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ABSTRACT. In late 2016, in its highly-watched decision in *Salman v. United States*, the Supreme Court attempted once again to clarify the crime of insider trading, this time regarding the secondary and tertiary recipients of information commonly referred to as "remote tippees." In doing so, the Court seemed to put to rest any question that a person who "gifts" a friend or family member with material non-public information for the purposes of trading on such information does in fact trigger a violation of law. As cases go, *Salman* is relatively straightforward. Nevertheless, it demonstrates several of the drawbacks that arise when criminal laws become the product primarily of cases and not statutes. Ordinarily, proponents of legislative law-making cast their arguments in fairness terms, as written statutes provide advance warning of what is and is not forbidden. This Essay contends that legislatively enacted statutes go further than that. Under the best circumstances, they can improve the content of criminal law precisely because they permit the legislature to differentiate similar yet morally distinct conduct. With this benefit in mind, the Essay imagines what insider trading law might look like were Congress to both define and subdivide the crime of insider trading into the kind of tiered or degreed crimes more routinely featured in state codes.

INTRODUCTION

Consider the following hypothetical:

> John calls his brother, Paul, and tells him that he has ten kilograms of cocaine, each of which is worth more than twenty-five thousand dollars. Paul eagerly asks John to share several kilos so that he can sell them and make some money too. Although John initially demurs, he eventually relents and gives three kilos to his brother. Paul, in turn, calls his friend, Sam, relaying his good fortune and inquiring if Sam wishes to join in the sale. Sam eagerly accepts Paul's offer and sells some of the cocaine, taking care to mask the proceeds.

Under the federal narcotics laws, John, Paul, and Sam have each conspired to distribute a controlled substance.[1] In determining whether a conspiracy exists, a fact-finder would ask whether two or more persons agreed to distribute a controlled substance and whether each of the charged defendants joined the agreement. Although John and Paul's familial relationship might be of interest to a jury, it otherwise would be of no legal significance. Nor would we worry too much about John's underlying motivation for sharing the cocaine with his brother. Whether John expected a tangible benefit from Paul or acted out of altruistic brotherly love, the two brothers would still be guilty of narcotics trafficking and conspiracy to traffic in narcotics, as would their friend Sam.[2]

The above hypothetical is wholly unremarkable, except for the fact that its insider trading analogue, *Salman v. United States*,[3] triggered substantial scholarly discussion, capped by a relatively narrow Supreme Court opinion in December 2016.[4] The case involved a Citibank employee, Maher Kara, who wrongfully disclosed material nonpublic information to his brother, Michael Kara, recognizing that Michael intended to trade on it for his own benefit.[5] Michael subsequently shared the information with his friend, Bassam Salman, a friend and brother-in-law of Maher Kara.[6] Salman traded on the information, taking care to conceal his wrongdoing by running the trades through a brokerage account in someone else's name.[7]

Had the three men conspired to distribute cocaine, their case would have been no candidate for certiorari, much less sustained scholarly inquiry. Because Salman conspired to profit from his brother-in-law's non-public material information, however, his case served as yet another reminder of the ways in

1. *See* 21 U.S.C. § 841 (2006) (criminalizing distribution of controlled substances); *id.* § 846 (criminalizing conspiracy and attempts to distribute controlled substances).
2. Many courts would treat the above scenario as a single conspiracy. *See, e.g.*, United States v. Gordon, 580 F.2d 827, 835 (5th Cir. 1978) ("A conspirator need not be involved in every transaction comprising the conspiracy and need not work with every member of the conspiracy in order to be convicted."). Even if the two agreements were analyzed independently, they each would establish a criminal conspiracy under federal law.
3. 137 S. Ct. 420 (2016).
4. For scholarly discussions published in anticipation of the decision, see, for example, Donna M. Nagy, *Beyond* Dirks*: Gratuitous Tipping and Insider Trading*, 42 J. CORP. L. 1 (2016); Jill E. Fisch, *Family Ties:* Salman *and the Scope of Insider Trading Liability*, 69 STAN L. REV. ONLINE 46 (2016); and A.C. Pritchard, *The SEC, Administrative Usurpation, and Insider Trading*, 69 STAN. L. REV. ONLINE 55 (2016).
5. *Salman*, 137 S. Ct. at 424. Eventually, Maher and Michael developed code words to discuss Maher's information. *Id.*
6. *Id.* (explaining that Maher Kara was married to Salman's sister).
7. *Id.*; *see also* United States v. Salman, 792 F.3d 1087, 1089 (9th Cir. 2015) (describing Salman's actions to hide trades).

which insider trading law has morphed from a single theory of fiduciary violation into a thicket of complex and interlocking judicial doctrines.[8]

On a more practical level, Salman's case enabled the Supreme Court to clarify insider trading law's application to "remote tippees," those traders who indirectly receive information from corporate insiders but otherwise play no direct role in the insider's violation of fiduciary duty.[9] Just a few years earlier, the Second Circuit had concluded in *United States v. Newman* that where a third party indirectly received material nonpublic information from an insider, the third party could not be prosecuted for trading on such information unless he was aware that the insider received a personal benefit "of some consequence" in exchange for passing along such information.[10]

That proof of such a benefit might serve as a prerequisite for liability illuminates the wide gulf between insider trading and federal conspiracy law. Consider again the hypothetical drug trafficker. No jury instruction would demand evidence that a drug dealer received a pecuniary benefit from his decision to share kilograms of cocaine with another. Rather, the inquiry would focus almost exclusively on the presence or absence of an agreement to distribute the illicit substance – a so-called meeting of minds.

Fortunately for prosecutors, *Salman* put to rest the notion that any such benefit would be a prerequisite to finding criminal liability, at least in those cases where the inside information had been provided by a family member or friend.[11] What the *Salman* decision did *not* do, unfortunately, is take seriously

8. Much has been written on the jurisprudential development of insider trading. For a helpful overview of the major developments in the creation of insider trading as an offense, see Donald C. Langevoort, *"Fine Distinctions" in the Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, which traces the evolution of insider trading jurisprudence by examining the Supreme Court's key decisions that shaped the contemporary law of insider trading.

9. *See* United States v. Newman, 773 F.3d 438, 448 (2d Cir. 2014) (defining "remote tippee" as a person "many levels removed" from a corporate insider and who has not "directly participated in the tipper's breach"); Langevoort, *supra* note 8, at 446-47 (describing courts' struggle to deal with "tippers," the "many people who trade on inside information [who] are not themselves insiders, but received the information from, and are thus enabled by, someone who is").

10. Newman effectively announced *two* new rules: first, that in a criminal case, the government must prove the tippee's knowledge of the insider's fiduciary breach, *Newman*, 773 F.3d at 449-50, and second, that the breach must be premised on the insider's receipt of a "personal benefit . . . of some consequence." *Id.* at 451-52 (defining benefit as "an exchange that is objective, consequential and . . . of a pecuniary or similarly valuable nature").

11. *Salman*, 137 S. Ct. at 428 (rejecting *Newman*'s holding that "the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends"). For tippers and tippees who are neither friends nor family members, *Newman*'s "personal benefit" requirement may yet hamper future prosecutions. *See* Jon Eisenberg, *In-*

the extent to which insider trading law falls short of criminal law's legality principle. The principle encompasses two distinct but related concepts.[12] First, criminal prohibitions should be set forth with sufficient clarity to inform citizens in advance of what is prohibited; second, and of more importance in this context, crime creation is reserved solely for the legislature.[13] Judges do not make crimes; legislatures do.[14]

Justice Alito's opening line in *Salman* tells us that "Section 10(b) of the Securities Exchange Act of 1934 . . . prohibit[s] undisclosed trading on inside corporate information by individuals who are under a duty of trust and confidence that prohibits them from secretly using such information for their personal advantage."[15] Future jurists and practitioners will indubitably appreciate this pithy recitation, but it rests primarily upon the Court's *inference* as to what Congress meant when it banned the use of "manipulative or deceptive devices" in Section 10(b).[16] Neither Section 10(b), nor even the SEC's subsequently

sider Trading Law After Salman, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 18, 2017), http://corpgov.law.harvard.edu/2017/01/18/insider-trading-law-after-salman [http://perma.cc/B823-WZMB] (discussing, from a practitioner's viewpoint, defenses that might prevail post-*Salman*); *cf.* United States v. Bray, 853 F.3d 18, 26-27 (1st Cir. 2017) (declining to consider *Salman*'s application to scenarios where the recipient of the tip is neither a family member nor friend of the tipper).

12. *See generally* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 189 (1985) (setting forth the principle while also arguing for a more "practical accommodation between judicial and legislative functions"); Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335 (2005) (exploring the legality principle's implications for the development of criminal law). For more on the legality principle, see SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 152 (9th ed. 2012) which explains that the legality principle communicates fair warning of illegal conduct, which in turn denies courts the ability to "fashion[] new criminal offenses retroactively."

13. *See, e.g.*, McBoyle v. United States, 283 U.S. 25, 27 (1931) (discussing the need for fair warning "in language that the common world will understand"); United States v. Eaton, 144 U.S. 677, 687 (1892) ("It is well settled that there are no common-law [i.e., judge-made] offenses against the United States.").

14. *See* Whalen v. United States, 445 U.S. 684, 689 (1980) (citing "the basic principle that within our federal constitutional framework the legislative power, including the power to define criminal offenses[,] . . . resides wholly with the Congress"). Similar arguments have been levelled against the executive branch: "[L]egislatures, not executive officers, define crimes." Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1023 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 368 (2016).

15. *Salman*, 137 S. Ct. at 423.

16. Section 10(b) of the Securities Exchange Act prohibits the use "in connection with the purchase or sale of any security" of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b) (2012).

promulgated Rule 10b-5,[17] explicitly define the conduct known as "insider trading."[18] To the contrary, the content of that prohibition is best mined by reading a series of cases, notably the Supreme Court's trio of oft-cited opinions: *Chiarella v. United States*,[19] *Dirks v. SEC*,[20] and *United States v. O'Hagan*.[21]

For those familiar with other areas of law, this common-law approach is neither surprising nor problematic. But *Salman* involved a *criminal* prosecution, and when we deal with criminal law, we expect statutes to play the starring role in legal analysis.[22] For other types of offenses, criminal law more or less satisfies this expectation.[23] Insider trading law's legislative source, however, is a cypher.[24] Accordingly, *Salman* is best viewed not as a case about remote

17. Rule 10b-5 makes it unlawful for any person to use the mails, instrumentality of interstate commerce, or national securities exchange to employ a "device, scheme or artifice to defraud"; to "make any untrue statement of a material fact" or omit to state a material fact necessary to prevent the statements from becoming misleading; or to engage in any "act, practice or course of business" that would or does "operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (2016).

18. Pritchard, *supra* note 4, at 55 ("Congress has never enacted a prohibition against insider trading, much less defined it."). The SEC has promulgated Rules 10b5-1 and 10b5-2 to clarify the Commission's view of certain terms, but both rules expressly incorporate the judiciary's definition of insider trading. *See* 17 C.F.R. §§ 240.10b5-1 (clarifying that insider trading prohibitions apply to those who trade while knowingly possessing material nonpublic information), 240.10b5-2 (defining "duties of trust or confidence" for purposes of insider trading). Notably, the "Preliminary Note" to both Rules prominently declares: "The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and [this rule] *does not modify the scope of insider trading law in any other respect*." (emphasis added). *Id.* §§ 240.10b5-1, -2.

19. 445 U.S. 222 (1980). *Chiarella* affirmed the classic theory of insider trading, whereby a trade becomes illegal when it is premised on a breach of an insider's fiduciary duty not to trade on his corporation's material nonpublic information.

20. 463 U.S. 646 (1983). *Dirks* analyzed the circumstances under which derivative liability might apply to those who receive information directly or indirectly from insiders.

21. 521 U.S. 642 (1997). *O'Hagan* established an alternative theory of insider trading liability, whereby the trader becomes liable not for trading in the shares of a company of which he is an insider, but rather, for misappropriating information from a source to whom the trader owes a duty.

22. *See* WILLIAM J. STUNTZ & JOSEPH L. HOFFMAN, DEFINING CRIMES 32-33 (2014) ("In America today, as a general matter, legislatures play the dominant role in initially defining crimes and in establishing the range of applicable sentences for those crimes.").

23. To return to the hypothetical that began this essay, the federal criminal code describes the term "controlled substance" in mind-numbing detail. *See* 21 U.S.C. §§ 811-14 (2012) (defining and setting forth five schedules of controlled substances).

24. For example, in a recently decided opinion, the First Circuit declared, "The unlawful trading in securities based on material, nonpublic information . . . is a well-established violation of Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5." United States v. Bray, 853 F.3d 18, 24 (1st Cir. 2017). To support this

tippees, much less the passage of information among friends and family members; rather, it is a case that highlights the value of legislatively driven crime-definition, particularly definitions that aim to differentiate misconduct and not simply to prohibit it.

Employing *Salman* as its backdrop, the remainder of this Essay considers the ways in which insider trading law might be strengthened by the adoption of a series of criminal statutes that define and differentiate degrees of insider trading. Part I considers the legality principle's boundaries and relationship to insider trading. Part II highlights several of the drawbacks inherent in piecemeal or "common law" criminal lawmaking. Finally, Part III imagines how insider trading law might change were Congress to undertake the task of both defining and subdividing this offense into several or more crimes.

I. LOCATING THE LEGALITY PRINCIPLE'S BOUNDARIES

The Latin phrase *nuna poena sine lege* ("no penalty without a law") reflects the principle that a person cannot be punished for something that has not been formally prohibited in advance.[25] Accordingly, an individual cannot be prosecuted or punished criminally for behavior that has not been proscribed in advance by statute.[26] The principle is grounded in both due process and separation-of-powers concerns.[27] The executive enforces the law and the judiciary ininterprets it, but the legislature tells us in the first instance which behavior is forbidden and the range of punishments that the government may impose.[28] The principle thus reflects the intuition that the democratically elected legislature is the sole body competent to declare in the first instance, on the state's behalf, what is and is not a crime.[29]

assertion, the opinion cites *Salman* and the Supreme Court's trio of cases that have turned insider trading into a "well-established" violation of law. *Id.*

25. *See* Jeffries, Jr., *supra* note 12, at 189; Robinson, *supra* note 12, at 336 (2005).

26. *See* Robinson, *supra* note 12, at 336 (explaining principle as a "legal concept" reflected by a series of related doctrines "that, taken together, demand a prior legislative enactment expressed with precision and clarity"). Robinson goes on to argue that "legality" is best understood as having two components; one concerning *ex ante* notice provided by legislative statutes, and the other relating to fairness in *ex post* adjudication. *Id.* at 369-74.

27. Jeffries, Jr., *supra* note 12, at 201 (explaining that the legality principle rests upon three types of arguments, including separation of powers; notice and fair warning; and prevention of arbitrary or discriminatory enforcement).

28. *See id.* at 190 (conveying the view that the judiciary as an institution is "not recognized as politically competent to define crime").

29. *See* United States v. Bass, 404 U.S. 336, 347-50 (1971) ("[L]egislatures and not courts should define criminal activity.").

Notwithstanding the foregoing, even though states have banished most common-law crimes[30] and federal courts insist that "criminal common law" does not exist,[31] one can easily point to any number of judge-developed doctrines that curtail or extend criminal liability. For example, the state of Tennessee, like other states, outlaws homicide by statute. For years, however, its courts employed the hoary "year and a day rule," which defined murder as a death occurring within a year and a day of a defendant's conduct.[32] "Murder" was prohibited by statute, but the "year and a day rule" was derived from Tennessee's common law precedent. Not only did the Supreme Court take no issue with this delegation of responsibility, but it also took no issue with the Tennessee Supreme Court's eventual decision to retire it, provided that the change in law was reasonably foreseeable to the defendant.[33]

One can find similar examples in the federal context. The federal criminal code prohibits conspiracies to defraud the United States and to violate its criminal code.[34] *Pinkerton v. United States* and its progeny, however, extend that liability to additional substantive crimes undertaken by a co-conspirator that are both foreseeable and undertaken in furtherance of the conspiracy.[35] So-called *Pinkerton* liability arises out of the Supreme Court case for which it is named; one will not find it enshrined in some federal statute. Similarly, the state of mind known as "willful blindness" is a judge-manufactured concept that both federal and state courts accept as the equivalent of knowledge.[36] Although one can easily locate the word "knowingly" throughout various criminal statutes,

30. Robinson, *supra* note 12, at 338 ("Under current law, most states abolish common law crimes").

31. *See, e.g.*, United States v. McLean, 802 F.3d 1228, 1230 (11th Cir. 2015) ("No federal criminal common law exists . . . . Congress – not the courts – crafts federal crimes by delineating the elements and prescribing punishment.").

32. Rogers v. Tennessee, 532 U.S. 451, 453-54 (2001) (describing the year and a day rule's provenance).

33. *Id.* at 461 ("In the context of common law doctrines . . . there often arises a need to clarify or even to reevaluate prior opinions as new circumstances and fact patterns present themselves. Such judicial acts, whether they be characterized as "making" or "finding" the law, are a necessary part of the judicial business in States in which the criminal law retains some of its common law elements."). Justice O'Connor's opinion in *Rogers*, it should be noted, commanded just a bare majority, and left intact the Supreme Court's earlier holding that an unforeseeable judicial enlargement of an otherwise narrow penal statute violated due process. *See* Bouie v. City of Columbia, 378 U.S. 347, 351-52 (1964) (barring the "unforeseeable and retroactive judicial expansion" of a criminal statute).

34. *See* 18 U.S.C. § 371.

35. 328 U.S. 640, 647-48 (1946).

36. Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2068-69 (2011) (surveying case law and finding that "[t]he doctrine of willful blindness is well established in criminal law").

the "willful blindness" doctrine is a primarily a product of judicial interpretation.[37]

One might argue that these cases do no violence to the legality principle because they leave untouched the relevant statute's underlying prohibition of a given type of conduct. As a result, it is difficult to say that the defendant lacked fair warning or that the legislature failed to play its proper role in defining criminal law. A defendant might have been surprised to learn that courts treat "willful blindness" as the equivalent of knowledge, but he would have had no trouble accessing the statute that outlawed the transportation of 110 pounds of marijuana in his car.[38] The defendant in *Rogers v. Tennessee* was surely just as aware that the law prohibited homicide, even if he could not be completely certain of Tennessee's intention to do away with the year and a day rule.[39] And the defendant in *Pinkerton* certainly knew he was violating the tax laws by conspiring with his brother, even if he was unaware of how much *additional* liability his agreement would provoke.[40]

The lesson one might derive from the above examples is that criminal prosecution comports with the legality principle so long as the relevant statute spells out, with some minimal precision, the core behavior—that is, the conduct or result—the government wishes to prohibit. Judges can devise ancillary rules (provided that these rules are theoretically foreseeable), but legislatures must outline the relevant conduct that is prohibited in the first instance.[41]

Thus, we might say that the legality principle requires legislatures to define core prohibited conduct, but permits courts to fashion and revise ancillary rules. Even this modest statement, however, is less robust than we care to admit. For one thing, as Sam Buell reminds his readers, "white collar offenses are

37. *Id.*

38. *See* United States v. Jewell, 532 F.2d 697, 698-99 (9th Cir. 1976) (en banc). Moreover, the government is under no obligation to educate the defendant on the *content* of the criminal law, other than publishing its contents. Jeffries, Jr., *supra* note 12, at 206-07 ("Publication of a statute's text always suffices; the government need make no further effort to apprise the people of the content of the law.")

39. *See* Rogers v. Tennessee, 532 U.S. 451, 464 (2001).

40. *Pinkerton*, 328 U.S. at 641 (indicating defendants were prosecuted for violations of the Internal Revenue Code).

41. The legislature's duty to articulate prohibited conduct is reflected in the Supreme Court's vagueness jurisprudence. A law is unconstitutionally vague when it "fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." United States v. Johnson, 135 S. Ct. 2551, 2556 (2015). For an argument that this duty requires a "predictable correlation between the established meaning" of a criminal statute and its application to specific conduct, see Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2053 (2015), which locates a "conduct" principle and a "correlation" principle in Supreme Court vagueness jurisprudence.

often both vaguer and broader than their street crime cousins."[42] Consider the federal mail fraud statute, which outlaws the use of the mails to perpetrate a "scheme or artifice to defraud."[43] The statute, first enacted in 1872, was subsequently amended to include language forbidding the taking of money or property using "misrepresentations or false pretenses."[44] Whatever its drafters' original intent, prosecutors and jurists have stretched it well beyond its original "theft through deception" paradigm.[45]

Given the foregoing, one might wonder whether insider trading law undermines the legality principle any more than the open-ended statutes prohibiting mail or wire fraud. Certainly, if one conceptualizes federal statutes as spanning a spectrum that includes everything from the most specific crimes, up to and including broadly articulated prohibitions of undesirable behavior, insider trading clearly registers at the end of the spectrum where legislative definition is murky at best. This is particularly the case as one moves from the classic version of insider trading to the so-called misappropriation theory of liability, all the way to a discussion of criminal liability for the secondary or tertiary recipients of non-public information.

None of this is to deny the existence of federal statutes that effectively incorporate by reference the content of the Supreme Court's insider trading cases.[46] Nor is it to deny the Securities and Exchange Commission's own gloss, through either rulemaking or its own enforcement activities, on insider trading or other securities-related evils.[47] Nevertheless, for criminal prosecutions of

42. Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 842 (2014) (observing the distinction between a statute that criminalizes a "scheme . . . to defraud" and crimes such as burglary).

43. 18 U.S.C. §§ 1341, 1343 (2012) (criminalizing mail fraud and wire fraud, respectively).

44. On the expansion of the statute, see Craig M. Bradley, Foreword, *Mail Fraud After* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. CRIM. L. & CRIMINOLOGY 573 (1988).

45. As Judge Rakoff wrote of the statute nearly four decades ago: "To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love." Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980). For a more recent and less positive view of the statute's elasticity, see *United States v. Weimert*, 819 F.3d 351, 355 (7th Cir. 2016), which observes that one can draw language from court opinions "so as to stretch the reach of the mail and wire fraud statutes far beyond where they should go." For earlier and more direct criticism of the mail fraud statute's potential clash with the legality principle, see Gregory Howard Williams, *Good Government by Prosecutorial Decree: The Use and Abuse of Mail Fraud*, 32 ARIZ. L. REV. 137, 149 (1990), which argues that "[a]llowing federal prosecutors unfettered discretion to expand the meaning of fraud under the mail fraud statute clearly violates the principle of legality."

46. *See* Nagy, *supra* note 4, at 26-36 (tracking the development of Congressional penalty statutes that incorporate the Court's insider trading jurisprudence).

47. See *supra* notes 17-18 and accompanying text.

business insiders and direct tippees (not to mention remote tippees), the Supreme Court's trio of cases, *Chiarella*, *Dirks*, and *O'Hagan*, remain the primary sources from which lower courts derive insider trading's meaning.[48] And with each new recitation on what the Court *really* meant in *Dirks* (or *Chiarella* or *O'Hagan*), insider trading law's connection to statutory language grows ever more remote.

To date, the primary complaint invoked by this dynamic is one of unwarned punishment, paired with accusations of administrative or prosecutorial overreach.[49] No doubt, these concerns are relevant. But there is more that we lose when we ignore the legality principle's teachings. As Parts II and III demonstrate, the statutory approach to criminal law is preferable not just because it provides citizens advance notice, but also because it allows for differentiation and a more holistic consideration of which conduct makes "insider trading" so undesirable that it is deserving of criminal punishment. That is, statutory lawmaking improves *the content* of criminal law and not just criminal law's procedure. These benefits emerge more clearly when we consider the problems of defining criminal law in a piecemeal common law fashion, an issue I take up in Part II.

II. INSIDER TRADING'S PIECEMEAL PROBLEM

If one conceptualizes the legality principle as a spectrum between code-driven and common-law systems, one can quickly conclude that insider trading falls on the common-law side of that spectrum. This is not surprising in the case of the many regulatory prohibitions that now pervade the federal criminal code.[50] Congress enacts a series of statutes, an administrative agency adds heft

48. *See supra* notes 19-21; *see also* Donna M. Nagy, Salman v. United States*: Insider Trading's Tipping Point?*, 69 STAN. L. REV. ONLINE 28, 29 (2016) ("The classical approach from *Dirks* and [*Chiarella*] is directed at a corporate insider's deceptive silence in transactions with shareholders of the securities issuer. And the misappropriation approach from [*O'Hagan*] is premised on an outsider's deception of the source of the entrusted information.").

49. *See* Pritchard, *supra* note 4, at 63 ("Congress, not administrative agencies, should take responsibility for enacting criminal prohibitions in a democracy committed to the rule of law."); *see also* Reed Harasimowicz, Note, *Nothing New, Man! – The Second Circuit's Clarification of Insider Trading Liability in* United States v. Newman *Comes at a Critical Juncture in the Evolution of Insider Trading*, 57 B.C. L. REV. 765, 790-93 (2016) (arguing that the legality principle's fair notice and arbitrary enforcement prongs counsel in favor of a narrow rule of liability).

50. United States v. Davis, 564 F.2d 840, 844 (9th Cir. 1977), *cert. denied*, Davis v. United States, 434 U.S. 1015 (1978) (affirming a conviction under the Controlled Substances Act in part because Congress had provided "sufficient guidelines and standards" for the Drug Enforcement Administration's exercise of authority). "The federal courts have long held that Congress may validly provide a criminal sanction for violation of rules or regulations which it

to them through its rulemaking and enforcement powers, and the Department of Justice selects a certain number of violations (often, the most egregious ones) for criminal prosecution. Or, to use criminal law's familiar vocabulary, the administrative criminal law statute remains, in many cases, only half-written. The legislature defines in advance the criminal prosecution's definition of mens rea ("willfully," in the case of securities violations[51]) but leaves at least part of the definition of the crime's actus reus to its coordinate branches.[52]

Insider trading law provides an instructive example of the drawbacks inherent in this practice.[53] *Salman* itself relies most prominently on an earlier Supreme Court case, *Dirks v. SEC*.[54] In *Dirks*, the Supreme Court simultaneously announced what *was not* illegal (trading on information disclosed by a whistleblower seeking to expose his company's fraud), in contrast to what *might be* illegal (trading on information provided by someone who disclosed the infor-

has empowered the President, a cabinet member or an administrative agency to promulgate." *Id.* at 843.

51. *See* 15 U.S.C. § 78ff(a) (2012) (providing criminal liability for any person who "willfully violates any provision of [the] chapter"). Courts disagree on the exact meaning of the term "willfully," particularly as it applies to securities violations. *Compare* United States v. Gansman, 657 F.3d 85, 91 n.7 (2d Cir. 2011) (suggesting that "merely reckless" behavior would be insufficient to establish evidence of "willfulness" for a criminal prosecution of insider trading), *with* United States v. Tarallo, 380 F.3d 1174, 1189 & n.5 (9th Cir. 2004) (concluding that "willful" behavior as defined by Section 78ff(a) may be proven by evidence establishing the defendant's "reckless indifference to the truth of statements made in the course of the fraud"). *See also* United States v. Parigian, 824 F.3d 5, 11 (1st Cir. 2016) (observing in *dicta* that trial court's jury instruction, which permitted a conviction if the prosecution showed that the defendant "knew or should have known" that a tipper breached a fiduciary duty, failed to meet the definition of "willfully" under Section 78ff(a)).

52. With a few caveats, the Court has approved this basic structure. *See* Loving v. United States, 517 U.S. 748, 768 (1996) ("There is no absolute rule . . . against Congress' delegation of authority to define criminal punishments. We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confin[e] themselves within the field covered by the statute.'" (quoting United States v. Grimaud, 220 U.S. 506, 518 (1911))).

53. Judge Rakoff (whose criticisms of insider trading are discussed *infra* at notes 78-81 and accompanying text) additionally attributes the problem of laws being half written to insider trading's "hybrid" nature, in that it includes both civil and criminal penalties for the same basic conduct. Hon. Jed Rakoff, Hybrid Statutes: A Study in Uncertainty, Speech at Conference on Corporate Crime and Financial Misdealing, New York University Law School (Apr. 17, 2015), http://www.law.nyu.edu/sites/default/files/upload_documents/Judge%20Rakoff%27s%20Address%20NYU%202015-04-17.pdf [http://perma.cc/EP2R-DJNJ].

54. Salman v. United States, 137 S. Ct. 420, 427 (2016) ("We adhere to *Dirks*, which easily resolves the narrow issue presented here.").

mation in exchange for a "personal benefit").[55] Although the Court helpfully suggested the grounds on which a jury might infer the existence of an insider's illicit benefit,[56] it left unanswered a series of additional questions. This is hardly surprising. The Supreme Court opinion deciding Raymond Dirks' civil case could only cover so much ground. That is, after all, a hallmark of the common law: courts answer questions incrementally, and usually only when directly asked.[57]

Since *Dirks*, lower courts have grappled with the question of the tippee's knowledge of a fiduciary breach and whether this requirement should be interpreted more stringently in a criminal case.[58] Indeed, mens rea was one of the driving factors in the Second Circuit's *Newman* decision, which found insufficient evidence in the record that the defendants, remote tippees, were sufficiently aware of the upstream fiduciary violation that resulted in their receipt of inside information. Without that knowledge, the Second Circuit concluded, the tippees could not be said to be acting "willfully."[59] The Second Circuit then went on to opine—quite gratuitously—on the nature of the insider's benefit. The insider's benefit, according to the court, had to be "consequential" and of a "pecuniary or similarly valuable nature."[60]

Salman depicted a contrasting set of facts. Unlike the remote tippees in *Newman*, the trading chain in *Salman* was relatively short and populated by close relatives. Salman clearly knew his brother-in-law Maher Kara had sourced the information, in clear violation of Kara's duty to Citibank.[61] Indeed, Salman and his co-conspirator (his brother-in-law's brother) discussed shred-

55. Dirks v. SEC, 463 U.S. 646, 663-64 (1983) (theorizing that a jury might infer breach of fiduciary duty either when an insider receives a tangible benefit or when he gifts confidential information to a relative or friend).

56. *Id.* at 664.

57. "This elasticity of the common law is regarded as its great advantage, but is also its fatal flaw in undermining the virtues of legality." Robinson, *supra* note 12, at 338 (footnote omitted) (explaining why state and federal criminal law facially reject common law adjudication as a means of defining substantive criminal law obligations).

58. *See, e.g.*, United States v. Parigian, 824 F.3d 5, 11 (1st Cir. 2016) (concluding that criminal liability demands actual knowledge, but acknowledging other circuit court cases treating criminal and civil cases alike "without analysis or, apparently, challenge by the defendant"); Langevoort, *supra* note 8, at 455-58 (analyzing cases purporting to measure "tippee scienter").

59. United States v. Newman, 773 F.3d 438, 447, 450 (2d Cir. 2014).

60. *Id.* at 452.

61. United States v. Salman, 792 F.3d 1087, 1089 (9th Cir. 2015), *aff'd*, 137 S. Ct. 420 (2016) ("Of particular relevance here, the Government presented evidence that Salman knew full well that Maher Kara was the source of the information.").

ding documents in order to protect their original source.[62] So much for denying willfulness and knowledge. But the question of the tipper's personal benefit still remained. How tangible or substantial did it have to be?

The Supreme Court answered *Salman*'s question firmly but narrowly. Since the original source gifted the information to a "trading relative or friend," it fell well within *Dirk*'s heartland and was conceptually no different from the insider who exploited private information and gifted one of his friends with the proceeds.[63] With that conceptual puzzle out of the way, Justice Alito practically scoffed at Salman's remaining rule of lenity and vagueness claims.[64] Lenity requires ambiguity, but according to Justice Alito, *Dirks* was far from ambiguous; to the contrary, *Dirks* explicitly envisioned trading violations premised on the provision of information to friends or family members.[65] Thus, Salman's prosecution was proper, and *Newman*'s personal benefit test itself seemed bound for the shredder.

However one feels about Justice Alito's reasoning, *Salman* aptly demonstrates the limitations inherent in the "fair warning" argument that often undergirds lenity and vagueness claims. At least in this case, it is easy to say that Salman should have known better; in fact, he did know better, as he made various efforts to cover his tracks.[66] Nevertheless, *Salman* provides relatively little guidance for those situations that lie outside *Dirk*'s so-called heartland. It does not address, for example, the question of gratuitous tipping outside the "friends and family" relationship. Nor does it clarify whether tippees must possess actual knowledge of an upstream breach (as was true of Salman) or whether something akin to reckless suspicion would suffice for criminal liability. To learn the definitive answer to these questions, one will need to wait.

62. *Id.*

63. Salman v. United States, 137 S. Ct. 420, 427-28 (2016) ("As Salman's counsel acknowledged at oral argument, Maher would have breached his duty had he personally traded on the information here himself then given the proceeds as a gift to his brother . . . . But Maher effectively achieved the same result by disclosing the information to Michael, and allowing him to trade on it.").

64. *Id.* at 428-29 (observing that the Court's insider trading doctrine is neither "hopeless[ly] indetermina[te]" nor the source of "grievous ambiguity or uncertainty" as applied to cases such as Salman's).

65. *Id.* at 427 ("*Dirks* makes clear that a tipper breaches a fiduciary duty by making a gift of confidential information to a 'trading relative' and that rule is sufficient to resolve the case at hand.").

66. Rather than trade in his own brokerage account, Salman deposited money "via a series of transfers via other accounts, into a brokerage account held jointly in the name of his wife's sister and husband." *Salman*, 792 F.3d at 1089 (also detailing Salman's agreement with Michael Kara that they would need to "shred" documents in Salman's office that implicated Maher Kara, their source).

The common law's standard methodology of advancement of legal obligations by judicial reasoning and analogy is well accepted in many contexts.[67] Contemporary criminal law, however, frowns upon the practice,[68] in part because the judicial prohibition of conduct by analogy offends the notion that losses of liberty should be carefully circumscribed by democratically accountable legislatures.[69] Recall the hypothetical that opened this Essay. Imagine that Congress, in enacting the Controlled Substances Act, had promulgated a single-sentence statute prohibiting the "intentional" distribution of any "controlled substance," without further defining what it meant by "controlled substance." Would we be content with a system that defined "controlled substance" incrementally, telling us in one opinion that "heroin" was a controlled substance, but waiting several more years to tell us that caffeine was not?[70]

Legislatively enacted statutes do more than provide advance notice. Under the best circumstances, when they form part of a coherent penal code, they reflect the legislature's attempt to consider a set of crimes deliberately and all at once.[71] The story of the Model Penal Code and the enactment of state penal

67. Indeed, reasoning by analogy is a hallmark of the common law tradition.

> In the most traditional form of common law, judges develop the legal rules. Much of Anglo-American tort law, contract law, property law, and criminal law emerged through this process. Many parts of these bodies of law were later codified into statutes, especially criminal law, which today in the United States is almost entirely statutory.

Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 619 (2014) (describing the common law tradition as "a form of Anglo-American law that is characterized by incremental development through judicial decisions in a series of concrete cases").

68. *See, e.g.*, Vo v. Superior Court, 836 P.2d 408, 418 (Ariz. Ct. App. 1992) (distinguishing the common law development of the term "fetus" in tort law, and noting that "the development of the criminal law through common law principles has been abolished in Arizona"); *see also* Note, *The Use of Analogy in Criminal Law*, 47 COLUM. L. REV. 613, 613 (1947) ("Analogy as used in the criminal law of certain European countries has never been a part of the Anglo-American legal system.").

69. For a discussion of this notion's historical underpinnings, see KADISH ET AL., *supra* note 12, at 153-54, which observes that most state legislatures have abolished common-law crimes.

70. As enacted, the Controlled Substances Act included a specific set of factors for deciding whether a drug fell on one schedule or another, and included an initial schedule that classified well-known drugs based on the information available at the time. *See* United States v. Gordon, 580 F.2d 827, 838-41 (5th Cir. 1978) (explaining why the Controlled Substances Act does not violate non-delegation doctrine).

71. *See* Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 711-12 (2010) ("Among its many benefits over the hodgepodge that preceded it, the Model [Penal] Code was crafted holistically, defining related offenses as a group that worked together to complement rather than to overlap one another.").

codes across the country during the latter half of the twentieth century is a story, at least on some level, of deliberation and foresight.[72] Legislatures across the country attempted to reform their criminal codes and, in doing so, confronted basic questions about mens rea, its relation to certain crimes such as homicide, and more generally, overriding concepts such as conspiracy, complicity and attempt.[73]

Concededly, the federal code is hardly as well-thought-out as either the Model Penal Code or its state counterparts. Title 18 combines redundant and overlapping statutes, while declining to define basic terms consistently.[74] Still, one would rather a sloppy criminal code than no code at all. More importantly, one would vastly prefer a reflective, all-in-one consideration of insider trading law's possible iterations (subject, of course, to updating and amendment), than make do with the path-dependence and uncertainty that arises out of a piecemeal approach.

One might conclude that a political economy narrative partially explains the distinction between insider trading law and other provisions of the federal criminal code. For example, a sustained effort to define insider trading would almost certainly bring to the fore white-collar crime's so-called "privilege problem."[75] Imagine that *Newman*'s personal benefit rule were the subject of open debate by elected officials. If *drug dealers* and other conspirators in federal crimes can be found guilty of violating the law merely by agreeing to engage in a crime, why should *tippees* accused of insider trading enjoy the benefit of an

72. *See id.* For an account of the effort to bring the Model Penal Code to fruition, as well as the multiple code revision projects undertaken by state legislatures in the decades following the Model Penal Code's adoption, see Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 948-49 (1999), which lauds the Model Penal Code's influence on state legislatures; and David Wolitz, *Herbert Wechsler, Legal Process, and the Jurisprudential Roots of the Model Penal Code*, 51 TULSA L. REV. 633 (2016), which describes Herbert Wechsler's goals in formulating a coherent criminal code that would serve as a model for state legislatures. *See also* Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal)?: The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 297 (1998) (describing the Code as among "the most successful academic law reform projects over attempted," wherein "more than two-thirds of the states undertook to enact new codifications of their criminal law").

73. Not all legislatures have performed this feat equally well, and not all state codes have remained intact. For a comparison of state and criminal codes throughout the country, see Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1 (2000). For a discussion of the "degradation" of state codes in the years following their initial revisions in response to the Model Penal Code, see Robinson et al., *supra* note 71.

74. For the classic critique, see Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006).

75. *See* Buell, *supra* note 42 (identifying and challenging the claim that white collar offenders enjoy a privilege in comparison to other criminals).

additional element, such as proof of a pecuniary benefit? Elected officials could certainly respond by citing the need for a rule that adequately defines the tippee's derivative obligation not to trade, but the very act of doing so would risk political capital. No wonder, then, that Congress has been more or less content to leave the hard work to comparatively insulated Article III judges.

Curiously, so too has the SEC, albeit for other reasons. The jurist who has most keenly observed insider trading's legality problem is Judge Jed Rakoff, the federal judge in the Southern District of New York who, coincidentally, sat by designation on the Ninth Circuit panel that decided *Salman* and pointedly declined to follow *Newman*.[76] In an earlier insider trading case, *United States v. Whitman*,[77] Judge Rakoff bluntly blamed the SEC for insider trading law's bumpy trajectory:

> Other nations have proposed and, in some cases, enacted laws of general applicability against insider trading. Congress, however, has never done so, partly because the SEC has generally opposed such proposals on the ground that that any statutory definition of illegal insider trading would inevitably create "loopholes" that would be eventually utilized in much the same way that the tax code generates tax "dodges" that are frequently successful.[78]

Donna Nagy, decidedly more sympathetic to the SEC's plight than Judge Rakoff, has praised Congress for avoiding any explicit definition of insider trading. In a pre-*Salman* discussion of tippee liability, Nagy writes: "Congress's determination to build on top of the Supreme Court's precedents, rather than start anew with a legislative definition of insider trading, was a well-considered decision that deserves both acknowledgement and respect."[79] Like the SEC,

76. Judge Rakoff authored the Ninth Circuit opinion. United States v. Salman, 792 F.3d 1087 (9th Cir. 2015), *aff'd*, 137 S. Ct. 420 (2016).

77. 904 F. Supp. 2d 363 (S.D.N.Y. 2012), *as corrected* (Nov. 19, 2012), *aff'd*, 555 F. App'x 98 (2d Cir. 2014).

78. *Id.* at 367 n.1 (citation omitted). Judge Rakoff has continued to cite insider trading law's statutory vacuum in speeches before various legal audiences. *See* Daniel Fisher, *U.S. Falling Behind Europe on Insider Trading Law, Rakoff Says*, FORBES (Mar. 1, 2017, 3:52 PM), http://www.forbes.com/sites/danielfisher/2017/03/01/u-s-falling-behind-europe-on-insider-trading-law-rakoff-says [http://perma.cc/78XG-QXQU] (reporting on Judge Rakoff's speech urging an audience of New York City Bar Association securities lawyers to consider drafting a model insider trading statute).

79. Nagy, *supra* note 4, at 29 (describing legislative enactments that effectively incorporate the Supreme Court's insider trading jurisprudence).

Nagy also fears that market actors would seek out and exploit loopholes in any explicit statutory definition of insider trading.[80]

Ultimately, this avoidance-of-loopholes argument proves too much. First, as Judge Rakoff points out, one can just as easily generate loopholes in a judicially defined prohibition as in a legislatively enacted one.[81] Second, *all* written statutes are vulnerable to the so-called loophole problem. Particularly in federal jurisdictions, criminal law threatens many of its targets with potentially life-altering deprivations of liberty. Despite those stakes, we not only adhere to the legality principle, but we robustly embrace it. Notwithstanding our fears that criminal defendants will skirt legislatively defined terms, we still commit to identifying—in written form—the very elements we believe to be the components of homicide, rape, robbery, or even tax evasion.[82] If all of these other crimes can somehow withstand the loophole threat, then surely so too can insider trading.

As I have tried to show throughout this Part, there are drawbacks to the type of piecemeal lawmaking typified by the Supreme Court's insider trading jurisprudence, particularly in regard to criminal law. Criminal law's content benefits, both expressively and practically, from legislative deliberation. More importantly, as I explain in Part III, legislatures are capable of doing something that judges are not: breaking down a single crime into a series of graded crimes.

III. DIFFERENTIATING INSIDER TRADING

What does one gain by forcing the legislature to articulate on the record exactly what it means by the term "insider trading"? Besides providing citizens some advanced indication of what is forbidden, statutory proscription's less-heralded benefit is its ability to subdivide criminal behavior. By placing the onus for criminal law-making squarely on the legislature, the legality principle

80. *Id.* (raising concerns regarding ossification and manipulation of the statutory language by "unscrupulous traders"); *see also* Harasimowicz, *supra* note 49, at 792 (citing the SEC's concerns that it not provide a "roadmap" for those wishing to commit securities fraud).

81. *Whitman*, 904 F. Supp. 2d at 367 n.1 ("[A]s this very case demonstrates, the judge-made law of insider trading, however flexible, can create potential gaps in coverage that are the functional equivalent of legislative loopholes.").

82. Perhaps this is because we value "the independent virtues of the legality principle" over its deterrent costs. *See* Paul H. Robinson, *Natural Law & Lawlessness: Modern Lessons from Pirates, Lepers, Eskimos, and Survivors*, 2013 U. ILL. L. REV. 433, 501 (describing values other than deterrence that speak in favor of the legality principle's application); *see also* Harasimowicz, *supra* note 49, at 792 (arguing that the individual's liberty outweighs the government's enforcement interest).

provides the mechanism and opportunity for differentiating a string of similar yet morally distinct actions.[83] A decentralized court system cannot easily or reliably subdivide the criminal category of "homicide" into four or five distinct offenses, and an administrative agency lacks the moral and legal imprimatur of authority to perform this feat.[84] A democratically elected legislature, as demonstrated by the state legislatures throughout the country who have revised and updated their criminal codes, is uniquely situated to perform this task.

With regard to insider trading, a legislative code could go far beyond answering vexatious questions such as the remote tippee's requisite mens rea with regard to his knowledge of a fiduciary duty violation. Were Congress to promulgate an insider trading statute, it could use such an occasion as an opportunity to distinguish different types of trading in terms of harm and moral wrongfulness. It could tether these subdivisions to an individual's mens rea, to the qualitative or quantitative nature of harm caused, or to some combination of the two.

For example, one might imagine a very simplistic three-tiered statute, matched to increasingly severe maximum ranges of imprisonment. For the highest tier – call it Aggravated Insider Trading – we might reserve punishment for serial violators or ringleaders of insider trading schemes, such as Raj Rajaratnam.[85] A second, catch-all tier – Insider Trading – could punish those who knowingly and intentionally trade on information known to be disclosed in violation of a fiduciary or contractual duty. And finally, a third tier, perhaps a misdemeanor – Reckless Trading – could attach to those remote traders who

83. Of course, there is no guarantee that the legislature will differentiate crimes or that it will do so in a particularly effective or morally just manner. Nevertheless, a purely "common law" criminal law scheme all but relinquishes the opportunity for differentiation of bad and worse versions of the same crime.

84. Some might challenge this point on the grounds that *Chevron* and its progeny presume that Congress can enact broadly applicable statutes and delegate to administrative agencies the responsibility for promulgating and enforcing appropriate regulations. *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, 467 U.S. 837 (1984); *supra* note 52. *Chevron*, however, says nothing about agencies' abilities to interpret, much less subdivide, criminal law. Moreover, although the Court has long extended prosecutors extensive discretion in their decisions to file or decline charges, *see* Wayte v. United States, 470 U.S. 598, 607 (1985), this discretion has never extended to the prosecution's preferred interpretation of criminal statutes, *see* Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J. concurring in the judgment) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

85. For a recitation of Rajaratnam's behavior, see United States v. Rajaratnam, 802 F. Supp. 2d 491, 499-520 (S.D.N.Y. 2011), which describes numerous schemes to procure and trade upon inside information.

ignored a substantial and unjustifiable risk that they were trading in information obtained in violation of a fiduciary duty.[86]

There are, of course, other ways to subdivide insider trading. We might view initial tippers more negatively than direct and secondary tippees. Or we might feel that insiders and direct tippees are equally deserving of condemnation, but secondary and tertiary tippees less so. We might distinguish "buyers and users" of information from "sellers" of information. Finally, we might view as worthy of special distinction the CEO or high-level corporate officer who exploits a corporate opportunity and harms his corporation.

Many readers will blanch at some or all of these suggestions. That is indeed the point. A legislatively enacted statute would force members of Congress to openly debate these distinctions. At the same time, a well-constructed statutory scheme could punish and prohibit *all* of these betrayals, while distinguishing them in gradations of harmfulness and moral wrongfulness. That is, after all, what our homicide, robbery and theft statutes do. The typical graded statute, ubiquitous throughout state penal codes but largely absent in the federal fraud context, punishes a wide swath of misconduct while matching the worst conduct with harsher mandatory and permissible punishments.[87] It may not do this flawlessly, but it at least conveys, in some understandable form, the difference between the worst and the less worse offenses within a given category.

Whatever the common law's flexibility in addressing new issues and preventing loopholes, its capacity for graded lawmaking is severely limited. Moreover, it focuses the debate almost exclusively on a question whose answer is a

86. Depending on one's view of the case, one might place the defendant in *Newman* in this category, as well as other remote tippees who have traded with less knowledge of an upstream violation than someone in Salman's position. The goal here is not to set forth the definitive insider-trading misdemeanor, but rather to suggest the creation of one that would alleviate several of the issues that arise in remote tippee cases. Admittedly, the misdemeanor might well overlap with civil enforcement cases, just as it might also require Congress to revisit the "willfulness" language in 15 U.S.C. 78ff(a). These are, however, desirable features of the proposal, as they would force Congress to confront the mens rea questions that have long bedeviled courts in this area. Moreover, criminal and civil insider trading prosecutions *already* overlap. *See* Joan MacLeod Heminway, *(Not) Holding Firms Criminally Responsible for the Reckless Insider Trading of Their Employees*, 46 STETSON L. REV. 127, 134-36 (2016) (citing a convergence of criminal and civil liability standards for insider trading).

87. Concededly, one also could embed these distinctions in a post-conviction sentencing regime. A discussion of the differences between legislatively graded offenses and fine-grained sentencing schemes exceeds the scope of this Essay. Suffice it to say that the legislature remains the branch best situated to identify those four or five abstract and recurring factors that distinguish one variant of misconduct from another. For more on the relative competencies of legislatures, judges and the executive, see Richard A. Bierschbach & Stephanos Bibas, *What's Wrong with Sentencing Equality?*, 102 VA. L. REV. 1447, 1480-82 (2016) (comparing legislatures with judges, juries and sentencing commissions).

binary yes or no: "Is *X* behavior a form of *Y* crime?" A statutory framework shifts the focus of debate. Instead of asking "What is insider trading?" or "Is *X* 'insider trading'?", we ask "Which activities do we wish to deter and prohibit?" and "Which of these activities do we find more dangerous and/or deserving of condemnation?" These latter questions are at once more productive and more valuable than the interminable back and forth that characterizes the former.

For all the foregoing reasons, the Supreme Court's decision in *Salman* reflects a missed opportunity, albeit an opportunity the Court could not have taken advantage of very easily. The legality principle has its constitutional antecedents, but the Court has never upended a statute solely for violating the prin-principle. Instead, the Court has relied on more concrete doctrines such as vagueness and lenity, either to interpret statutes so that they conform to notions of fair warning or, in rare instances, to declare them beyond repair. That, unfortunately, poses a problem for cases like *Salman*. The insider trading *doctrine* at issue in *Salman* was far from vague; the *Dirks* decision alone provides a helpful roadmap for many would-be traders, and Salman and his kin seemed well aware of that roadmap. Lenity may be a rising star among criminal defense attorneys, but its success is far from assured and will remain so insofar as courts analyze ambiguity not just in regard to statutory language, but also in reference to prior precedents.

CONCLUSION

Several decades ago, the Supreme Court might have declared the Securities Exchange Act's prohibition on "manipulative or deceptive devices" too vague to reasonably apply in criminal insider trading prosecutions. Through a series of decisions, however, the Court has eliminated much of that vagueness, at least for a core group of offenders. Thanks to cases such as *Chiarella*, *Dirks*, *O'Hagan*, and now *Salman*, we all have a fair understanding of what insider trading is, although we still debate its boundaries. Were insider trading solely a civil wrong, this outcome would be commendable. But if we think criminal law is truly exceptional, not just in its power to deprive individuals of their liberty, but because it originates in statutes duly enacted by democratically elected representatives, then we must view this state of affairs with at least a bit of unease.

A few years before his death, Justice Scalia raised concerns similar to these in a statement accompanying a denial of certiorari.[88] The denial pertained to the *Whitman* case tried by Judge Rakoff, whose opinion[89] pointedly noted the

88. *See* Whitman v. United States, 135 S. Ct. 352, 354 (2014) (Scalia, J., respecting denial of certiorari).

89. *See supra* note 78 and accompanying text.

absence of a legislative definition of insider trading.[90] Recognizing that *Whitman* itself served as a poor vehicle for debating these issues, Justice Scalia nevertheless reminded his audience that the rule of lenity "vindicates the principle that only the *legislature* may define crimes and fix punishments."[91]

One can share Justice Scalia's anxiety and still agree, more or less, with *Salman*'s outcome, particularly if one considers *Salman* not only in regard to *Dirks*, but also more broadly in relation to federal conspiracy law. The Supreme Court treated Maher Kara's gift of information to Michael Kara much like most courts would treat one co-conspirator's decision to "gift" another a kilogram of cocaine. And the Court further treated Salman the very same way it would treat any third person who knowingly joined in an illicit conspiracy. But the Court reached its conclusion not by examining the statutory language of one or more criminal *statutes*; instead, it examined its own *precedent*. However comfortably Salman's behavior fell within the "heartland" of the Supreme Court's insider trading doctrine, it occupied a judicial heartland, not a legislative one.

One need not pity Salman and his coconspirators. They knew what they were doing and apparently knew they were doing something in violation of the law. The larger problem for *Salman* is that the Supreme Court let Congress off the hook. And by doing so, it foreclosed the corollary benefits that arise when a legislature sets itself to the task not only of defining crimes, but of differentiating them as well.

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90. See *supra* notes 77-78 and accompanying text.

91. *Whitman*, 135 S. Ct. at 354 (emphasis in original).