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ZACHARY J. LUSTBADER

Title 18 Insider Trading

ABSTRACT. This Note advances a general theory of insider trading liability under the fraud prohibitions of the U.S. Criminal Code. For half a century, federal prosecutors have pursued insider trading convictions by charging defendants with willfully violating the securities laws. But the resulting doctrine has long been viewed as incoherent, inefficient, unpredictable, and unjust.

I articulate and defend a Title 18 insider trading framework independent of the classic tests of Rule 10b-5. Doctrinally, I translate the traditional axes of insider trading liability into the lexicon of federal criminal law. And as a normative matter, I argue that the well-established elements of federal criminal fraud better anchor insider trading's legal forms to its conceptual foundations. Once detached from the law of Rule 10b-5, a standalone Title 18 model charts a viable path out of insider trading's doctrinal quagmire—crucially, without requiring further legislative reform. It also rationalizes the Second Circuit's recent landmark holding in *United States v. Blaszczak*, which securities scholars have largely regarded as an aberration. That case has returned to the Second Circuit after grant, vacatur, and remand by the Supreme Court, and a new decision is still pending as of the time this Note is being finalized for print.

In the short run, the Title 18 approach recasts the offense as embezzlement from a nonconsenting information owner, and it streamlines proof of the elements in criminal insider trading prosecutions. But in the long run, Title 18 can meaningfully insulate insider trading doctrine from the specter of prosecutorial and judicial overreach.

AUTHOR. J.D. 2021, Yale Law School; A.B. 2016 in Statistics, Harvard University. Special thanks to Kate Stith for her invaluable support and guidance. I am also indebted to Ian Ayres, Amy Chua, Abbe Gluck, Emily Hall, Christine Magdo, John Morley, Steffi Ostrowski, Nicholas Parrillo, Claire Priest, Ketan Ramakrishnan, Roberta Romano, Simone Seiver, Derek Weiss, Gideon Yaffe, and David Zornow for their insightful comments, and to students in the Spring 2020 Advanced Criminal Law Research Seminar and participants in the *Yale Law Journal* Student Scholarship Workshop for their helpful suggestions. Finally, I am grateful to Jordan Dannenberg and the rest of the *Journal*'s editors for their excellent revisions. A previous version of this Note was awarded Yale Law School's Colby Townsend Memorial Prize for the best paper by a second-year student and the Judge Ralph K. Winter, Jr. Prize for the best paper in corporate law.

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INTRODUCTION

Securities and Exchange Commission (SEC) Rule 10b-5 prohibits the use of any "device, scheme or artifice to defraud . . . in connection with the purchase or sale of any security."[1] In the 1960s, the SEC began to allege that under certain circumstances, corporate insiders break the Rule by trading while in possession of material nonpublic information (MNPI).[2] Federal prosecutors followed suit, initiating criminal prosecutions by charging defendants with "willfully" violating Rule 10b-5.[3] Over time, the courts have grown a "judicial oak" to "flesh out" 10b-5 doctrine,[4] and with it, the ever-evolving ban on insider trading.

Few are content with the regime this paradigm has produced. The law of insider trading is "arbitrary,"[5] "dysfunctional,"[6] "ad hoc,"[7] and "maddening."[8] The field "suffer[s] from uncertainty and ambiguity to a degree not seen in other areas of law."[9] Landmark holdings quickly become the object of precedential ping-pong between the Second Circuit and the Supreme Court.[10] Statutory codification of judge-made rules is perennially proposed, but never

1. 17 C.F.R. § 240.10b-5 (2020).
2. *In re* Cady, Roberts & Co., 40 S.E.C. 907, 911 (Nov. 8, 1961).
3. Securities Exchange Act of 1934 (Exchange Act) § 32(a), 15 U.S.C. § 78ff(a) (2018); *see infra* Sections I.A, I.B.1.
4. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975); *see infra* Section III.A.
5. John C. Coffee, Jr., *Introduction: Mapping the Future of Insider Trading Law: Of Boundaries, Gaps, and Strategies*, 2013 COLUM. BUS. L. REV. 281, 285.
6. Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491, 1491 (1999).
7. United States v. Whitman, 904 F. Supp. 2d 363, 367 (S.D.N.Y. 2012) (Rakoff, J.), *aff'd*, 555 F. App'x 98 (2d Cir. 2014).
8. Oral Argument at 26:30, United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811) (Sullivan, J.).
9. PREET BHARARA, JOON H. KIM, JOHN C. COFFEE, JR., KATHERINE R. GOLDSTEIN, JOSEPH A. GRUNDFEST, MELINDA HAAG, JOAN E. MCKOWN & JED S. RAKOFF, REPORT OF THE BHARARA TASK FORCE ON INSIDER TRADING 1 (Jan. 2020), https://static1.squarespace.com/static/5e1f2462d354fa5f5bac2699/t/5e2a1e9d12e0c33aefc41303/1579818654541/Report+of+the+Bharara+Task+Force+on+Insider+Trading.pdf [https://perma.cc/R83E-YGMM].
10. Famously, Judge Rakoff of the Southern District of New York, writing for a panel while sitting by designation on the Ninth Circuit, "decline[d] to follow" a Second Circuit precedent, *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), that had bound his own rulings as a district judge. United States v. Salman, 792 F.3d 1087, 1093 (9th Cir. 2015). Judge Rakoff's Ninth Circuit opinion was then affirmed by a unanimous Supreme Court. *See* Salman v. United States, 137 S. Ct. 420, 428 (2016), *abrogating Newman*, 773 F.3d 438.

enacted.[11] SEC regulations offer some clarity on the margins, but they explicitly avoid disturbing "[t]he law of insider trading [as] otherwise defined by judicial opinions."[12] And as litigation rages on, the ban on insider trading continues to engender serious, even fundamental doubts: whether it is good policy, whether its elements capture core instances of the offense, whether its common-law evolution comports with due process and the separation of powers, and whether it was ever duly enacted into federal law in the first place.[13]

Through it all, courts and commentators have situated the principal legal grounds for the offense within the domain of securities regulation. Because prosecutors mirrored the SEC and pursued the agency's theory of insider trading liability, the law's mode of analysis, its enforcement apparatus, and its substantive commands all arose in tandem with broader securities jurisprudence. Criminal insider trading, by construction, must track the elements and interpretive method of Rule 10b-5. The crime is, by historical accident, a creature of the securities laws.

This Note proposes that the path out of the quagmire is to abandon the securities-regulation model altogether. The law of insider trading, at a basic level, has little to do with the byzantine regulatory and statutory scheme governing public offerings, periodic disclosure, and private distributions.[14] It is far removed even from the rest of Rule 10b-5 litigation,[15] so much so that the major securities-regulation casebooks treat the topics "Rule 10b-5 Securities Fraud" and "Insider Trading" as distinct subjects warranting separate chapters.[16] In-

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11. *See infra* Section IV.B.

12. 17 C.F.R. § 240.10b5-1 (2020); 17 C.F.R. § 240.10b5-2 (2020) (same).

13. *See infra* Sections I.B, III.A, IV.A.

14. *See, e.g.*, Stephen M. Bainbridge, *Regulating Insider Trading in the Post-Fiduciary Duty Era: Equal Access or Property Rights?*, *in* RESEARCH HANDBOOK ON INSIDER TRADING 80, 80 (Stephen M. Bainbridge ed., 2013) (explaining that while the SEC's original theory was flawed, it was more connected to the core concerns of securities regulation than modern insider trading doctrine is); Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 365 (suggesting the heading of "information problems" rather than "securities").

15. For a brief description, see *infra* notes 41-44 and accompanying text.

16. *See* STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS chs. 5, 6 (5th ed. 2019) (separately discussing "Rule 10b-5 Antifraud" and "Insider Trading"); JOHN C. COFFEE, JR., HILLARY A. SALE & M. TODD HENDERSON, SECURITIES REGULATION: CASES AND MATERIALS chs. 14, 15 (13th ed. 2015) ("Rule 10b-5: Fraud in Connection with a Purchase or Sale of a Security" and "Insider Trading"); JAMES D. COX, ROBERT W. HILLMAN, DONALD C. LANGEVOORT, ANN M. LIPTON & WILLIAM K. SJOSTROM, SECURITIES REGULATION: CASES AND MATERIALS chs. 13, 15 (9th ed. 2020) ("Fraud in Connection with the Purchase or Sale of a Security" and "The Regulation of Insider Trading"); LARRY D. SODER-

deed, while the paradigmatic example involves an insider trading his corporation's *securities*, there is no obvious reason to categorically exempt the trading of commodity futures, spot currencies, precious metals, or any other assets outside the purview of the securities laws.

Rule 10b-5 doctrine, both in substance and in form, has masked and distorted the simple conceptual basis for insider trading law: the crime of embezzlement.[17] And embezzlement—the fraudulent appropriation of property entrusted to one's care—is already prohibited elsewhere under federal law. Title 18, the U.S. Criminal Code, imposes its own sweeping prohibitions on "scheme[s] . . . to defraud."[18] Since well before the promulgation of Rule 10b-5, the Court has held that embezzlement is per se an act of fraud.[19] The object of embezzlement may be tangible or intangible property, including nonpublic information.[20] When an entrusted corporate insider appropriates confidential business information to her own use, then, she has executed a scheme to defraud. If she also triggers a statutory jurisdictional hook—often by using the mails[21] or wires[22]—she has committed a federal crime.

The Title 18 approach has long stood in Rule 10b-5's shadow. Prosecutors have often successfully supplemented criminal 10b-5 counts with embezzlement-as-fraud charges,[23] but the prevailing, securities-centric narrative has been that Title 18 insider trading liability for securities transactions is practically subsumed by Rule 10b-5.[24] On this account, Title 18 has little or no inde-

QUIST & THERESA A. GABALDON, SECURITIES REGULATION chs. 12, 13 (9th ed. 2018) ("Fraud and Related Issues Under Rule 10b-5 and the Sarbanes-Oxley Act" and "Insider Trading").

17. Judge Rakoff has maintained that embezzlement is, or should be, the theoretical core of insider trading law. *See, e.g.*, United States v. Pinto-Thomaz, 352 F. Supp. 3d 287, 295-96 (S.D.N.Y. 2018).

18. In addition to the mail-, wire-, and securities-fraud statutes, see 18 U.S.C. § 1344 (2018) on bank fraud; 18 U.S.C. § 1346 (2018) on honest-services fraud; and 18 U.S.C. § 1347 (2018) on health-care fraud. I do not address these, except for honest-services fraud as discussed *infra* Section II.D.2.

19. *See* Grin v. Shine, 187 U.S. 181, 189 (1902).

20. *See* Carpenter v. United States, 484 U.S. 19, 26-27 (1987).

21. 18 U.S.C. § 1341 (2018).

22. 18 U.S.C. § 1343 (2018).

23. For the most comprehensive account, see William K.S. Wang, *Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tipping*, 70 U. MIAMI L. REV. 220 (2015).

24. For attestations to this scholarly and judicial equilibrium, see Ian Ayres & Joe Bankman, *Substitutes for Insider Trading*, 54 STAN. L. REV. 235, 260 (2001), noting that "[i]n practice, the interpretations of the mail and wire fraud statutes seem to follow the interpretation of Section 10(b)"; and Andrew Verstein, *Insider Trading in Commodities Markets*, 102 VA. L. REV.

pendent force, securities doctrine provides the dominant mode of analysis, and insider trading in securities markets is generally not prosecutable absent a violation of Rule 10b-5. This view has persisted even as Congress, through the Sarbanes-Oxley Act of 2002 (SOX), has added to Title 18 a ban on *securities fraud*, which mirrors the classic mail- and wire-fraud statutes.[25] Supposing that the statute merely duplicated 10b-5 "securities fraud," some scholars noted in passing that they could not "think of any reason for the use of this unnecessary Sarbanes-Oxley Act provision."[26]

The Second Circuit shattered this consensus in December 2019 with its ruling in *United States v. Blaszczak*.[27] Defendants, convicted of insider trading under the Title 18 fraud statutes, argued that a crucial 10b-5 instruction—that the insider must have received a "personal benefit"—had been impermissibly omitted from the jury charge.[28] The panel, however, disagreed.[29] It held that Title 18 fraud, unlike its traditional counterpart in the securities laws, has no personal-benefit requirement at all.[30] Insider trading under Title 18, per the court's logic, is not a mere parallel vehicle of criminal liability to the conventional one under the securities laws: it is a different offense altogether, with its own elements and its own distinct legal standards.[31]

After *Blaszczak*, several securities scholars decried a "siege" on settled law,[32] and the list of law-firm blogs raising concern over the case's implications reads

447, 449 n.5 (2016), remarking that "the availability of wire fraud may be bound up in our insider trading doctrine." *See also* Sandra Moser & Justin Weitz, *18 U.S.C. § 1348—A Workhorse Statute for Prosecutors*, DEP'T JUST. J. FED. L. & PRAC., Oct. 2018, at 111, 112 (contrasting 18 U.S.C. § 1348 (2018) with "the limitations placed on the use of the mail fraud, wire fraud, and traditional securities fraud statutes").

25. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 807(a), 116 Stat. 745, 804 (codified as amended at 18 U.S.C. § 1348 (2018)).

26. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 15 n.56 (2012).

27. 947 F.3d 19 (2d Cir. 2019), *vacated*, No. 20-5649, 2021 WL 78043 (U.S. Jan. 11, 2021) (mem.).

28. *Id.* at 35.

29. The panel split over whether government information qualifies as "property." *See id.* at 46 (Kearse, J., dissenting). After grant, vacatur, and remand by the Supreme Court in light of *Kelly v. United States*, 140 S. Ct. 1565 (2020), the Second Circuit is set to reconsider the property issue. The government now backs reversal on those grounds. *See infra* Section II.D.2.

30. *Blaszczak*, 947 F.3d at 34-37.

31. *See infra* Part II.

32. Andrew N. Vollmer, The Second Circuit's *Blaszczak* Decision: *Dirks* Besieged (Jan. 11, 2020) (unpublished manuscript), https://ssrn.com/abstract=3516082 [https://perma.cc/695E-NSL8]; *see infra* notes 202-205 and accompanying text.

as a "who's who" of the New York white-collar bar.[33] But consistent with the Second Circuit's personal-benefit holding in *Blaszczak*, this Note advances a model of Title 18 insider trading independent of the law of Rule 10b-5. I argue that a standalone theory of Title 18 insider trading is not only plausible—it helps explain where insider trading doctrine went astray, and how courts can realign it with its legal and conceptual foundations.

This Note has two central objectives. The first is to sketch a doctrinal framework for Title 18 insider trading liability. I show that each of the judge-made rules of 10b-5 case law is remarkably close to—but meaningfully different from—a well-established doctrinal concept in federal criminal law.[34] By operating in the Title 18 paradigm and casting insider trading as simple embezzlement (within federal jurisdiction) from a nonconsenting information owner, courts can cut some of the Gordian doctrinal knots, rooted in the path-dependent evolution of the securities laws, that have long plagued insider trading law. Under the Title 18 model, insider trading is no more connected to securities regulation than wire fraud is to telecommunications law. Predicate fields are relevant only for delimiting the scope of federal jurisdiction: Did a defendant transmit an interstate wire communication?[35] Did the scheme have a connection with a security?[36] The remaining elements of Title 18 fraud—roughly uniform across its several sections—set the substantive contours of the offense and define, with surprising clarity, the bounds of criminally proscribed insider trading.

The second task is to demonstrate that a shift to Title 18 is worth welcoming. It is no coincidence, I argue, that each of the Title 18 parallels to Rule 10b-5 is more coherent and deeply rooted in longstanding legal norms. Time and again, the courts' securities precedents have shown that when judges openly decide outcomes on policy grounds, hard cases make bad law.[37] More egregiously, in the realm of insider trading, judicial inventions have served as the basis for criminal convictions. The use of amorphous, extralegal criminal standards to imprison defendants should unite in opposition civil libertarians,

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33. *See infra* note 206.

34. *See infra* Section II.C, tbl.1.

35. 18 U.S.C. § 1343 (2018).

36. 18 U.S.C. § 1348 (2018); *see infra* Section II.C.4.

37. *Cf.* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060, 1091 & n.26 (1975) (theorizing that appeals to "policy" rather than "principle" render judges "deputy legislators," and that policy rationales lead to rules with inconsistent goals); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (arguing that judicial pronouncement of general rules untethered from binding principles "appears uncomfortably like legislation").

criminal-defendant advocates, and interpretive textualists.[38] Title 18 restrains this criminal-law adventurism by tethering the offense to common-law fraud while avoiding the common-law creation of crimes. But because Title 18 marginally expands the elements of liability relative to Rule 10b-5, it clarifies the law without sacrificing the force of criminal sanctions. Prosecutors should be among its strongest advocates.

Insider trading doctrine is at sea, but it can and should be anchored to the law of fraud as federal crime. Part I critiques insider trading case law under Rule 10b-5. Part II outlines the "embezzlement within federal jurisdiction" theory under Title 18 and makes the case for its conceptual integrity. Part III traces doctrinal improvements to differences in interpretive method, and it suggests that Title 18 offers defendants better long-run protection from prosecutorial and judicial excess. Part IV responds to possible objections. The first two Parts, though far from claiming to provide definitive or comprehensive answers, work toward tentative doctrinal conclusions. The last two Parts step back to evaluate why the securities-regulation model has failed us; why Title 18 dominates; and why federal-criminal principles can make insider trading doctrine more law-like, more just, and less maddening.

I. THE SECURITIES THEORY AND ITS FAILINGS

This Part surveys the shaky foundations of the traditional Rule 10b-5 model of criminal insider trading. Section I.A provides a brief summary of the law, and Section I.B critiques four components of the doctrine, each of which I then compare to a more coherent Title 18 analog in Part II. The basic contention is that insider trading's major doctrinal defects stem, in one way or another, from the decision to situate the offense within the securities laws.

A. Foundation

Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) prohibits the use of any "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe."[39] The most important such rule is Rule 10b-5, the central antifraud provision of the securities laws, promulgated by the SEC in 1942.[40] In the eight decades

38. *See infra* Section III.A.

39. Exchange Act § 10(b), 15 U.S.C § 78j(b) (2018).

40. Exchange Act Release No. 3230, 7 Fed. Reg. 3804 (May 22, 1942) (codified as amended at 17 C.F.R. § 240.10b-5 (2020)).

since the SEC issued Rule 10b-5, the Rule has provided the legal basis for everything from class-action lawsuits against public companies[41] to SEC enforcement actions against con artists.[42] Widely regarded as the "catchall" fraud of securities regulation,[43] its basic elements in a government action are (1) deceit, (2) materiality, (3) scienter, and (4) a nexus to a security.[44] Deceit generally requires either (a) a misstatement or (b) an omission in violation of a duty to disclose; materiality sets a threshold of how important a misstatement or omission must be to serve as grounds for liability; scienter delimits the requisite mental state; and nexus requires a sufficient connection to a security.[45]

When a corporate insider, armed with MNPI about an issuer, trades on the basis of that information, how does she violate Rule 10b-5? The answer is not immediately obvious. The Exchange Act explicitly contemplates lawful trading by corporate insiders,[46] and section 10 says nothing on the matter. The text of Rule 10b-5, on its face, does little to change that. Subsection (b) explicitly covers only affirmative false statements,[47] so insider trading could only be cast as a "scheme . . . to defraud" or as a practice "operat[ing] as fraud or deceit."[48] But fraud, under the common law, does not generally arise from awareness of undisclosed material facts.[49] And securities fraud in particular, under general 10b-5 jurisprudence, is limited to deceit of a particular kind: misstatements or

41. *See, e.g.*, John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534 (2006).

42. *See, e.g.*, Complaint at 2-3, SEC v. Madoff, No. 08-civ-10791 (S.D.N.Y. Dec. 11, 2008), 2008 WL 5197070 (charging Bernie Madoff with a civil violation of Rule 10b-5).

43. Chiarella v. United States, 445 U.S. 222, 234-35 (1980) ("Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud."). *See generally* Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 511 (2011) (attempting to reconcile the many different conceptions of securities fraud under Rule 10b-5).

44. *See* Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005); 3 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 12:19 (Westlaw Dec. 2020 ed.) (noting that reliance, damages, and loss causation are not elements in a government enforcement action).

45. *See infra* Sections I.B, II.D.1.

46. Exchange Act § 16(a)-(b), 15 U.S.C. § 78p(a)-(b) (2018) (imposing disclosure and short-swing profit disgorgement on insiders, irrespective of their knowledge of material nonpublic information (MNPI)).

47. 17 C.F.R. § 240.10b-5(b) (2020) (also including "omit[ting] to state a material fact necessary in order to make the statements made . . . not misleading").

48. 17 C.F.R. § 240.10b-5(a), (c) (2020).

49. *See* Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817); RESTATEMENT (SECOND) OF CONTRACTS § 161 (AM. LAW INST. 1981).

omissions in the face of a duty to disclose.[50] The rationale for this limitation is that the Exchange Act generally governs corporate *disclosure* rather than corporate *management*. Sweeping in all violations of state-law fiduciary duties would risk transforming the Exchange Act into a federal corporation law, particularly in the context of shareholder lawsuits.[51]

The SEC argued that Rule 10b-5 barred insider trading two decades after the Rule came into force. In the seminal *Cady, Roberts* action, the SEC set out the "classical" theory of insider trading: the corporation's insiders have a duty to disclose the MNPI they possess about their corporation to their trading counterparties, and they commit fraud if they fail to do so.[52] Ever since, the classical theory of insider trading has been a fraud of nondisclosure to the trading counterparty in the face of a duty to disclose MNPI. The Supreme Court adopted this general rule in *Chiarella v. United States*.[53]

Corporate insiders, though, are neither the only parties who learn of MNPI nor the only subjects of insider trading enforcement actions. At the same time, there is no general duty to disclose MNPI in securities transactions, and *Chiarella*'s command applies only to trades of stock in the insider's own company.[54] So the Court has fashioned two different standards: one, under the classical theory, in which an outsider illegitimately obtains information from a corporate source; and another, under the "misappropriation" theory, in which the trader breaches a duty not to the counterparty, but to the source of his information.

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50. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 177 (1994) (framing the only available theories, besides a "manipulative act," as "material misstatement (or omission)"); *see also* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 152-53 (1972) (explaining the fraud-by-omission theory as a party's silence in the face of a duty to disclose).

51. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 478-79 (1977); *see also* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1106-08 (1991) (denying an Exchange Act cause of action where plaintiffs lost no state-law remedy); *cf.* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 161-62 (2008) (avoiding sweeping in ordinary commercial transactions primarily governed by state law). In *Santa Fe*, the Court refused to read into 10b-5 the sort of "federal corporation law" advocated by William Cary, the former Securities and Exchange Commission (SEC) Chairman who spearheaded and authored the Commission's opinion in *Cady, Roberts*. 430 U.S. at 480 n.17; William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 667 (1974). For a classic rebuttal, see Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

52. *In re* Cady, Roberts & Co., 40 S.E.C. 907, 911 (Nov. 8, 1961).

53. 445 U.S. 222, 228-29 (1980).

54. *Id.*

Under the classical theory, the outsider trader—the "tippee"—must somehow assume a duty to disclose to his trading counterparty. In *Dirks v. SEC*, the Court held that the tippee's obligation to "disclose or abstain" arises when the insider breaches his own fiduciary duty by making the "tip" in the first place.[55] Not all disclosures of information constitute a breach of duty, and many are authorized. Corporations may wish to disclose information to key players—investors, suppliers, and creditors, among others—and can only act through their natural-person agents.[56] The *Dirks* test for assessing whether an insider breached his fiduciary duty turns on whether "the insider personally will benefit" from the disclosure.[57] The personal-benefit test has since dominated much of the discussion on insider trading law.[58]

The classical theory, with its *Dirks* extension to tipper-tippee liability, only restricts trades in the stock of the principal to which an insider is a fiduciary. If the general counsel of WidgetCorp learns that her company is contemplating an acquisition of SupplyCo,[59] and she proceeds to buy shares of SupplyCo for herself, the classical theory has nothing to say on the matter. Neither she nor her employer nor anyone she tips would have any *Chiarella-Dirks* duty to a trading counterparty. The fraud of insider trading here, held the Court in *United States v. O'Hagan*,[60] operates through a distinct "misappropriation" theory. Rather than a fraud of nondisclosure to the trading counterparty, misappropriation is fraud on the source of the information.[61] The misappropriator must be in breach of a duty of trust or confidence to the source by remaining silent, either by trading on the information "without alerting the source," or by receiving a *Dirks* personal benefit for surreptitiously conveying the MNPI to an outsider.[62] Misappropriation can occur through other vehicles as well. For

55. 463 U.S. 646, 661 (1983).

56. These disclosures are, however, regulated by Regulation FD (Reg FD), which limits the ability of public companies to selectively disclose information only to certain parties. 17 C.F.R. § 243.100-103 (2020). Reg FD does not apply to information leaked in breach of a fiduciary duty, 17 C.F.R. § 243.101(c) (2020), and it does not render selective disclosures fraudulent, 17 C.F.R. § 242.102 (2020).

57. *Dirks*, 463 U.S. at 662.

58. *See infra* Section I.B.3.

59. A more restrictive standard is in place for tender offers, akin to an equal-access rule. *See* Exchange Act § 14(e), 15 U.S.C. § 78n(e) (2018); 17 C.F.R. § 240.14e-3 (2020); *infra* Section I.B.4.

60. 521 U.S. 642 (1997).

61. *Id.* at 652-53.

62. *Id.* at 663. But for the interaction between the misappropriation theory and personal benefit (or lack thereof), see *infra* Section I.B.3.

example, if the insider legitimately shares MNPI (that is, without breaching a fiduciary duty), the recipient-outsider might owe a duty *to the insider*.[63] The outsider might then trade or tip in breach of that duty.

Crucially, all of the above is the Court's interpretation of an administrative rule. The only effect of section 10 and Rule 10b-5 is to deem the covered conduct unlawful, and standing alone, the Rule carries no criminal sanctions. Section 32(a) of the Exchange Act provides for criminal penalties only when an individual "willfully violates" section 10 via Rule 10b-5.[64] A combination of section 10, section 32(a), and Rule 10b-5 thus enables criminal prosecutions.

B. Doctrinal Knots

1. Mens Rea*: Willful Violation*

The only element differentiating a criminal 10b-5 offense from a civil one is the mental state of the defendant. Because so much turns on mens rea, one might think that courts would be strict gatekeepers of the requirement that a criminal defendant "willfully violate" 10b-5. Instead, however, the Second Circuit—the "Mother Court" of securities regulation[65]—has at times watered down the willful-violation requirement, in substantial tension with Supreme Court case law.

In a watershed trio of rulings in the 1990s, the Court interpreted the phrase "willful violation" to imply a break from the maxim that "ignorance of the law is no excuse."[66] In *Cheek v. United States*, the Court held that in the criminal sanctions embedded in the tax laws, Congress had "carv[ed] out an exception to the traditional rule" that "ignorance of the law or a mistake of law is no defense."[67] "Willfulness," in criminal tax law, at least, "require[d] the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that

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63. Rule 10b5-2 lays down a nonexhaustive list of situations in which one who learns information is presumed to have a "duty of trust or confidence" to the source of the information for purposes of the misappropriation theory. 17 C.F.R. § 240.10b5-2 (2020).

64. Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (2018).

65. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting). Throughout the Note, I focus primarily on case law from the Supreme Court and the Second Circuit.

66. 4 WILLIAM BLACKSTONE, COMMENTARIES *27 ("*Ignorantia juris, quod quisque tenetur scire, neminem exusat . . . .*"); *Ignorantia Juris Non Excusat*, BLACK'S LAW DICTIONARY (11th ed. 2019).

67. 498 U.S. 192, 199, 200 (1991).

duty."[68] Three years later, in *Ratzlaf v. United States*, the Court turned to the definition of a "willful violation" in the criminal prohibition against structuring bank transactions to keep deposits below the $10,000 reporting limit, holding that a defendant had to know that doing so was unlawful.[69]

Finally, in *Bryan v. United States*, the Court laid down a general rule. Justice Stevens explained that to act willfully is, in general, to act with a "bad purpose."[70] To willfully violate a statute is to act "with knowledge that [one's] conduct [is] unlawful."[71] The Court read *Ratzlaf* and *Cheek* to require something even more. In those cases, which "involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct," the government had to prove knowledge of the *specific law* the defendant was accused of violating.[72] But even outside of the *Cheek-Ratzlaf* umbrella, whenever criminal sanctions require that a defendant "willfully violate" a statute, it is still the prosecutor's burden to show that the defendant knew that what he was doing was somehow unlawful.[73]

Interpreting the requirement of willful violation is an exercise in statutory interpretation that is deeply rooted in questions of criminal culpability.[74] Dan Kahan has argued that the knowledge-of-law requirement is tethered to the distinction between malum prohibitum and malum in se crimes—those wrong

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68. *Id.* at 201.

69. 510 U.S. 135, 136-37 (1994). After *Ratzlaf*, Congress removed the willful-violation requirement for criminal structuring. But notably, it did so without redefining willfulness. It simply limited the willfulness requirement to other violations. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253.

70. 524 U.S. 184, 191 (1998); *see also id.* at 193 ("[W]ith respect to the conduct . . . that is only criminal when done 'willfully' . . . [t]he jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful."). This general definition comes against a backdrop of ambiguity, with the Court referring to "willful" as a "word of many meanings." Spies v. United States, 317 U.S. 492, 497 (1943).

71. *Bryan*, 524 U.S. at 192 (quoting *Ratzlaf*, 510 U.S. at 137).

72. *Id.* at 194-95.

73. *See* Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 385-86 (1998) (calling *Bryan* a "compromise" rule that applies generally in "run-of-the-mill" willfulness cases where a *Cheek-Ratzlaf* exception is absent). Notably, the dissenters in *Bryan* were advocating for an even *stricter* mens rea requirement: no Justice believed that knowledge of unlawfulness was entirely unnecessary. *See Bryan*, 524 U.S. at 202 (Scalia, J., dissenting); Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 804-05 (2002).

74. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 590 (2001) ("*Bryan* amounts to a requirement that the government prove functional notice where notice is not inherent in the crime charged.").

because of legislative fiat, and those independently morally wrongful.[75] The basic concept, especially for felonies stemming from complex or obscure regulatory mandates, is that ignorance of the law *is* an excuse.[76] The willfulness requirement also implicates questions of constitutionality.[77] In *O'Hagan*, the Court called section 32's willfulness standard "vital" to its recognition of the misappropriation theory of insider trading.[78]

The Second Circuit's precedent on insider trading, however, has taken a separate path. Once, in a nonprecedential summary order, the circuit cited *Bryan* and directly applied its willfulness rule to section 32.[79] Later, without citing *Bryan* or that summary order, the circuit repudiated the knowledge-of-unlawfulness theory altogether.[80] Since *Bryan*, both the courts[81] and scholars[82] have cycled through definitions.

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75. Dan M. Kahan, *Ignorance of the Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127, 129 (1997); *see also id.* at 149 (arguing that the defenses of ignorance and mistake of law arise when "the underlying conduct violates no moral norms independent of the law that prohibits it"). The Court articulated a similar logic in *Ratzlaf*. *See* 510 U.S. at 144-45.

76. *Cf.* Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1557-59 (2008) (arguing that stricter mens rea elements are essential to compensate for overbroad criminal prohibitions).

77. *See, e.g.*, Screws v. United States, 325 U.S. 91, 105 (1945); *cf.* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 31-34 (1996) (arguing for a constitutionalized mens rea requirement for criminal offenses).

78. United States v. O'Hagan, 521 U.S. 642, 665 (1997). *O'Hagan* was decided at roughly the same time as the willfulness cases—after *Cheek* and *Ratzlaf*, and just a year before *Bryan*. It is difficult to think that the *O'Hagan* Court construed willful violation to mean something else.

79. United States v. Schlisser, 168 F. App'x 483, 485 (2d Cir. 2006). In another case, Judge Raggi, in dissent, suggested approval of the definition, United States v. Cassese, 428 F.3d 92, 104 (2d Cir. 2005) (Raggi, J., dissenting), and a reported opinion once cited *Bryan* for a different securities statute without applying or adopting it, United States v. Tagliaferri, 820 F.3d 568, 573 (2d Cir. 2016).

80. United States v. Kaiser, 609 F.3d 556, 568-69 (2d Cir. 2010). For a contemporaneous critique of *Kaiser*, see Ellen Podgor, *Quality Control at the Second Circuit II:* United States v. Kaiser *and Historical Truth*, WHITE COLLAR CRIME PROF BLOG (July 10, 2010), https://lawprofessors.typepad.com/whitecollarcrime_blog/2010/07/quality-control-at-the-second-circuit-ii-united-states-v-kaiser-and-historical-truth.html [https://perma.cc/3EQF-7NRV].

81. *See, e.g.*, United States v. Newman, 773 F.3d 438, 447 (2d Cir. 2014) (requiring "a realization on the defendant's part that he was doing a wrongful act under the securities laws" (quoting *Cassese*, 428 F.3d at 98)), *abrogated on other grounds by* Salman v. United States, 137 S. Ct. 420 (2016); *see also* Buell, *supra* note 43, at 557-58 (cataloging disparate cases and theories across circuits).

82. Scholars at times cite passingly to one case or another, leading to substantially different definitions. *See, e.g.*, Coffee, *supra* note 5, at 292 n.23 (citing *Cassese*, 428 F.3d at 98, for the

Two possible justifications for rejecting the knowledge-of-unlawfulness rule, both raised by Samuel Buell,[83] warrant consideration. First, section 32 itself provides an affirmative partial defense—against imprisonment, not against conviction—if the defendant can prove that "he had no knowledge of [the] rule or regulation" he is charged with violating.[84] That defense, the logic goes, would be redundant if the prosecutor already had to prove knowledge of the law for a conviction.[85] But this is no case against the *Bryan* rule (knowledge of general unlawfulness), subject to a partial defense of ignorance of the *particular* rule.[86] Second, one might think that knowledge of the law imposes too high an evidentiary standard. As Buell puts it, "ignorance of the law generally does not excuse serious criminal offenses, including fraud."[87] But the *Bryan* Court held precisely that ignorance of general unlawfulness is a defense for crimes predicated on willful violations.[88] While malum in se crimes like fraud generally have no ignorance-of-the-law defense, section 32 must apply to Rule 10b-5 in the same way it does to every Exchange Act section and to every rule whose violation can carry criminal sanctions.[89]

The other, more plausible reason for this doctrinal divergence is that judges are compensating for insider trading law's near-constant state of flux.[90] How, exactly, are prosecutors supposed to prove beyond a reasonable doubt that the

premise that willful violation means "specific intent to defraud"); James J. Park, *Insider Trading and the Integrity of Mandatory Disclosure*, 2018 WIS. L. REV. 1133, 1190 n.227 (citing a 1970s Second Circuit case to define willful as intentional and deliberate, as opposed to merely accidental or negligent).

83. Buell, *supra* note 43, at 556.

84. Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (2018); *see* United States v. Behrens, 713 F.3d 926, 929-30 (8th Cir. 2013) (explaining that the defendant must show ignorance of the content of the rule, not that her conduct violated it).

85. Buell, *supra* note 43, at 556; *see* United States v. Tarallo, 380 F.3d 1174, 1188 (9th Cir. 2004) (same).

86. Buell cites *Cheek* and *Ratzlaf* in arguing against the knowledge-of-unlawfulness rule, but he omits *Bryan*. Buell, *supra* note 43, at 556 n.159. Much of securities law (including the judge-made insider trading regime) clearly qualifies as "highly technical," which would counsel in favor of a *Cheek-Ratzlaf* rule. But fraud itself may be more amenable to *Bryan*, as it is a quintessential malum in se crime. *See* Kahan, *supra* note 75, at 148; *see also* WILLIAM K.S. WANG & MARC I. STEINBERG, INSIDER TRADING § 7.2.1 (3d ed. 2010) (arguing for *Bryan* under a similar rationale). Section 32, however, places the same willfulness requirement on any covered violation of the securities laws, technical or not, and *Bryan* seems to provide the correct reading in part because of the additional affirmative defense in the statutory text.

87. Buell, *supra* note 43, at 556.

88. *See supra* notes 70-73 and accompanying text.

89. *See* Exchange Act § 32(a), 15 U.S.C. § 78ff(a) (2018).

90. *See infra* Sections I.B.2-4.

defendant knew he was violating some legal duty, when even judges cannot agree on the scope of that duty? In ordinary cases, it is not hard to imagine prosecutors meeting this burden through circumstantial evidence—for example, evidence of disguising payments,[91] or even of eating crumpled Post-It notes, inscribed with MNPI, in the middle of Grand Central Station.[92] But for complex cases on the margin of existing case law, judges are loath to demand proof of legal knowledge and blunt the law's force. The implication of *Bryan* and section 32 is that because Rule 10b-5 is merely one entry in a long list of regulatory commands, Congress has prescribed a high mens rea threshold for triggering criminal sanctions. The upshot of the Second Circuit's departure from *Bryan* is that it wants nothing more than to escape the confines of the regulatory-crime paradigm.

2. Breach as Fraud*: Nondisclosure*

Under either of the Rule 10b-5 theories of insider trading, fraud consists of silence in the face of a duty to disclose. This construction is no accident, but rather tied to a broader feature of 10b-5 doctrine. For fear of sweeping in all breaches of fiduciary duty and invading the province of state corporate law, courts have limited Rule 10b-5's ambit to misrepresentations or omissions in breach of a duty to disclose.[93] Yet molding insider trading to fit that framework has required doctrinal gymnastics, and it has had practical, pernicious consequences, reaching both the classical and misappropriation theories.

a. Classical Theory

The classical theory of insider trading characterizes fraud as nondisclosure in violation of a duty to disclose to a trading counterparty. The problem, though, is that it is unclear that corporate insiders have such a duty at all.

As with contract dealings at common law,[94] there is no general affirmative duty to disclose material information to securities-trading counterparties.[95]

91. *See* United States v. Kanodia, 943 F.3d 499, 507-08 (1st Cir. 2019) (applying the *Bryan* definition and sustaining a willfulness finding on those grounds).

92. *See* Ben Rooney, *Post-It Note Eating Insider Trader Pleads Guilty*, CNN (Sept. 19, 2014, 4:06 PM ET), https://money.cnn.com/2014/09/19/news/companies/post-it-note-insider-trader/index.html [https://perma.cc/44Q9-M55Q].

93. *See supra* notes 50-51 and accompanying text.

94. *See* Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817); RESTATEMENT (SECOND) OF CONTRACTS § 161 (AM. LAW INST. 1981).

The efficiency rationale for this duty-based principle is straightforward: the accuracy of stock prices depends on the ability of traders to profit from the costly search for and analysis of information;[96] in turn, efficient stock prices facilitate efficient transactions in the real economy.[97]

The question, then, is whether an insider owes a fiduciary or other duty to a particular counterparty when trading stock in his own company—one that would arise from some ex ante allocation of information rights that the insider violates.[98] The best answer is simply no. Corporate insiders owe fiduciary duties to the corporation. But they generally do not owe duties to individual shareholders.[99] When state courts speak in the language of "duty to the shareholders," they refer to shareholders as collective owners of the corporation—residual claimants driving an agency relationship with a corporate affiliate, through the shareholders' end control over the corporation's business.[100] This duty serves as a foil to managers' self-interest or the interests of others.[101] It does not entail equivalent duties to *individual* shareholders, and certainly not in arm's-length anonymous transactions in the corporation's securities.[102] Taken

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95. Chiarella v. United States, 445 U.S. 222, 235 (1980).

96. *See, e.g.*, JONATHAN R. MACEY, INSIDER TRADING: ECONOMICS, POLITICS, AND POLICY 21-22 (1991); Richard A. Epstein, *Returning to Common-Law Principles of Insider Trading After* United States v. Newman, 125 YALE L.J. 1482, 1513 (2016); *see also* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 28-29 (1978) (arguing that contract law protects nondisclosure of deliberately acquired information, and using the example of knowledge of corporate losses).

97. *See, e.g.*, James Dow & Gary Gorton, *Stock Market Efficiency and Economic Efficiency: Is There a Connection?*, 52 J. FIN. 1087 (1997); Marcel Kahan, *Securities Laws and the Social Cost of "Inaccurate" Stock Prices*, 41 DUKE L.J. 977 (1992).

98. *Cf.* Meinhard v. Salmon, 164 N.E. 545, 546-48 (N.Y. 1928) (setting out the concept of usurpation of an entity's business opportunity).

99. *See* Goodwin v. Agassiz, 186 N.E. 659, 660 (Mass. 1933). Donald Langevoort reports that one of Chairman Cary's top priorities at the SEC was to "overturn" the case. Donald C. Langevoort, *Rereading* Cady, Roberts*: The Ideology and Practice of Insider Trading Regulation*, 99 COLUM. L. REV. 1319, 1319 (1999).

100. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

101. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that the board "could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders").

102. Zachary J. Gubler, *A Unified Theory of Insider Trading Law*, 105 GEO. L.J. 1225, 1241-43 (2017); *see* Epstein, *supra* note 96, at 1510 (explaining that the classical duty "rests on a command from the SEC, and not only on any duty that the corporate insiders have assumed"); *see also* Strong v. Repide, 213 U.S. 419, 431 (1909) ("That the defendant was a director of the corporation is but one of the facts upon which the liability is asserted . . . ."); *In re* Cady, Roberts & Co., 40 S.E.C. 907, 910 (Nov. 8, 1961) (advancing the tenets of the classical theory

to their logical extreme, conflicting fiduciary duties to multiple shareholders in their individual capacities would make the corporation and its directors servant to many masters, answerable to none.[103]

This base case assumes that the insider purchases equity from a current shareholder. What about sales of stock to strangers of the corporation, whose interests the directors are not yet charged with advancing?[104] Purchases made against short-sellers who are betting against the company's success?[105] Trades in derivative contracts, debt securities, or any other financial interest besides common equity? The shares of competitors or suppliers?[106] That the classical theory cannot directly speak to these substantially similar scenarios is evidence that it relies on a duty lacking a firm basis in corporate law. The securities laws, of course, impose many mandatory disclosure requirements on the corporation

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"whether or not they are precisely and technically sufficient to sustain a common law action for fraud and deceit"); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 264-66 (1991). *But see* Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-*Chiarella *Restatement*, 70 CALIF. L. REV. 1, 5 (1982) (claiming that the law had a "trend" toward a rule akin to a "shareholders' equal protection clause"). Duties to disclose information to trading counterparties required a showing of "special facts" and were only applicable to face-to-face, rather than exchange-based, transactions. *See In re* Wayport, Inc. Litig., 76 A.3d 296, 315 (Del. Ch. 2013) (explaining the "special facts" doctrine as creating a duty of disclosure only when the insider "deliberately misleads" his counterparty (quoting Lank v. Steiner, 224 A.2d 242, 244 (Del. 1966))); *see also* Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1219-21 (1995) (describing the evolution and prevalence of the rule).

103. *Cf.* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020) (showing the tendency for corporate managers to advance their own interests when they justify actions on account of various stakeholders). Conflicts between the corporation and selling shareholders can easily arise. A straightforward example is trades for the corporation's account; disclosure would be unfavorable to the corporation but favorable to the counterparty. *See infra* note 110 and accompanying text. Another is strategically disseminating information to the market through trades made by authorized parties. That might take the form of authorizing trading as a form of compensation to insiders, *see infra* notes 359-362 and accompanying text, or else providing information to outsider securities analysts or traders who would correct market inaccuracies with respect to the corporation's share price, *cf.* Dirks v. SEC, 463 U.S. 646, 658-59 (1983).

104. *See Cady, Roberts*, 40 S.E.C. at 913 (extending the prohibition to sellers by appealing to the "plight of the buying public").

105. In a short sale, a trader borrows stock from an existing shareholder and sells it, with the hopes of buying it back later at a lower price to return to the shareholder. The short-seller thus only fleetingly owns stock for the purpose of betting against it.

106. *See* Ayres & Bankman, *supra* note 24.

and its affiliates.[107] But the disclosure of MNPI to a trading counterparty is not one of them.[108]

The classical theory is also overinclusive because it can give rise to liability even when the corporation acts in its own interest. For example, a mandatory classical duty running from insider to shareholder bars the corporation from authorizing an insider to trade—a move that might otherwise serve as effective compensation or as a liquidity vehicle for cashing out long-held equity.[109] It may even block the corporation *itself* from informedly repurchasing shares for its own account.[110] The strained logic of the classical theory would imply that Rule 10b-5 restricts not just the freedom of rogue insiders, but also that of the corporation itself.

b. *Misappropriation Theory*

The misappropriation theory, at first blush, seems to solve most of the classical theory's problems. Corporate insiders may not owe affirmative duties to their trading counterparties, but they certainly owe duties to the corporation.[111] Unlike the classical theory, the misappropriation theory is not limited to trades in the common equity of the information source. Misappropriation

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107. For descriptions and critiques, see, for example, Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 692-96 (1984); Paul Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1049-51 (1995); and Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2373-80 (1998).

108. The Exchange Act even imposes a duty to disclose the *existence* of insider transactions, but it imposes no such duty internal to the transaction itself. Exchange Act § 16(a), 15 U.S.C. § 78p(a) (2018). Before the Court approved of the misappropriation theory, Congress added provisions imposing civil liability to contemporaneous traders taking the other side of insider transactions on the day of the alleged offense. *See* Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, § 5, 102 Stat. 4677, 4680-81 (codified at Exchange Act § 20A, 15 U.S.C. § 78t-1 (2018)).

109. *See infra* Section IV.A.1. And yet, though the classical theory holds that the corporation cannot give information as compensation to *insiders*, it does not prohibit corporate distribution of valuable information to *outsiders* if consistent with the corporation's interest. *See* Dirks v. SEC, 463 U.S. 646, 661-62 (1983).

110. *See* Mark J. Loewenstein & William K.S. Wang, *The Corporation as Insider Trader*, 30 DEL. J. CORP. L. 45, 76 (2005) (noting that much of the logic of the classical theory applies to this context, even though "when a corporate board authorizes share repurchases on the basis of undisclosed information, the board is probably acting in the best interests of its long-term shareholders").

111. These generally fall under the duty of care and the duty of loyalty. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

also makes clear that the victim is the owner of valuable MNPI: the classical insider trader, who profits off the company's information by trading with a current shareholder, still defrauds the corporation.

But while the misappropriation theory avoids the classical theory's reliance on duties to trading counterparties, it still requires identifying silence in the face of a duty to disclose to an information owner.[112] This construct once again leads to some counterintuitive results. In particular, what if the insider is not silent about his wrongdoing? Can he escape liability simply by sending a memorandum to the Board of Directors minutes before executing his otherwise unlawful trade? Surprisingly, the Court's answer is yes. To square the misappropriation theory with securities law's nondisclosure principle, the *O'Hagan* Court declared that a misappropriator's disclosure to the principal fully cleanses the offense of its fraudulent character.[113]

This cleansing-by-disclosure defense becomes even more puzzling when extended to cases of misappropriation from non-corporate information sources. In *SEC v. Rocklage*,[114] for example, the First Circuit refused to absolve a defendant who disclosed in advance to her insider husband—to whom she owed a duty of confidentiality—that she was going to trade on his information. The court reasoned that this disclosure might cleanse fraudulent use of the information, but not fraudulent acquisition.[115] It is not clear, however, that the case involved any fraudulent acquisition at all. The defendant may well have misappropriated information, but she learned of it simply by listening to her husband talk about his work.[116] Viewed charitably, the First Circuit acknowledged the perverse consequences of *O'Hagan*'s nondisclosure framework and carved out an exception. Conceptually, though, the carveout could just as easily extend to corporate-victim cases. That extension, in turn, would bring us right back to where we started, a definition of securities fraud that escapes the misrepresentation/omission binary. The Court limits 10b-5 along those lines, however, in part to secure the vigorously policed boundary between federal securities regulation and state corporate law.

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112. *See supra* notes 50-51 and accompanying text.

113. United States v. O'Hagan, 521 U.S. 642, 654-55 (1997); *see* Richard W. Painter, Kimberly D. Krawiec & Cynthia A. Williams, *Don't Ask, Just Tell: Insider Trading After* United States v. O'Hagan, 84 VA. L. REV. 153, 180 (1998).

114. 470 F.3d 1 (1st Cir. 2006).

115. *Id.* at 12-14.

116. *See, e.g.*, Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1344-46 (2009) (describing the strained logic of the case).

3. Multiparty Liability*: Tippers, Tippees, and Personal Benefit*

Section I.B.2 argued that the duty-to-disclose framework has led to unfounded doctrine and unprincipled loopholes. There is, however, an even deeper problem. What to do when the unfaithful insider himself does not trade, but instead enables a third party to do so?[117] Consider first the classical theory. In criminal matters, prosecutors might wish to rely on the various theories of accessorial or conspiratorial liability, which apply to any "offense against the United States,"[118] including the criminal securities laws.[119] And in civil matters, the SEC can rely on its statutory authority to punish aiders and abettors.[120] Crucially, though, because outsiders have no duty to their trading counterparties, they alone cannot commit classical insider trading. If there is no duty to the trading counterparty, there is no violation; if there is no violation, no one can aid the violator.[121]

The Court's solution in *Dirks v. SEC* was to fashion a rule for when an insider's duty to disclose transfers to the outsider making a trade on the basis of MNPI. If the insider transmits the information in breach of her own fiduciary duty, then the outsider inherits the *Chiarella-Cady, Roberts* duty to disclose.[122] The insider is a "tipper"; the outsider is a "tippee." The Court held specifically that an insider breaches a duty to the corporation and so becomes liable as a

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117. For the faithful insider—who may distribute valuable information to outsiders on behalf of the corporation, but who apparently cannot be authorized to trade on it himself—see *supra* note 109 and accompanying text.

118. 18 U.S.C. §§ 2, 371 (2018); *see infra* Section II.C.3.

119. Prosecutors charge now, as a matter of course, § 371 conspiracies to violate section 32(a)—that is, a conspiracy to willfully violate the securities laws, specifically section 10(b) and Rule 10b-5. *See, e.g.*, Indictment, United States v. Rajaratnam, No. 1:09-cr-01184 (S.D.N.Y. Dec. 15, 2019), 2009 WL 4807008.

120. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 104, 109 Stat. 737, 757 (codified as amended at Exchange Act § 20(e), 15 U.S.C. § 78t(e) (2018)).

121. This applies to both conspiracy and complicity. Conspiracy requires a charge that the defendant agreed with others to perform conduct that, if completed, would constitute the underlying substantive offense. *See, e.g.*, Ocasio v. United States, 136 S. Ct. 1423, 1429 (2016). Aiding and abetting requires that a substantive offense actually take place, because it is merely another path to liability rather than a separate offense. *See* 18 U.S.C. § 2 (2018); United States v. Perry, 643 F.2d 38, 45 (2d Cir. 1981).

122. Dirks v. SEC, 463 U.S. 646, 664 (1983).

tipper only if he receives a "personal benefit" for transmitting the information.[123]

The Court has left unanswered whether the personal-benefit test applies to the misappropriation theory.[124] On one reading, *Dirks* articulated a federal standard for breach of a federally created duty—the classical duty "to the shareholders," not to the corporation (or anyone else) as the information source.[125] On another reading, approved by the Second Circuit, *Dirks* articulates a federal standard for all breaches of duty implicated by 10b-5. It thus implements an additional requirement in misappropriation cases, over and above plain misappropriation of information, mandating a "personal benefit" to prove any 10b-5 violation.[126] If the latter view is correct, and if "personal benefit" means something more than just "personal use,"[127] then the personal-benefit test immunizes at least some misappropriators from liability.[128]

The personal-benefit test—best understood as the classical theory's substitute for wrongful intent and accomplice liability[129]—has thus taken on a life of its own in the misappropriation theory as an ambiguous rule that may exempt

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123. *Id.* at 662 ("[T]he test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach [by the tippee].").

124. *See* Salman v. United States, 137 S. Ct. 420, 425 n.2 (2016) (assuming without deciding that the personal-benefit test applies because the government did not contest the issue).

125. *Dirks*, 463 U.S. at 660; *see* Merritt B. Fox & George N. Tepe, *Personal Benefit Has No Place in Misappropriation Trading Cases*, 71 SMU L. REV. 767, 775-76 (2018); *see also* United States v. O'Hagan, 521 U.S. 624, 682 n.1 (1997) (Thomas, J., concurring in the judgment in part and dissenting in part) (commenting that there is no personal-benefit test in the embezzlement-based foundation for the misappropriation theory).

126. *See* SEC v. Obus, 693 F.3d 276, 286 (2d Cir. 2012).

127. *See* United States v. Pinto-Thomaz, 352 F. Supp. 3d 287, 299 (S.D.N.Y. 2018) ("[W]hile use of the term 'personal purpose' or 'personal advantage,' rather than 'personal benefit,' could perhaps have averted subsequent confusion, *Dirks* was quite clear as to the wide breadth of its understanding of a personal benefit."). The better way to shield those in the unique situation of *Dirks* is to look to the nature of the confidential information—there, the perpetuation of a fraud—and not to whether the insider blows the whistle or trades directly, since both are socially valuable (and usually self-interested). *See* Jonathan Macey, *Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1921-22 (2007) (excluding the *Dirks* conduct from the definition of misappropriation for lack of a "valid [corporate] interest in maintaining the confidentiality of information about fraud or other illegal activities").

128. *See, e.g.*, Jonathan R. Macey, *Beyond the Personal Benefit Test: The Economics of Tipping by Insiders*, 2 U. PA. J.L. & PUB. AFF. 25 (2017); Donna M. Nagy, *Beyond* Dirks*: Gratuitous Tipping and Insider Trading*, 42 J. CORP. L. 1, 23-26 (2016) (proposing covering gratuitous tipping as misappropriation).

129. *See Dirks*, 463 U.S. at 659 (roughly using this functional reasoning).

clear fraudsters from 10b-5 sanctions. For instance, *Dirks* mentions that an insider could receive a benefit via a quid pro quo or when he "makes a gift of confidential information to a trading relative or friend."[130] What about gifts to strangers or nonprofit organizations? After a back-and-forth with the Supreme Court,[131] the Second Circuit now includes gifts intending to benefit any person within the ambit of the *Dirks* personal benefit.[132] What about disgruntled employees seeking harm to the corporation?[133] What if insiders even spend their own money as a part of the scheme? All of these examples are clear cases of personal *use*,[134] but the personal-benefit test has muddied their legal status under Rule 10b-5.

The *Dirks* test has also led courts and the SEC to fashion more rules that operationalize the case's command. Because federal case law now defines *breach* of duty, the SEC has entered into the business of federally defining the *existence* of "duties of trust or confidence" underlying the misappropriation theory—including even when individuals owe duties to family members.[135] And because of the ambiguity surrounding how tippees precisely inherit the duties of the insider, courts have had to define what level of knowledge tippees must have about a personal benefit for them to be held liable, lest "remote" tippees, unaware of illicit roots of the information presented to them, be chilled from executing efficient trades.[136] One invented policy has led to another, further obfuscating the doctrine.

4. Scope*: Securities Nexus*

Rule 10b-5 doctrine inescapably constructs a theory of insider trading as *securities* fraud. To complete a violation under Rule 10b-5, the ultimate fraud must be "in connection with the purchase or sale of any security."[137] Two ques-

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130. *Id.* at 664.

131. *See supra* note 10 (discussing *Newman*, *Salman*, and Judge Rakoff).

132. United States v. Martoma (*Martoma II*), 894 F.3d 64, 74-76 (2d Cir. 2018).

133. *See* Oral Argument, *supra* note 8, at 24:00.

134. For more on the relationship between misappropriation, embezzlement, and personal benefit, see *infra* Section II.C.2.

135. 17 C.F.R. § 240.10b5-2 (2020).

136. *See* SEC v. Obus, 693 F.3d 276, 287-88 (2d Cir. 2012); *see also* United States v. Newman, 773 F.3d 438, 449-50 (2d Cir. 2014) (assessing the culpability of remote tippees by analogy to substantive criminal law), *abrogated on other grounds by* Salman v. United States, 137 S. Ct. 420 (2016).

137. 17 C.F.R. § 240.10b-5 (2020).

tions emerge. First, why apply insider trading law only to those who trade in securities, and not to those who trade in other asset classes? Second, if the offense must be rooted in its relationship to a security, what kind of nexus does the "in connection with" requirement demand?

a. *Why Securities?*

Whether an asset is a security is a threshold question for much of securities regulation. The statutory definition covers some enumerated asset classes like stocks and bonds,[138] it does not touch ordinary commodities and currencies,[139] and the legal status of other assets is often ambiguous.[140]

The classical theory requires a trade in the stock of an agent's company,[141] so it will always involve a security. The misappropriation theory, however, seems conceptually unrelated to the type of asset traded. This fact renders the securities requirement of Rule 10b-5 unduly narrow.[142] People may value the secrecy of all sorts of information that affects the price of assets like foreign currencies, rare minerals, commodity futures, ordinary consumer products, or even outright bets on future events.[143] When duty-bound agents informedly trade these products without alerting their principals, they cause precisely the same harms to the principals as those targeted by 10b-5's misappropriation theory: leaked information, sullied reputations, lost profits, and more.[144]

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138. *See* Exchange Act § 3(a)(10), 15 U.S.C. § 78c(a)(10) (2018).

139. Other bodies of law may apply. *See* Commodity Exchange Act, 7 U.S.C. §§ 1-26 (2018).

140. The open-ended standard is "investment contract." *See* SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946).

141. *See supra* Section I.A.

142. Andrew Verstein argues that where insider trading law creates new impositions beyond common law, justifications for it properly extend to some asset classes but not others. *See* Andrew Verstein, *Crypto Assets and Insider Trading Law's Domain*, 105 IOWA L. REV. 1, 51-58 (2019) (noting also that optimal public-enforcement levels may vary). Of course, regulation may be more or less justifiable in different kinds of markets. But for the kind of insider trading law actually enacted by Congress—a ban on fraud—the end asset class is only relevant insofar as it modulates the level of harm to the information owner. *See infra* Part II.

143. For a newly approved exchange for direct bets on events rather than on the prices of assets, see KALSHI, http://kalshi.com [https://perma.cc/74YW-VWT7]; and Alexander Osipovich, *Online-Trading Platform Will Let Investors Bet on Yes-or-No Questions*, WALL ST. J. (Feb. 17, 2021, 5:30 AM ET), https://www.wsj.com/articles/online-trading-platform-will-let-investors-bet-on-yes-or-no-questions-11613557800 [https://perma.cc/XM2M-FTDS].

144. *See infra* Section II.C.4.

The real reason for the securities constraint has to be the limits of SEC authority. The Exchange Act covers bets on the prices of stocks and bonds,[145] but not on the price of soybeans,[146] the entry of candidates into the U.S. presidential race,[147] or the ultimate victor of the *Game of Thrones*.[148] Accordingly, 10b-5 insider trading law does not reach front-running fiduciaries of agriculture companies,[149] it does not block campaign aides from capitalizing on advance knowledge of a still-covert candidacy,[150] and it does not prevent HBO insiders from betting on confidential plot points.[151] It does, however, stop all of these people from using their inside knowledge to trade on any asset that happens to be a *security*, no matter how tangentially related that security is to the source of the information.

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145. By this I mean both explicit bets, like cash-settled futures contracts, and effective bets, like the purchase of the underlying asset.

146. *See Soybean Futures Quotes*, CME GROUP, https://www.cmegroup.com/trading/agricultural/grain-and-oilseed/soybean.html [https://perma.cc/8Y23-DNQP].

147. *See, e.g.*, *Will Kamala Harris File to Run for President Before the End of 2022?*, PREDICTIT, https://www.predictit.org/markets/detail/6953/Will-Kamala-Harris-file-to-run-for-president-before-the-end-of-2022 [https://perma.cc/9RN9-NGT3].

148. *See* Richard A. Oppel Jr., *How Bettors in the Know Cashed In on 'Game of Thrones*,*'* N.Y. TIMES (May 21, 2019), https://www.nytimes.com/2019/05/21/us/game-of-thrones-predictions-betting.html [https://perma.cc/7W6F-EDC9] (noting suspiciously unfavorable two-to-nine odds for the finale's ruler of Westeros).

149. Front-running in this context refers to trading ahead of another's anticipated transaction, in the hopes of profiting off the subsequent change in price. Notably, the Commodity Futures Trading Commission exercised authority granted to it under the Dodd-Frank Act to promulgate a general commodities antifraud rule in parallel to Rule 10b-5. 17 C.F.R. § 180.1 (2020); *see* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 753(a), 124 Stat. 1376, 1750 (2010) (codified at Commodity Exchange Act § 6(c), 7 U.S.C. § 9 (2018)). *See generally* Verstein, *supra* note 24 (discussing the regulation's applicability and rationales).

150. *See* Alex Altman, *Political Betting Market Raises Questions About Insider Trading*, TIME (Oct. 6, 2015, 3:59 PM ET), https://time.com/4062628/fantasy-sports-predictit-political-forecasting [https://perma.cc/K579-XYBT].

151. By so greatly moving the betting odds, trading on the finale in some senses revealed just as much as would be exposed by releasing part of the script, as a hacker notably threatened to do in a prior season. *See* Nicole Hong, *Iranian Charged with Hacking HBO, Taking 'Game of Thrones' Scripts*, WALL ST. J. (Nov. 21, 2017, 3:13 PM ET), https://www.wsj.com/articles/prosecutors-charge-iranian-national-in-hbo-hacking-1511280910 [https://perma.cc/W84A-4E2R].

b. *What Connection?*

To keep 10b-5 doctrine from sweeping in every "common-law fraud that happens to involve securities,"[152] the Court has been reluctant to expansively deem certain frauds to be "in connection with" a securities trade. Most relevantly, this hesitation likely played a role in first pushing the Court and the SEC toward the classical theory. Misappropriation fraud, after all, occurs through a distinct relationship from the actual transaction in securities. There is a mismatch between the duty, on the one hand, and the trade, on the other. Even if the misappropriation theory makes more theoretical sense as a *fraud*, it was not until *O'Hagan* that a divided Court held that the theory implies fraud *in connection with the purchase or sale of a security*.[153] The securities laws seem to have no special claim over this kind of fraud, which does not turn on the asset class in which the insider trades.

This mismatch thus explains the path-dependent appeal of the classical theory before *O'Hagan*.[154] In *Chiarella*, which set forth the classical theory, a "markup man" at a print shop learned of a corporate takeover bid through his work and bought stock in the target companies.[155] The theory at trial was that Chiarella had committed a fraud by not disclosing this information to his trading counterparty.[156] This charge was outside the bounds of the classical theory because Chiarella traded securities of a different company. The misappropriation theory could plausibly cover Chiarella's conduct, but the government did not present this more attenuated securities nexus to the jury. The Court thus declined to evaluate the theory on the merits.[157] In the face of the so-called "equal access" theory[158]—which would require all trading counterparties to dis-

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152. SEC v. Zandford, 535 U.S. 813, 820 (2002).

153. Justice Thomas disagreed with the majority's adoption of the misappropriation theory in *O'Hagan*, in part because the deception of the information owner did not in any way change the substance of the securities transaction. If the company had instead authorized the trade on MNPI, the insider would still have the same informational advantage over his counterparty. United States v. O'Hagan, 521 U.S. 642, 689-90, 690 n.6 (1997) (Thomas, J., concurring in the judgment in part and dissenting in part).

154. For an account of the securities paradigm's interaction with misappropriation of property over the course of the case law, see Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 SMU L. REV. 1589 (1999).

155. Chiarella v. United States, 445 U.S. 222, 224 (1980).

156. *Id.* at 236.

157. *Id.* at 235-37.

158. *See* SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 848-49 (2d Cir. 1968).

close any MNPI known to them—the Court opted to embrace, as the locus of fraud, silence in the face of a duty to disclose to a trading counterparty.[159] Through a vehicle other than the securities laws, one that was less tethered to securities transactions, the courts might well have avoided the more strained fraud logic of the classical theory. And though the misappropriation theory is now settled law, the vestiges of the classical theory remain.[160]

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The Commission, the Court, or the Second Circuit might reverse course on any one of these points. But existing precedent, along with insider trading's uncomfortable place within the securities laws, means that any road to recovery would be a long one. And it is far from clear that the securities paradigm is the right vehicle for rehabilitating the doctrine—or that it was ever the best fit for insider trading law at all.

II. TITLE 18: EMBEZZLEMENT WITHIN FEDERAL JURISDICTION

The unstable legal foundations of 10b-5 insider trading do not imply a lack of wrongdoing by all insider traders. They arise instead from the doctrine's tenuous connection to criminal insider trading's core harm: fraud on a nonconsenting information owner. When framed as simple embezzlement—subject to the limits of federal criminal jurisdiction—insider trading becomes more conceptually, legally, and normatively sound. This Part outlines a tentative proposal for what a fleshed-out Title 18 insider trading doctrine might look like. The model collapses the distinction between "tippers" and "tippees," "breach of duty" and "benefit," and the "classical" and "misappropriation" theories. In short, there are enough similarities between Rule 10b-5 and Title 18 fraud to allow for a clear parallel theory under the Federal Criminal Code. But Title 18's roots are also sufficiently distinct to support a theory that helps resolve insider trading's major doctrinal infirmities.

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159. *Chiarella*, 445 U.S. at 231-35.

160. *See infra* Section III.C (discussing areas in which 10b-5 liability is broader than Title 18 liability).

A. Foundation

The prohibitions against mail and wire fraud are a prosecutorial mainstay,[161] and they follow a single model[162]: a scheme to defraud, effectuated by a jurisdictional hook.[163] The mail-fraud statute, 18 U.S.C. § 1341, criminalizes use of the mails "for the purpose of executing" the scheme to defraud.[164] The wire-fraud statute, 18 U.S.C. § 1343, does the same for any "transmi[ssion] by means of wire, radio, or television communication in interstate or foreign commerce."[165]

The basic elements of the statutes are (1) jurisdiction, (2) intent, (3) a scheme to defraud, (4) materiality, and (5) an object of property. Together, they hew closely to the common-law definition of fraud.[166] Put simply, a defendant must knowingly participate in some scheme to defraud that involves use of the mails or wires. The main questions, then, become what schemes are covered and what role the jurisdictional hook must play. The respective answers are "many" and "little."[167]

The mail- and wire-fraud statutes have been used to prosecute insider trading since well before SOX's enactment of § 1348. The landmark case is *Carpen-*

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161. *See* Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980) ("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.").

162. *See* Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005).

163. The statutes contain additional language referring to "obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343 (2018). This is a codification of *Durland v. United States*, 161 U.S. 306 (1896), in which the Court held that federal criminal fraud extended beyond common-law "false pretences." Instead, fraud under Title 18 could extend to false representations about future conduct as well as present facts. *Id.* at 312-13. For the Court's recognition of congressional codification, see *McNally v. United States*, 483 U.S. 350, 357-58 (1987).

164. 18 U.S.C. § 1341 (2018).

165. 18 U.S.C. § 1343 (2018).

166. The Court made clear that this is the rule in *Neder v. United States*, which held that the mail- and wire-fraud statutes have a materiality requirement notwithstanding the fact that neither includes the word "material." 527 U.S. 1, 23 (1999) ("Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes."). The *Neder* Court was explicit that even *Durland*, which expanded the definition past common-law "false pretences," still kept the fraud statutes within the limits of common-law *fraud*. *Id.* at 24 (citing *Durland*, 161 U.S. at 312-13). There are exceptions, though, rooted in the "scheme to defraud" language, namely that the government need not prove reliance or damages. *See id.* at 24-25.

167. *See infra* Sections II.C.2, II.C.4.

ter v. United States.[168] In *Carpenter*, a pre-*O'Hagan* decision, the Court evenly divided on the question of whether the defendants were guilty of Rule 10b-5 securities fraud; the Justices did not yet adopt the misappropriation theory.[169] But remarkably, the Court affirmed the charges of mail fraud in what was fundamentally an insider trading case. One defendant was a reporter for the *Wall Street Journal* who wrote for the "Heard on the Street" column, which recommended long and short positions on various stocks. Ahead of publication, the reporter, with conspirators, traded on the information to benefit from the anticipated change in stock price that the *Journal*'s recommendation would precipitate. The Court held that the defendants engaged in fraud by embezzling the *Journal*'s confidential business information (that is, by fraudulently appropriating the information to their own use).[170]

The split decision—that the defendants' conduct met the requirements of Title 18 mail fraud, but perhaps not of 10b-5 securities fraud—would seem to drive a clear wedge between the two legal theories. In the aftermath of *Carpenter*, the mail- and wire-fraud statutes certainly imposed liability in at least some securities-trading cases where Rule 10b-5 may not have.[171] But now the insider trading literature treats *Carpenter* primarily as a mere foil for what came next—a waypoint to the eventual expansion of 10b-5 liability.[172] That is because a decade after *Carpenter*, the Court decided *United States v. O'Hagan* and mustered enough votes to back the 10b-5 misappropriation theory.[173] *O'Hagan*'s holding would very likely cover the core conduct of the *Carpenter* defendants;[174] the Court, after all, cited *Carpenter* to develop the concept of fraudulent misappropriation under the securities laws.[175] The newly expansive Rule 10b-5 once again took center stage.

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168. 484 U.S. 19 (1987).

169. *Id.* at 24; *see infra* note 172.

170. *Id.* at 27.

171. *Compare* Wang, *supra* note 23, at 256-57 (citing, for the proposition that 10b-5 liability is narrower, cases between *Carpenter* and *O'Hagan* that upheld Title 18 fraud while rejecting 10b-5 misappropriation liability), *with id.* at 261-63 (citing, for the proposition that courts have found coextensive liability, cases primarily post-*O'Hagan*).

172. *See, e.g.*, JOHN P. ANDERSON, INSIDER TRADING: LAW, ETHICS, AND REFORM 44-45 (2018); Nagy, *supra* note 128, at 19-20; A.C. Pritchard, *Justice Lewis F. Powell, Jr., and the Counterrevolution in the Federal Securities Laws*, 52 DUKE L.J. 841, 943-45 (2003).

173. United States v. O'Hagan, 521 U.S. 642 (1997).

174. It is arguable, however, whether the column's stock picks constitute material information about a security, even if the *Carpenter* defendants' deception was material. *See infra* Section II.D.1. Materiality is not discussed at all in *Carpenter*.

175. 521 U.S. at 654.

O'Hagan, however, did not change the common-law substance of the mail- and wire-fraud prohibitions. The *O'Hagan* Court could cite *Carpenter* to define a "securities law" misappropriation theory,[176] just as the *Chiarella* Court could cite fiduciary principles to craft insider trading's classical theory.[177] The two 10b-5 theories are surely *close* to common-law fraud.[178] But while close may count in horseshoes and hand grenades, it is not sufficient for defining federal crimes. After *O'Hagan*, courts and scholars have often proceeded as if substantive elements of 10b-5 and Title 18 fraud are the same.[179] William Wang, who provides the most comprehensive account of mail- and wire-fraud insider trading prosecutions, suggests that Title 18 may import several judge-made 10b-5 elements into criminal fraud.[180] Now, the Second Circuit's decision in *Blaszczak* stands in clear opposition to this prior understanding.

B. Blaszczak *and Sarbanes-Oxley Securities Fraud*

The securities-centric view of insider trading has dominated the courts and legal scholarship since the SEC first asserted its position in the 1960s. Rule 10b-5, the logic goes, is where federal insider trading law developed. It is where both civil and criminal sanctions are possible. It is the tool that connects the offense to *securities* markets, over which Congress has already asserted sweeping jurisdiction,[181] rather than the unrelated jurisdictional hooks of the mails and wires. Even if one accepts that securities are the lynchpin of a rule against insider trading, however, that view should no longer counsel in favor of 10b-5

176. Tellingly, the Court cited *Carpenter* but repurposed its theory to articulate a form of "fraud *akin to* embezzlement." *Id.* (emphasis added). "Akin to" is found nowhere in *Carpenter*, which was explicit that fraud *includes* embezzlement. Carpenter v. United States, 484 U.S. 19, 27 (1987).

177. *See supra* Section I.B.2.a.

178. *See infra* Section II.C, tbl.1.

179. *See supra* notes 24, 26 and accompanying text; *see also infra* notes 202-205 and accompanying text (describing the reaction to the contrary holding in *Blaszczak*).

180. *See* Wang, *supra* note 23, at 271-75 (supposing possible application of the classical theory to mail and wire fraud and noting that "virtually no courts have explored" whether it would apply); *id.* at 290-96 (same for personal benefit); *id.* at 296-97 (same for use/possession).

181. In addition to the comprehensive federal scheme implemented in part by the Securities Act and the Exchange Act, see the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227; and the National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416. Where Congress has asserted jurisdiction through comprehensive regulation of a market, the Supreme Court has allowed for crimes predicated on that jurisdiction to escape particularized connections to interstate commerce in individual prosecutions. *See* Taylor v. United States, 136 S. Ct. 2074, 2080 (2016).

over the Title 18 approach. That is because since 2002, Title 18 has imposed its own prohibition on securities fraud in the mold of the mail- and wire-fraud statutes.

The Sarbanes-Oxley Act, enacted in the wake of the Enron accounting scandal, may be best known for its regulation of the auditing and internal controls of public companies. But it also made important changes to the Title 18 fraud statutes. In addition to raising the maximum sentence for mail and wire fraud to 20 years,[182] the Act implemented a prohibition on public-company retaliation against fraud whistleblowers.[183] It also added a standalone attempt and conspiracy statute for Title 18 fraud, which omits the "overt act" requirement found in the general federal conspiracy statute.[184] And it enacted § 1348 "securities fraud," a criminal prohibition on knowingly executing or attempting to execute a scheme to defraud "in connection with any security."[185] Much of the language tracks that of the mail- and wire-fraud statutes. It is also similar to the language of Rule 10b-5, with some crucial exceptions: (1) it explicitly includes a mens rea of "knowingly" (rather than the willful-violation requirement of section 32) and (2) it allows for connection with "any security" rather than the "purchase or sale" of such security.[186] Further, it specifies that the security must be one issued by a public company.[187] If the statute could once be read to only cover "internal" accounting-type frauds in connection with a public company, it can no longer. The Fraud Enforcement and Recovery Act of 2009 amended the statute to retitle it "Securities and Commodities Fraud," adding a separate hook of commodity futures and options.[188] As amended, the statute suggests that the hook can be met by fraud that includes *trading* in any

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182. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 745, 805 (codified as amended at 18 U.S.C. §§ 1341, 1343 (2018)).

183. Sarbanes-Oxley § 806(a), 116 Stat. at 802-03 (codified as amended at 18 U.S.C. § 1514A (2018)).

184. Sarbanes-Oxley § 902, 116 Stat. at 805 (codified at 18 U.S.C. § 1349 (2018)). The general conspiracy statute is at 18 U.S.C. § 371 (2018).

185. Sarbanes-Oxley § 807(a), 116 Stat. at 804 (codified as amended at 18 U.S.C. § 1348 (2018)).

186. *Id.*

187. *Id.* Public companies under the Exchange Act are those required to register under either section 12 or section 15 of the Act. That requirement is triggered, very roughly, by listing on a national securities exchange, reaching a large enough number of shareholders and asset base, or conducting a registered public offering. *See* Exchange Act §§ 12, 15, 15 U.S.C. §§ 78*l*, 78o (2018).

188. Pub. L. No. 111-21, § 2(e), 123 Stat. 1617, 1618.

security or commodity future, and roughly, by the kind of trading that can take place on a national securities exchange or commodity-futures exchange.[189]

The insider trading implications of § 1348—and of the mail- and wire-fraud statutes—were thrown into sharp relief in December 2019. David Blaszczak, the so-called "king of political intelligence,"[190] had been busted by prosecutors for obtaining confidential information about forthcoming decisions by the Centers for Medicare and Medicaid Services and passing it along to hedge-fund managers.[191] Federal prosecutors in the U.S. Attorney's Office for the Southern District of New York charged him and co-conspirators with various criminal-fraud counts under Title 15 and Title 18. At trial, Judge Kaplan instructed the jury that the "personal benefit" test applied to charges of Title 15 securities fraud. For the Title 18 fraud statutes,[192] however, Judge Kaplan refused to give a personal-benefit instruction. Instead, he defined embezzlement as the fraudulent appropriation to one's own use of property entrusted to one's care, without any mention of a "personal benefit" per se.[193] The jury acquitted all defendants of Title 15 securities fraud, but it handed down a verdict of guilty on several Title 18 counts.[194]

Because of the split verdict, the omission of a personal-benefit instruction, if erroneous, was almost certainly not harmless.[195] The Second Circuit thus had to address the question of whether Judge Kaplan's view of the law was correct. Judge Sullivan, writing for the majority,[196] upheld the view that the personal-benefit test has no place in the Title 18 fraud statutes. Relying on *Carpen-*

189. *See infra* notes 259-264 and accompanying text.

190. Bob Van Voris, *'King of Political Intelligence' Insider Conviction Upheld*, BLOOMBERG (Dec. 30, 2019, 7:44 PM EST), https://www.bloomberg.com/news/articles/2019-12-30/-king-of-political-intelligence-fails-to-overturn-insider-case [https://perma.cc/T2YE-EF58].

191. United States v. Blaszczak, 947 F.3d 19, 26 (2d Cir. 2019), *vacated*, No. 20-5649, 2021 WL 78043 (U.S. Jan. 11, 2021) (mem.).

192. The defendants were also charged with conversion of federal-government property or records, 18 U.S.C. § 641 (2018), which I do not take up since it applies only in the context of the federal government as victim.

193. *Blaszczak*, 947 F.3d at 29.

194. *Id.* at 29-30.

195. *See* Neder v. United States, 527 U.S. 1, 10-13 (1999) (holding that harmless-error review applies to missing elements in jury instructions).

196. The panel split on the question of whether the defendants' scheme targeted property of the victim, but the dissent did not dispute the personal-benefit holding. *See Blaszczak*, 947 F.3d at 46 (Kearse, J., dissenting).

ter, the panel ruled that there was no requirement intrinsic to embezzlement as a "scheme to defraud" requiring a personal benefit.[197]

Defendants' principal arguments on the personal-benefit question were that the Title 18 fraud statutes incorporate the common-law scope of fraud and that they should be interpreted in pari materia with the securities-law definition of fraud.[198] But these arguments cannot both be true. As Part I explained, the modern judge-made law of Rule 10b-5 diverges in important ways from the common law of fraud.[199] So the Second Circuit had to decide whether to tether § 1348 to adrift 10b-5 case law or to bind it to the adjacent mail- and wire-fraud statutes.[200] The Second Circuit chose the latter approach, and it declined to "graft" the judge-made personal-benefit test onto Title 18 fraud.[201]

The negative reaction has been swift. In a recent article, Karen Woody questions whether the *Blaszczak* panel "erred by not importing" judge-made 10b-5 principles, suggests that its decision could establish § 1348 as a distinct species of crime even from mail and wire fraud, and critiques *Blaszczak* for its contribution to the "ever-moving target" of criminal insider trading.[202] Andrew Vollmer writes of "serious legal errors" in a seven-page broadside against the personal-benefit holding.[203] And Donald Langevoort suggests that reliance on Title 18 might "inadvertently pulverize the more nuanced equitable principles

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197. *Id.* at 34-37.

198. *See* Brief and Special Appendix for Defendant-Appellant Theodore Huber at 24-32, *Blaszczak*, 947 F.3d 19 (No. 18-2811).

199. *See supra* Section I.B; *infra* Section II.C.

200. Title 18 contains an interpretive instruction: no inference can be made based on "the chapter in Title 18 . . . in which any particular section is placed, nor by reason of the catchlines used in such title." Act of June 25, 1948, ch. 645, § 19, 62 Stat. 683, 862. To the extent this instruction applies to subsequent congressional directions to codify text in particular Title 18 sections, the Court has declined to follow it—including when interpreting the Sarbanes-Oxley Act of 2002 (SOX). *See* Yates v. United States, 574 U.S. 528, 539-41 (2015); Tobias A. Dorsey, *Some Reflections on* Yates *and the Statutes We Threw Away*, 18 GREEN BAG 2D 377, 386-90 (2015). Even without chapter placement, though, one could still rely on *title* placement. Congress codified the new SOX securities fraud into the Criminal Code, not the securities laws.

201. *Blaszczak*, 947 F.3d at 36-37.

202. Karen E. Woody, *The New Insider Trading*, 52 ARIZ. ST. L.J. 594, 623, 644 (2020).

203. Vollmer, *supra* note 32, at 1. *But see* John C. Coffee, Jr., *The* Blaszczak *Bombshell: A Return to the "Parity of Information" Theory of Insider Trading?*, CLS BLUE SKY BLOG (Feb. 26, 2020), https://clsbluesky.law.columbia.edu/2020/02/26/the-blaszczak-bombshell-are-we-returning-to-a-parity-of-information-theory-of-insider-trading [https://perma.cc/RT77-GPJ6] (pushing back against fears over elimination of the personal-benefit test).

that underlay insider trading policy."[204] Vollmer and Woody are among a handful of professors on three amicus briefs—at the Second Circuit, on petition for rehearing en banc, and on petition for writ of certiorari—supporting the defendants.[205] Law firms with white-collar defense practices have sounded the alarm en masse.[206]

This Note reaches a different conclusion. By situating § 1348 within a standalone theory of Title 18 fraud, it suggests that the *Blaszczak* panel's personal-benefit holding is compelling and correct. It argues that a Title 18 theory of insider trading distills the offense down to its doctrinal core and better tethers it to its conceptual foundations. What the *Blaszczak* court took for granted—the argument that this Note develops—is that the Title 18 fraud statutes operate in tandem, independently of the mode of analysis pervasive in securities regulation and in Rule 10b-5 insider trading doctrine.[207] Those statutes, construed together, constitute an independent, coherent, and principled vehicle for criminal prosecutions of insider trading.

204. Donald C. Langevoort, *Watching Insider Trading Law Wobble:* Obus, Newman, Salman, *Two* Martomas, *and a* Blaszczak, 89 FORDHAM L. REV. 507, 527 (2020).

205. Brief of Law Professors as *Amici Curiae* in Support of Petitioners at 2, Olan v. United States, No. 20-306 (U.S. Oct. 9, 2020); Brief of *Amici Curiae* Law Professors in Support of Defendant-Appellants' Petition for Rehearing and for Rehearing En Banc at vi, *Blaszczak*, 947 F.3d 19 (No. 18-2811), 2020 WL 1040819; Brief of *Amici Curiae* Law Professors at 2, *Blaszczak*, 947 F.3d 19 (No. 18-2811), 2019 WL 1200033.

206. *E.g.*, *Insider Trading & Disclosure Update*, DEBEVOISE & PLIMPTON LLP 5 (Dec. 2019), http://www.debevoise.com/-/media/files/insights/publications/2019/12/insider-trading-update-dec-2019.pdf [https://perma.cc/UB6H-PD97] (calling the case "an unprecedented expansion of insider trading liability"); *Second Circuit Denies Rehearing in Key Insider Trading Case*, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP 5 (Apr. 13, 2020), https://www.paulweiss.com/media/3979952/13apr20-blaszczak-rehearing-petition.pdf [https://perma.cc/N7L4-4HGX] ("[T]he Second Circuit has essentially lowered the bar for criminal insider trading prosecutions . . . ."); *Second Circuit Lowers the Bar for Charging Criminal Insider Trading*, DAVIS POLK & WARDWELL LLP 3 (Jan. 7, 2020), https://www.davispolk.com/files/2020-01-07_second_circuit_lowers_the_bar_for_charging_criminal_insider_trading.pdf [https://perma.cc/C3LK-8XZ5] ("The Second Circuit acknowledged . . . enforcement policy implications but refused to consider them in its decision."); United States v. Blaszczak*: The Second Circuit Expands Reach of Criminal Insider Trading Law*, COVINGTON & BURLING LLP (Jan. 8, 2020), https://www.cov.com/en/news-and-insights/insights/2020/01/united-states-v-blaszczak-the-second-circuit-expands-reach-of-criminal-insider-trading-law [https://perma.cc/Q73M-VWTY] (noting that the decision "allows prosecutors to sidestep one of the more challenging requirements of the Title 15 securities fraud statute").

207. *Cf.* David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1435 (2008) (calling § 1348 a "sleeper" provision that has lurked within the category of mail and wire fraud, rather than Title 15 securities fraud).

C. Paradigm Shifts

This Section returns to the components of 10b-5 doctrine discussed in Section I.B above and outlines their relevant analogs in federal criminal law. Each Title 18 concept, I argue, better aligns insider trading's legal forms with its conceptual foundations. Together, the full complement of relevant Title 18 doctrines exposes 10b-5 case law as a close, but imperfect, substitute for federal criminal fraud. A freestanding Title 18 model, once detached from the law of Rule 10b-5, sets out a viable path for resolving insider trading's major doctrinal puzzles.

Table 1 maps the 10b-5 constructions discussed above to the relevant components of a fraud-within-federal-jurisdiction theory. While this Section makes doctrinal arguments for how the Title 18 analogs will play out in the insider trading context, it does not purport to comprehensively articulate the definitive scope of the law.

TABLE 1.
MAPPING CRIMINAL INSIDER TRADING TO TITLE 18

Component	Rule 10b-5	Title 18
Mens Rea	**Willful Violation** Exchange Act § 32(a)	**Knowledge** *Morissette*; 18 U.S.C. § 1348
Breach as Fraud	**Nondisclosure** *Chiarella*, *O'Hagan*	**Embezzlement** *Carpenter*, *Blaszczak*
Multiparty Liability	**Tipper-Tippee Liability; Personal Benefit** *Dirks*, *Salman*	**Complicity/Conspiracy** 18 U.S.C. §§ 2, 1349
Scope	**Securities Nexus** Rule 10b-5; *O'Hagan*	**Jurisdictional Hooks** 18 U.S.C. §§ 1341, 1343, 1348

1. Mens Rea*: Knowledge*

Because Title 18 fraud does not—and should not[208]—require proof of a willful violation, the fraud statutes escape the *Cheek*/*Ratzlaf* and *Bryan* rules. Prosecutors need not show that defendants had knowledge of the law against insider trading, particularly when the courts disagree about what the law even entails.

The classic federal mens rea rule comes from *Morissette v. United States*, in which the Court read the federal conversion statute to require the defendant's knowledge that the property he took belonged to someone else.[209] Morissette, who claimed that he thought the property was abandoned, was entitled to a presumption of "innocent intent," which the government had to rebut by a showing of knowledge.[210] The Court has since read statutes to require the necessary factual knowledge to avoid sweeping in conduct with innocent intent.[211]

Accordingly, conviction under the mail- and wire-fraud statutes, which lack a clear statement on mens rea, requires at least knowledge of the fraudulent means of the scheme.[212] The securities-fraud ban under § 1348, enacted more recently, has a more straightforward, explicit requirement of "knowingly" executing a scheme to defraud.[213] For the execution to be knowing, the defendant must have knowledge of the facts that constitute a scheme to defraud.[214] That

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208. Fraud, including embezzlement, is a malum in se crime, which rarely if ever should permit ignorance of the law as a defense. *See supra* note 86.

209. 342 U.S. 246, 263-73 (1952).

210. *Id.* at 270-71.

211. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 72-73 (1994); Staples v. United States, 511 U.S. 600, 611-12 (1994); Liparota v. United States, 471 U.S. 419, 426 (1985). A category of "regulatory" crimes with minor penalties has been read to entail strict liability. *See* United States v. Dotterweich, 320 U.S. 277 (1943) (distribution of adulterated drugs). *But see Staples*, 511 U.S. at 607, 618 (confining strict liability under the welfare-offense doctrine primarily to situations in which defendants should be placed on notice for handling dangerous devices, and perhaps only to misdemeanors).

212. Beyond knowledge, courts vary in how they articulate the requirement. *See, e.g.*, United States v. Pharis, 298 F.3d 228, 234 (3d Cir. 2002) ("knowingly participated in a scheme to defraud"); United States v. Gold Unlimited, Inc., 177 F.3d 472, 478 (6th Cir. 1999) ("knowingly devised a scheme to defraud" and "did so with the intent to defraud"); United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996) ("knowing and willing participation in a scheme or artifice to defraud with the specific intent to defraud").

213. 18 U.S.C. § 1348 (2018).

214. *See* Dixon v. United States, 548 U.S. 1, 5 (2006). The defendant perhaps does *not*, however, need to have knowledge that the fraud will involve trading specifically a commodity future or public-company security. The knowledge presumption generally does not apply to jurisdictional elements. *See* Rehaif v. United States, 139 S. Ct. 2191, 2196 (2019) (stating the rule,

is, under an embezzlement theory, defendants must know both that property was entrusted to their care and that they appropriated it to their own use. If a defendant did not know what he was doing—for example, an accidental leak, a bona fide belief of permission to trade or disclose—there is no crime.[215]

The major caveat is that when the object of the fraud is information, it is more difficult to define when a defendant has knowledge that he has taken it—particularly when he *learns* of the information in a duly authorized manner and later misappropriates it. Put differently, it is more difficult to articulate when information is appropriated than when cash has been skimmed off the top of the books. Knowledge of the misappropriation requires knowingly using the information for one's own purposes, without authorization. As applied to duties of trust or confidence, this may amount to knowledge of the existence and scope of a fiduciary or other relationship.[216] The trade has to be unauthorized by the information source;[217] the defendant, it follows, must know that the information is not his to trade on in order to know of his misappropriation.[218]

Notably, there is an alternate vehicle for proving knowledge in the form of "willful blindness," through which prosecutors escape the requirement to show actual knowledge. Willful blindness requires (1) a subjective belief that a fact is very probably true and (2) deliberate steps to avoid learning that fact.[219] This could come into play when, for example, the insider has a strong belief that information was meant to be kept confidential, but prevents herself from learn-

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and excluding a jurisdictional element from the mens rea requirement even when "knowingly" textually referred to the entire statutory violation); *see also* United States v. Yermian, 468 U.S. 63 (1984) (false statements made during a matter under federal jurisdiction); United States v. Feola, 420 U.S. 671 (1975) (assault of federal officers). The courts still may require some level of mens rea with respect to the jurisdictional hook, as they seem to do for mail and wire fraud. *See* Pereira v. United States, 347 U.S. 1, 9 (1954) (requiring use of the mails to at least "reasonably be foreseen"). Still, § 1348 only requires "connection with" a security, rather than making the criminal act itself the use of mail or wire. *Compare* 18 U.S.C. §§ 1341, 1343 (2018), *with* 18 U.S.C. § 1348 (2018).

215. There are, once again, possible civil sanctions, likely not under Rule 10b-5 but under Reg FD, which requires prompt public disclosure after inadvertent private dissemination of information on behalf of an issuer to, among others, broker-dealers, investment companies, or shareholders likely to trade. *See* Regulation FD, 17 C.F.R. §§ 243.100-103 (2020).

216. *Cf. Rehaif*, 139 S. Ct. at 2196 (requiring knowledge of the status that made it unlawful for the defendant to possess a firearm).

217. *See infra* note 223 and accompanying text.

218. *Cf.* SEC v. Cuban, 620 F.3d 551, 557 (5th Cir. 2010) (probing whether the defendant, Mark Cuban, understood that he could not trade, in addition to his understanding that he had to keep information confidential).

219. *See* Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011).

ing whether this is so.[220] Even with both actual knowledge and willful blindness, there surely will be edge cases. But these standards are far less convoluted than the willful-violation standard, and they roughly cover any insider trader who *knows what she is doing*, regardless of whether she is an expert in securities law.

2. Breach as Fraud*: Embezzlement*

Fraud under Title 18 centers the rights of the defrauded: information holders whose right to control their information's spread is seized from them by disloyal, duty-bound agents. Just as Title 18 need not graft personal benefit onto its doctrinal skeleton, so too can it refrain from stumbling into the "disclosure" constructs of 10b-5 insider trading.

As the *Blaszczak* panel and *Carpenter* Court recognized, the main parallel to the fiduciary fraud of 10b-5 insider trading is embezzlement—the "fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another."[221] That entrustment generally arises from either of the two articulations of duty in 10b-5 case law: a fiduciary duty or another duty of trust or confidence.[222] A property owner is a victim of embezzlement when his property is appropriated by one with whom he has such a relationship. Embezzlement, as a form of conversion, requires lack of authorization for use of the information.[223]

The *Carpenter* Court held that defendants' fraudulent appropriation of the *Journal*'s information-property to their own uses (that is, trading for their personal accounts) constituted embezzlement.[224] This definition of embezzlement,

220. *Cf.* United States v. Svoboda, 347 F.3d 471, 476 (2d Cir. 2003) (applying a willful-blindness or "conscious avoidance" theory to a conspiratorial plot to unlawfully use MNPI in trading).

221. Carpenter v. United States, 484 U.S. 19, 27 (1987) (quoting Grin v. Shine, 187 U.S. 181, 189 (1902)).

222. *See* 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 394 (15th ed. 1995). Neither federal judges nor the SEC need be charged with defining the scope or existence of these duties, which are creatures of state corporate and fiduciary law. *See* Brophy v. Cities Serv. Co., 70 A.2d 5, 7 (Del. Ch. 1949) ("[I]f an employee in the course of his employment acquires secret information relating to his employer's business, he occupies a position of trust and confidence toward it, analogous in most respects to that of a fiduciary, and must govern his actions accordingly."); *cf.* Bainbridge, *supra* note 102 (arguing for relying on state-law fiduciary duty in 10b-5 insider trading actions).

223. *See* 29A C.J.S. *Embezzlement* §§ 16, 24 (2020).

224. *Carpenter*, 484 U.S. at 27. Because this Note advances a theory of insider *trading*, I do not attempt to articulate a full theory of what other kinds of uses of information constitute misappropriation.

as violative of the information owner's exclusive right to use the information, covers unauthorized trading on the basis of MNPI entrusted to one's care. It should also cover unauthorized "tipping" for the insider's own purposes. This is true regardless of whether the tipper received some pecuniary or nonpecuniary "personal benefit,"[225] unless the courts define that test so broadly as to be coextensive with the "one's own use" standard.[226] Moreover, the Court has explicitly held that embezzlement is per se fraudulent,[227] meaning that executing the scheme to embezzle, subject to a jurisdictional limit, is Title 18 fraud. Because the theory requires unauthorized personal use (fraudulent conversion), it avoids implicating the main policy concern of the personal-benefit test. The embezzlement theory would do nothing to chill insiders' communications of MNPI to securities analysts or other outsiders, so long as they are making company-authorized disclosures instead of taking the information and pursuing their own interests.[228]

The underlying acquisition and use of the MNPI must still be fraudulent, rather than merely wrongful. Consider a plotline from the Showtime television series *Billions*[229]: McKayla, a flight attendant, overhears higher-ups from the investment bank Spartan Ives discussing an upcoming merger plan; she then buys shares of the target company and makes a profit of $24,000. If this had been a commercial flight and McKayla had been an employee of an airline, it seems unlikely that her trading would constitute a fraud. Even though she knew the information was not meant to be leaked to her, she used no deceptive device to obtain it, and she never had it entrusted to her care, which would be

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225. In addition to *Blaszczak* and *Carpenter*, see 29A C.J.S. *Embezzlement* § 16 (2020), noting that "personal gain or benefit is not necessarily an element of the offense" and that the test is "unauthorized assumption and exercise of dominion or right of ownership." *See also id.* § 17 ("If money or property is entrusted to the recipient for a certain purpose the recipient may be guilty of embezzlement by using it for another purpose, even though the accused derives no direct personal benefit." (footnote omitted)); 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 19.6(b) & n.10 (3d ed. 2018) (giving substantially the same rule and collecting cases).

226. *See supra* notes 127-134 and accompanying text.

227. Grin v. Shine, 187 U.S. 181, 189 (1902) ("[I]t is impossible for a person to embezzle the money of another without committing a fraud upon him."); *see also* Int'l News Serv. v. Associated Press, 248 U.S. 215, 242 (1918) (characterizing a misappropriation of quasi-property as a "fraud upon complainant's rights" that "substitutes misappropriation in the place of misrepresentation"); Lightner Mining Co. v. Lane, 120 P. 771, 776 (Cal. 1911) ("Where one betrays a trust and appropriates trust property to his own use, it is called a fraud.").

228. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 8.05 cmt. b (AM. LAW INST. 2006) ("An agent who has possession of property of the principal has a duty to use it only on the principal's behalf, unless the principal consents to such use.").

229. *Billions: Optimal Play* (Showtime television broadcast Mar. 5, 2017).

necessary for the embezzlement theory. State property law might have something to say about who is entitled to profit from the information,[230] but federal fraud law does not.[231] If, however, McKayla worked on a Spartan Ives private jet and was an employee of the bank, she might have had the information-property entrusted to her within the scope of her duties. Her conduct would then be akin to a bank teller pocketing cash at her post.[232] Trading on the information would be embezzlement and thus criminal insider trading under Title 18.

Embezzlement resembles the misappropriation theory, but it can explain and remedy some of the confusion surrounding misappropriation under 10b-5. In addition to omitting any personal-benefit requirement,[233] it may also be able to solve the stubborn puzzle of *O'Hagan*, which treats disclosure of misconduct as a safe harbor.[234] The core wrong of embezzlement arises not from later nondisclosure of the taking, but from the breach of originally vested trust.[235] The "fraudulent" in fraudulent appropriation is meant to make embezzlement a fiduciary analog to larceny, exempting conversion with intent to return or with claim of genuine right.[236] It does not follow that a fiduciary's notification of the principal immunizes the offender. Thus, it is not clear that the defendant in *SEC v. Rocklage* would defeat a Title 18 fraud charge by disclosing her trades to her husband, the information source.[237]

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230. *See* Epstein, *supra* note 96, at 1506.

231. *But see* Coffee, *supra* note 5, at 299-306 (proposing that under the logic of *O'Hagan*, the SEC might also claim a duty to disclose to a source who "lost" information). Even without a duty of trust and confidence, a trader may fraudulently obtain information in other ways. *Cf.* SEC v. Dorozhko, 574 F.3d 42, 50-51 (2d Cir. 2009) (remanding a 10b-5 case for a determination of whether a computer hacker's means of obtaining information was "deceptive").

232. *Compare* 29A C.J.S. *Embezzlement* § 26 (2020) ("[A]n ordinary contractual relationship [is not] sufficient to confer fiduciary or confidential status."), *with id.* § 27 (characterizing employer-employee relationships as entailing a duty of "trust and confidence").

233. For a discussion on the possible nonexistence of a personal-benefit requirement under the misappropriation theory, see *supra* notes 124-128 and accompanying text.

234. *See supra* Section I.B.2.b.

235. *See* Epstein, *supra* note 96, at 1501-03 (explaining misappropriation as a violation of contractual duties by "using the information against the principal"). Counterintuitively, the fraud-as-nondisclosure concept forces courts to search for a duty to disclose based on the earlier breach of trust. *Cf.* United States v. Newman, 664 F.2d 12, 19 (2d Cir. 1981) (counseling against "bootstrap[ping] . . . an obligation to disclose in every breach of fiduciary duty").

236. *See* 3 LAFAVE, *supra* note 225, § 19.6(f); *see also* State v. Green, 861 P.2d 954, 958-59 (N.M. 1993) (describing "fraudulently" as with "inten[t] to deceive or cheat" and explaining that it serves to distinguish simple conversion).

237. *See supra* notes 114-116 and accompanying text. The *Carpenter* Court did note that the insider "pretended to perform his duty of safeguarding" the information and "played the role of

A pure embezzlement theory, therefore, might be able to avoid the *O'Hagan* trap. On this view, criminal embezzlement implies no cleansing-by-disclosure defense; if a bank teller were to leave an "I'm taking the money" note on her way out the front door, she would still be guilty of embezzlement. Such criminal fraud is distinguished from fraud under the *securities laws*, which generally requires a misstatement or silence in the face of a duty to disclose.[238] The rationale for that narrower scope—fear of a de facto federal corporation law displacing state fiduciary suits[239]—does not apply to the Criminal Code. Accordingly, at least two circuit court cases on § 1348, while not addressing cleansing-by-disclosure directly, have held that misrepresentations and omissions are not the only vehicles for § 1348 schemes to defraud.[240]

The embezzlement framework also helps to resolve another live question—whether the information must actually change the insider's trading behavior. Rule 10b5-1 purports to define trading "on the basis of" MNPI as mere "aware[ness]" of the information.[241] According to the SEC, an insider commits securities fraud by trading and remaining silent while aware of MNPI. On this view, unless the trade falls under one of the Rule's exceptions, informed insiders would generally be prohibited from trading. Courts, however, have not uniformly deferred to the SEC and are split on the question.[242] This use-versus-

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loyal employee." 484 U.S. 19, 28 (1987). But it is not clear from *Carpenter* that disclosure alone has the same legal effect as consent, which does serve as a defense to embezzlement. *See* 29A C.J.S. *Embezzlement* § 24 (2020).

238. *See supra* note 50. *Santa Fe Industries, Inc. v. Green*, the case typically cited for this proposition, left open the broader category of "deception," which might be thought to cover plain embezzlement. *See* 430 U.S. 462, 476 (1977) (declining to extend 10b-5 liability to "a breach of fiduciary duty . . . without any deception, misrepresentation, or nondisclosure"); *cf.* Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 158 (2008) (rejecting a requirement for a "specific oral or written statement" because conduct itself can be deceptive). The *O'Hagan* Court, however, took the path of nondisclosure. *See* United States v. O'Hagan, 521 U.S. 642, 654-55 (1996) (citing Carpenter v. United States, 484 U.S. 19, 25-27 (1987), for embezzlement, but then citing *Santa Fe*, 430 U.S. at 476, to approve the misappropriation theory as "deception through nondisclosure").

239. *See supra* note 51.

240. United States v. Coscia, 866 F.3d 782, 796 (7th Cir. 2017); United States v. Mahaffy, 693 F.3d 113, 125 (2d Cir. 2012); *see also* Moser & Weitz, *supra* note 24, at 119 n.27 (collecting district court cases).

241. 17 C.F.R. § 240.10b5-1(b) (2020).

242. *See, e.g.*, United States v. Smith, 155 F.3d 1051 (9th Cir. 1998); SEC v. Adler, 137 F.3d 1325 (11th Cir. 1998); United States v. Teicher, 987 F.2d 112 (2d Cir. 1993); *see also* Andrew Verstein, *Mixed Motives Insider Trading*, 106 IOWA L. REV. 1253, 1261-65 (2021) (discussing the split). This issue was the catalyst for Justice Scalia's rebuke of administrative deference on rules with criminal applications. *See infra* note 340.

awareness debate seems intractable under Rule 10b-5 because the classical and misappropriation theories point in different directions.[243] On the one hand, the trading counterparty would always want to know when the insider is "aware" of MNPI.[244] On the other, the information source loses exclusive control only when the insider changes his conduct on the basis of the principal's information.[245] An embezzlement theory, by defining the offense as a crime against the information owner, suggests that awareness is not enough. The insider must actually *appropriate* information to her own *use*, implying that the information is a but-for cause of the insider's pattern of trading behavior.[246]

3. Multiparty Liability*: Conspiracy and Complicity*

Perhaps the most straightforward contribution of the Title 18 theory is that it unscrambles the jumbled doctrine of tipper-tippee liability. Because a criminal violation occurs without regard to whether the *trader* is the one with the duty to disclose or abstain, there is no need to define "tippers" (who transfer a duty to disclose) and "tippees" (who inherit it). There is also no need to invent a standard of sufficient knowledge for a duty to transfer and result in liability.

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243. *See* Verstein, *supra* note 242, at 1271-72.

244. *See* Donna M. Nagy, *The "Possession vs. Use" Debate in the Context of Securities Trading by Traditional Insiders: Why Silence Can Never Be Golden*, 67 U. CIN. L. REV. 1129, 1132 (1999) (arguing that "applying . . . a use test to securities standing by so-called 'traditional insiders' . . . stands the classical theory of insider trading liability on its head" (footnote omitted)).

245. *Cf.* Allan Horwich, *Possession Versus Use: Is There a Causation Element in the Prohibition on Insider Trading?*, 52 BUS. LAW. 1235, 1242-45 (1997) (arguing that the common-law prohibition requires actual use).

246. The supposed drawback of the "use" standard is that it allows insiders to profit by following through on a trading plan when desirable but strategically abstaining from trading when MNPI indicates that they should do so. *See* Jesse M. Fried, *Insider Abstention*, 113 YALE L.J. 455, 484-86 (2003); *cf.* 17 C.F.R. § 240.10b5-1(c) (2020) (granting an analogous safe harbor from Rule 10b-5). But it is not clear that such a course of conduct would be outside the umbrella of Title 18 fraud. Our hypothetical strategic insider (1) appropriates her principal's information to (2) alter her pattern of securities trading. Perhaps 10b-5's "disclose or abstain" command implicitly exempts abstention, *see* Chiarella v. United States, 445 U.S. 222, 227 (1980), but this Section has argued that Title 18 imposes no such command. Perhaps, because the purchases and sales are themselves lawful without regard to the abstentions, this fraud is not "in connection with the purchase or sale of any security," 17 C.F.R. § 240.10b-5 (2020), but Title 18 securities fraud has no such "purchase or sale" requirement, 18 U.S.C. § 1348 (2018); *see infra* note 259. Of course, public enforcement may be more difficult as subtle changes in trading patterns become more challenging to detect. Nothing prevents private parties from imposing prophylactic trading restrictions to stop more covert forms of misappropriation. *See infra* notes 359-361 and accompanying text.

Under federal criminal law, principal and accomplice liability are two routes to criminal responsibility for a single substantive offense.[247] Conspiracy, by contrast, is a separate offense. Complicity will likely do most of the work to sweep in tipper-tippee relationships, though conspiracy law also imposes additional sanctions for agreements in furtherance of fraudulent insider trading.[248] To be held culpable as an accomplice, one must both have the requisite mental state and actually aid in the commission of a crime. Under the widely used *Peoni* standard, the accessory must "wish[] to bring about" the crime and "seek by his action to make it succeed."[249] Assuming the requisite intent, many possible contributions to the crime are sufficient, and no individual needs to complete all the elements of the offense single-handedly.[250] For joint perpetrations, courts need not identify one party as "principal" and another as "accomplice" because confederates together complete an offense against the United States, and they are treated identically by the Federal Criminal Code.[251]

Applying these vehicles of liability to insider trading produces results that are generally consistent with the intuitive levels of knowledge courts have tried to demand for tipper and tippee culpability.[252] Roughly, the tipper must know of a duty of trust or confidence and (given knowledge of subsequent trading by the tippee) that he is appropriating the information without authorization. The tippee must believe that she is contributing to misappropriation—either by executing the trade or by tipping someone else who she believes will—via knowledge of the insider's duty to the information source.[253] At bottom, there is no need to designate particular individuals as tippers or tippees and to craft knowledge standards tailored to all the possible permutations of tipping from insider to end trader. The only important questions, intent and contribution, apply to all actors.

Conspiracy has a role to play as well. In general, conspiracy requires a knowing agreement by all relevant parties with the specific intent to complete

247. 18 U.S.C. § 2 (2018). I omit *Pinkerton* liability, whereby defendants may be directly liable for the crimes of their co-conspirators. *See* Pinkerton v. United States, 328 U.S. 640, 646-47 (1946).

248. *See supra* note 119.

249. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938); *see* Kate Stith, *No Entrenchment: Thomas on the Hobbs Act, the* Ocasio *Mess, and the Vagueness Doctrine*, 127 YALE L.J.F. 233, 237 n.19 (2017) (explaining the standard and noting its adoption by all the circuits).

250. *See* Rosemond v. United States, 572 U.S. 65, 73-74, 74 n.6 (2014).

251. 18 U.S.C. § 2 (2018).

252. *See supra* note 136 and accompanying text.

253. This seems to align with the *Newman* court's solution to the "remote tippee problem," except with knowledge of misappropriation, not knowledge of personal benefit. *See id.*

the substantive offense.[254] Tippers and tippees who agree to appropriate and trade are precisely whom conspiracy covers,[255] especially when the parties continually work to further an ongoing scheme.

4. Scope*: Jurisdictional Hooks*

Each of the Title 18 fraud statutes has its own jurisdictional hook to situate it within Congress's constitutional powers.[256] Mail fraud requires use of the mails, and wire fraud requires an interstate wire transmission.[257] The § 1348 fraud statute requires a "connection with" a public-company security or a commodity future.[258]

The Title 18 prohibitions allow for insider traders, so long as they satisfy one of the jurisdictional requirements, to be convicted regardless of the asset class in which they trade. While § 1348 is asset-specific—covering commodity futures and public-company securities[259]—the mail- and wire-fraud statutes are not. The controlling jurisdictional test for mail and wire fraud is liberal. The use of the mails or wires need only be "incident to an essential part of the

254. *See* Ocasio v. United States, 136 S. Ct. 1423, 1429 (2016).

255. Scholars have previously noted that tipper-tippee liability is effectively a substitute for the criminal regime of liability for multiple parties. *See* Miriam H. Baer, *Insider Trading's Legality Problem*, 127 YALE L.J.F. 129, 129-31 (2017). The key innovation of the Title 18 approach is that without the classical theory, there is no longer a need to define "tippee" at all, because we need not define someone who inherits a duty to disclose MNPI to a trading counterparty. *See supra* notes 118-123 and accompanying text.

256. *See* U.S. CONST. art. I, § 8, cls. 3, 7 (enumerating the Commerce Power and Postal Power).

257. 18 U.S.C. §§ 1341, 1343 (2018).

258. 18 U.S.C. § 1348 (2018).

259. Its scope is broader than Rule 10b-5 in some senses and narrower in others. Section 1348 excludes exempt securities and the securities of private issuers, but it adds commodity futures. It also notably broadens the nexus language to a "connection with any" security (rather than a "connection with the *purchase or sale* of any security"), suggesting that while trading is a sufficient connection, it may not be a necessary one. While extensions to areas other than trading are necessarily outside the scope of this Note, one reasonable corollary is that § 1348 bans what Andrew Verstein has called "insider giving": the informed donation of overvalued stock, which is clearly misappropriation of the company's information. Andrew Verstein, *The Problem with Insider Giving*, CLS BLUE SKY BLOG (Aug. 31, 2020), https://clsbluesky.law.columbia.edu/2020/08/31/the-problem-with-insider-giving [https://perma.cc/RHB7-JG6S]. For these gifts, the inevitable later "purchase or sale" might be too remote to form a sufficient 10b-5 "connection." *See* 17 C.F.R. § 240.10b-5 (2020).

scheme" or a "step in the plot,"[260] which roughly means that the use of the hook is foreseeable given the contours of the scheme to defraud.[261]

Carpenter is instructive here. Nothing about its mail-fraud holding relied on the fact that defendants ultimately traded assets that legally qualified as securities. Nor was the relevant interest of the victims any kind of harm to securities markets—or, for that matter, to the integrity of the nation's postal system. Instead, the harm was that the *Journal* lost its exclusive use of information.[262] The *Journal* won over readers in part by promising to provide stock tips it viewed as beneficial to investors. But if its employees traded on the information in advance, otherwise loyal subscribers could reasonably question whether the paper provided information not already priced into the recommended stocks, as well as doubt the impartiality of the *Journal*'s recommendations. And, of course, if a corporate information-owner *itself* wished to trade on proprietary information, the harms would be even more direct. Where an insider trades ahead of the information source, his front-running drives up the principal's costs or cuts into its gains; it also risks leaking the principal's plans to the market at large.[263]

Public enforcement may be more or less important in each of these markets,[264] and Congress is free to criminalize behavior in only specific domains.[265]

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260. Schmuck v. United States, 489 U.S. 705, 710-11 (1989) (quoting Badders v. United States, 240 U.S. 391, 394 (1916)). In *O'Hagan*, Justice Thomas made explicit that he was willing to consider the mail-fraud statute broader than the section 10(b) ban on securities fraud. United States v. O'Hagan, 521 U.S. 642, 700-01 (1997) (Thomas, J., concurring in the judgment in part and dissenting in part).

261. *See supra* note 214. Trading in a public-company security or commodity future seems certain to trigger § 1348's jurisdictional hook, given that the degree of necessary connection is less strict than that already ratified by the Court for Rule 10b-5. *See O'Hagan*, 521 U.S. at 653; *supra* note 259. But it isn't obvious whether § 1348, whose jurisdictional language is *not* the same as the mail- and wire-fraud statutes, only requires securities or commodity futures as a "step in the plot," or whether it demands something more. In the 10b-5 context, the Court has interpreted "in connection with" to require more than merely any "common-law fraud that happens to involve securities." SEC v. Zandford, 535 U.S. 813, 820 (2002).

262. Carpenter v. United States, 484 U.S. 19, 26-27 (1987).

263. *See supra* notes 149-151 and accompanying text.

264. *See* Verstein, *supra* note 142, at 56-58. Securities and commodity-futures markets in particular may demand special enforcement attention. The commonality between them, besides heavy regulation, is trading on public exchanges. Listing on a national securities exchange is itself a trigger for public-company status, *see* Exchange Act § 12, 15 U.S.C. § 78*l* (2018), though a public company need not necessarily trade on an exchange. Commodity futures must generally be traded on a board of trade designated by the Commodity Futures Trading Commission. *See* 7 U.S.C. § 6(a) (2018). It makes sense that insider trading could be easier when identities are shielded by anonymous trading markets, so public enforcement could be

But the underlying *wrongful act* is the same, subject only to jurisdictional constraints. Congress has power over the mails and interstate wires; it has exercised that power, with approval from the Court, to punish frauds that happen to implicate the mails or wires. Just as wire fraud does not import telecommunications-law principles to define what constitutes fraud, neither do tenets of securities regulation set the non-jurisdictional contours of Title 18 securities fraud.

D. Rounding Out the Offense

Section II.C covered the doctrinal improvements made likely by the Title 18 model of insider trading, specifically by cataloging the parallel components to those of the 10b-5 theory discussed in Section II.B. This Section briefly outlines the remainder of the offense. Table 2 provides an overview of the elements of the Title 18 insider trading theory, the first three of which were covered in Section II.C above, and the remaining two of which I turn to here. Those two—materiality and property—serve as limiting principles, stemming from common law,[266] concerning the scope of the "scheme to defraud."

Section II.D.1 highlights the differences between the materiality analysis of Title 18 and that of Rule 10b-5. Section II.D.2 explores the issue of whether confidential information is "property" that can be embezzled when it is owned by the government, rather than a private entity. That issue split the *Blaszczak* panel, and it returns to the Second Circuit after remand by the Supreme Court.

particularly warranted in that area. But that fact should not preclude the government from applying general fraud statutes when embezzlers opt to trade in some other asset class.

265. Contrast the fraud statutes with the Hobbs Act, which criminalizes robbery and extortion up to the limits of Congress's Commerce Power. 18 U.S.C. § 1951 (2018); *see* Stirone v. United States, 361 U.S. 212, 215 (1960).

266. In this sense, they are perhaps best thought of as sub-elements of the scheme to defraud. *See* Neder v. United States, 527 U.S. 1, 21 (1997) (stating materiality as a requirement of common-law fraud); McNally v. United States, 483 U.S. 350, 358 (1987) (specifying property rights as the necessary target of common-law fraud). For honest-services fraud and the congressional repudiation of *McNally*, however, see *infra* Section II.D.2.

TABLE 2.
ELEMENTS OF THE TITLE 18 THEORY OF INSIDER TRADING

Element	General Rule	Application
Jurisdiction	"[I]ncident to an essential part of the scheme" *Schmuck*	Scheme involves use of mails, wires, or securities/commodity-futures markets
Knowledge	Knowing execution § 1348 Knowledge of fraud §§ 1341, 1343	Knowledge of entrustment and of appropriation
Scheme to Defraud	Embezzlement *Carpenter*, *Blaszczak*	Duty of trust or confidence and appropriation to one's own use
Materiality[267]	"[N]atural tendency to influence" *Neder*	Material *deception*, not material information
Of Property[268]	Confidential information *Carpenter*, *Blaszczak*, *Cleveland*, *Kelly*	Information appropriated is property in hands of information holder

1. Materiality

Title 18 fraud and 10b-5 fraud both generally include materiality elements, but their requirements differ in important ways. Because *Chiarella*'s classical theory relies on an omission to a trading counterparty, the relevant object of 10b-5 materiality analysis is the information kept private—hence, "material nonpublic information" omitted from the trader's disclosures.[269] The securities-law analysis centers the reasonable investor and asks whether the full truth would "significantly alter[] the 'total mix' of information made available" to

267. *But see infra* notes 278-281 and accompanying text (questioning whether embezzlement has a materiality element).

268. *But see* 18 U.S.C. § 1346 (2018); Skilling v. United States, 561 U.S. 358, 404 (2010); *infra* Section II.D.2 (discussing honest-services fraud).

269. *See, e.g.*, Dirks v. SEC, 463 U.S. 646, 648 (1983).

him.[270] Courts look to, for example, quantitative measures of the extent to which a misrepresentation affected a company's bottom line[271] and to event studies, which aim to measure the market impact of the revelation of the truth.[272] They have also swept into the definition of "material" lies about the transaction process, rather than about the underlying security.[273]

Under the Title 18 theory, in contrast, the fraud is not on the trading counterparty, but on the information owner.[274] It is the deception of *her* that the government must show is material. In general, as articulated in *Neder v. United States*, material deception implies "a natural tendency to influence" its target.[275] A related concept, which circuit courts have tied to the common law, is that fraud requires more than just mere inducement of a transaction;[276] it instead requires deception with respect to an "essential element of the bargain."[277]

It is not clear precisely how materiality analysis should factor into an embezzlement theory of fraud. The Court has framed embezzlement as per se fraudulent, without discussion of a materiality element, but it has also charac-

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270. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); *see also* Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (adopting the *TSC Industries* standard for Rule 10b-5).

271. *See* Litwin v. Blackstone Group, L.P., 634 F.3d 706 (2d Cir. 2011); SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 19, 1999).

272. *See, e.g.*, *In re* Vivendi, S.A. Sec. Litig., 838 F.3d 223, 253 (2d Cir. 2016). For an overview of some of the constraints facing this methodology, see Jill E. Fisch, Jonah B. Gelbach & Jonathan Klick, *The Logic and Limits of Event Studies in Securities Fraud Litigation*, 96 TEX. L. REV. 553 (2018).

273. The highest-profile example is *United States v. Litvak*, in which a bond trader's statements as to a price *previously* paid for a security were held to be within the potential ambit of materiality. 808 F.3d 160 (2d Cir. 2015).

274. In practice, the misappropriated information will likely be material in the securities-law sense of moving the stock price. *But see* Wendy Gerwick Couture, *Criminal Securities Fraud and the Lower Materiality Standard*, 41 SEC. REG. L.J. 77, 84 (2013) (arguing that since immaterial information can move the market, the materiality requirement of § 1348 may set a lower bar).

275. 527 U.S. 1, 16 (1999) (quoting United States v. Gaudin, 515 U.S. 506, 509 (1995)).

276. *See, e.g.*, United States v. Shellef, 507 F.3d 82, 108 (2d Cir. 2007) (holding that a mere tendency to induce a transaction is not enough).

277. United States v. Schwartz, 924 F.2d 410, 421 (2d Cir. 1991); *see* United States v. Kelerchian, 937 F.3d 895, 912-13 (7th Cir. 2019) (citing the *Schwartz-Shellef* rule); United States v. Takhalov, 827 F.3d 1307, 1312-15 (11th Cir. 2016) (citing the *Schwartz-Shellef* rule and drawing analogies for when the rule would or would not be satisfied); *cf.* United States v. Weimert, 819 F.3d 351, 357-58 (7th Cir. 2016) (noting that even though lies about negotiating positions are "surely material in the sense that [they are] capable of influencing another party's decisions," they are nevertheless *not* material under the wire-fraud statute because of market expectations that "negotiating positions" are "distinct from facts and promises about future behavior").

terized fraud as requiring a materiality element.[278] Ways to reconcile these holdings include (1) embezzlement has a materiality element, but *Carpenter* had no need to discuss it because the deception in that case was material,[279] or (2) *Neder*'s holding that the Title 18 fraud statutes have a materiality element does not apply to embezzlement, which was not at issue in that case.[280] Either way, materiality seems unlikely to pose a serious obstacle to cases of insider trading as embezzlement. The tainted "bargain" in insider trading is between the principal and the duty-bound agent. Appropriating confidential information seems inherently contrary to the duty of trust and confidence.[281]

2. *Of Property*

Perhaps the most active area of current debate in the fraud statutes is the question of what a deception must target in order to qualify as fraud. Through the 1980s, Assistant U.S. Attorneys would charge public officials and private-sector employees with fraud for dishonest performance of their duties.[282] In *McNally v. United States*, the Court rejected the theory and held that Title 18 schemes to defraud had to be schemes to defraud victims *of property*.[283] If Congress wished to go beyond the common-law definition of fraud as deprivation of property, it would have to "speak more clearly than it ha[d]."[284] Congress took up the invitation the next year and defined "scheme to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."[285] But to avoid a constitutional-vagueness problem, the Court subsequently narrowed that statute in its review of the prosecution of Enron's CEO, *Skilling v. United States*, "par[ing]" honest-services fraud to its "core" of bribes

278. *See supra* notes 227, 266; *see also* Michael R. Dreeben, *Insider Trading and Intangible Rights: The Redefinition of the Mail Fraud Statute*, 26 AM. CRIM. L. REV. 181, 213 (1988) (noting that *Carpenter* contained no materiality test).

279. Specifically, the appropriation of the *Wall Street Journal*'s prepublication stock picks. Carpenter v. United States, 484 U.S. 19, 23-24 (1987).

280. *Neder* speaks in the language of "misrepresentation or concealment of material fact." 527 U.S. 1, 22 (1999) (emphasis omitted).

281. *Cf.* Prakash, *supra* note 6, at 1543 & n.246 (characterizing the issue as whether the deception is "material to the question of whether the employment relationship should continue").

282. *See* McNally v. United States, 483 U.S. 350, 358 (1987) (citing United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir. 1984); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973)).

283. *Id.* at 358-60.

284. *Id.* at 360.

285. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4181, 4508 (codified at 18 U.S.C. § 1346 (2018)).

and kickbacks.[286] That limited definition of honest-services fraud would exclude prosecutions of agents vested with discretionary authority to disclose information to market participants,[287] even if they exercise that authority in a self-interested manner.[288]

Importantly, the property requirement limits what constitutes fraud on the government more than it narrows the scope of fraud on private entities.[289] This issue split the *Blaszczak* panel: Did the Centers for Medicare and Medicaid Services have a property right in its predecisional regulatory information?[290] The question is complicated. The basic rule comes from *Cleveland v. United States*, which held that the object of the fraud must be "property in the hands of the victim"[291] and that government regulatory interests—there, video poker licenses issued by the state—did not qualify as property because they were a product of "the Government's role as sovereign, not as property holder."[292] And after *Blaszczak* came down, the Supreme Court in *Kelly v. United States*, the "Bridgegate" case, clarified that it is not enough for a defendant to obtain control of property that is "incidental" to a scheme to control a government's regulatory decision.[293] When the co-conspirators in that case decided that it was "[t]ime for some traffic problems in Fort Lee,"[294] they were usurping the government's regulatory power to decide the alignment of traffic lanes, not its economic property.

In January, at the government's request, the Supreme Court granted certiorari in *Blaszczak*, vacated the opinion, and remanded the case for reconsidera-

286. 561 U.S. 358, 404 (2010).

287. Reg FD limits the situations in which this can arise. *See supra* notes 56, 215.

288. *See Skilling*, 561 U.S. at 409-10 (rejecting a theory of honest-services fraud as undisclosed self-dealing). There are other possible theories, notably "intentional[] misappl[ication]" of property. 18 U.S.C. § 666 (2018) (covering offenses against federally funded organizations). In *Kelly v. United States*, the Court overturned a § 666 conviction, for which the government relied on intentional misapplication, on the grounds that the government had to prove "fraud." 140 S. Ct. 1565, 1568-69, 1571-72 (2020). Since the *Kelly* Court did not mention the intentional-misapplication theory, the scope of that provision remains unclear.

289. *See, e.g.*, United States v. Al Hedaithy, 392 F.3d 580, 603 (3d Cir. 2004) (explaining that private entities have a broad property "right to control").

290. United States v. Blaszczak, 947 F.3d 19, 30-34 (2d Cir. 2019), *vacated*, No. 20-5649, 2021 WL 78043 (U.S. Jan. 11, 2021) (mem.).

291. 531 U.S. 12, 15 (2000).

292. *Id.* at 24.

293. 140 S. Ct. 1565, 1573 (2020).

294. *Id.* at 1569.

tion in light of *Kelly*.[295] On remand, pursuant to a new position of the Solicitor General's Office, the government confessed error on the "property" question and accordingly supported reversal of the Title 18 fraud counts.[296] But while some of the Second Circuit's logic is undeniably suspect under *Kelly*,[297] it is not clear that the case alters the basic question posed by *Cleveland*. On the one hand, the allocation of regulatory information could itself be thought of as a regulatory decision;[298] the government decides "who gets to know," and the information's value depends on the subsequent exercise of government power.[299] On this view, an employee front-running a government purchase in a commodity-futures market would run afoul of § 1348, but trading ahead of a regulatory announcement would be outside the law's scope. On the other hand, predecisional information could be viewed as analytically distinct from the underlying exercise of sovereign power, just as a company has a property right in the exclusive use of its nonpublic business information despite a legal obligation to later file quarterly reports.[300] That makes predecisional information different from the issuance of video poker licenses or the alignment of traffic lanes on public roads, which are sovereign decisions the government cannot sell to a private party without losing its end sovereign power altogether.[301] Appropriating valuable government information, on this view, is no different from embezzling public funds.

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295. *See Blaszczak*, 2021 WL 78043; Memorandum for the United States, Olan v. United States, No. 20-306 (U.S. Nov. 24, 2020). *Olan* was the principal case name on the petition to the Supreme Court.

296. Brief on Remand for the United States of America at 7-9, United States v. Blaszczak, No. 18-2811 (2d Cir. Apr. 2, 2021).

297. The *Blaszczak* majority catalogued several economic harms, including resources devoted to preserving confidentiality and responding to lobbying efforts. United States v. Blaszczak, 947 F.3d 19, 33 (2d Cir. 2019), *vacated*, 2021 WL 78043. But in *Kelly*, the Court rejected the government's argument that the Port Authority was defrauded of property via the expense of paying extra toll booth collectors, because the cost of labor was "incidental" to the regulatory object of the scheme. *See supra* notes 293-294 and accompanying text.

298. Petition for a Writ of Certiorari at 15, *Olan*, No. 20-306 (U.S. Sept. 4, 2020).

299. *See Blaszczak*, 947 F.3d at 48 (Kearse, J., dissenting); *see also* Eugene Volokh, *Journalists Might Be Felons for Publishing Leaked Governmental "Predecisional Information*,*"* REASON (Jan. 27, 2020, 11:43 AM), https://reason.com/volokh/2020/01/27/journalists-might-be-felons-for-publishing-leaked-governmental-predecisional-information [https://perma.cc/U5BL-BNNB] (raising possible First Amendment concerns when the property is regulatory information and the misappropriation is public disclosure, rather than trading).

300. *See* Exchange Act §§ 13(a)(2), 15(d)(1), 15 U.S.C. §§ 78m(a)(2), 78o(d)(1) (2018).

301. *Cf. Cleveland*, 531 U.S. at 23-24 ("[W]hile a patent holder may sell her patent, the State may not sell its licensing authority." (citation omitted)).

The property requirement is also relevant to the hot-button issue of congressional insider trading.[302] By statute, for the purposes of insider trading, congresspersons and Hill staff owe a duty of trust and confidence to Congress, to the government, and to the people.[303] But the object of the fraud must still be property under the *Cleveland-Kelly* framework.

If the property theory fails, an honest-services theory might still be available for prosecuting government officials who profit off nonpublic information. Because *Skilling* limited prosecutions for honest-services fraud to bribes and kickbacks, it seems unlikely that direct trading on information, without the intervention of an outsider, could qualify. But receiving *compensation* for a tip seems like as a quintessential bribe, a quid pro quo for the public official to act in violation of the official's lawful duty.[304] Criminal sanctions would therefore still be available.

III. INSIDER TRADING AS FEDERAL CRIME

Part II showed that the major axes of insider trading liability, many of which have suffered from serious analytical gaps, find close analogs in the fraud statutes of the Federal Criminal Code. Each element of Title 18 liability brings with it the potential for more internal coherence, more explanatory power, and a longer tenure of underlying judicial precedent.

This Part steps back to look at improvements made possible by the theory as a whole. It is no coincidence, I argue, that the Title 18 elements offer a marked improvement over those of the 10b-5 theory, despite strikingly similar underlying texts. Some of the difference is a product of the tension in regulatory crimes generally, which struggle to reconcile broad principles of administrative law with the brutal realities of imprisoning defendants for violations of agency rules. But most of the disparity has to do with the approach that the

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302. *See* Nicholas Fandos & Katie Benner, *Justice Dept. Ends Stock Trade Inquiry into Richard Burr Without Charges*, N.Y. TIMES (Jan. 19, 2021), https://www.nytimes.com/2021/01/19/us/politics/richard-burr-stock-trades-investigation.html [https://perma.cc/6E43-NKP6].

303. Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 4, 126 Stat. 291, 292 (codified at 15 U.S.C. § 78u-1(g) (2018)). It is not entirely clear if this statute per se applies to Title 18—the statutory language merely reads "including section 10(b) and Rule 10b-5."

304. *See* 18 U.S.C. § 201(b)(1)(C), (b)(2)(C) (2018). There is also the possibility of prosecuting a bribery theory as a standalone charge, which I do not discuss here. Bribery theories could be possible under the Hobbs Act, 18 U.S.C. § 1951 (2018), the federal bribery-and-gratuity statute, 18 U.S.C. § 201 (2018), and the federal-programs-fraud statute, 18 U.S.C. § 666 (2018).

Supreme Court and the Second Circuit have historically taken to interpret the securities laws. Regardless of one's stance on the Court's securities-regulation jurisprudence generally, these modes of analysis become at least questionable as a basis for criminal liability. Rescuing insider trading—disproportionately charged as a criminal infraction[305]—from this paradigm is the central contribution of the Title 18 theory. And it is why, while the doctrinal provisions discussed in Section II.C each marginally expand the scope of liability for insider trading defendants, the Title 18 theory protects defendants far more in the long run from the judicial adventurism of Rule 10b-5 that could just as easily contract liability today, yet drastically expand it tomorrow.

Section III.A spells out the basic constraint. Title 18, by tethering liability to common-law fraud, displaces the securities field's affinity for expansive criminalization by judicial fiat. Section III.B outlines a concrete mechanism—the rule of lenity—through which Title 18 can protect defendants from prosecutorial overreach. In the criminal 10b-5 context, in contrast, lenity may be effectively unavailable. Finally, Section III.C evaluates the most severe weakness in Title 18's safeguards. Specifically, advancing a Title 18 theory does nothing to repeal, replace, or restrict parallel enforcement under Rule 10b-5.

A. From "Judicial Oaks" to the Ban on Common-Law Crimes

In *Blue Chip Stamps v. Manor Drug Stores*, Justice Rehnquist famously remarked that the Court's case law under Rule 10b-5 constituted "a judicial oak which has grown from little more than a legislative acorn."[306] He posited that the Court may well be justified in interpreting the Rule such that its "growth" is consistent with legislative and administrative intent—and he explicitly accepted that the Court should weigh "policy considerations" as it "flesh[es] out the portions of the law" unarticulated by Congress or the SEC.[307]

This purposivist, policy-minded framework has become black-letter law of securities regulation.[308] Courts reflexively repeat that Rule 10b-5 should be construed "not technically and restrictively, but flexibly to effectuate its remedi-

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305. *See* Michael Perino, *Real Insider Trading*, 77 WASH. & LEE L. REV. 1647, 1682 & tbl.1 (2020) (breaking down enforcement into criminal, civil, and administrative actions).

306. 421 U.S. 723, 737 (1975).

307. *Id.*

308. For the historical argument that early purposivism survived the Court's later textualist turn, see generally A.C. Pritchard & Robert B. Thompson, *Securities Law in the Sixties: The Supreme Court, the Second Circuit, and the Triumph of Purpose over Text*, 94 NOTRE DAME L. REV. 371 (2018).

al purposes."[309] When insiders systematically had a trading advantage over their counterparties, it was only fair to impose on them a duty to disclose.[310] When they tipped outsiders to their personal advantage, it only made sense to ensure that tippees inherited that duty—but to craft the duty in a way that would exclude altruists like whistleblowers.[311] The courts could not allow tippees without sufficient knowledge to suffer criminal sanctions;[312] they had to let lies about past transactions be material in order to protect investors;[313] they could not require knowledge of the law for criminal conviction or else risk defeating the law's function.[314] And so the wheel turns.

This is not to say that all of these rules are necessarily bad policy or bad law. But it does mean that securities regulation has adopted a mode of adjudication that decides whether conduct should be punished ex post. As Miriam Baer persuasively argues,[315] insider trading suffers from a legality problem. When courts invent crimes in common-law fashion, they vitiate the guarantee of due process via notice of the law's prohibitions. They also usurp the legislative function, raising separation-of-powers concerns and ultimately undermining the democratic function of legislatures and judges.[316]

Federal criminal law has an explicit doctrine against crime by judicial fiat: the ban on common-law crimes. In *United States v. Hudson & Goodwin*, two centuries ago and long before *Erie* declared there is no general federal common law,[317] the Court disclaimed the authority of federal courts to fashion common-law crimes. Denying any Article III power of criminal-law creation, the Court held that "[t]he legislative authority of the Union must first make an act a

309. A Westlaw search for the precise quote and "10b-5" returns approximately 150 cases.

310. *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 (Nov. 8, 1961) ("In considering these elements under the broad language of the anti-fraud provisions we are not to be circumscribed by fine distinctions and rigid classifications.").

311. Dirks v. SEC, 463 U.S. 646, 662 (1983) ("[A] purpose of the securities laws was to eliminate 'use of inside information for personal advantage.' Thus, the test is whether the insider personally will benefit . . . ." (quoting *Cady, Roberts*, 40 S.E.C. at 912 n.15)).

312. United States v. Newman, 773 F.3d 438, 450 (2d Cir. 2014), *abrogated on other grounds by* Salman v. United States, 137 S. Ct. 420 (2016).

313. United States v. Litvak, 808 F.3d 160, 177 (2d Cir. 2015) (rejecting immateriality as "inconsistent with the 'longstanding principle enunciated by the Supreme Court that § 10(b) should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes'" (citation omitted)).

314. *See supra* Section I.B.1.

315. Baer, *supra* note 255.

316. *Id.* at 134.

317. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[318] To be sure, the federal courts have frequently interpreted criminal statutes in ways that resemble the common-law style[319]—but Title 18 case law at least sets an *objective* of fixed interpretation,[320] rather than the open judicial policymaking that has long pervaded securities doctrine. Title 18 better meets the legality test, as Baer articulates it, of "spell[ing] out, with some minimal precision, the core behavior . . . the government wishes to prohibit."[321] While the Title 18 elements are marginally more favorable to prosecutors, it is easy to imagine that a future Court—particularly one of the 1960s variety[322]—could expand the scope of securities law's prohibitions, and with it, the scope of criminal liability.

B. *From Deference to Lenity*

The corollary to the ban on common-law crimes is a reluctance among the judiciary to overbroadly interpret ambiguous criminal prohibitions. The "rule of lenity" concretizes that principle into a canon of statutory interpretation.[323] But just as securities case law has "flexibly" construed the field's prohibitions, judges may ultimately defer to the government—not the criminal defendant—in criminal 10b-5 cases.

The rule of lenity stretches back in one form or another to at least 1820, when Chief Justice Marshall explained the "rule that penal laws are to be construed strictly" per the "tenderness of the law for the rights of individuals" and "the plain principle that the power of punishment is vested in the legislative,

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318. 11 U.S. (7 Cranch) 32, 34 (1812); *see also* Whalen v. United States, 445 U.S. 684, 689 (1980) ("[W]ithin our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress.").

319. *See* Daniel C. Richman, *Defining Crime, Delegating Authority—How Different Are Administrative Crimes?* 11-12, 46-47 (Columbia Pub. Law Research Paper No. 14-680, 2020), https://ssrn.com/abstract=3713998 [https://perma.cc/8FB8-F96S].

320. *See supra* Part II (explaining Title 18's anchoring in common-law fraud).

321. Baer, *supra* note 255, at 136.

322. *See supra* note 308.

323. *See* DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES 97-98 (2d ed. 2019) (collecting cases); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1366 (2018) (quoting a federal court of appeals judge as calling lenity "shorthand for [the] proposition that judges aren't supposed to create crime" (alteration in original)); *see also* Woody, *supra* note 202, at 641-44 (calling for lenity in § 1348 cases).

not in the judicial department."[324] Lenity's two principal rationales, notice and the separation of powers, are thus identical to those underlying the ban on common-law crimes.[325] The rule is not a ban on *all* ambiguity, as the strict construction in favor of the defendant does not begin at step zero.[326] At different points, the Court has framed the rule as appropriate only when there is "grievous ambiguity"[327] or simply when multiple readings are plausible.[328] Questions abound over the "permissible" means to be used before lenity is reached,[329] and much of the debate boils down to textualism versus purposivism.[330]

Most notably for Rule 10b-5, one principle that may apply before lenity is judicial deference to the executive branch, which itself applies after recourse to legitimate tools of interpretation.[331] Securities law, like other fields, criminalizes certain violations of enabling statutes and agency-promulgated rules. Under the respective doctrines of *Chevron*[332] and *Auer*[333] deference, federal courts generally defer to reasonable agency interpretations of the statutes and rules they are charged with enforcing, so long as the relevant text is sufficiently ambigu-

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324. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820); *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1127 (2017) (describing lenity as a valid rule of law at the Founding).

325. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 130-34 (2010) (describing early federal judges' tethering of the canon to the separation of powers).

326. *Cf.* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134-44 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014) and noting difficulties in the threshold question of ambiguity).

327. Muscarello v. United States, 524 U.S. 125, 139 (1998) (quoting Staples v. United States, 511 U.S. 600, 619 n.17 (1994)).

328. Williams v. United States, 458 U.S. 279, 290 (1982).

329. *Compare, e.g.*, Deal v. United States, 508 U.S. 129, 135 (1993) (ruling out lenity because the text of the statute was facially unambiguous), *with* Moskal v. United States, 498 U.S. 103, 108 (1990) (reserving lenity for after the use of language, structure, legislative history, and policy purposes).

330. For an overview of the arguments and an advancement of the abolition of the rule of lenity from a decidedly prodelegation lens, see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345. As Kahan points out and accepts, the purposivist approach is basically hostile to the rule of lenity; the rule cannot have any substantial force if it comes after legislative history, court-delegated repair of statutory defects, and prioritization of the law's animating purposes. *Id.* at 386-89.

331. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n.9 (1984); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2414-15 (2019) (same for *Auer* deference).

332. 467 U.S. at 844.

333. Auer v. Robbins, 519 U.S. 452, 461 (1997). *But cf. Kisor*, 139 S. Ct. at 2417 (approving of denial of deference for a "simple common-law property term").

ous. But in criminal cases, deference to the government stands in clear opposition to resolving ambiguity in favor of the defendant. Which takes priority?

The reason that this question becomes intractable is that the same statute is enforced both civilly and criminally.[334] In theory, one might want *Chevron* and *Auer* to apply to civil cases and lenity to apply to criminal cases. But the statutory language is the same for both, except for the additional criminal mens rea requirement of a willful violation. A court must therefore choose one interpretation or the other, and resolution of the two competing canons is one of the major live questions regarding regulatory crimes.[335] Though the Court has not foreclosed lenity applications for criminal enforcement of civil regulatory offenses,[336] it has suggested that *Chevron* and *Auer* may generally take precedence. In a footnote, Justice Stevens wrote for the Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon* that the Court has no rule of applying lenity to the interpretation of agency rules simply because those rules can also be enforced criminally.[337]

This poses serious due-process and notice concerns for 10b-5 insider trading, which is the subject of substantial criminal enforcement though grounded in a regulatory prohibition. At least in order to gain *Chevron* deference, the agency must make its interpretation known ex ante and through a sufficiently formal channel.[338] But when an agency interprets its own regulations—as the SEC does for Rule 10b-5—it can earn *Auer* deference simply by arguing for its

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334. *See* Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025, 1030-33.

335. *See* Richman, *supra* note 319, at 54 (defending regulatory crimes, but calling this an unresolved "tougher question"). The Court recently sidestepped the issue in *Esquivel-Quintana v. Sessions*, where it avoided the Sixth Circuit's internal disagreement on this point by holding that neither lenity nor *Chevron* applied because the statute was unambiguous. 137 S. Ct. 1562, 1572 (2017).

336. Where no agency regulation was relevant to the decision, the Court has held that lenity applies to civil statutes whose rules carry criminal sanctions so long as there is no willfulness requirement. United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517-18, 518 n.10 (1992) (plurality opinion). While this again speaks to the essentiality of the willfulness requirement in criminal offenses for regulatory crimes—and shows that the courts will usually bend over backwards to preclude harsh penalties without willfulness—it does not solve the problem for Rule 10b-5.

337. 515 U.S. 687, 704 n.18 (1995). Justice Stevens did cabin the statement, though, with an implication that the rule might apply should a criminal defendant lack sufficient notice of potential liability. If there is a field in which that proviso would make sense, 10b-5 insider trading is it.

338. *See* United States v. Mead Corp., 533 U.S. 218, 229-30 (2001).

favored interpretation in an amicus brief at the Supreme Court.[339] If taken to its logical extreme, for a sufficiently ambiguous rule (like 10b-5), the agency becomes an unbridled ex post facto criminal lawmaker.[340]

Discomfort with the reach of *Chevron* and especially *Auer* in the Rule 10b-5 context probably explains why the Court has often held that certain theories of 10b-5 liability exceed the SEC's (vague) statutory authority under section 10(b).[341] Title 18, however, bypasses the question altogether. It allows for full application of the rule of lenity without a *Chevron* problem.

C. *The Continuing Threat of 10b-5 Liability?*

Sections III.A and III.B made the case that the broader prohibition of Title 18 may nevertheless provide stronger long-run protections for criminal defendants. This Section evaluates the extent to which the government could circumvent those protections, even if courts adopted a fully fleshed-out Title 18 theory.

As Table 1 shows above, Title 18 liability is generally broader than that under Rule 10b-5: it includes violations without knowledge of unlawfulness; embezzlement, covert or disclosed; complicity without a check for "personal ben-

339. Auer v. Robbins, 519 U.S. 452, 461-63 (1997); *see* Kisor v. Wilkie, 139 S. Ct. 2400, 2417 n.6 (2019) (approving of the Court's decision in *Auer* to defer to an agency position first set out in an amicus brief, though holding that it should not be the "general rule"). There is a case to be made that Rule 10b-5 warrants no *Auer* deference at least in some dimensions, because the rule largely repeats the content of section 10(b) and thus implicates the Court's "anti-parroting" doctrine. *See* Gonzales v. Oregon, 546 U.S. 243, 257 (2006). Justice Thomas made precisely this point in his separate opinion in *O'Hagan* (decided before *Gonzales*), where he noted that the "in connection with" requirement was no different between section 10(b) and Rule 10b-5. United States v. O'Hagan, 521 U.S. 642, 691-92, 692 n.8 (1997) (Thomas, J., concurring in the judgment in part and dissenting in part).

340. *See* U.S. CONST. art. I, § 9, cl. 3. Justice Scalia, a fierce defender of both lenity and *Chevron*, noticed the tension and wrote in 2014 that he would repudiate the *Babbitt* footnote and apply the rule of lenity whenever criminal and civil sanctions arose from the same statute—indeed, to section 10(b) itself. Whitman v. United States, 574 U.S. 1003, 1005 (2014) (mem.) (Scalia, J., respecting denial of certiorari); *see id.* at 1004 ("[King] James I, however, did not have the benefit of *Chevron* deference."). Justice Scalia implied this perspective in *O'Hagan* too, writing separately in a one-page opinion to note that he would have applied the rule of lenity—not *Chevron*—and rejected the SEC's misappropriation theory. *O'Hagan*, 521 U.S. at 679 (Scalia, J., concurring in part and dissenting in part).

341. *E.g.*, Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc., 552 U.S. 148, 158-59 (2008); Chiarella v. United States, 445 U.S. 222, 234-35 (1980); Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472-73 (1977); *see* 5 U.S.C. § 706(2)(C) (2018). For a challenge to the logic of limiting 10b-5 through section 10, see Steve Thel, *Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules*, 2014 COLUM. BUS. L. REV. 1.

efit"; and trading in assets other than securities.[342] But that fact does not mean that a 10b-5 violation is a necessarily included offense of Title 18 mail, wire, and securities fraud. In particular, there are at least four scenarios in which criminal 10b-5 liability might be imposed even when an actor is innocent of Title 18 fraud:

- Trading authorized by the original information source;[343]
- Trading in exempt or private-company securities, if the scheme manages to avoid use of the mails and wires;[344]
- Trading on government information, if it escapes the label of misappropriated "property;"[345]
- Any new ground for imposing liability that future judges may impose by "flexibly" construing the securities laws.[346]

Doctrinal arguments cannot change the statutory and regulatory landscape; only Congress and the SEC can do that. Prosecutors, meanwhile, are free to simultaneously bring 10b-5 and Title 18 charges against defendants, letting one charging theory pick up the slack for any gaps found in the other. It is therefore important to consider the extent to which Title 18 can displace, rather than merely supplement, 10b-5 prosecutions.

1. *Civil Enforcement*

This Note takes no position on whether to overrule any part of the Court's Rule 10b-5 precedents. An advantage of the Title 18 approach is that it avoids the doctrinal baggage of securities case law; the corresponding disadvantage is that 10b-5's defects persist. Some flaws may be amenable to judicial correction. For example, the Supreme Court could take steps to overrule its own early precedents, perhaps by repudiating the classical theory. Some problems, though, seem endemic to the choice to situate the offense within the securities laws. For example, omitting the willfulness requirement could lead to an over-

342. This list is not exhaustive. For example, Title 18 omits the "purchase or sale" requirement of Rule 10b-5, thereby more clearly reaching conduct like "insider giving." *See supra* note 259. Title 18's shifted focus on material deception could also plausibly include trading on "immaterial" information under the securities laws. *See supra* Section II.D.1.

343. *See supra* Sections I.B.2.a, II.C.2; *infra* Section IV.A.1.

344. *See* 18 U.S.C. § 1348 (2018) (applying to securities only if issued by a public company under the Exchange Act).

345. *See supra* Section II.D.2.

346. *See supra* notes 308-314 and accompanying text.

broad criminal prohibition against violations of obscure rules.[347] And even if the courts were laser-focused on constructing a more coherent 10b-5 doctrine, they would have decades of precedent to reject along the way.

That leaves only a few options. First, Congress could codify an insider trading ban and make it the exclusive vehicle for civil enforcement. Second, the SEC could patch up the doctrine via further notice-and-comment rulemaking.[348] As I explain below, however, political realities suggest that neither reform vehicle is particularly likely.[349] That leaves a third option—to trust the SEC to use its discretion wisely in civil enforcement. But hoping for self-restraint in administrative action is more a plea for justice than a structural solution.[350] Nor is executive-branch reform likely to come from the top down. Under current case law, the SEC is an independent agency whose actions are largely insulated from the kind of unified enforcement scheme that might emerge from presidential control.[351]

A prosecutorial turn to Title 18, therefore, does little to constrain what the SEC may do with its still-broad civil powers. That includes not just the wide range of enforcement actions possible under Rule 10b-5, but also the many additional rules the SEC might promulgate should the courts limit the scope of 10b-5 doctrine.[352] For those concerned with either the far-reaching administrative powers held by the SEC or the substantive law those powers have pro-

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347. *See supra* Section I.B.1.

348. The relevant substantive rules promulgated thus far—Rules 10b5-1 and 10b5-2—do nothing to disturb the law as "otherwise defined by judicial opinions construing Rule 10b-5." 17 C.F.R. § 240.10b5-1 (2020); 17 C.F.R. § 240.10b5-2 (2020) (same).

349. *See infra* Section IV.B.

350. *See* Dirks v. SEC, 463 U.S. 646, 664 n.24 (1983).

351. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 487 (2010) (assuming by agreement of the parties that SEC Commissioners are removable only for cause); Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935) (establishing the constitutionality of removal protections); *see also* Wiener v. United States, 357 U.S. 349, 356 (1958) (finding removal protections even where Congress was silent); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (arguing for the policy-direction power of the President over executive but not independent agencies). *But see* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593 & n.199 (1994) (arguing that Article II requires presidential removal authority because it does not vest the executive power in the President "*and in such inferior entities as the Congress may from time to time ordain and establish*"); Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781 (2013) (arguing, in any event, that SEC Commissioners are removable without cause).

352. Reg FD, in fact, was a response to judicially articulated limits on the SEC's insider trading enforcement authority. *See* 65 Fed. Reg. 51716, 51716-17 (Aug. 24, 2000) (codified at 17 C.F.R. § 243.100-103 (2020)).

duced, the solution cannot come from turning to federal criminal law. It must come from within.

2. *Criminal Enforcement*

The framework of Parts I and II is more promising when it comes to limiting the impact of criminal 10b-5 prosecutions. A viable Title 18 approach obviates the need for courts to engage in the kind of open-ended construction that they have at times employed to define the reach of Rule 10b-5 insider trading.[353] Most notably, the opportunity to pursue cases under a distinct Title 18 theory would free the courts from the fear that strictly interpreting the "willful violation" requirement would take criminal sanctions off the table.[354] Where the law of 10b-5 insider trading is unclear—as it often is in its most problematic areas—prosecutors will find it challenging to prove a defendant's knowledge of unlawfulness under *Bryan*.[355] That fact makes Title 18 the natural choice for prosecutions that turn on an issue on which 10b-5 law is particularly dubious, confusing, or unstable.[356] And even where a prosecutor thinks 10b-5 is a safe bet under current case law, she can (and probably should) still add a Title 18 count to the indictment. That dynamic naturally leads to increased prosecutorial interest in previously unused legal theories and, in turn, a more developed Title 18 case law over time.

IV. OBJECTIONS

Parts II and III provide only a general framework for prosecuting insider trading under Title 18, along with tentative conclusions about some of the most relevant doctrinal questions. This Part addresses three objections to the theory as a whole. Two, in Section IV.A, are to its substance: a critique that the theory overcriminalizes harmless or beneficial conduct, and a claim that it draws focus

353. *See supra* Part I.

354. *See supra* Section I.B.1.

355. 524 U.S. 184, 192 (1998).

356. This, of course, is a fundamental point of the willful-violation requirement for regulatory offenses, and it is also why its stricter application will screen out the prosecutions most responsible for 10b-5's "legality problem." *See supra* Section III.A; *see also* Jill E. Fisch, *Constructive Ambiguity and Judicial Development of Insider Trading*, 71 SMU L. REV. 749, 760 (2018) (noting that thus far under 10b-5, "the government has not confined itself to bringing criminal charges only after courts have confirmed the applicable legal theory in the civil context").

away from market fairness. The last, in Section IV.B, is an institutional-prerogative argument against unilateral action by the courts.

A. Substance

1. Broader Enforcement

One possible critique, especially from the defense bar, is that Title 18 erodes the safeguards that courts have fashioned to protect insider trading defendants from prosecutorial overreach. A preliminary question is whether these added protections on top of traditional fraud prohibitions are sensible or legally correct, and I have argued in Parts I and II that they are often not. And the principal response, discussed in Section III.A, is that in the long run, the open policymaking that has long characterized 10b-5 jurisprudence could easily lead to far more expansive criminal liability depending on the judges hearing a defendant's appeal. Moreover, it is unclear why it would be problematic for the criminal prohibition to be broader than what the SEC can enforce civilly,[357] any more than the U.S. Postal Service and Federal Communications Commission should have plenary authority over the scope of criminal mail and wire fraud.[358] The core victims of fraud-by-insider-trading are information owners, not securities traders, and fraud can be criminal without reliance on a federal agency's regulation.

But because this critique often stems from an anti-intervention perspective, it is important to note an additional feature of the Title 18 model that critics of aggressive enforcement should embrace. Under Title 18's embezzlement theory, owners of information can consent to the personal use of MNPI by their agents and immunize them from fraud liability. For decades, one of the principal objections to insider trading law has turned on its mandatory nature—corporations are barred from allowing insiders to use MNPI for their own pur-

357. *See* Oral Argument, *supra* note 8, at 20:30; Woody, *supra* note 202, at 639-40; Elkan Abramowitz & Jonathan S. Sack, *Back to the Future: Criminal Insider Trading Under Title 18*, N.Y.L.J. (July 2, 2018, 12:46 PM), https://www.law.com/newyorklawjournal/2018/07/02/back-to-the-future-criminal-insider-trading-under-title-18 [https://perma.cc/5T35-H273] ("We question whether the drafters of the laws at issue could have contemplated such a disparity in civil and criminal liability for the very same conduct.").

358. *But cf.* Bainbridge, *supra* note 14, at 80, 97-98 (arguing for institutional-competence advantages for the SEC via detection of wrongdoing and payment of bounties, while acknowledging that the rationale for insider trading law "has little to do with the traditional concerns of securities regulation").

poses.[359] Embezzlement, of course, requires a nonconsenting victim.[360] And once the classical theory falls, so that there is no default duty to disclose to an arm's-length counterparty, consent from the information owner means there is no fraud.

Title 18 thus provides a real test for the various economic models of insider trading that have been proposed since *Cady, Roberts*. Some corporate- and securities-law scholars have argued that corporations will allow insiders to trade at least in some circumstances, essentially because insider trading allows shareholders to cheaply compensate their officers and directors while also credibly improving the accuracy of their stock prices.[361] By contract, corporations might allow some insiders in certain situations to trade on information. Even if state corporate law were to establish a default rule against insider trading, corporations could opt out in their charters.[362] Skeptics of the ban on insider trading should be content to sacrifice imperfect defenses like personal benefit for the unqualified power of corporate choice.

2. *Fraud on Whom?*

An objection from the opposite side is that Title 18 does not go far enough—it strips insider trading of its "market fairness" rationales and allows insiders to take advantage of outsiders by virtue of their positions. By vesting the choice of trading authorization and disclosure with the firm, Title 18 removes the constraints imposed by the classical theory or even broader alternatives.[363]

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359. *See, e.g.*, HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET (1966); Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983); Epstein, *supra* note 96; David D. Haddock & Jonathan R. Macey, *A Coasian Model of Insider Trading*, 80 NW. U. L. REV. 1449 (1986); *see also* Ian Ayres & Stephen Choi, *Internalizing Outsider Trading*, 101 MICH. L. REV. 313, 322-25 (2002) (proposing that firms should also be allowed to choose whether to allow outsider informed trading in the company's shares).

360. *See supra* note 223 and accompanying text.

361. *See supra* note 359. But for examples of fiduciaries that have set up prophylactic rules that extend beyond the traditional nonmisappropriation duty, see Epstein, *supra* note 96, at 1500-01.

362. *See, e.g.*, Ayres & Bankman, *supra* note 24, at 275; Carlton & Fischel, *supra* note 359, at 895.

363. But for a general argument in favor of the misappropriation theory's absorption of the classical theory under Rule 10b-5, see Gubler, *supra* note 102.

The main response is that the law we are interpreting does not mandate a far-reaching concept of "market fairness;" all it does is prohibit *fraud*.[364] Disparities between counterparties in a transaction—be they in skill, knowledge, foresight, "unerodable advantage,"[365] or technical expertise—are not in and of themselves fraudulent. Efforts to extend the Rule 10b-5 fraud in that direction based on abstract concepts of "fairness" are perhaps the principal cause of the doctrinal spiral outlined in Part I.[366]

But this does not mean that the Title 18 embezzlement theory is about fraud at the *expense* of fairness. Embezzlement implies that an insider gains an "unfair" advantage in the stock market because of the means by which she obtained that advantage. Lawful research and expert insights bring lawful rewards and hefty profits; fraudulent misappropriation of information invites legal sanctions.

Consider by way of example the prominent issue of congressional insider trading. If a member of Congress trades on MNPI learned during the course of her committee work, the source of public anger is not that the counterparty to the trade was defrauded or lacked the same access to information. What animates a view that the transaction was unfair is that it was unfair *to us*—that rather than working on behalf of citizens, members of Congress are abusing their access to information for their own personal purposes.[367] This is the very essence of the Title 18 theory, that personal use constitutes a duty-bound agent's infringement on the rights of his principal.[368] In embezzlement cases, even if the principal suffers no easily identifiable economic loss, the fraud is wrongful because it interferes with the owner's right to control its information.[369]

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364. *Cf.* Matt Levine, *You Have to Pay the Right Person*, BLOOMBERG (Mar. 13, 2019, 11:58 AM EDT), https://www.bloomberg.com/opinion/articles/2019-03-13/you-have-to-pay-the-right-person [https://perma.cc/GS3E-AUKN] (framing insider trading as about "theft" rather than a parity-of-information view of "fairness").

365. *See* Ayres & Choi, *supra* note 359, at 319-20 (demonstrating the unworkability of the concept).

366. *Cf.* Langevoort, *supra* note 204, at 527 (characterizing insider trading as "equitable" doctrine).

367. *Cf.* Sung Hui Kim, *Insider Trading as Private Corruption*, 61 UCLA L. REV. 928, 933 (2014) (characterizing insider trading as corrupt use of a position of power).

368. *Cf.* Mills & Weisberg, *supra* note 207, at 1437 (noting concern about "unmoor[ing] the fraudulent action from a particular victim").

369. *See* Carpenter v. United States, 484 U.S. 19, 26 (1987) (explaining that the *Wall Street Journal* had a right to control the dissemination of its recommendations even if reporters' trading on it caused no direct economic harm). Still, the *Journal* could be harmed in the long run by readers' diminished interest if, before publication, the market were to already account for the column's stock recommendations.

Because this Note interprets the contours of a fraud prohibition, its scope does not permit a full analysis of whether the law should prohibit nonfraudulent kinds of informed trading. But as many scholars have pointed out at length, there are compelling reasons to be skeptical of such impositions when they are grounded in justifications like "parity of information," "shareholder equality," or "market integrity." As for the classical theory, Dennis Carlton and Daniel Fischel demonstrated in a seminal article that ordinary outsider shareholders benefit from insider trading if it is in the corporation's interest to allow it.[370] By definition, if the scheme of agreements setting up the corporation and the subsequent market forces allowing its issuance of equity provide for the right of insider trading, they will do so in the long run only because that right increases the size of the pie—via mitigation of agency and monitoring costs—that outsiders can obtain.[371] This is a classic Coasean bargain. It is in the corporation's interest to choose the forms of permissible insider trading that maximize the value of the corporation, through combined effects of incentives generated for corporate officers, the accuracy and liquidity of share prices, and the extent to which insider trading would allow for lower compensation to corporate managers.[372] As for informed trading generally, the functioning of efficient capital markets is rooted in the ability of investors to profit off the costly search for and analysis of material information.[373] Counterparties will inevitably possess different levels of knowledge about the securities they exchange and gain "access" to information in different ways.[374] And arm's-length counterparties do not have a default claim on the skills and knowledge of other investors in the market.[375]

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370. Carlton & Fischel, *supra* note 359, at 880-82.

371. *Id.*

372. *See* MACEY, *supra* note 96, at 9-11; *see also* EASTERBROOK & FISCHEL, *supra* note 102, at 259-61 ("It is not 'unfair' to investors to use a device that makes them wealthier!").

373. *See supra* notes 96-97 and accompanying text.

374. *See* EASTERBROOK & FISCHEL, *supra* note 102, at 253-54.

375. *See* Kronman, *supra* note 96, at 1-2 (providing a foundational account of nondisclosure as a property right); Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117, 137-40 (1982) (further claiming the law should permit misinformation in response to certain inquiries); *see also* ANDERSON, *supra* note 172, at 201-21 (considering various ethical frameworks); Epstein, *supra* note 96, at 1496 (arguing that without a breach of duty, "there is no 'unfair advantage' at all"). This raises doubt as to whether counterparties to informed trades, especially in impersonal markets, can rightly be classified as victims. *See* Henry G. Manne, *Insider Trading and Property Rights in New Information*, 4 CATO J. 933, 934 (1985) (explaining that while all investors would like valuable information, the question is whether certain trading practices affect their wellbeing, assuming the information is not disclosed); *see also* MACEY, *supra* note 96, at 24-25 (arguing that counterparties actually benefit

B. Institutional Prerogative

One final critique warrants attention: even if one agrees that the embezzlement-within-federal-jurisdiction theory is sound, who is to say that the courts are the right actors to decide this question? If so much of the incoherence of 10b-5 case law finds its roots in judges departing from the text, why not demand statutory or regulatory change before finding refuge in some other broad federal provision?

The answer is that the law of embezzlement is not new, and it already covers insider trading. While the theory advanced in Part II is in part a novel articulation, it is not novel law. It simply takes the existing elements of Title 18 and applies them to the insider trading context. If anything, it calls for an end to the "securities exceptionalism" that has in effect created a separate standard for frauds that involve securities transactions. The right question, then, is not whether to wait for Congress to act—it is whether to wait for Congress to act *again*.

Two other factors counsel in favor of skepticism over the potential for further legislative reform. First, stretching back to the first Supreme Court insider trading cases in the 1980s, tailored codification has proven politically elusive. The Insider Trading Proscriptions Act of 1987 received a vote in neither chamber,[376] even as the same Congress passed another reform package without codifying a substantive insider trading ban.[377] In the last decade, multiple bills have been introduced in Congress.[378] The most politically promising was the 2019 Insider Trading Prohibition Act,[379] which passed by a lopsided bipartisan vote in the House, but which then went nowhere in the Senate. The much-anticipated report of the "Bharara Task Force," headed by the former U.S. Attorney for the Southern District of New York, issued recommendations for a statutory fix shortly thereafter,[380] to no avail thus far. The reasons for decades-

because of the change in share price caused by the informed trader's transactions); John P. Anderson, *Greed, Envy, and the Criminalization of Insider Trading*, 2014 UTAH L. REV. 1, 9 (noting that because of the weak foundations of the counterparty-as-victim idea, especially in impersonal markets, it has "all but disappeared from legislative debates, court decisions, and scholarly treatment").

376. Insider Trading Proscriptions Act of 1987, S. 1380, 100th Cong.

377. Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677.

378. *See* BHARARA ET AL., *supra* note 9, at 12-13 (detailing the proposals and noting their differences).

379. Insider Trading Prohibition Act, H.R. 2534, 116th Cong. (2019).

380. BHARARA ET AL., *supra* note 9.

long inaction extend beyond ordinary legislative inertia. Most remarkably, the SEC has continually opposed statutory codification.[381] (A generous explanation is that the SEC fears codification of bad law, or the enactment of statutes that would create loopholes. A more cynical theory is that codification would limit the SEC's power to shape the law.)[382] Similarly, the SEC has promulgated no rules to actually define the insider trading ban, outside of ancillary provisions that explicitly do not disturb judge-made law.[383] In contrast, because Title 18 makes it marginally easier to secure convictions, it has the added advantage of naturally tending to draw in prosecutorial interest[384]—even as the statutes in the long run rein in potential criminal-law adventurism.

Second, even if passed, statutory and regulatory solutions under the securities laws could not replicate the full complement of reforms brought about by Title 18. The proposals, to various degrees, codify current doctrine or nudge it in the direction of a ban on embezzlement or theft.[385] But even the ideal securities-law codification—achieved by statute or by SEC rule—would not accomplish everything. For example, abolishing the willfulness requirement for violations of the securities laws would raise serious notice and due-process concerns, but keeping it imposes a high mens rea bar in criminal cases.[386] A ban within the securities laws could not reach trading in other asset classes.[387] Courts have regularly constrained expansive readings of section 10, making pure regulatory solutions that bypass Congress suspect.[388] And the mode of ad-

381. *See* Baer, *supra* note 255, at 144; Dave Michaels, *No Law Needed on Insider Trading, SEC Chief Says*, WALL ST. J. (Sept. 6, 2017, 5:36 PM ET), https://www.wsj.com/articles/no-law-needed-on-insider-trading-sec-chief-says-1504733816 [https://perma.cc/9ETJ-QETV].

382. *Cf.* David D. Haddock & Jonathan R. Macey, *Regulation on Demand: A Private Interest Model, with an Application to Insider Trading Regulation*, 30 J.L. & ECON. 311, 316 (1987) (proposing that the SEC's regulatory priorities serve to benefit the interest group of market professionals); A.C. Pritchard, *The SEC, Administrative Usurpation, and Insider Trading*, 69 STAN. L. REV. ONLINE 55, 62 (2016) (noting the SEC's case-by-case approach and arguing that "the Court should not defer to the SEC when it develops rules through adjudication if those rules carry potential criminal consequences").

383. *See supra* note 348 and accompanying text.

384. *Cf.* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1744 (2013) (criticizing solutions that assume away the incentives that generated the problem).

385. For a description of the proposals and their differences, see BHARARA ET AL., *supra* note 9, at 10-12. The Bharara approach embraces embezzlement, though it would also cover ordinary theft of information. *Id.* at 18.

386. *See supra* notes 74-78 and accompanying text.

387. *See supra* Section I.B.4.

388. *See supra* note 341 and accompanying text.

judication that has characterized securities regulation, along with the bad doctrine it has produced, will not grind to a halt simply because Congress has decided it is time for a particular insider trading bill to become a law.

CONCLUSION

As of the time this Note is being finalized for print, the Second Circuit is poised to reconsider a portion of what is widely regarded to be one of its most consequential insider trading precedents in years. But *Blaszczak* was a watershed only in the sense that it laid bare what has been true about insider trading doctrine from the beginning. In the six decades since *Cady, Roberts*, the principles of culpability underlying the crime of insider trading have consistently been at odds with the securities framework meant to contain them. Situating the offense within Title 18 case law exposes much of the relevant 10b-5 doctrine as a set of crude substitutes for federal criminal fraud.

Rather than perpetually tending to 10b-5's tangled "judicial oak," we should start grounding insider trading doctrine in stronger roots. Turning to Title 18—without importing the doctrine of 10b-5—can produce a theory of liability independent of the muddied, ad hoc, freeform evolution of the prohibition under the securities laws. Interpreting the offense as part of the law of federal crimes is no panacea, and this Note provides only overarching, tentative doctrinal conclusions. But because federal criminal fraud better aligns insider trading doctrine with its conceptual foundations, greater prosecutorial reliance on it can shape a body of law that both resolves many of insider trading's most stubborn doctrinal puzzles and curbs the open judicial policymaking that created them. In that way, Title 18 can prevent regulators, prosecutors, and judges from falling into the same traps that led to the law's current confusion.