra.*

B • ***Young v. U.S.:*** https://openjurist.org/124/f3d/794/young-v-united-states.

C • ℘40E *supra.*

D • ℘45B *supra.*

After criticizing the government, Judge Easterbrook accepted Toulabi's case "as the parties have presented it,"[247] and until Ryan's case, he had done the same thing in every other case. Although a court may in appropriate circumstances disregard the government's non-assertion of a procedural default, Judge Easterbrook seems never to have done so until Ryan's case. In view of the fact that the government had not merely forfeited but had waived any claim of default in his case, Ryan's was an especially inappropriate case for departing from the pattern Judge Easterbrook had observed for more than twenty-five years. In the earlier cases, disregarding the government's non-assertion of a petitioner's default might have been lawful, but in a case in which the government had deliberately waived any claim of default, it was not.[248]

Judge Easterbrook strained so hard to keep George Ryan in prison that it seems fair to speculate about his motives. The following section of this Memoir considers three hypotheses.

C. *Possible Explanations*

Hypothesis One: Judge Easterbrook sought to nullify *Skilling*.

Although Judge Easterbrook had devised the Seventh Circuit standard that *Skilling* abrogated,[249] this hypothesis seems to me unlikely. When researching my *amicus* brief in *Weyhrauch*, the closest thing I could find to authority for a bribes-and-kickbacks standard was a statement

---

failing to challenge these Seventh Circuit decisions in the case before the court, criticizing the U.S. Attorney's Office for failing to make several other arguments, and finally, after several pages of blustery dicta, deciding the case on the basis of the issues submitted by the parties). *See* Bousley v. United States, 523 U.S. 614, 616 (1998) (allowing some defendants who pleaded guilty before *Bailey* to challenge their convictions for noncriminal conduct); Bailey v. United States, 516 U.S. 137, 143 (1995) (holding that only "active employment" of a firearm during a drug transaction constitutes "use" of the firearm during that transaction).

[247] *Toulabi*, 875 F.2d at 124.

[248] Before disregarding even an inadvertent forfeiture, a court must determine that doing so would serve the interests of justice. Day v. McDonough, 547 U.S. 198, 210 (2006). Judge Easterbrook did not mention any possible interest in freeing innocent people from prison but did consider "the independent interest [of the judicial branch] in the finality of judgments." He wrote, "Ryan's trial lasted eight months, and his appeal led to more than 100 pages of opinions by four judges of this court." *Ryan*, 645 F.3d at 918.

Ryan's trial did not last eight months, and no one ever said it did. Judge Easterbrook just made it up. Ryan's *six*-month trial was bad enough. But what chutzpah it took for a court whose decisions had permitted the government to conduct a wide-ranging, kitchen-sink trial to cite the appalling length of this trial, not as proof that the defendant had been denied due process, but as proof of how much due process he had received. The court's chutzpah was especially remarkable because the Supreme Court already had held the six-month trial improper, declaring that the jury should have heard only evidence of bribes and kickbacks.

[249] *See* United States v. Bloom, 149 F.3d 649, 656–57 (7th Cir. 1998) (Easterbrook, J.).

p.62 supra
blatant, flagrant, bias
seemingly not present in Ryan
"default" discussed at p.45–48 supra
silently
affirmatively
silent forfeiture
the Supreme Court itself calls this "abuse of discretion" (p.59f.229 supra), which makes it "unlawful" (disobedience of binding command/ precedent of Supreme Court)
falsely
all of them bad
illlicit, unlawful (!)
G
again, willful disobedience of binding precedent (stare decisis) is unlawful (Constitutional Due Process, Obstruction of Justice)
so-called at p.12 supra
A
B
C
much less affirmative waiver
D
quoted on p.59 supra
with this as rationale, Easterbrook then concluded, "It would be inappropriate to treat this collateral proceeding as a second direct appeal."
E
shit sticking to wall, p.26 supra
via Skilling
F

A • ℘40E *supra.*

B • ℘45B *supra*

C • ℘61C *supra.*

D • ℘59D *supra.*

E • ℘11C *supra.*

F • ℘22A *supra.*

G • ℘31F *supra.*

Judge Easterbrook had made for the Seventh Circuit in *United States v. Thompson*.[250] He noted that "misuse of office" is a "slippery" phrase, declared that "one of these days we may need to gloss the phrase to reduce the risk that uncertainty poses to public servants," and added that it would be "consistent with [the] language" of the honest-services statute to limit it to situations "in which the 'private gain' comes from third parties who suborn the employee with side payments."[251] Judge Easterbrook is not a champion of the mail fraud statute, and I doubt that he sought to nullify *Skilling*. The judge's extreme hostility to affording post-conviction relief, however, might have affected his judgment.[252]

Hypothesis Two: In "the most high profile case in Chicago in recent memory,"[253] Judge Easterbrook took account of public sentiment and the prospect of criticism in the press.

This hypothesis also seems to me unlikely. I doubt that Judge Easterbrook cared at all that, in Chicago parlance, Ryan's was a "heater

~ breach of duty of honest services

A

i.e., void-for-vagueness

pretty close to the ultimate post-Alschuler/Skilling "bribes-and-kickbacks" standard

---

[250] 484 F.3d 877, 883–84 (7th Cir. 2007).

[251] *Id.* at 883–84. I noted this statement several times in my brief. *See* Brief of Albert W. Alschuler as *Amicus Curiae*, *supra* note 110, at 3, 20, 21, 28. I sent a copy to Judge Easterbrook with a note declaring that, unlike most briefs, mine had a hero, and he was it.

B

as opposed to, oh say, JURY INSTRUCTIONS (as opposed to EVIDENCE, Easterbrook's hobby-horse) that later interpretations (Skilling) invalidated as "convicting of behavior that was no longer deemed illegal/criminal"

a bogus jury instruction

[252] Judge Easterbrook declared that a post-conviction petitioner was entitled to a new trial only when he could show "that on the evidence at trial in light of the later statutory interpretation the only proper judgment is a judgment of acquittal." Oral Argument, *supra* note 157, at 1:19. As shown above in Part VI, Judge Easterbrook's attribution of this standard to the Supreme Court was a fabrication. Neither that Court nor any other had required post-conviction petitioners to show that the evidence was insufficient to support their convictions. But consider for a moment how harsh Judge Easterbrook's imaginary standard would be. This standard would leave people in prison even when it seemed far more likely than not that they had never been convicted of a crime. Suppose, to take an exaggerated example, that a judge told a jury to convict a defendant of grand larceny if he either entered a store with a shopping bag or stole property worth more than $300. Suppose the evidence of entering with a shopping bag was overwhelming while the evidence of stealing was weak. The evidence of stealing consisted entirely of an identification of the defendant by a nearly blind witness who claimed to have seen him in dim light. Even after a higher court ruled that entering with a shopping bag was no crime, Judge Easterbrook apparently would leave the defendant in prison. Questions of credibility are for the jury, and, if the defendant had been convicted of larceny under proper instructions, the testimony of the nearly blind witness would have been sufficient to support his conviction. From Judge Easterbrook's perspective, it would not matter that, because of the court's invitation to convict of a nonexistent crime, the jury would have had no reason to examine the witness's credibility or to consider whether the defendant stole anything. Chief Justice Rehnquist took a better view of the purpose of post-conviction remedies when he wrote for the Supreme Court in *Bousley*, "[O]ne of the principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'" Bousley v. United States, 523 U.S. 614, 620 (1998).

D

E

[253] *See* United States v. Warner, 498 F.3d 666, 705 (7th Cir. 2007) (Kanne, J., dissenting).

C

A • ***U.S. v. Thompson:***
(i) • https://openjurist.org/484/f3d/877/united-states-v-l-thompson;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/US-v-Thompson.pdf.

B • ℘31F *supra.*

C • ℘27E *supra.*

D • ℘17A *supra.*

E • ℘40E *supra.*

case."[254] His own view of the case, however, might have been influenced by what he read in the papers.

Hypothesis Three: Judge Easterbrook sought to save face.

Although I do not know what motivated Judge Easterbrook's first opinion in Ryan's case, this final hypothesis rings truest to me than the others. For Judge Easterbrook to decide the case on the basis of the issues submitted by the parties would have been to acknowledge to his fellow judges and to the parties that his statements of law at argument had been erroneous and his badgering of counsel unjustified. If preserving his dignity required inventing a default by Ryan that never occurred and concealing a waiver by the government that did, perhaps he was willing to subordinate both truth and justice to that objective.[255]

since Alschuler declared the preceding two hypotheses unlikely, this is the one he endorses

which is weird, though, since oral arguments are so temporary and unimportant, compared to the long life and importance of written(/published) opinions

"did not mention," p.54 supra

"did not mention," p.54 supra

VIII. A MINI-VICTORY IN THE SUPREME COURT AND A NEW ARGUMENT

GVR

As every law clerk reviewing petitions for certiorari knows, the Supreme Court's mission is not to correct errors but to resolve "unsettled questions of federal constitutional or statutory law of general interest."[256] Nevertheless, our certiorari petition in Ryan's case asked for error correction. We wrote that "[t]he Seventh Circuit's failure to follow *Day* and implement *Skilling* warrants, at a minimum, a *per curiam* reversal and

GVR, p.11H supra

---

[254] If Judge Easterbrook had sought public praise, however, his opinion would have succeeded. The *Chicago Tribune* editorialized:

> On appeal, Ryan's attorneys advanced several arguments here, one of which was that he didn't accept bribes or kickbacks, so he shouldn't be in the slammer. What's remarkable about the appellate court smackdown, written by Chief Judge Frank Easterbrook, is the swift backhand it delivers to that claim. . . . As if to tell Ryan's lawyers: You cannot be serious.

A

No, Corruption Isn't "Just Politics": Jurors and Judges Aren't Buying that Defense Mantra, CHI. TRIB. (July 11, 2011), http://articles.chicagotribune.com/2011-07-11/opinion/ct-edit-honest-20110711_1_public-corruption-jurors-convict [http://perma.cc/ATJ5-N73N].

[255] Early in his opinion, Judge Easterbrook came close to acknowledging that *Skilling* applied retroactively and that Ryan's post-conviction petition was timely. *See* Ryan v. United States, 645 F.3d 913, 914–15 (7th Cir. 2011), *vacated and remanded*, 132 S. Ct. 2099 (2012) (declaring that "a district court or court of appeals may make the retroactivity decision under § 2255(f)(3)," and adding, "Because the United States has waived any limitations defense to Ryan's position, we need not decide whether *Skilling* applies retroactively on collateral review, though *Davis* . . . and *Bousley* . . . imply an affirmative answer"). Although Judge Easterbrook thus came close to confessing error on a tangential issue after realizing that one of his own opinions flatly contradicted his statements during argument, I doubt that he was capable of backing away from his more pivotal claim that post-conviction petitioners may not challenge the jury instructions that produced their convictions for noncriminal conduct.

B

C

D

E

[256] WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 269 (1987); *see* Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH & LEE L. REV. 271, 278–80 (2006).

F

A • (i) • http://articles.chicagotribune.com/2011-07-11/opinion/ct-edit-honest-20110711_1_public-corruption-jurors-convict;
(ii) • https://perma.cc/ATJ5-N73N;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/ChicagoTribune%3DPublicCorruptionIsntJustPolitics.pdf.

B • ℘11C *supra.*

C • ℘40D *supra.*

D • ℘40E *supra.*

E • **Rehnquist:** https://www.amazon.com/Supreme-Court-How-Was/dp/0688086683.

F • **Shapiro:**
(i) • https://scholarlycommons.law.wlu.edu/wlulr/vol63/iss1/7;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Shapiro%3DLimitsOlympianCourt.pdf.

remand with directions to address the issues presented by the parties."[257] We cited a Supreme Court rule declaring that certiorari can be appropriate when a court of appeals has "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power."[258]

While Ryan's petition was before the Supreme Court, the Court decided *Wood v. Milyard*.[259] *Wood* was in large part a replay of *Day v. McDonough*.[260] The Court declared, as it had in *Day*, that a federal court is "not at liberty . . . to bypass, override, or excuse" the government's deliberate waiver of a non-jurisdictional defense.[261] But *Wood* made it more difficult for a court—especially an appellate court—to disregard the government's inadvertent forfeiture of a defense. Calling "the principle of party presentation basic to our adversary system," the Court said that appellate courts may notice forfeited defenses only in "exceptional cases" and "extraordinary circumstances."[262]

After its decision in *Wood*, the Supreme Court granted our petition for certiorari, vacated the Seventh Circuit's judgment, and remanded Ryan's case for further consideration in light of *Wood*.[263] The Seventh Circuit would no longer be able to conceal and disregard the government's waiver of Ryan's supposed default, or so we thought.

A new argument focused on the issues the parties had briefed and the district court decided more than a year earlier. To the amazement of everyone in the courtroom, Judge Easterbrook asked no questions. None of the seasoned court watchers in attendance could recall any other case in which he remained silent.[264]

Seventeen days after the argument, the court issued another opinion by Judge Easterbrook upholding the denial of post-conviction relief.[265]

noting the "abuse of discretion" at p.59 supra

C

D

as opposed to inadvertent forfeiture, see p.59 supra

as opposed to sua sponte hijacking by the court/judge, see "Gorilla Rule," p.53H supra

GVR, p.11H supra

but read on, gentle reader

G

oral

"Easterbrook's Second Opinion"

very quickly

OMFG??!!

even though the Supreme Court essentially ordered such relief, on the basis of Skilling

A

B

E

F

H

I

---

257 Petition for Writ of Certiorari, *supra* note 41, at 3.

258 *Id.* (citing S. CT. RULE 10(a)).

259 132 S. Ct. 1826 (2012).

260 547 U.S. 188 (2006).

261 *Wood*, 132 S. Ct. at 1830; *see* Day v. McDonough, 547 U.S. 198, 202, 210 n.11 (2006).

262 *Wood*, 132 S. Ct. at 1833.

263 Ryan v. United States, 132 S. Ct. 2099 (2012).

264 A recording of this argument can be found at http://media.ca7.uscourts.gov/sound/2012/migrated.orig.10-3964_07_20_2012.mp3.

265 Ryan v. United States, 688 F.3d 844 (7th Cir. 2012). Judge Easterbrook has not always been so speedy. His opinion for the court in the case of another former Illinois governor appeared more than one-and-one-half years after the case had been argued. *See* United States v. Blagojevich, 794 F.3d 729, 729 (7th Cir. 2015) (listing the argument date as Dec. 13, 2013 and the decision date as July 21, 2015).

A • ℘42E *supra.*

B • ℘58C *supra.*

C • ℘18M *supra.*

D • ℘59D *supra.*

E • ℘11H *supra.*

F • **Oral Argument (Second):**
(i) • http://media.ca7.uscourts.gov/sound/2012/migrated.orig.10-3964_07_20_2012.mp3;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Ryan-v-US%3DSecondOralArgument.mp3.

G • ℘40B *supra.*

H • ℘11B *supra.*

I • ℘26F *supra.*

Easterwood's Second Opinion, p.11B supra

IX. JUDGE EASTERBROOK OPINES AGAIN

invented, fabricated, falsified

A. Another Concocted Waiver

A

Judge Easterbrook's second opinion mentioned neither the government's waiver of Ryan's supposed procedural default nor the imaginary default itself. Instead, the opinion announced a substantially broader waiver by the government. Judge Easterbrook declared that the government waived any objection to treating Ryan's post-conviction challenge as though it were a direct appeal. He also declared that *Wood v. Milyard* required the court to treat the government's possibly misguided decision as conclusive:

see "Falsehood #9," p.53 supra

falsely

B

this is false (see next page)

> The United States . . . did not contend that there is any difference between the sort of review available on a petition under § 2255 and the kind available on direct appeal. . . . At oral argument this court questioned whether the same standard should be used on direct appeal and collateral attack. We directed the parties to file supplemental memoranda concerning that subject. Once again the United States failed to contend that the standards differ. We concluded, however, that the standards are materially different, and that on collateral review the appropriate question is whether the evidence was sufficient to convict under the correct instructions. . . .
>
> The Supreme Court held Ryan's petition for certiorari until it decided *Wood v. Milyard*. . . . The Supreme Court found a waiver in *Wood* because the state knew about a potential defense and told the court that it was not asserting it. That's exactly what happened here. The United States Attorney learned at oral argument that there was a potential procedural argument, then informed the court that the argument was not being asserted. Why a litigant comes to such a decision is irrelevant, and a mistake in reaching a decision to withhold a known defense does not make that decision less a waiver. . . . We therefore turn to the harmless-error inquiry, framed as if this were a direct appeal.[266]

collateral

C

D

reincarnation of Easterbrook's "evidence" (as opposed to "jury instructions") hobby-horse, see p.40,44,64 supra

Typical Easterbrook pompous/gnarly/ ~imparsable syntax; it just means: "the govt has mistakenly made this substantially broader waiver [even though the govt hadn't made the waiver], so we're going to honor that waiver"

see p.19 supra

A

[266] *Ryan*, 688 U.S. at 847–48.

should read 688 F.3d

A • ℘11B *supra.*

B • ℘18M *supra.*

C • ℘17A (not ℘66F) *supra.*

D • ℘40B(vi–viii) *supra.*

Falsehood Number Five: "The United States . . . did not contend that there is any difference between the sort of review available on a petition under § 2255 and the kind available on direct appeal."[267]

In all of its filings in the district court and the court of appeals, the government emphasized the difference between the review available under § 2255 and that available on direct appeal. The government's supplemental brief following oral argument declared, "Collateral relief is . . . limited only to those grievously wronged; 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.'"[268]

To be sure, the government did not claim that "on collateral review the appropriate question is whether the evidence was sufficient to convict under the correct instructions."[269] If it had, it could not have cited any decision in support. The government did contend, however, that the review afforded § 2255 petitioners was limited in the same way the Supreme Court had limited the review afforded state prisoners who sought federal habeas corpus relief. {Viz.:}

When a constitutional error (such as directing a jury to convict for noncriminal conduct) has occurred at trial, a court hearing a direct appeal must set aside the defendant's conviction unless the government shows beyond a reasonable doubt that the error was harmless.[270] In *Brecht v. Abrahamson*,[271] however, the Supreme Court held that a less demanding harmless error standard applies in post-conviction proceedings brought by state prisoners. A state prisoner is entitled to federal habeas corpus relief only when the error had a "substantial and injurious effect or influence in determining the jury's verdict."[272] In *O'Neal v. McAninch*,[273] the Supreme Court modified the *Brecht* standard slightly.[274] It then applied its modified standard in a habeas corpus proceeding in which a state prisoner alleged that jury instructions directed his conviction for

---

[267] *Id.* at 847.

[268] Government's Supplemental Memorandum, *supra* note 204, at 7 (quoting Brecht v. Abrahamson, 507 U.S. 619, 634 (1993), United States v. Frady, 456 U.S. 152, 165 (1982), and United States v. Addonizio, 442 U.S. 178, 184 (1979)) (emphasis omitted).

[269] *Ryan*, 688 F.3d at 847.

[270] *See* Chapman v. California, 386 U.S. 18, 24 (1967).

[271] 507 U.S. 619 (1993).

[272] *Id.* at 631.

[273] 513 U.S. 432 (1995).

[274] *See id.* at 436 (declaring that "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'a substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless").

FALSEHOOD #5: MISREPRESENTATION OF (BOTH) COUNSEL POSITIONS ON DIRECT APPEAL VIS-À-VIS COLLATERAL REVIEW (UNDER 28 USC §2255)

repeating Easterbrook quote from p.67 supra

B

collateral

as opposed to "harmless error"

as Easterbrook "wanted" it to

as opposed to jury instructions (Easterbrook's hobby-horse, see p.40,44,67)

correctly

(federal)

28 USC §2254 (as distinct from 2255)

Skilling ("unconstitutionally void for vagueness," p.21E supra)

trial/direct stage => harmless error standard; post-conviction stage => substantial/injurious error standard

C

(O'Neal)

making this now the "Brecht-McAninch harmless error standard"

A

C

B

D

A

E

F

G

or, a fortiori, "concludes"

as if that needed gloss

A • ℘11B *supra.*

B • ℘40B(viii) *supra.*

C • ***Brecht v. Abrahamson:*** https://supreme.justia.com/cases/federal/us/507/619/case.html.

D • ℘41A *supra.*

E • ***U.S. v. Addonizio:*** https://supreme.justia.com/cases/federal/us/442/178/case.html.

F • ***Chapman v. California:*** https://supreme.justia.com/cases/federal/us/386/18/case.html.

G • ℘48D *supra.*

noncriminal conduct.[275] The government argued that the court should apply the *Brecht-McAninch* harmless-error standard in Ryan's case.[276]

Five years after *McAninch*, however, in *Lanier v. United States*,[277] the Seventh Circuit held that the "harmless beyond a reasonable doubt" standard applies in § 2255 proceedings brought by federal prisoners.[278] The government argued that the court overlooked *Brecht* and *McAninch* when it decided *Lanier*,[279] and it probably did. We nevertheless maintained that *Lanier* was correct. The federal courts' willingness to allow state courts to deny post-conviction relief to some state prisoners who may be innocent does not imply that the federal courts should refuse to release prisoners whom they themselves have wrongly convicted.[280]

Although Ryan and the government battled fiercely about what harmless error standard to apply on collateral review, Judge Easterbrook portrayed the government's lawyers as ignorant of the distinction between collateral and direct review. He attributed to them a sweeping waiver they did not make and thereby avoided acknowledging his unlawful disregard of a waiver they did make. He agreed to treat Ryan's case as though it had arisen on direct appeal, but only because he said the government had never asked him to do anything else—not even after the court advised it that a materially different standard applied. By falsely

---

[275] The petitioner in *McAninch* claimed that erroneous instructions might have led to his conviction without the state of mind required by an Ohio statute. *Id.* at 435. The Supreme Court reversed the Sixth Circuit's denial of relief because that court had required the prisoner to assume the burden of showing that the instructional error was prejudicial. *Id.* at 436. The Court declared that grave doubt about whether the erroneous instructions had a substantial and injurious effect would entitle the petitioner to post-conviction relief.

[276] Brief of the United States at 20–23, Ryan v. United States, 645 F.3d 913 (7th Cir. 2011) (No. 10-3964).

[277] 220 F.3d 833 (7th Cir. 2000).

[278] *Id.* at 839.

[279] *See* Brief of the United States, *supra* note 276, at 21–22.

[280] We noted that the decision in *Brecht* rested on federalism concerns inapplicable to § 2255 proceedings brought by federal prisoners. The Supreme Court wrote:

> The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system. . . . We have also spoken of comity and federalism. "The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."

Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) (quoting Engle v. Isaac, 456 U.S. 107, 128 (1982)).

the actual language: "This Court should follow the reasoning of the above cases and hold that the standard set forth in Brecht applies in the context of §2255 motions, and that relief is warranted only upon a finding that trial errors resulted in 'actual prejudice.'"

A

in Ryan v. U.S.

D

as just defined on previous page

C

as distinguished from state prisoners (recalling 28 USC §2254 vs. §2255, mentioned on p.68 supra)

against Lanier

(federal)

see p.12L supra

this is what Falsehood #5 is about (and Easterbrook similarly accused Ryan's lawyers too, p.70 infra)

epicycle-upon-epicycle obfuscation

(gov't)

"save face," p.65 supra; "goat," p.70 infra; "underestimated," p.60 supra

(O'Neal)

A

jury

as in p.68f.274

B

in Brecht

E

A • ℘48D *supra.*

B • ℘40B(iii) *supra.*

C • ***Lanier v. U.S.:*** https://law.justia.com/cases/federal/appellate-courts/F3/220/833/625484.

D • ℘68C *supra.*

E • ℘42A *supra.*

portraying the government's lawyers as goats, Judge Easterbrook managed to avoid revealing what a goat he had been himself.[281]

B. Poor at Counting

Immediately after announcing that the court would honor the government's waiver by reviewing Ryan's case as though it had arisen on direct appeal, Judge Easterbrook declared that the court would do no such thing. The court would refuse to review four of Ryan's mail fraud convictions because they had come before the court on collateral review rather than direct appeal.[282] The court would ignore these convictions although no judge had suggested at argument that the convictions could be ignored and although the government had never maintained that the court could properly refuse to review these convictions. Again, Ryan's first opportunity to discuss a determinative issue would come in his petition for rehearing. The ever-moving target had shifted once again.[283]

Judge Easterbrook explained:

> Ryan was sentenced to 78 months in prison on one RICO count. This is the only sentence he is still serving. All of the others—[including his] 60 month sentences on the seven mail-fraud convictions . . . have expired. Section 2255 allows a person to contest ongoing imprisonment,

---

[281] Judge Easterbrook earlier had portrayed Ryan's lawyers and the district court as goats. In the statement of facts in his first Ryan opinion, he wrote:

> [After the Supreme Court decided *Skilling*,] Ryan began a collateral attack under 28 U.S.C. § 2255. He contended that the jury instructions were defective because they permitted the jury to convict him on an honest-services theory without finding a bribe or a kickback . . . . Asserting that the errors could not be shown to be harmless under the standard used on direct appeal, Ryan asked for a new trial. The district court concluded that the errors are harmless under that standard and denied Ryan's petition.

Ryan v. United States, 645 F.3d 913, 914 (7th Cir. 2011). By mentioning that the harmless-error standard invoked by Ryan and employed by the district court was the one "used on direct appeal," Judge Easterbrook apparently sought to convey the impression that Ryan's lawyers and the district court did not understand the difference between direct and collateral review. In fact, Ryan advocated the standard used on direct appeal only because the Seventh Circuit itself had endorsed the use of this standard in *Lanier*.

[282] *Ryan v. United States*, 688 F.3d 844, 848–49 (7th Cir. 2012).

[283] By the time of Judge Easterbrook's opinion, Ryan had filed five briefs in the Seventh Circuit—a principal brief, a reply brief, a supplemental brief following argument, a petition for rehearing, and a supplemental brief following the Supreme Court's remand. These briefs had discussed almost everything under the sun except the possibility that the court might dredge up previously unmentioned doctrines to justify a refusal to hear his challenges. After so much process, denying due process was a challenge, but Judge Easterbrook managed to do it.

A • ℘11C *supra.*

B • ℘11B *supra.*

C • ℘14A *supra.*

D • I think this refers to Appellant's Position Statement (per 7th Cir Rule 54) following Supreme Court Remand, http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DApltPosStmt.pdf.

false, see p.74 infra

and it is the single RICO sentence that underlies Ryan's imprisonment today. The jury was told that, to convict Ryan on the RICO charge, it had to find a pattern of criminality including at least two acts of criminal mail fraud. The jury convicted Ryan on seven mail fraud counts, so if at least two of these are valid after *Skilling* then the RICO conviction is valid as well.

see p.26 supra

should read "seven mail-fraud"

else, the RICO charge disappears

just mentioned, p.70 supra

Ryan's challenge to expired sentences may or may not be moot as a technical matter. A collateral attack begun while custody continues can continue afterward to stave off collateral consequences. . . . Ryan has not identified any collateral consequences of the mail-fraud convictions . . . that would not equally be required by the RICO conviction. . . . Even on direct appeal, courts are free to pretermit decisions about convictions producing concurrent sentences, when the extra convictions do not have cumulative effects. As a practical matter, the concurrent sentence doctrine was abrogated for direct appeal when Congress imposed a special assessment of $50 (now $100) for each separate felony conviction . . . . A collateral attack under . . . § 2255 contests only custody, however, and not fines or special assessments.

post-custody

while the prisoner is still incarcerated

A

hence (presumably), even moreso upon post-conviction collateral attack

verb (archaic): abandon, neglect, disregard, omit, defer (at least temporarily)

see p.72 infra

18 USC §3013

translation (why does Easterbrook so favor/affect such pompous/verbose multi-negative obfuscations?): "the RICO conviction already implies all the collateral consequences that the mail-fraud convictions do (insofar as Ryan has argued)" — the snide implication (the "moot technical matter") being: "so why bother with this mail- fraud collateral attack now, since the damage has already been done (Ryan having been imprisoned for RICO)?"

B

An attempt to decide on collateral review whether *each* of the seven mail-fraud convictions was valid would smack of an advisory opinion—something that no waiver, however deliberate, can authorize. Ryan has not argued that the district judge would have given a lower sentence on the RICO count had she believed, say, that only four of the mail-fraud convictions represented bribes, and the other three represented undisclosed conflicts of interest. After all a district judge may base a sentence on established misconduct whether or not that misconduct has led to a conviction.[284]

cf. forfeiture/waiver, p.45–48 supra

Easterbrook's opinions (p.11B,C supra) affirmed all trial judge's rulings (p.25A,C;30C supra), which upheld the 3 mail-fraud convictions (for review of all mail-fraud materials, see p.351–361 of p.40Bix)

After upholding three mail fraud convictions, Judge Easterbrook declared that they were "more than enough to sustain the RICO conviction and sentence."[285] Although Judge Easterbrook had indicated that reviewing more than the number of convictions needed to sustain the

C

[284] *Ryan*, 688 F.3d at 848–49.

[285] *Id.* at 852.

A • **Collateral Consequences** ("beyond the sentence" of conviction): The host of difficulties/sanctions/disqualifications (e.g., the right to vote, or hold public office) that can place unanticipated burdens on individuals (convicted of felonies/misdemeanors, incarcerated or not) working to re-enter society and lead satisfying lives as productive citizens.
(i) • https://en.wikipedia.org/wiki/Collateral_consequences_of_criminal_conviction;
(ii) • https://www.ncjrs.gov/pdffiles1/nij/241927.pdf;
(ii′) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Berson%3D UnderstandingCollateralConsequences.pdf;
(iii) • https://niccc.csgjusticecenter.org (National Inventory/Database of Collateral Consequences).

B • **Advisory Opinion** (prohibited):
(i) • https://en.wikipedia.org/wiki/Advisory_opinion;
(ii) • https://lawstreetmedia.com/issues/law-and-politics/should-the-united-states-supreme-court-have-the-power-to-issue-advisory-opinions (includes video podcast);
(ii′) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/AdvisoryOpinionsInFederalCourts.pdf (text only).

C • ℘11B *supra*.

RICO charge would "smack of an advisory opinion—something that no waiver, however deliberate, can authorize," he did not indicate which of the court's three rulings was advisory.[286]

Judge Easterbrook's discussion blended three doctrines that sometimes can block post-conviction review—the custody requirement, the concurrent-sentence doctrine, and mootness. Even if the judge's portrayal of the facts had been accurate (and I will tell you shortly why it was an outrageous falsehood), none of these doctrines would have limited the court's review of any of Ryan's convictions.

Custody. Relief under § 2255 is limited to people in custody, but custody is determined at the time a post-conviction petition is filed, not at the time a court resolves a case.[287] Even when a petitioner has served his entire sentence and even when no collateral consequences of his conviction remain, a petitioner satisfies the custody requirement if, like Ryan, he was imprisoned when he filed his petition.[288]

The Concurrent Sentence Doctrine. The concurrent sentence doctrine permits a court to deny review when a concurrent sentence has no adverse consequences for a petitioner.[289] Judge Easterbrook acknowledged that this doctrine had become a dead letter in cases on direct review.[290] He failed to note that the Seventh Circuit also had recognized its demise in § 2255 proceedings. Vacating any of Ryan's mail fraud convictions would have required a redetermination of his sentence, including his RICO sentence.[291] In a case arising under § 2255, the Seventh Circuit said, "Our own cases . . . undercut the rationale behind the concurrent sentence doctrine; we have held that 'the vacation of a concurrent sentence might lead the sentencing judge to reconsider a sentence not vacated.'"[292]

---

[286] *Id.* at 849.

[287] *See* Carafas v. LaVallee, 391 U.S. 234, 238 (1968) ("[U]nder the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to completion of [the] proceedings . . . .").

[288] *See* Spencer v. Kemna, 523 U.S. 1, 7 (1998) (noting that the absence of any collateral consequences may make a habeas corpus action moot but does not justify a dismissal for lack of custody if the petitioner was in custody when he filed his petition).

[289] *See* Claassen v. United States, 142 U.S. 140, 146 (1891).

[290] *Ryan*, 688 F.3d at 849.

[291] *See* United States v. Smith, 103 F.3d 531, 533–35 (7th Cir. 1996) (noting that vacating one or more counts in a § 2255 proceeding "unbundles" the sentencing package and requires a redetermination of sentence).

[292] Borre v. United States, 940 F.2d 215, 223 n.16 (7th Cir. 1991) (quoting United States v. Holzer, 848 F.2d 822, 824 (7th Cir. 1988)). Judge Easterbrook observed, "Ryan has not argued that the district judge would have given a lower sentence on the RICO count had she believed, say, that only four of the mail-fraud convictions represented bribes, and the other three represented undisclosed conflicts of interest." *Ryan*, 688 F.3d at 849. But of course Ryan would have had no reason to make any argument at all on the subject until Judge Easterbrook jumped from the box shouting "Surprise!" Even then, Ryan, like Judge

p.71B supra
(as just quoted)
munged
but, his discussion here was null-and-void, for 2 reasons: (i) none of the 3 doctrines was applicable; (ii) he lied about the facts
p.71A supra
D
or, "skip
discretionary
as explained in p.72D(ii) inst
A
B
C
E
A
F
G
H
A
like a jack-in-the-box
that is, "surprise, I just decided the Concurrent Sentence Doctrine does apply in the 7th Cir. after all
because, U.S. v. Smith (just cited) already took care of the requirement for the trial judge to revisit for resentencing (i.e., the Concurrent Sentence Doctrine doesn't hold in the 7th Cir.)
that is, even if the Concurrent Sentence Doctrine did apply in the 7th Cir.

A • ℘11B *supra.*

B • ***Carafas v. LaVallee:*** https://supreme.justia.com/cases/federal/us/391/234/case.html.

C • ***Spencer v. Kemna:*** https://supreme.justia.com/cases/federal/us/523/1/case.html.

D • (i) • **Consecutive vs. Concurrent Sentences** (https://www.law.cornell.edu/wex/concurrent_sentence): When a criminal defendant is convicted of multiple crimes, the sentencing judge must assign a certain time-period for each crime. When the sentences run one-after-another in sequence, they are called *consecutive sentences.* When the sentences run simultaneously/overlappingly (the longest period controlling), they are called *concurrent sentences.* The choice is at the option/discretion of the judge. Typically, if the multiple crimes are interrelated with one-another, concurrent sentences are chosen (if unrelated, then consecutive sentences); other factors may also take part in the considerations (such as plea bargaining, and compassion).
(i′) • See also: **Totality Principle** (https://en.wikipedia.org/wiki/Totality_principle).
(ii) • **Concurrent Sentence Doctrine** (https://definitions.uslegal.com/c/concurrent-sentence-doctrine, http://www.jstor.org/stable/1121363?read-now=1&refreqid=excelsior%3A69644299d3abc5d2b3f3a89c9b5144dc&seq=1#page_scan_tab_content): This is the (discretionary) principle that when an appellate court reviews/affirms *one* conviction/sentence, it need not hear challenges to convictions on *other* counts, provided that those count carry sentences that are less-than-or-equal-to the affirmed conviction. Thus, where a defendant had been sentenced to several concurrent sentences on different counts, an appellate court which upholds the conviction on the longest count, need not consider the remaining challenges. In *Benton v. Maryland,* 395 U.S. 784 (1969) (https://en.wikipedia.org/wiki/Benton_v._Maryland, https://supreme.justia.com/cases/federal/us/395/784/case.html), the Supreme Court held that the concurrent sentence doctrine could not be justified on mootness grounds, but stated that it "may have some continuing validity as a (discretionary) rule of judicial convenience." Following *Benton,* all but two of the federal circuits have embraced the concurrent sentence doctrine as a discretionary matter of judicial administration; but only a few state courts have followed suit.

E • ***Claassen v. U.S.:*** https://www.law.cornell.edu/supremecourt/text/142/140.

F • ***U.S. v. Smith:*** https://www.courtlistener.com/opinion/732343/united-states-v-richard-alexander-smith/?.

G • ***Borre v. U.S.:*** https://openjurist.org/940/f2d/215/borre-v-united-states.

H • ***U.S. v. Holzer:*** https://www.courtlistener.com/opinion/507160/united-states-v-reginald-j-holzer.

Mootness. Judge Easterbrook wrote, "Ryan's challenge to expired sentences may or may not be moot as a technical matter."[293] Because vacating any of Ryan's convictions would have led to resentencing on the others, none of his convictions was even arguably moot. Moreover, in a habeas corpus proceeding in which the petitioner had both completed his sentence and regained the right to vote before the Supreme Court decided his case, the Court declared:

> [S]ome collateral consequences of his conviction remain, including the possibility that the conviction would be used to impeach testimony he might give in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other felony charges in the future.[294]

Judge Easterbrook not only distorted the custody requirement, the concurrent sentence doctrine, and the doctrine of mootness; he also probably erred by declaring that any two valid mail fraud convictions would justify Ryan's RICO conviction.[295] The Supreme Court has said that a pattern of racketeering activity is not established simply by proving two predicate crimes. Although two predicates are necessary, they may not be sufficient.[296] One cannot know whether the jury would have found the

---

Easterbrook, could only have speculated about what sentence the trial judge would impose if she learned that most of Ryan's supposed crimes were not crimes. That is why vacating some of Ryan's convictions would have required the Seventh Circuit to remand the case to the trial judge herself for resentencing on the surviving counts.

Judge Easterbrook seemed confident that, even if most of Ryan's convictions were vacated because they were for non-criminal conduct, his initial sentence would be unchanged. "After all, a district judge may base a sentence on established misconduct whether or not that misconduct has led to a conviction." *Ryan*, 688 F.3d at 849. Unlike Judge Easterbrook, however, a district judge might not regard every nondisclosure of a conflicting interest as "misconduct" after *Skilling*. All of Judge Easterbrook's statements were contestable or just plain wrong, but Ryan had no opportunity to contest them.

[293] *Ryan*, 688 F.3d at 848.

[294] Evitts v. Lucey, 469 U.S 387, 391 n.4 (1985). *See also* Sibron v. New York, 392 U.S. 40, 55 (1968) (acknowledging that an earlier Supreme Court decision had "abandoned all inquiry into the actual existence of specific collateral consequences and in effect presumed that they existed").

[295] *Ryan*, 688 F.3d at 848.

[296] H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 237 (1989). One of the lessons you might draw from this Memoir is that federal criminal law and procedure are horribly complicated and arcane. The judges who pretend that jurors can understand the law are confused about it themselves. Congress could simplify things, but, like the judges, it adds new gargoyles to the edifice instead. *See* Albert W. Alschuler, *Terrible Tools for Prosecutors:*

per footnote 292 (the part on this page)

prisoner had regained at least some of his collateral consequences (as defied at p.71A supra)

basically, the question of collateral consequences is never moot

as just seen

p.13E supra

i.e., no "argument" (as suggested by Easterbrook) could have been reasonably made anyway, except for speculation, which is meaningless

even

automatically (without the need for argument)

B

A

because they were raised sua sponte, only in the opinion, p.11B supra; see p.8B supra

A

C

D

A

E

a more charitable characterization would just be: "technical"

F

A • ℘11B *supra*.

B • The **Federal Sentencing Guidelines** (https://en.wikipedia.org/wiki/United_States_Federal_Sentencing_Guidelines) leave a lot to the discretion of the district judge.

C • ***Evitts v. Lucey:*** https://supreme.justia.com/cases/federal/us/469/387/case.html.

D • ***Sibron v. New York:*** https://supreme.justia.com/cases/federal/us/392/40/case.html.

E • ***H.J. Inc. v. Northwestern Bell Tel.:*** https://supreme.justia.com/cases/federal/us/492/229/case.html.
"[A]t least two racketeering predicates committed within a 10-year period are necessary to establish a RICO pattern, but implies that two acts may not be sufficient."

F • **Albert W. Alschuler, Terrible Tools for Prosecutors:**
(i) • https://chicagounbound.uchicago.edu/public_law_and_legal_theory/454;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Alschuler%3DTerribleToolsForProsecutors.pdf.

requisite pattern if the number of predicate crimes had been fewer. Judge Easterbrook's bending of doctrine was surpassed, however, by his bending of the facts. His analysis rested on a false premise. {Viz.:}

Falsehood Number Six: "Ryan was sentenced to 78 months in prison on one RICO count. This is the only sentence he is still serving. All of the others—[including his] 60 month sentences on the seven mail-fraud convictions . . . have expired."[297]

Ryan's mail fraud sentences had not expired. He entered prison on November 7, 2007.[298] If, hypothetically, he had been serving only a sixty-month (five-year) prison sentence, he would not have completed this sentence until November 7, 2012, three months after the court issued its opinion.[299] Moreover, Ryan's sentences on the mail fraud counts extended beyond sixty months of imprisonment. On each count, he was sentenced to a year of supervised release after leaving prison.[300] Supervised release qualifies as custody.[301] None of the legal doctrines Judge Easterbrook invoked treat supervised release any differently from imprisonment. Ryan's sentences on the mail fraud convictions still had fifteen months to run.[302]

As you are about to see, Judge Easterbrook engaged in some remarkable gymnastics to sustain the three mail fraud charges the court did review. Why was he reluctant to engage in the same gymnastics to sustain them all?

I suspect he wasn't reluctant. At argument, Judge Wood had asked whether we differentiated among the counts. I answered that we didn't, but Judge Wood's question made it seem likely that she did.

FALSEHOOD #6: MISREPRESENTATION OF TIME RYAN HAD SPENT IN PRISON

and not the full 78 months

incarceration

non-incarceration

concurrent

p.75ff infra

only

post-Skilling

identified on p.75 infra

oral, p.66F supra

seven total mail-fraud

at 4:08

Notes on Senator Leahy's Proposal to "Fix" Skilling v. United States, 67 SMU L. REV. 501, 521–24 (2014) (arguing that "democracy sucks").

297 *Ryan*, 688 F.3d at 848.

298 Catrin Einhorn, *Ex-Gov. Ryan of Illinois Reports to Prison*, N.Y. TIMES (Nov. 8, 2007), http://www.nytimes.com/2007/11/08/us/08ryan.html?_r=0 [http://perma.cc/G3BS-MD4E].

299 *Ryan*, 688 F.3d at 846 (noting that the court issued its opinion on August 6, 2012).

300 Separate App'x of Pet'r-Appellant, Vol.1, *supra* note 70, at A-000187 (the district court's judgment).

301 *See* Hensley v. Municipal Court, 411 U.S. 345, 349 (1973); Jones v. Cunningham, 371 U.S. 236, 243 (1963); Kusay v. United States, 62 F.3d 192, 193 (7th Cir. 1995) (Easterbrook, J.).

302 A federal statute provides that a prisoner who "has displayed exemplary compliance with institutional disciplinary regulations" can receive as much as fifty-four days credit per year toward his sentence. 18 U.S.C. § 3624(b) (2012). I did not know how much vested "good time" Ryan had accumulated by the date of Judge Easterbrook's opinion, and I don't imagine Judge Easterbrook did either. Nothing in the record indicated that Ryan had received any. Even if one were to assume that Ryan had been awarded the maximum allowable amount of good time credit toward a five-year sentence, he would have been on supervised release at the time of the Seventh Circuit's decision. His mail fraud sentences had not "expired."

B

C

A

E

G

D

F

A • ℘40B *supra.*

B • ℘11B *supra.*

C • ℘31C *supra.*

D •

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **78 Months on Count 1.**

As to Count 2 - 8 & 11 - 13, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **60 months.** As to Count 18 - 22, the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **36 months, all to run concurrent.**

The Court recommends to the Bureau of Prisons:

Placement at Oxford facility.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction to Supervised Release, said periods to run concurrent as follows:

Counts	1-8, 11-13, 18-22	a period of	1 year(s) Supervised Release.

The defendant shall report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of supervised release that apply in this case.

E • ***Hensley v. Municipal Court:*** https://supreme.justia.com/cases/federal/us/411/345/case.html.

F • ***Jones v. Cunningham:*** https://supreme.justia.com/cases/federal/us/371/236/case.html.

G • ***Kusay v. U.S.:*** https://law.justia.com/cases/federal/appellate-courts/F3/62/192/534802.

One of the counts the court refused to address was the Harry Klein (Jamaica vacations) count. As you may recall, the government's closing argument had emphasized that Ryan's cash-back arrangement with Klein concealed a "classic conflict of interest," not that it concealed a bribe.[303] The three other unreviewed counts concerned two contracts awarded to lobbying clients of co-defendant Lawrence Warner. The decisions to award these contracts had been made by professionals in Ryan's office after competitive evaluations, and Ryan did not participate in the evaluations. Speaking of one of the contracts, the district court said, "[T]here is no suggestion that Ryan took any specific 'action' related to the IBM contract—and the standard definition of bribery requires some sort of official action in exchange for the benefits received."[304]

Judge Easterbrook's opinion declared that the benefits Ryan and members of his family had received from Warner "underlay" the three mail fraud convictions the court reviewed.[305] Perhaps at least Judge Wood was unwilling to say that any benefits provided by Warner underlay any of the unreviewed counts. Judge Easterbrook, however, might have persuaded Judge Wood that addressing the question would not matter because all of Ryan's mail fraud sentences had expired.[306]

C. At Long Last: The Court Addresses the Issues Briefed by the Parties

Turning to the three mail fraud convictions the court agreed to review, Judge Easterbrook declared that the defects of the pre-*Skilling* instructions were harmless "in the strong sense that the jury *must* have found bribery and not just a failure to disclose a conflict of interest."[307] He wrote, "We have three principal reasons."[308]

Easterbrook's first reason was *Falsehood Number Seven*—the claim described at the outset of this Memoir that the jury must have found Ryan guilty of taking bribes when it convicted him on the tax charges.[309] The tax charges had nothing to do with the government's bribery allegations,

---

[303] *See* Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000417–18.

[304] Ryan v. United States, 759 F. Supp. 2d 975, 1000 (N.D. Ill. 2010). *See also id.* at 1000–01 (discussing counts 4, 5, and 7, the three counts involving Warner that the Seventh Circuit refused to review).

[305] Ryan v. United States, 688 F.3d 844, 850 (7th Cir. 2012).

[306] If this speculation is accurate, one may wonder why Judge Wood did not speak up after our petition for rehearing revealed that Ryan's sentences had not expired. Acknowledging that Judge Easterbrook's declaration about the expiration of these sentences had misled her, however, might have been embarrassing both to her and to him, and if neither Judge Tinder nor Judge Easterbrook was willing to join her in vacating the unreviewed convictions, she might have seen no reason to make a fuss.

[307] *Ryan*, 688 F.3d at 849.

[308] *Id.*

[309] *Id.* at 849–50.

quid pro quo

with her query mentioned at p.74 supra

though they hadn't, see p.74 supra

whether jury instructions harmless-or-not, see p.76f.310 infra; basically, the parties agree the instructions were (now, post-Skilling) erroneous, so the main remaining question is whether-or-not the errors were harmless

F

G

in quote-marks

A

MISREPRESENTATION THAT JURY "MUST" HAVE FOUND BRIBERY BECAUSE IT CONVICTED ON TAX COUNTS

p.75,76,78 infra

A

B

C

where the 3 reviewed mail-fraud charges are identified as Counts 2,3,8

D

H

this would be consistent with the conjecture about Easterbrook "saving face," p.65 supra

p.70 supra

A • See also ℘12 *supra.*

B • ℘40B *supra.*

C • ℘30C *supra.*

D • ℘11B *supra.*

E • ℘14A *supra.*

F • ℘12M *supra.*

G • ℘12K supra.

H • **Ryan's (Second) Petition for Rehearing with Suggestion of Rehearing En Banc:** http://judicialmisconduct.us/sites/default/files/2017-06/Ryan-v-US%3DPetForReh%2C2012_0.pdf.

and Judge Easterbrook made up out of whole cloth the instructions he said had been given to the jury.[310]

"Second," Judge Easterbrook wrote, "both sides argued this case to the jury as one about bribery."[311] If the parties had indeed argued the case as one about bribery without mentioning that the jury had the option of convicting Ryan for failing to disclose a conflict of interest, Judge Easterbrook's conclusion that "the jury must have found bribery" would have been appropriate.[312]

Judge Easterbrook recited the government's argument to the jury that Ryan "sold his office," that he "might as well have put up a 'for sale' sign," and that the "type of corruption here" was like a meal plan or open bar.[313] He did not note that the government failed to mention the bribery instructions even once or that it called the undisclosed conflicts instruction the heart of its case. He also saw no reason to mention the government's description of the undisclosed conflicts instruction as "the heart and soul . . . of . . . each and every Warner situation, because [of] that flow of benefits I talked to you about."[314]

Judge Easterbrook did refer to one portion of the government's argument Ryan had stressed:

> The prosecutor told the jury that it did not need to find a quid pro quo in order to convict. And that, Ryan maintains, means that the prosecutor was arguing that the jury could convict based on secrecy rather than bribery.
>
> We think that this misunderstands what the prosecutor meant by "quid pro quo." A dispute developed at trial about whether the prosecution had to show that a particular payment from Warner to Ryan matched a particular decision that Ryan made to confer benefits on Warner. The prosecutor denied that matching was

---

[310] *See supra* Part II. Did I indicate that Judge Easterbrook was ready at last to address the issues briefed by the parties? He was *almost* ready. Even when Judge Easterbrook turned to the question of harmless error that the parties had long asked the court to decide, he began his analysis by advancing an outlandish argument of his own. He did so although the Supreme Court had returned the case to the Seventh Circuit with directions to take account of a recent decision stressing the importance of adversary procedure. Perhaps Judge Easterbrook cannot help himself.

[311] *Ryan*, 688 F.3d at 850.

[312] *Id.* at 849.

[313] *Id.* at 852.

[314] Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000417–18 (transcript of the government's argument).

this language falsely/misleadingly implies "one ONLY about bribery"

second of three (finding instructions harmless), p.75 supra

see p.80 infra

falsely

because: the OPTIONS injected the element of NONDETERMINISM into the jury process: did the jury convict on the basis of the bribery/kickback instruction, OR on the basis of one-or-more of the OPTIONS?

"must" in quote-marks

the "meal plan or open bar" description IS indicative of bribery; BUT the problem is that OPTIONS were also offered

the "whole cloth" instruction problem on p.80 is based on this "whole cloth" invention of a non-existent dispute

this one-to-one match might be called a "one-to-one quid-pro-quo," as distinguished from a more generalized "meal plan or open bar" quid-pro-quo; see p.34N supra

one-to-one

p.75: "at long last" (p.75 supra)

jury "must have found bribery," Falsehood #7

B

A

A • ℘40B *supra.*

B • ℘11B *supra.*

two different conceptions of "quid pro quo"

more generalized ("meal plan," "open bar")

one-to-one

necessary and contended that taking money in exchange for a promise (explicit or reasonably implied) to deliver benefits in return is bribery; it isn't necessary to show that Warner's paying for the band at the wedding could be matched against a particular decision Ryan made in exchange. The district judge told the jury that the prosecutor was right about this. Thus when the prosecutor denied that it was necessary to show a quid pro quo, he was not arguing that it was unnecessary to show bribery; he was arguing that Ryan's lawyers had defined bribery too narrowly. This aspect of the prosecutor's argument did not invite a conviction based on nondisclosure, rather than the receipt of bribes.[315]

this is glossed on the next page

FALSEHOOD #8: MISREPRESENTATION OF THE UNDERSTANDING OF QUID PRO QUO

Falsehood Number Eight:

repeating part of the preceding quote

A dispute developed at trial about whether the prosecution had to show that a particular payment from Warner to Ryan matched a particular decision that Ryan made to confer benefits on Warner. . . . [W]hen the prosecutor denied that it was necessary to show a quid pro quo, he was not arguing that it was unnecessary to show bribery; he was arguing that Ryan's lawyers had defined bribery too narrowly.[316]

The dispute Judge Easterbrook described did not happen. He made it up. Ryan's lawyers never maintained that "a particular payment from Warner to Ryan [must match] a particular decision that Ryan made to confer benefits on Warner." Indeed, in the conference on jury instructions, Ryan's counsel declared, "I understand . . . [a] one-to-one match-up is not

A

315 *Ryan*, 688 F.3d at 850.

316 *Id.*

A • ℘11B *supra.*

how could it be otherwise (the basic meaning of quid pro quo is elementary "1L" stuff)?

required."[317] On that point, Ryan and the government had been in accord from the beginning.[318]

phrase introduced on preceding page

Did the prosecutor "invite a conviction based on nondisclosure," or did he "argu[e] that Ryan's lawyers had defined bribery too narrowly?" See what you think:

> Have we proved a quid pro quo? No, [we] haven't. Have we charged a quid pro quo? No, we haven't. We have charged an undisclosed flow of benefits back and forth. And I am going to get to the instructions in a minute, folks, but that's what we have charged. . . . We have charged an undisclosed flow of benefits, which, under the law, is sufficient.[319]

only

falsely

p.76 supra

p.76 supra

i.e, he lied

When Judge Easterbrook maintained that both sides argued Ryan's case to the jury as one about bribery, he could not have failed to realize that the instructions provided another option and that the government encouraged the jury to use it.

third of three (finding instructions harmless), p.75 supra

Judge Easterbrook wrote, "Our third principal reason for finding the error in the jury instructions harmless comes from analysis of the arguments pro and con about particular counts."[320] He then quoted at length the district court's analysis of one count, a count involving another government contract awarded to a lobbying client of Lawrence Warner.

p.13B supra

should read "a"

Ryan's co-defendent, a lobbyist and personal friend

himself

other, career

Although professionals in Ryan's office made the decision to award the contracts at issue in three of the counts the court refused to review, Ryan

---

C

[317] Trial Transcript at 22081 (Feb. 28, 2006), United States v. Warner, 2006 WL 2583722 (N.D. Ill. 2006) (No. 02-CR-505). After *Skilling*, fearing that the government and the courts might try to make the issue in Ryan's case the propriety of a "stream of benefits" concept of bribery, we began the discussion of bribery in our Seventh Circuit brief by embracing this concept ourselves:

should read "stream of benefits"

> Ryan does not doubt that accepting a "retainer" with "the understanding that when the payor comes calling, the government official will do whatever is asked" is bribery. . . . He agrees that "where there is a stream of benefits given by a person to favor a public official . . . it need not be shown that any specific benefit was given in exchange for a specific official act." He affirms that "the intended exchange in bribery can be 'this for these' or 'these for these,' not just 'this for that.'"

D

Brief and Required Short App'x of Pet'r-Appellant at 16, Ryan v. United States, 645 F.3d 913 (2011) (No. 10-3964) (citations omitted).

[318] Of course all discussions of the law of bribery occurred outside the presence of the jury. Even if Ryan's lawyers and the prosecutors had differed more than they did, there would have been no reason to mention their dispute in an argument to the jury.

Duh

A

[319] Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000416 (transcript of the government's argument).

B

[320] *Ryan*, 688 F.3d at 850.

A • ℘40B *supra.*

B • ℘11B *supra.*

C • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Transcript%3Dp22011-22121.pdf.

D • ℘40B *supra.*

made the decision to award this one. The portion of the district court opinion quoted by Judge Easterbrook declared that Ryan's reason must have been either to promote effective law enforcement, as he claimed, or else:

> to compensate Warner for the stream of benefits he provided, as the Government urged. The jury rejected the good faith motive. Accordingly, the jury could only have convicted him on this count if it believed his conduct was a response to the stream of benefits.[321] Ryan suggests that the only "private gain" he received for his intervention in this transaction was the approval of his friend.[322] . . . [H]owever, the jurors must have rejected this argument; they were specifically instructed that if the benefits Ryan received from Warner were merely the proceeds of a friendship, they could not be the basis for a conviction.[323] The court concludes that the jury must have found Ryan accepted gifts from Warner with the intent to influence his actions.[324]

This passage illustrates the fallacy that we maintained infected most of the district court's opinion. The court spoke of "compensat[ing] Warner for the stream of benefits" and of "accept[ing] gifts from Warner with the intent to influence [Ryan's] actions" as though they were the same thing.[325] But the gifts came at an earlier point than the "compensation." These gifts might have been unconditional and legitimate even if they inspired gratitude and later did prompt "compensation."[326] By equating subsequent favoritism for a benefactor with bribery, the district court concluded that the jury must have found bribery. Few elected officials, however, disregard the interests of friends and supporters entirely. If a jury finding that Ryan sought to benefit Warner established that he had

---

321 Under the instructions, the jury could have found a lack of good faith simply because Ryan failed to disclose a conflict of interest, and it might have found non-disclosure of a conflict even if Ryan's only reason for approving the contract was to promote effective law enforcement. But ignore that difficulty.

322 The instructions did not require the jury to find any "private gain" at all on Ryan's part. If he "misused his office" to provide "private gain" to anyone including Warner, he would have been guilty of honest services fraud.

323 I will discuss this erroneous statement in text shortly.

324 *Ryan*, 688 F.3d at 852 (quoting Ryan v. United States, 759 F. Supp. 2d 975, 999 (N.D. Ill. 2010)).

325 *Id.*

326 *Id.*

"quoted at length," preceding page

binary choice

quid pro quo

p.78f.317 supra

i.e., quid pro quo, required to sustain a bribery charge; BUT Skilling requires a MONETARY benefit (not just "approval")

"must" in quote-marks

no, they weren't; p.80 infra

quid pro quo

falsity, falsehood

(here it comes, the denouement/scholium/moral of this Memoir)

but if that happened (later, freely, extemporaneously, with no nexus to the instigating events of gift-giving), it couldn't "count" as a quid pro quo for bribery

but they weren't the same thing; hence, conflating concepts like this could have no legitimate purpose; the only purpose "must" have been to obfuscate/falsify, for the purpose of "keeping George Ryan in prison"

echoing p.23 supra

p.80f.327 infra

"must" in quote-marks

falsely

p.13B supra

of any sort, monetary, social, or other

else (other than Ryan)

A

next page

that is, Ryan would have been guilty of "honest services fraud" in the pre-Skilling sense, but not on the post-Skilling (bribery) sense — hence, not guilty of law-breaking

the issue being whether said regard is pure/innocent, or whether it has a corrupt component; noting that JURIES are authorized/empowered to make that determination, but JUDGES ARE NOT (but that's what Easterbrook and the other judges have done in this case)

A • ℘11B *supra.*

committed bribery, almost every other elected official must be guilty of bribery too.[327]

Among the errors of the quoted passage was its statement that "the jurors . . . were specifically instructed that if the benefits Ryan received from Warner were merely the proceeds of a friendship, they could not be the basis for a conviction."[328] The jury instructions mentioned friendship only in their description of an Illinois statute—one that forbade accepting gifts from lobbyists but exempted "anything provided on the basis of a personal friendship."[329] The court told the jury that violating this statute or any of a number of other Illinois statutes to produce private gain for Ryan or anyone else constituted honest services fraud.[330]

If Warner's gifts to Ryan were given on the basis of friendship, the jury could not properly have rested Ryan's conviction on his violation of *this statute*. But the jury could have based its conviction on any of a number of other grounds, including Ryan's failure to disclose the conflict of interest created by Warner's gifts.[331] Although a gift from someone like Klein, who was not a lobbyist, could not violate the statute, it could create a conflict of interest, and a gift provided by a lobbyist on the basis of friendship could too.[332]

Our brief explained how the district court had inflated its instruction; it had never told the jury that "if the benefits Ryan received from Warner were merely the proceeds of a friendship, they could not be the basis for a conviction."[333] At argument, however, Judge Wood asked, "So what do you do with the instruction that the jury was given saying don't convict if you think it was just friendship? Don't convict if you think it was a gift. The jury did convict."[334] I replied:

---

[327] *See* Alschuler, *supra* note 68, at 481–82 (noting that every definition of bribery looks to the moment an alleged bribe is received and that none includes subsequent favoritism for a benefactor).

[328] *Ryan*, 688 F.3d at 852.

[329] Separate App'x of Pet'r-Appellant, Vol. 2, *supra* note 59, at A-000421 (jury instructions describing 5 ILCS 425/10 as that provision read from January 1, 1999 through the end of 2002).

[330] *Id.*

[331] *See id.* at A-000420 (the conflict of interest instruction).

[332] Only one of the benefits provided by Warner even arguably might have violated the statute forbidding the acceptance of gifts from lobbyists—his failure to charge a fee for adjusting an insurance claim after Ryan's apartment flooded on Christmas Day. *See* Brief and Required Short App'x of Pet'r-Appellant, *supra* note 317, at 8. Campaign contributions were specifically exempted from the statutory prohibition, and none of the other benefits Warner provided went to people who were prohibited from receiving them. *See id.*; *supra* Part III (describing the benefits given by Warner). The statute was all but irrelevant to the government's case.

[333] Brief and Required Short App'x of Pet'r-Appellant, *supra* note 317, at 25.

[334] Oral Argument, *supra* note 157, at 34:39.

falsity

p.79 supra

nothing to do with the federal statute at issue, 28 USC §1346

so we're back to the business of the jury convicting on the basis of some undifferentiated mish-mash of reasons, some illegal (in some sense) and some not; we just don't/can't know what was in their minds

that is, the jury could have convicted on the basis of "failure to disclose," but that was no longer federally illegal, post-Skilling

also, instead, additionally, whatever

B

wrongly

mere

which doesn't exist, see next page

no, it wasn't

C

B

A

and not the others, so we're still in a state of undifferentiated mish-mash

now repealed/replaced (http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=130&ChapterID=2); for the relevant language at the time of trial, see Jury Instructions (p.13B), p.23909-23910

D

E

A • ℘40B *supra.*

B • ℘11B *supra.*

C • ℘24B *supra.*

D • ℘40B *supra.*

E • ℘17A *supra.*

such a (limitation, "uninflation") instruction would have helped clean up some of the mish-mash, if it existed, but it didn't

p.80f.329 supra

> There is no such instruction, Your Honor. . . . [T]he only mention of friendship comes in the context of an Illinois statute that prohibits gifts from lobbyists and other prohibited sources, and it says that it does not prohibit gifts made on the basis of friendship. It doesn't say that failure to disclose a gift made on the basis of friendship can't be the basis for a conviction on a conflict of interest theory. It doesn't say that Ryan can't be convicted simply for favoring friends in the award of government benefits.[335]

"inflation" error, preceding page

(i) preceding page ("our brief explained"); (ii) at oral argument just mentioned ("there is no such instruction"); (iii) footnote 336

We pointed out the district court's error once more in our supplemental brief following the Supreme Court's remand.[336] Thus we had noted the district court's error three times before Judge Easterbrook embraced it. I considered listing as *Falsehood Number Nine* the declaration that the jury was instructed not to convict if Warner provided his gifts on the basis of friendship. Because this statement originated in an understandable error of the district court rather than a phantasm of Judge Easterbrook, however, it probably does not rise to the *whopper* level. Perhaps it proves only that talking to the U.S. Court of Appeals for the Seventh Circuit is like talking to a wall. We noted the error a fourth time in our petition for rehearing,[337] but the court saw no reason to correct it.

this Alschuler semi-proposed Falsehood #9 is different from ours (at p.53 supra)

falsely made by Easterbrook, see p.5–6,8 of p.75H

that is, the court didn't fight back, to try "correcting" Alschuler (so maybe this counts as "embracing" it)

X. Larger Lessons and Some Proposals for Reform

pissing and moaning (rightly so) about sua-sponte-style "judicial activism" (see p.53H supra)

A. Decent Procedure in an Adversary System

Here's what Judge Easterbrook wrote in 1989:

> I [offer no] praise for judges who . . . write essays about issues the parties did not present. Just as the parties may choose the terms of their contract, they may choose the subjects of their litigation. Resolving a case on a ground not presented denies the parties this autonomy and increases the risk [of] an uninformed opinion. . . . It is

sua sponte (see p.53H supra)

by the parties

right, it only exposes the judge's opinion, not the (presumably wiser) opinions of litigants/counsel — hence, our adversarial (as opposed to inquisitorial) system

A

B

C

---

[335] *Id.* at 34:48–35:35.

[336] *See* Circuit Rule 54 Statement of Pet'r-Appellant at 18–19 n.21, Ryan v. United States, 688 F.3d 845 (7th Cir. 2012) (No. 10-3964).

[337] Ryan's Petition for Rehearing with Suggestion of Rehearing En Banc, *supra* note 34, at 8.

the wording there is: "Ryan objected before the trial began and through his appeal that honest services convictions may not be predicated on violations of state law."

A • ℘17A *supra.*

B • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Ryan%3DRule54Statement.pdf.

C • ℘14A *supra.*

> hard enough to navigate when the court sticks to questions fully ventilated by counsel.[338]

The view of the adversary system Judge Easterbrook took in 1989 is the one endorsed by the Supreme Court:

> In our adversary system . . . we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. . . . [A]s a general rule, "our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief."[339]

not judges/courts

and this, BTW, is why so few pro se litigants get any where (they DON'T know the law of "what's best for them")

The Court has said, "To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights."[340] It has quoted with approval Judge Richard Arnold: "Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us."[341]

cf. p53H supra

Judge Easterbrook's saturnalia of *sua sponte* continued unabated after the Supreme Court remanded Ryan's case for reconsideration in light of *Wood v. Milyard*.[342] In *Wood*, the Court again reiterated the importance of adversary procedure. It said, "[A] federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system," and it added:

i.e., discretion

> For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance. . . . That restraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore

A

B

C

D

E

F

---

[338] Frank H. Easterbrook, *Afterword: On Being a Commercial Court*, 65 CHI-KENT L. REV. 877, 880 (1989).

[339] Greenlaw v. United States, 554 U.S. 237, 243–44 (2008) (quoting Castro v. United States, 540 U.S. 375, 386 (2003) (Scalia, J., concurring)).

[340] *Id.* at 243–44.

[341] *Id.* at 244 (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in the denial of rehearing *en banc*)).

[342] *See* Ryan v. United States, 132 S. Ct. 2099, 2099 (2012) (remanding in light of *Wood v. Milyard*, 132 S. Ct. 1826 (2012)).

A • **Easterbrook:**
(i) • https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3232&context=cklawreview;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Easterbrook%3D Afterword%2CCommercialCourt.pdf.
• The "Afterword" of the title refers to a preceding "Foreword," in the *Chicago-Kent Law Review,* υ65 İ3 (1989) (the whole issue available at https://scholarship.kentlaw.iit.edu/cklawreview/vol65/iss3), devoted to the topic: *Symposium on the Seventh Circuit as a Commercial Court.*

B • ***Greenlaw v. U.S.:*** https://supreme.justia.com/cases/federal/us/554/237/opinion.html (emphasis added, internal quotes and cites suppressed):
• "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, **we follow the principle of party presentation** ["PPP," see ℘83D *infra*]. That is, we rely on the parties to frame the issues for decision and assign to courts the role of **neutral arbiter of matters the parties present.** … [o]ur adversary system is designed around the premise that **the parties know what is best for them, and are responsible for advancing the facts and arguments** entitling them to relief. … [Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do **we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do,** and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us."

C • ***Castro v. U.S.:*** https://www.leagle.com/decision/2003915540us3751907.

D • ***U.S. v. Samuels:*** https://openjurist.org/808/f2d/1298/united-states-v-samuels.

E • ℘11H *supra.*

F • ℘18M *supra.*

would not have anticipated developing in their arguments on appeal.[343]

Judge Easterbrook apparently was unimpressed. He disregarded not only the Supreme Court's admonition but also Seventh Circuit decisions insisting on the party-presentation principle.[344] By the time Ryan's case ended, he had made six rulings in favor of the government that the government had not sought—that by convicting on the tax charges the jury must have found bribery; that all of Ryan's five-year sentences for

---

[343] Wood v. Milyard, 132 S. Ct. 1826, 1833–34 (2012).

[344] An example is Judge Richard Posner's opinion in *Hartman v. Prudential Insurance Co.* The plaintiffs in this diversity action arising under Illinois law were two orphans. As the court described the facts, the plaintiffs' father wanted to make them the beneficiaries of two life insurance policies. His estranged wife, however, bribed an insurance agent to thwart the father's objective. She then persuaded her lover to murder the father, and she collected a substantial settlement from the insurer. The defendants were the estranged wife, the bribed agent, and the insurer. The district court entered summary judgment in their favor. Hartman v. Prudential Ins. Co., 9 F.3d 1207, 1208–09 (7th Cir. 1993).

The Seventh Circuit agreed with the district court that the plaintiffs were not entitled to the remedy they sought, reformation of the insurance policies. *Id.* at 1214. An intermediate appellate court in California, however, had approved a recovery of damages in a similar case. *Id.* at 1213. Although the California decision broke new ground by allowing recovery for fraud by people who had not themselves relied on fraudulent representations, Judge Posner wrote that the court had "no reason to doubt that Illinois" courts would follow the California decision. *Id.* The Seventh Circuit nevertheless affirmed the judgment in favor of the defendants because the plaintiffs' counsel had not sought recovery on the theory approved by the California court. *Id.* at 1214–15.

"We are not happy with this result," Judge Posner wrote. *Id.* at 1214. He explained, however, that a contrary ruling would create unfortunate incentives. "One consequence . . . would be that prudent appellees would have to brief issues not raised or pressed by appellants lest the appellate court fasten on such a (non)issue and use it to upend the judgment of the trial court." *Hartman*, 9 F.3d at 1214. (Of course a prudent party would have no reason to discuss issues not raised by his opponent if the court followed a consistent practice of allowing supplemental briefing before deciding a case on the basis of an issue not previously raised.) "Another consequence would be to diminish the responsibility of lawyers and to reduce competition among them." *Id.*

Commentators have bemoaned the courts' inconsistency. Although they may strictly enforce the adversary system's rules of forfeiture when deserving orphans seek recovery from murdering step-mothers and insurance companies, the same courts may follow what the commentators call "the gorilla rule" when their *sua sponte* actions will enable them to ensure the finality of judgments and the continued imprisonment of possibly innocent people. *See, e.g.*, Melissa M. Devine, *When Courts Save Parties From Themselves: A Practitioner's Guide to the Federal Circuit and the Court of International Trade*, 21 TUL. J. INT'L & COMP. L. 329, 332–33 (2013); Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023, 1061 (1987); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253, 1310 (2002) (discussing inconsistent use of the gorilla rule); Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 SUFFOLK J. TRIAL & APP. ADV. 179, 180 (2012) ("[W]hen the governing rule is declared to be both firm but discretionary, the hairs on the back of the neck tend to bristle.").

about the no-sua-sponte teaching

"must" in quote-marks

B

(i)

(ii)

A

Stephanie and Eva Hartmann

Prudential

C

because, it appears to "not do justice" for the petitioners

sua sponte, Gorilla, see p.53H supra

which is absurd: how does one decide "which unraised issues" (out of the whole universe of potential issues) to brief??

that is., one which would recognize the California ruling as persuasive/applicable precedent

some courts (in some cases) may do the sua sponte thing, but others not so much

(no doubt a play on words, "Prudential Insurnce")

"competition" is used here in sense of extracting the best possible legal arguments (and hence justice) from the participants (and not in the crass sense of cut-throat money-making lawyerism)

D

A • ℘18M *supra.*

B • **Six unsought (false) rulings by Easterbrook (government hadn't sought/presented these, hence Easterbrook illicitly violated the "PPP," ℘83D *infra*):**
(i) • That jury "must" have found bribery because it convicted on tax counts. ℘12,19M, 37,38 *supra;* Falsehood #7, c12,75 *supra.*
(ii) • That jury "must" have found bribery because both sides argued the case as if it were one about bribery. ℘19M,76 *supra.*
(iii) • That jury "must" have found bribery because of earlier/prior gifting coupled with independent later/subsequent/non-contemporaneous favoritism. ℘19M,79 *supra.*
(iv) • That government didn't waive. ℘19D *supra,* Falsehood #9, ℘53 *supra.*
(v) • That Ryan did forfeit. Falsehood #9, ℘53 *supra.*
(vi) • That government didn't concede Ryan had properly objected to jury instructions. ℘19C,D *supra.*

C • ***Hartmann v. Prudential:***
(i) • https://openjurist.org/9/f3d/1207/hartmann-v-prudential-insurance-company-of-america;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-05/Hartmann-v-Prudential.pdf.
• See also the related case preceding this one, *U.S. v. Hartmann,* 958 F.2d 774 (7th Cir., 1992), https://openjurist.org/958/f2d/774.

D • **References for *Sua Sponte,* Party-Presentation Principle ("PPP"), Raise-or-Waive/Forfeit, Gorilla Rule** (see also ℘53H):
(i) • Allan Vestal, *Sua Sponte Consideration in Appellate Review,* Fordham Law Review, vol. 27 issue 4 article 1 (1958), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1612&context=flr;
(ii) • Robert Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule,* Vanderbilt Law Review, vol. 40 №5 (1987), http://heinonline.org/HOL/LandingPage?handle=hein.journals/vanlr40&div=47&id=&page= *{not freely available online};*
(iii) • Rhett Dennerline, *Pushing Aside the General Rule in Order to Raise New Issues on Appeal,* Indiana Law Journal, vol. 64 issue 4 article 7 (1989), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1233&context=ilj;
(iv) • Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard,* 39 SAN DIEGO L. REV (2002) *{not freely available online};*
(v) • Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making,* 17 SUFFOLK J. TRIAL & APP. ADV. (2012) *{not freely available online};*
(vi) • Melissa M. Devine, *When Courts Save Parties From Themselves: A Practitioner's Guide to the Federal Circuit and the Court of International Trade,* 21 TUL. J. INT'L & COMP. L. (2013), https://www.cit.uscourts.gov/Judicial_Conferences/17th_Judicial_Conference/17th_Judicial_Conference_Papers/DevinePaper.pdf;
(vii) • E. King Poor, James Goldschmidt, *Sua Sponte Decisions on Appeal,* For the Defense (2015), https://www.quarles.com/content/uploads/2015/10/FTD-1510-Poor-Goldschmidt.pdf;
(viii) • Ronald Offenkrantz, Aaron Lichter, *Sua Sponte Actions in the Appellate Courts: The "Gorilla Rule" Revisited,* App. Prac. & Process 113 (2016), https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1388&context=appellatepracticeprocess;
(ix) • Luke Ryan, *How the Party Presentation Rule Limits Judicial Discretion,* St. Thomas Journal of Complex Litigation, https://www.stu.edu/Portals/Law/docs/academics/student-orgs/jcl1/volumes/4/RyanLuke-EssayThePartyPresentationRule.pdf.

mail fraud had expired; that the concurrent sentence doctrine (or something else) made it inappropriate to review more than two (or three) of these convictions; that Ryan had forfeited his objection to the undisclosed-conflicts instruction; that *Day v. McDonough* allowed the court to disregard the government's waiver of a claim of forfeiture; and that a post-conviction petitioner may not complain about erroneous instructions that directed his conviction for noncriminal conduct.[345] In most of these rulings, Judge Easterbrook flouted the basic principle of fairness the Supreme Court has said courts must observe when they find sufficient reason for departing from the party-presentation principle: "Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions."[346]

When a litigant's first opportunity to address a decisive issue comes in his petition for rehearing, it comes too late. For one thing, petitions for rehearing are difficult to write. An advocate must determine which audience to address. Does he hope to persuade the erring opinion writer to repent? Does he hope to persuade the other members of the panel to stand up to him? Or does he hope to find champions among judges not on the panel?[347]

Although an advocate is likely to criticize an opinion more forcefully when he has abandoned all hope of winning its author's vote, he dare not punch hard even then—certainly not as hard as he would have if opposing counsel had advanced the same arguments. A good advocate does not speak truth to federal judicial power; instead, as if appearing before Vladimir Putin, he seeks a way to make his point while minimizing the risk of umbrage. In a petition for rehearing, he depicts every howling error and every lie as a slight misapprehension.

Whatever an advocate says, it's unlikely anyone will listen. The Seventh Circuit advises lawyers, "Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted."[348] The court's view seems to be that its opinions are so close to perfection that lawyers should just save their time and their clients'

---

[345] Judge Easterbrook's first opinion in Ryan's case focused almost entirely on Ryan's supposed failure to make proper objection to the instructional errors. Ryan v. United States, 645 F.3d 913, 915 (2011). At the end of this opinion, however, Judge Easterbrook made clear that he had not retreated from his statements at argument that instructional errors are not cognizable in post-conviction proceedings. *See id.* at 917 ("Jury instructions that misstate the elements of an offense are not themselves a ground of collateral relief . . . . (Unconstitutional jury instructions are a different matter. . . . But *Skilling* is about statutory interpretation.)").

[346] Day v. McDonough, 547 U.S. 188, 210 (2006).

[347] Whatever the advocate's goal, he is allowed only fifteen double-spaced pages to achieve it. *See* FED. R. APP. P. 40(b).

[348] *Practitioner's Handbook*, *supra* note 154, at 158.

(iii)
(iv)
(v)
(vi)
the six rulings just stated
is this a sucky system, or what? (see p.16 supra)
A
incorrectly and fasely
B
C

A • ℘11C *supra.*

B • ℘59D *supra.*

C • **Federal Rules of Appellate Procedure (FRAP):** http://www.uscourts.gov/sites/default/files/Rules%20of%20Appellate%20Procedure..

money. Federal appellate judges rarely back away from published opinions, and an advocate should bother them only when he has found a smoking gun.

Partly because of the dismissive view most judges take of petitions for rehearing, the rule should be that an appellate court may never rest a decision in whole or in part on a ground the parties have had no prior opportunity to address. There should be no exceptions. When, following argument, a judge believes he has found something important the parties have missed, the court should invite supplemental briefing or else offer the parties another way to have their say.

An informal procedure might suffice. An individual judge could simply pose a question to counsel on both sides by letter (with copies to the other judges on the panel and to the court's case file). The judge's letter could set forth an issue the parties had not raised and request responses by a specified time. The use of this procedure might delay the issuance of an opinion, but so be it.

Sending questions by letter might be useful even before argument if, for example, a judge found a thirty-five year old case cited by neither party that made him "wonder what we have got here if anything." The gain in the quality of answers produced by advance notice of some queries might justify the accompanying diminution of the questioner's sadistic satisfaction. Providing an opportunity to be heard before a court makes a *sua sponte* ruling is essential to fairness, and it also is likely to improve the quality of judicial decisions. Judge Easterbrook's rulings in *Ryan* show how wrong judges are likely to be when they strike out on their own.[349]

B. Correcting Errors {in the judicial realm, as in all other walks of life}

The *New York Times* publishes corrections every day. When a *Times* story refers to 556 federally recognized American Indian tribes rather than 566, the *Times* fixes it.[350] When a story says that Sumba is southwest of Bali rather than southeast, the *Times* notes the error.[351] When John Coppolella's name has been spelled John Coppalella, a correction appears.[352] And when I see a *New York Times* correction, I think: Those guys are professionals. They care about getting things right.

---

[349] Admittedly, Judge Easterbrook managed to get things wrong even when he did allow supplemental briefing.

[350] *Corrections: March 1, 2015*, N.Y. TIMES (Mar. 1, 2015), http://www.nytimes.com/2015/03/01/pageoneplus/corrections-march-1-2015.html [http://perma.cc/ZN7C-CC5L].

[351] *Id.*

[352] *Corrections: March 8, 2015*, N.Y. TIMES (Mar. 8, 2015), http://www.nytimes.com/2015/03/08/pageoneplus/corrections-march-8-2015.html [http://perma.cc/JL3N-GRHN].

and even then, he'd better make sure the gun is unloaded and out of commission

no, that'll be abused (recalling that it's already a court precedent that's routinely abused) — it must be a formal rule (FRCP, FRCrP, FRAP)

Easterbrook's words, p.40 supra

what a crazy concept

more-than-manifest in Easterbrook

A

B

A • **NYT Corrections:**
(i) • https://www.nytimes.com/2015/03/01/pageoneplus/corrections-march-1-2015.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/NYT%2C Corrections%3D2015-03-01.pdf.

B • **NYT Corrections:**
(i) • https://www.nytimes.com/2015/03/08/pageoneplus/corrections-march-8-2015.html;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/NYT%2C Corrections%3D2015-03-08.pdf.

The Justices of the Supreme Court and the Supreme Court's Reporter of Decisions are professionals too. Until the "final, official text" of a Supreme Court opinion appears in a bound volume of the United States Reports, all versions of the opinion issued by the Court note that it remains subject to revision.[353] In practice, that means that every opinion remains subject to revision for as long as five years, and "the Justices—or, in any event, the Court's staff—invest much energy in correcting . . . errors."[354]

When Judge Easterbrook maintained that George Ryan had received as much process as was due, he wrote, "Ryan's trial lasted eight months."[355] The assertion wasn't true, but the error wasn't important. Ryan's *six*-month trial was bad enough. Many of us have made errors like that. Nevertheless, our petition for rehearing noted the error, and it was not corrected. None of the more serious errors described in this Memoir were corrected either, although they had been brought to the court's attention in our petitions for rehearing.

Why would Judge Easterbrook and his colleagues have left uncorrected, say, the untenable argument that Ryan's conviction on the tax charges showed that the jury had found him guilty of taking bribes? Here are four hypotheses: (1) The judges of the Seventh Circuit do not read petitions for rehearing. (2) The judges felt in their bones that we must be wrong. (3) Although the argument based on the tax counts was untenable, it provided only one of three reasons for concluding that the jury must have found that Ryan took bribes. Because eliminating this argument would not have changed the outcome of the case, the judges did not care that it was wrong. And (4) Judge Easterbrook himself did not strike the untenable argument because acknowledging that he had made up the facts would have been embarrassing, and his colleagues remained silent because they did not want to embarrass or confront him.

None of these reasons for refusing to correct an error is any good. When a judge learns at any time before his court issues its mandate that an opinion he has written or joined contains a clear error, he should act to correct it, and he should do so even if the error is not outcome-determinative or important. Like the journalists of the *New York Times* and

---

[353] *Bound Volumes*, UNITED STATES SUPREME COURT, http://www.supremecourt.gov/opinions/boundvolumes.aspx [http://perma.cc/UU7V-9HBA].

[354] Charles Rothfeld, *Should the Supreme Court Correct Its Mistakes? Yes, If the Process Is Fair and Open*, 128 HARV. L. REV. F. 56, 56 (2014). Even decades after the publication of an opinion, the Court may revise it through a formal, published order. *See* Richard J. Lazarus, *The (Non)finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 561–62 (2014). The Court recently began to provide greater notice of its "postrelease edits to slip opinions." UNITED STATES SUPREME COURT, http://www.supremecourt.gov/opinions/slipopinion/15 [https://perma.cc/P8D3-AAKU].

[355] Ryan v. United States, 645 F.3d 913, 918 (7th Cir. 2011). *See supra* note 355.

A

B

C

D

E

F

G

should read 248

A • **Supreme Court Bound Volumes:**
(i) • https://www.supremecourt.gov/opinions/boundvolumes.aspx;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/SupremeCourt%3DBoundVolumes.pdf.

B • **Rothfeld:**
(i) • https://harvardlawreview.org/2014/12/should-the-supreme-court-correct-its-mistakes;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Rothfeld%3DShouldSupremeCourtCorrectMistakes.pdf;
(iii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Rothfeld%3DShouldSupremeCourtCorrectMistakes%2C2.pdf.

C • **Lazarus:**
(i) • http://harvardlawreview.org/wp-content/uploads/2014/12/Vol128_Lazarus.pdf;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/Lazarus%3DNonFinalityOfSupremeCourtOpinions.pdf.

D • **Supreme Court Slip Opinions:**
(i) • http://www.supremecourt.gov/opinions/slipopinion/15;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/SupremeCourt%3DSlipOpinions.pdf.

E • ℘11C *supra.*

F • ℘63f248 *supra.*

G • Falsehood #7, ℘75A *supra.*

the Justices of the Supreme Court, the judges of the United States courts of appeals should take pride in their work and should think of themselves as members of a profession whose standards include truth-telling and accuracy.[356]

XI. CONCLUSION

Judge Easterbrook is a stickler for rules who breaks the rules. The other judges of the Seventh Circuit should enforce the rules, respect the basic principles of the adversary system, and check Judge Easterbrook's penchant for confabulation. 28 U.S.C. § 46(b) does not put three judges on a panel to promote "collegiality."

A

B

[356] The authors of codes of judicial conduct might do well to borrow some key provisions of the Code of Ethics of the Society of Professional Journalists. *See SPJ Code of Ethics*, SOCIETY OF PROF'L JOURNALISTS (Sept. 6, 2008), https://www.spj.org/pdf/ethicscode.pdf [http://perma.cc/HC6R-D6TM].

C

A • 28 USC §46(b): https://www.law.cornell.edu/uscode/text/28/46.

B • **Code of Judicial Ethics:**
See http://judicialmisconduct.us/Introduction#judicialoathandethics.

C • **Code of Journalistic Ethics:**
(i) • https://www.spj.org/pdf/ethicscode.pdf;
(ii) • http://judicialmisconduct.us/drupal/sites/default/files/2018-04/JournalistCodeOfEthics.pdf.