

NOTE

UNITED STATES V. BLASZCZAK: LAYING THE GROUNDWORK FOR A NEW APPROACH TO PROSECUTING INSIDER TRADING

Emily Gruener*

*No federal statute currently prohibits insider trading. Instead, prosecutors have traditionally brought insider trading cases under the Title 15 securities laws and, less frequently, the Title 18 securities fraud statute. The Supreme Court has recognized two theories of insider trading liability—the classical theory and the misappropriation theory—both premised on the fraud that occurs when a person breaches a fiduciary duty. Courts have held that pursuant to the Supreme Court case *Dirks v. SEC*, proof of an insider trading violation under Title 15, in cases brought under either the classical or misappropriation theories, requires proof of a personal benefit to the tipper. In its recent decision *United States v. Blaszczak*, the Second Circuit Court of Appeals became the first court of appeals to address whether the *Dirks* “personal benefit” test applies to cases brought under the Title 18 securities fraud statute, holding that *Dirks* has no application in Title 18 cases.*

*This Note explores the implications of *United States v. Blaszczak* on future insider trading prosecution strategy. It argues that the Second Circuit’s holding in *Blaszczak* that the *Dirks* personal benefit test has no application in Title 18 cases is justified by the legislative history and purpose of that statute. Moreover, it argues that the Second Circuit’s decision in *Blaszczak* is part of a larger trend towards characterizing most types of insider trading as a form of embezzlement, which may eventually obviate the need for the *Dirks* personal benefit requirement altogether. Finally, it argues that prosecutors could use the *Blaszczak* court’s acknowledgment that the meaning of “fraud” is different across the Title 15 and*

* J.D. Stanford Law School, 2020. My deepest thanks and appreciation to the editors of the *Stanford Law and Policy Review*, my parents, and my LC family.

** The original abstract of this Note stated in error that this work was the first piece of academic literature to explore the implications of *United States v. Blaszczak* on future insider trading prosecution strategy. For an earlier work analyzing the *Blaszczak* decision, please see Karen E. Woody, *The New Insider Trading*, 52 ARIZ. ST. L.J. 594 (2020).

Title 18 securities fraud statutes to advance a new approach to prosecuting insider trading—an approach that requires neither proof of a personal benefit nor breach of a fiduciary duty.

INTRODUCTION.....	180
I. THE DEVELOPMENT OF INSIDER TRADING LAW	183
A. Rejection of the “Information Parity” Rationale for Insider Trading Liability	184
B. The Classical and Misappropriation Theories of Insider Trading	186
C. The Addition of 18 U.S.C. Section 1348 as a Vehicle for Insider Trading Liability	189
II. THE <i>BLASZCZAK</i> COURT’S DECISION TO DISTINGUISH THE TITLE 18 SECURITIES FRAUD STATUTE FROM THE TITLE 15 SECURITIES FRAUD STATUTE BASED ON LEGISLATIVE HISTORY	189
III. THE <i>BLASZCZAK</i> COURT’S ENDORSEMENT OF A UNIFIED “EMBEZZLEMENT” THEORY OF INSIDER TRADING	195
A. The Blaszcak Court’s Move to Unite Title 15 and Title 18 Securities Fraud Under a Common Theory of “Embezzlement”	195
B. The Blaszcak Court’s Holding that the Personal Benefit Test Has No Application Under the “Embezzlement” Theory of Fraud	197
IV. THE EMBEZZLEMENT THEORY’S REMAINING DOCTRINAL AND PRACTICAL PROBLEMS.....	200
A. The Tension Between the Policy Considerations Animating Dirks and the Embezzlement Theory of Liability.....	200
B. Inconsistencies Between the Text of the Title 15 Securities Laws and the Embezzlement Theory.....	203
C. The Embezzlement Theory Is Too Narrow to Capture All Types of Harmful Insider Trading.....	204
V. A NEW APPROACH TO PROSECUTING INSIDER TRADING.....	206
CONCLUSION	210

INTRODUCTION

Before he was convicted for insider trading, David Blaszcak was one of the most effective healthcare political intelligence consultants in Washington.¹ The

1. Superseding Indictment at ¶ 3, *United States v. Blaszcak*, No. S1 17-CR-357 (LAK), (S.D.N.Y. Mar. 5, 2018), 2018 WL 3238323; Brody Mullins & Aruna Viswanatha, *The King*

secret to Blaszcak's success was his network. He unearthed information about upcoming changes to government-provided insurance coverage and reimbursement rates information from Christopher Worrall,² a Center for Medicare and Medicaid Services ("CMS") employee who had his "hands in everything."³ Using Worrall's information, Blaszcak developed a reputation for making spot-on "predictions" about how proposed CMS rules would affect publicly traded healthcare companies, allowing the investment firms he tipped off to make lucrative trades before CMS announced the changes to the public.⁴ Blaszcak once bragged to a colleague: "I am a beast that cannot be stopped."⁵

Theodore Huber, Robert Olan, and Jordan Fogel were three of Blaszcak's clients, partners and analysts at Deerfield Management Company, L.P., an investment firm that managed multiple hedge funds specializing in healthcare.⁶ The Three Deerfield partners trusted Blaszcak because they knew he "enjoyed unique access to the agency's pre-decisional information through his inside sources at the agency."⁷ Fogel called his partnership with Blaszcak the "Blaszcak-Fogel money printing machine."⁸

In June 2010, CMS began discussing new cuts to radiation oncology reimbursement rates. Blaszcak met with Worrall at CMS on May 8, 2012.⁹ The next day, Blaszcak emailed Fogel that he had an update on one of Fogel's "favorite topics"; he relayed information that there would be cuts to radiation oncology reimbursement rates that would financially harm certain healthcare providers.¹⁰ Huber, Olan, and Fogel used this information to trade in the securities of three companies, Varian Medical Systems, Elekta AB, and Accuray Incorporated, shorting approximately \$80 million of their shares and making approximately \$2.73 million in profits after CMS announced the rate cuts to the public.¹¹

The trading team repeated this pattern in 2013. Blaszcak met with Worrall on June 14, 2013. In the days following, Blaszcak told Fogel that CMS would issue a proposed rule that would cut reimbursement rates for various kidney dialysis treatments by 12 percent.¹² Deerfield then entered orders to short stock in Fresenius Medical Care, since Fresenius would be "hurt by such a significant

of 'Political Intelligence' Faces a Reckoning, WALL ST. J. (Aug. 18, 2016), <https://perma.cc/7Y9S-H893>.

2. Superseding Indictment, *supra* note 1, at ¶ 4.

3. Brief for the United States at 11, *United States v. Blaszcak*, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811(L)).

4. *Id.*

5. Superseding Indictment, *supra* note 1, at ¶ 60.

6. *Id.* at ¶ 20.

7. *United States v. Blaszcak*, 947 F.3d 19, 26-27 (2d Cir. 2019).

8. Brief for the United States, *supra* note 3, at 25-26.

9. *Id.* at 25-26.

10. *Id.*

11. *Id.* at 23.

12. *Id.* at 29-30.

ESRD reimbursement reduction.”¹³ After the proposed rule was announced on July 1, 2013, Deerfield made approximately \$860,000 in trading profits.¹⁴ Blaszcak then continued to provide non-public CMS information to Fogel about internal deliberations regarding the final rule, tipping Fogel that the 12 percent cut announced in the proposed rule would actually be phased in over three or four years.¹⁵ Based on this information, Deerfield executed trades in Fresenius and Davita Healthcare Partners before the final rule was announced, earning about \$791,000 in profits.¹⁶ Fogel praised Blaszcak for his “predictions,” calling him “the man.”¹⁷ From 2009 to 2014, this scheme allowed Deerfield to trade on insider information for a profit of about \$7.1 million dollars.¹⁸

The United States filed an indictment against Blaszcak, Huber, Olan, and Worrall¹⁹ on March 5, 2018 for eighteen counts, including securities fraud under two different statutes: 18 U.S.C. section 1348 (“Title 18 securities fraud”) and 15 U.S.C. section 78j(b) (“Title 15 securities fraud”).²⁰ Both Title 15 and Title 18 prohibit using schemes to defraud in connection with the sale or purchase of securities.²¹ But Title 15, enacted in 1934, has been around much longer than Title 18, enacted in 2002.²² As a result, most prosecutors bring insider trading charges under Title 15, and relatively few courts have interpreted Title 18 independently of Title 15.²³ In *Blaszcak*, however, the government brought charges under both statutes. And after a five-week trial, Huber, Olan, Worrall, and Blaszcak were acquitted of Title 15 securities fraud, but Huber, Olan, and Blaszcak were convicted—for the same conduct—of Title 18 securities fraud.²⁴

The district court had given two different jury instructions. Under Title 15, the court required the jury to find that Worrall had tipped the information in exchange for a personal benefit and that Blaszcak, Huber, and Olan knew that he tipped the information in exchange for a personal benefit.²⁵ The “personal benefit” instruction stemmed from well-settled Supreme Court precedent under *Dirks v. S.E.C.* holding that trading on inside information is not fraudulent under

13. *Id.* at 29.

14. *Id.* at 29-30.

15. *Id.* at 30.

16. *Id.*

17. *Id.*

18. *Id.* at 5-6.

19. Fogel was a cooperating witness. *Id.* at 1-2.

20. *Id.*

21. 15 U.S.C. § 78(j)(b) (2018); 18 U.S.C. § 1348 (2018); *see also* C.F.R. § 240.10b-5.

22. 15 U.S.C. § 78(j)(b); 18 U.S.C. § 1348.

23. *See* Thomas Lee Hazen, *Identifying the Duty Prohibiting Outsider Trading on Material Non-public Information*, 61 HASTINGS L.J. 881, 887 (2010) (identifying Rule 10b-5 as the “primary weapon against insider trading”).

24. Brief for the United States, *supra* note 3, at 37.

25. *United States v. Blaszcak*, 947 F.3d 19, 29 (2d. Cir. 2019).

Title 15 unless the tipper disclosed the information for a personal benefit.²⁶ But declining to impose the *Dirks* personal benefit requirement to convictions brought under Title 18, the district court instructed that jury it could convict under Title 18 if the defendant knowingly and willingly “participated in a scheme to embezzle or convert confidential information from CMS by wrongfully taking that information and transferring it to his own use or the use of someone else.”²⁷

On appeal, the defendants argued that the Second Circuit should reverse their Title 18 securities fraud convictions because the district court failed to instruct the jury of the government’s duty under *Dirks* to prove that Worrall had breached his duty to CMS in exchange for a personal benefit and that Huber, Olan, and Blaszcak knew of this breach.²⁸ Instead, the Second Circuit upheld their convictions, becoming the first federal court of appeals to hold that insider trading convictions brought under the Title 18 securities fraud statute do not require the government to prove the *Dirks* personal benefit requirement.²⁹

This Note explores the impact of *United States v. Blaszcak* on the prosecution of insider trading. Part I describes the development of insider trading law, including the genesis of the *Dirks* “personal benefit” requirement applied in Title 15 securities fraud cases. Part II examines the Second Circuit’s rationale in *Blaszcak* for distinguishing Title 18 securities fraud from Title 15 securities fraud based on legislative history and demonstrates that weight of legislative history and judicial precedent supports Second Circuit’s decision. Part III argues that the *Blaszcak* decision represents the Second Circuit’s endorsement of a unified “embezzlement” theory of insider trading, under which the *Dirks* personal benefit test becomes largely irrelevant. Part IV explores the doctrinal inconsistencies and policy problems inherent in such an approach. Part V suggests that prosecutors could use the *Blaszcak* court’s holding that the meaning of “fraud” differs across the Title 15 and Title 18 securities fraud statutes to advance a new approach to prosecuting insider trading altogether—an approach that requires neither proof of a personal benefit nor breach of a fiduciary duty.

I. THE DEVELOPMENT OF INSIDER TRADING LAW

The federal securities laws do not expressly define or prohibit insider trading.³⁰ Instead, liability for insider trading developed from the antifraud

26. *Dirks v. SEC*, 463 U.S. 646, 663 (1983).

27. *Blaszcak*, 947 F.3d at 29.

28. See, e.g., Brief and Special Appendix for Defendant-Appellant Theodore Huber at 4, *Blaszcak*, 947 F.3d 19 (No. S1 17-CR-357).

29. *Blaszcak*, 947 F.3d at 36-37.

30. Eric C. Surette, Annotation, *Application of Holding in Dirks v. S.E.C., 463 U.S. 646 (1983), that Recipient of Tip from Insider Must Abstain from Using such Information if Insider Will Benefit from Disclosing Tip*, 42 A.L.R. Fed. 3d Art. 8 (2019).

provisions of the Securities Exchange Act of 1934 (the “Exchange Act”).³¹ Section 10(b) of the Exchange Act prohibits

us[ing] or employ[ing], in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.³²

Rule 10b-5, promulgated under the SEC’s Section 10(b) authority, prohibits using any “device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security.”³³

A. Rejection of the “Information Parity” Rationale for Insider Trading Liability

The SEC initially championed a theory of insider trading liability under the Title 15 securities laws based on the “inherent unfairness involved where a party takes advantage” of insider information “knowing it is unavailable to those with whom he is dealing.”³⁴ This approach to insider trading provided a bright-line rule, prohibiting any person in possession of material, non-public information from trading before the information was disclosed to the public. In *S.E.C. v. Texas Gulf Sulphur Co.*, the Second Circuit accepted the SEC’s “information parity” rationale, finding that Rule 10b-5 “is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information.”³⁵

The Supreme Court definitively rejected this “parity of information” rationale for the Title 15 securities laws in *Chiarella v. United States*.³⁶ In *Chiarella*, a financial printer devised a scheme to identify the targets of corporate takeover bids, which were redacted from corporate takeover documents, and

31. *Id.*

32. 15 U.S.C. § 78(j)(b) (2018); *see also* 15 U.S.C. § 78ff(a) (2018) (establishing criminal penalties for willful violations of the Exchange Act and concomitant regulations).

33. 17 C.F.R. § 240.10b-5.

34. *See* *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 910-18 (1961). Some scholars argue for a return to this approach. *See, e.g.,* Bruce W. Klaw, *Why Now Is the Time to Statutorily Ban Insider Trading Under the Equality of Access Theory*, 7 WM. & MARY BUS. L. REV. 275, 302 (2016) (arguing that “in the context of the securities markets, the ethical mandate of equal opportunity translates into the need for a legal requirement of *equality of access* to corporate information”); Joel Seligman, *The Reformulation of Federal Securities Law Concerning Non-public Information*, 73 GEO. L.J. 1083, 1090 (1985) (arguing that Congress should “reimpose the ‘parity of information’ approach to fraud liability under federal securities law”); Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 354-55 (1979) (arguing in support of the “equality of access theory” of insider trading).

35. *S.E.C. v. Texas Gulf Sulphur Co.*, 401 F.2d 822, 848 (2d Cir. 1968) (en banc).

36. *Chiarella v. United States*, 445 U.S. 222, 233-34 (1980).

traded on this information by purchasing shares in the target companies.³⁷ When the tender offers for shares in the target companies became public knowledge, the defendant profited by selling the target company shares.³⁸ The government argued that the defendant violated the Title 15 securities laws by failing to disclose the inside information he gained to the public, and therefore unfairly exploiting his informational advantage.³⁹ But the Court rejected this argument, explaining that “a duty to disclose under § 10(b) does not arise from the mere possession of non-public market information,” since such an approach “is without support in the legislative history of § 10(b) and would be inconsistent with the careful plan that Congress has enacted for regulation of the securities markets.”⁴⁰ Instead, the Court found that the duty to disclose insider information or abstain from trading arises only from breach of a duty of trust and confidence.⁴¹ In other words, if there is no duty, there is no breach. And if there is no breach, there is no fraud within the meaning of the Title 15 securities laws.⁴² Thus, the defendant in *Chiarella* did not violate the Title 15 securities laws by failing to disclose the material, non-public information he gleaned from the takeover bids to the public.⁴³ He had no duty to disclose insider information, because “the duty to disclose arises when one party has information that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.”⁴⁴ He was not a corporate insider, and had no fiduciary duty to either the target company shareholders or to the acquiring company shareholders.⁴⁵ The Court’s decision in *Chiarella* thus winnowed down the categories of persons who could be liable under the Title 15 securities laws to only those persons who owed a fiduciary duty to another party.⁴⁶

37. *Id.* at 224.

38. *Id.*

39. *Id.* at 225-27.

40. *Id.* at 235.

41. *Id.* at 227-29; see also Donald C. Langevoort, *Insider Trading and the Fiduciary Principle: A Post-Chiarella Restatement*, 70 CALIF. L. REV. 1, 3 (1982) (“*Chiarella* has made the fiduciary principle a consideration of utmost importance.”).

42. *Chiarella*, 445 U.S. at 235.

43. *Id.* at 236-37.

44. *Id.* at 228 (quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(a)(1977) (AM. L. INST. 1976)).

45. *Id.* at 231.

46. See Stephen M. Bainbridge, *Insider Trading Regulation: The Path Dependent Choice Between Property Rights and Securities Fraud*, 52 S.M.U. L. REV. 1589, 1599 (“*Chiarella* radically limited the scope of the insider trading prohibition as it had been defined in *Texas Gulf Sulphur*.”); see also A.C. Pritchard, *United States v. O’Hagan, Agency Law and Justice Powell’s Legacy for the Law of Insider Trading*, 78 B.U. L. REV. 13, 15 (1998) (arguing that Justice Powell sought to limit the scope of insider trading prosecutions by tethering insider trading law to common law principles).

B. The Classical and Misappropriation Theories of Insider Trading

After *Chiarella*, two theories of insider trading under the Title 15 securities fraud laws emerged and solidified, both premised on a breach of duty and confidence: the classical theory and the misappropriation theory.⁴⁷ The classical theory targets corporate insiders. Under the classical theory, a tipper violates the Title 15 securities fraud laws when he misappropriates a company's material,⁴⁸ non-public information in violation of a fiduciary duty owed to that company's shareholders.⁴⁹ *S.E.C. v. Texas Gulf Sulphur Co.*, in which several officers and directors of the Texas Gulf Sulphur Company illegally purchased that company's stock after learning (but not disclosing) that its drilling efforts in Ontario had uncovered valuable stores of copper and zinc ore, is an example of a "classical" case.⁵⁰

Dirks v. S.E.C., decided in 1983, further defined what constitutes a fraudulent breach of duty under the classical theory.⁵¹ In *Dirks*, a whistleblowing former officer of the corporation Equity Funding of America contacted Dirks and provided him with insider information so that he could investigate and disclose Equity Funding's fraudulent practices.⁵² The whistleblower urged Dirks to verify and disclose the fact that the corporation had vastly overstated its assets.⁵³ Dirks then investigated the fraud and disclosed his findings to clients and investors, some of whom sold their holdings in the corporation.⁵⁴ The SEC found that Dirks, as a tippee, had violated the Title 15 securities laws by disclosing the information about the fraud to these clients and investors.⁵⁵ The SEC noted that when tippees, "regardless of their motivation or occupation . . . come into possession of material 'corporate information that they know is confidential and know or should know came from a corporate insider,' they must either publicly disclose that information or refrain from trading."⁵⁶

The Supreme Court rejected the SEC's theory of tippee liability, concluding that it "differ[ed] little from the view" it rejected in *Chiarella* that the purpose of

47. As recognized by the Supreme Court in *United States v. O'Hagan*, 521 U.S. 642, 654 (1997), the misappropriation theory encompasses the "embezzlement" theory of fraud. See also *United States v. Carpenter*, 484 U.S. 19, 27 (1987) (holding that "[t]he concept of fraud includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another").

48. Information is material if there is a substantial likelihood a reasonable investor would consider it important in deciding how to invest. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1998).

49. See Surette, *supra* note 30.

50. *S.E.C. v. Texas Gulf Sulphur Co.*, 401 F.2d 822, 839-44 (2d Cir. 1968) (en banc).

51. *Dirks v. SEC*, 463 U.S. 646-47 (1983).

52. *Id.* at 648-49.

53. *Id.* at 649.

54. *Id.*

55. *Id.* at 650-51.

56. 21 S.E.C. Docket 1401, 1407 (1981) (quoting *Chiarella v. United States*, 445 U.S. 222, 230 n.12 (1980)).

the Title 15 securities laws is to alleviate information asymmetries between trading parties in order to promote “fairness.”⁵⁷ The Court evinced concern that “[i]mposing a duty to disclose or abstain solely because a person knowingly receives material non-public information from an insider and trades on it could have an inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market.”⁵⁸ The Court saw the need to preserve the analyst’s ability to “ferret out and analyze information” by “meeting with and questioning corporate officers and others who are insiders” to facilitate accurate pricing of corporate stock.⁵⁹

To allay these concerns, the Court devised the “personal benefit” test as a legal rule that would allow the market analysts to engage in the “good” kind of insider trading while preserving the government’s ability to prosecute the “bad” kinds of insider trading. The Court wanted to preserve an analyst’s ability to ferret out market-moving information, but wanted to discourage tipping when the tipper acted for his own personal benefit. As such, the Court reaffirmed its holding in *Chiarella* that only tipping that breaches a tipper’s fiduciary duty constitutes fraud, and decided that such a breach only occurs where the insider receives a personal benefit in exchange for the tip.⁶⁰ If the tipper “receives no personal benefit in exchange for his tip, then unconstrained trading on the basis of the tip is entirely permissible.”⁶¹ A tipper, then, does not engage in illegal behavior under the Title 15 Securities laws even where he or she divulges confidential corporate information without consent or notice as long as she receives no personal benefit for doing so.⁶² The “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.”⁶³

Extending the “personal benefit” theory to tippees, the Court in *Dirks* held that tippees do not automatically inherit the tipper’s fiduciary duties unless 1) the

57. *Dirks*, 463 U.S. at 656-57; see also *Chiarella*, 445 U.S. at 232 (rejecting the theory that “[t]he use by anyone of material information not generally available is fraudulent . . . because such information gives certain buyers or sellers an unfair advantage over less informed buyers and sellers”).

58. *Dirks*, 463 U.S. at 658.

59. *Id.* at 658-59.

60. *Id.* at 662-63.

61. Jonathan R. Macey, *Beyond the Personal Benefit Test: The Economics of Tipping by Insiders*, 2 U. OF PA. J. L. & PUB. AFF. 26, 38 (2017).

62. Courts have recognized a variety of personal benefits that qualify under *Dirks*. In *United States v. Martoma*, 894 F.3d 64, 74 (2d Cir. 2017), the Second Circuit recognized that “*Dirks* set forth numerous examples of personal benefits that prove the tipper’s breach: a ‘pecuniary gain,’ a ‘reputational benefit that will translate into future earning,’ a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter,’ the tipper’s ‘intention to benefit the particular recipient,’ and ‘a gift of confidential information to a trading relative or friend.’” Courts have found that the personal benefit is “usually, but not always, founded on a gift from the tipper to the tippee or on a *quid pro quo* relationship between the tipper and tippee.” See Surette, *supra* note 30, at 4.

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

tipper received a personal benefit in exchange for the tip and 2) the tippee knows that the tipper received a personal benefit in exchange for the tip. Therefore, a tippee escapes liability under the Title 15 securities laws where he is unaware that the tipper acts for his own personal gain. But where “the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach,”⁶⁴ the tippee will be liable for the information that “has been made available to them improperly.”⁶⁵

In *United States v. O'Hagan*,⁶⁶ the Supreme Court accepted the misappropriation theory of insider trading, which expanded insider trading liability to “corporate outsiders,” or persons who tip or trade confidential company information but owe no fiduciary duty to the shareholders of that company.⁶⁷ Under the misappropriation theory, a tipper violates the securities laws when he or she breaches a duty owed to the source of the information.⁶⁸ The defendant in *O'Hagan*, who was employed by a law firm hired by Grand Metropolitan PLC to represent it regarding a tender offer for Pillsbury Company's common stock, used information gleaned from that relationship to purchase call options and shares of Pillsbury.⁶⁹ The Court found him guilty of Title 15 securities fraud under the misappropriation theory even though he had no duty to Pillsbury's shareholders.⁷⁰ Instead, the Court found he had breached his duty to his law firm and the client of his law firm, Grand Met, through his “undisclosed, self-serving use” of their information “to purchase or sell securities,” defrauding them “of the exclusive use of that information.”⁷¹ In

64. *Id.* at 660; see also Donald C. Langevoort, *The Demise of Dirks: Shifting Standards for Tipper-Tippee Liability*, 8 No. 6. INSIGHTS 23, 24 (1994).

65. *Dirks*, 463 U.S. at 647.

66. 521 U.S. 642 (1997).

67. *Id.* at 651. The government first argued the misappropriation theory to the Supreme Court in *Chiarella*, but the majority declined to rule on it, finding that the misappropriation theory was not included in the jury instructions at issue. *Chiarella v. United States*, 445 U.S. 222, 236 n.21 (1980). Prior to its acceptance by the Supreme Court, the misappropriation theory was accepted by several lower courts, including the Second Circuit, the Third Circuit, the Seventh Circuit, and the Ninth Circuit. See *S.E.C. v. Cherif*, 933 F.2d 403, 410 (7th Cir. 1991); *S.E.C. v. Clark*, 915 F.2d 439, 449 (9th Cir. 1990); *Rothberg v. Rosenbloom*, 771 F.2d 818, 823 (3d Cir. 1985); *United States v. Newman*, 664 F.2d 12, 18 (2d Cir. 1981).

68. *United States v. O'Hagan*, 521 U.S. 642, 652 (1997); see also Stephen M. Bainbridge, *Incorporating State Fiduciary Law Duties into the Federal Insider Trading Prohibition*, 52 WASH & LEE L. REV. 1189, 1190 (1995) (noting that a person only “violates the federal insider trading prohibition . . . if his trading activity breached a fiduciary duty owed either to the investor with whom he trades or to the source of the information”); Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After United States v. O'Hagan*, 84 VA. L. REV. 153, 175 (1998) (stating that the misappropriation theory requires determination of “whether a fiduciary relationship exists creating a duty to disclose to the principal the fiduciary's use of information.”).

69. *O'Hagan*, 521 U.S. at 647-48.

70. *Id.* at 652-53.

71. *Id.* at 652.

accepting the misappropriation theory, the Supreme Court extended insider trading liability to corporate outsiders while upholding the requirement that the tipper breach a fiduciary duty in order to be liable for fraud under the Title 15 securities laws.

C. The Addition of 18 U.S.C. Section 1348 as a Vehicle for Insider Trading Liability

Congress added Title 18 securities fraud to the criminal code as part of the Sarbanes-Oxley Act of 2002, after the Supreme Court had decided *Chiarella*, *Dirks*, and *O'Hagan*.⁷² 18 U.S.C. section 1348 provides that:

Whoever knowingly executes, or attempts to execute, a scheme or artifice . . . to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 . . . or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 . . . shall be fined under this title, or imprisoned not more than 25 years, or both.⁷³

Although the addition of 18 U.S.C. section 1348 to the criminal code gave the government an additional avenue for charging insider trading, the government has largely preferred to rely on the Title 15 securities laws.⁷⁴ In *United States v. Mahaffy*, a 2006 case where the government charged the defendant with violating the Title 18 securities statute, Judge Glasser noted that he could identify “no previous convictions under 18 U.S.C. § 1348.”⁷⁵ Until *United States v. Blaszcak*, few courts deciding high-profile insider trading cases had interpreted 18 U.S.C. section 1348 at all. Part II discusses the *Blaszcak* court’s novel interpretation of 18 U.S.C. section 1348 and its decision to distinguish it from the existing Title 15 securities fraud statute.

II. THE *BLASZCZAK* COURT’S DECISION TO DISTINGUISH THE TITLE 18 SECURITIES FRAUD STATUTE FROM THE TITLE 15 SECURITIES FRAUD STATUTE BASED ON LEGISLATIVE HISTORY

In *Blaszcak*, the Second Circuit addressed for the first time whether the *Dirks* personal benefit test applies to insider trading prosecutions brought under the Title 18 securities fraud statute. Defendants Huber, Olan, and Worrall

72. 18 U.S.C. § 1348 (2018).

73. *Id.*

74. See, e.g., *Rajaratnam v. United States*, 736 Fed. App’x 279 (2d Cir. 2018); *United States v. Gupta*, 747 F.3d 111 (2d Cir. 2014); *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *abrogated by* *Salman v. United States*, 137 S. Ct. 420 (2016) (charging insider trading in violation of the Title 15 securities fraud statutes, not the Title 18 securities fraud statutes); *United States v. Goffe*, 721 F.3d 113 (2d Cir. 2013).

75. *United States v. Mahaffy*, No. 05-CR-613, 2006 WL 2224518, at *11 (E.D.N.Y. Aug. 2, 2006).

appealed their Title 18 convictions, arguing, among other things, that the District Court had improperly instructed the jury on the Title 18 counts by failing to instruct the jury that Title 18 securities fraud requires proof of a “duty of confidence and breach of that duty for personal gain by the insider”⁷⁶—elements of the *Dirks* test. For the Title 15 securities fraud counts, under which the defendants were acquitted, the district court had instructed the jury that:

1. In order to convict Worrall of Title 15 securities fraud, it needed to find that he tipped confidential CMS information in exchange for a personal benefit;
2. In order to convict Blaszcak of Title 15 securities fraud, it needed to find that he knew that Worrall disclosed the information in exchange for a personal benefit; and
3. In order to convict Huber or Olan of Title 15 securities fraud, it needed to find that Huber or Olan knew that a CMS insider tipped the information in exchange for a personal benefit.⁷⁷

For the Title 18 securities fraud count, the district court instructed the jury that it could convict the defendants if it found the defendants knowingly and willingly “participated in a scheme to embezzle or convert confidential information from CMS by wrongfully taking that information and transferring it to [their] own use or the use of someone else.”⁷⁸ The defendants argued that the district court erred in failing to instruct the jury that a “scheme to defraud” under Title 18 also required proof for a duty of confidence and breach of that duty for personal gain by the insider.⁷⁹

The Second Circuit rejected the defendant’s reasoning, holding that the *Dirks* personal benefit test is not required for convictions under the Title 18 securities fraud. The court reasoned that it would be inappropriate to layer the elements required for conviction under Title 15 onto Title 18 because the two statutes contemplate different theories of fraud. The court explained that under the Title 15 securities fraud statute, an insider’s wrongdoing is based on the insider’s breach of “a duty of trust and confidence by disclosing material, non-public information in exchange for a ‘personal benefit.’”⁸⁰ Likewise, a tippee does not commit fraud under Title 15 “unless he utilized the inside information knowing that it had been obtained in breach of the insider’s duty.”⁸¹ Title 18, in contrast, criminalizes the act of embezzlement, by which a defendant fraudulently appropriates to his own use the “money or goods entrusted to one’s

76. Brief and Special Appendix for Defendant-Appellant David Blaszcak at 2, *United States v. Blaszcak*, 947 F.3d 19 (2d Cir. 2019) (Nos. 18-2811(L), 18-2825(CON), 18-2878(CON)).

77. *Blaszcak*, 947 F.3d at 29.

78. *Id.*

79. Brief and Special Appendix for Defendant-Appellant David Blaszcak at 44-45, *Blaszcak*, 947 F.3d 19 (Nos. 18-2811(L), 18-2825(CON), 18-2878(CON)).

80. *Blaszcak*, 947 F.3d at 34-35.

81. *Id.* at 35.

care by another.”⁸² Because a person can misappropriate another’s property regardless of whether he decides to use that property for his own benefit, the Second Circuit held that the Title 18 counts at issue did not require application of the *Dirks* personal benefit test for either tippers or tippees.⁸³

In justifying its decision to treat Title 15 securities fraud and Title 18 securities fraud differently, the *Blaszczak* court analyzed the differing purposes of the two statutes. The court recognized that Title 15 was added as part of the Exchange Act, which aimed to protect the “free flow of information into the securities markets.”⁸⁴ The Supreme Court developed the *Dirks* test to serve this purpose, declaring that trading on inside information should only be prohibited when done to gain a personal advantage. The theory is that “[w]hen an insider enriches himself at the expense of shareholders to whom he owes fiduciary duties, he harms the shareholders in particular and undermines confidence in the market more generally.”⁸⁵ Title 18 securities fraud, in contrast, was “added to the criminal code by the Sarbanes-Oxley Act of 2002 in large part to overcome the ‘technical legal requirements’ of the Title 15 fraud provisions.”⁸⁶ The Second Circuit concluded: “[g]iven that Section 1348 was intended to provide prosecutors with a different—and broader—enforcement mechanism to address securities fraud than what had been previously provided in the Title 15 fraud provisions, we decline to graft the *Dirks* personal benefit test onto the elements of Title 18 securities fraud.”⁸⁷

In deciding *Blaszczak*, the Second Circuit became the first federal court of appeals to hold that prosecutors may convict under the Title 18 securities statute without proving the elements of the *Dirks* personal benefit test. Some commentators noted that the ruling “represents a radical expansion of insider trading liability”⁸⁸ and “allows prosecutors to circumvent the personal-benefit requirement that has long attached to insider trading prosecutions.”⁸⁹ Others argued that the Second Circuit’s decision “heightens the risk for analysts and others who communicate with company executives, employees, and other insiders to obtain investment-relevant information without providing any benefit to those employees.”⁹⁰ Yet the legislative and judicial history of the Title 18

82. *Id.* at 35 (quoting *United States v. Carpenter*, 484 U.S. 19, 27 (1987)).

83. *Id.* at 36.

84. *Id.* at 35.

85. Brief for the United States at 53, *Blaszczak*, 947 F.3d 19 (Nos. 18-2811(L), 18-2825(CON), 18-2878(CON)).

86. *Blaszczak*, 947 F.3d at 36.

87. *Id.* at 36-37.

88. Adam Pritchard, *2nd Cir. Ruling Makes Messy Insider Trading Law Worse*, LAW 360 (Jan. 27, 2020, 4:10 PM EST), <https://perma.cc/MF23-JMGD>.

89. Greg Andres et al., *Second Circuit Lowers the Bar for Charging Criminal Insider Trading*, DAVIS POLK (Jan. 1, 2020), <https://perma.cc/THK3-5LKX>.

90. Barry Goldsmith et al., *United States v. Blaszczak: Second Circuit Ruling Heightens Risks of Insider Trading Investigations and Prosecutions*, GIBSON DUNN (Jan. 8, 2020), <https://perma.cc/GD4F-DBRA>.

Securities Fraud statutes largely supports the Second Circuit's interpretation.

Title 18 Securities fraud was added to the criminal code as part of the Sarbanes-Oxley Act of 2002.⁹¹ The legislative history surrounding 18 U.S.C. section 1348 is limited, but most sources point to congressional intent to free federal prosecutors and investigators from relying on the Title 15 securities fraud statutes and the Title 18 mail and wire fraud statutes⁹² to obtain insider trading convictions. One Senate report stated that the goal of the new securities fraud statute was to “deal[] with the specific problem of securities fraud” so that federal investigators and prosecutors would be freed from either “resort[ing] to a patchwork of technical Title 15 offenses and regulations” or “treat[ing] the cases as generic mail or wire fraud cases.”⁹³ In describing the new Title 18 securities fraud offense, Senator Sarbanes, one of the bill's sponsors, emphasized that the Title 18 wire and mail fraud provisions were inadequate, on their own, to deal with the securities fraud problem.⁹⁴ In support of his amendment creating a “tough new 10-year felony for securities fraud,” Senator Patrick Leahy, Senate Judiciary Committee Chairman, noted that he was “surprised to learn that unlike bank fraud, health care fraud, and even bankruptcy fraud, there is no specific Federal crime of securities fraud to protect victims of fraud related to publicly traded companies.”⁹⁵

The general backlash against corporate fraud arising from the Enron scandal, which prompted the passage of the Sarbanes-Oxley Act,⁹⁶ also supports the conclusion that Congress intended prosecution of insider trading to be easier under the Title 18 securities fraud statute than under existing statutes. One Senate report specifies that the new, “more general and less technical provision” should “not be read to require proof of technical elements from the securities laws, and is intended to provide needed enforcement flexibility in the context of publicly traded companies to protect shareholders and prospective shareholders against all the types [of] schemes and fraud which inventive criminals may devise in the future.”⁹⁷ Because the personal benefit requirement makes it harder, not easier, for prosecutors to convict defendants for insider trading, especially where the

91. Sarbanes-Oxley Act of 2002, PUB. L. NO. 107-204, tit. VIII, § 807(a), 116 Stat. 804 (2002) (codified as amended at 18 U.S.C. § 1348 (2018)).

92. 18 U.S.C. §§ 1341, 1343 (2018).

93. S. REP. NO. 107-146, at 20 (2002); *see also* 148 Cong. Rec. S6,528 (daily ed. July 10, 2002) (statement of Sen. McCain) (“This amendment also creates a new securities fraud offense. The provision makes it easier, in a limited class of cases, to prove securities fraud.”).

94. 148 CONG. REC. S6,539 (daily ed. July 10, 2002) (statement of Sen. Sarbanes).

95. 148 CONG. REC. S6,439 (daily ed. July 9, 2002) (statement of Sen. Leahy); *see also id.* at S6,436-37 (statement of Sen. Daschle) (“The Leahy amendment punishes criminals by creating a tough new 10-year felony for securities fraud. It provides prosecutors with a new tool that is flexible enough to keep up with the most complex new fraud schemes and tough enough to deter violations on the front end.”).

96. Sarbanes-Oxley Act of 2002, Pub L. No. 107-204, 116 Stat. 745 (2002).

97. S. REP. NO. 107-146, at 20 (2002).

trade involves multiple “layers” of tips, Congress likely did not intend to engraft the *Dirks* personal benefit requirement onto the Title 18 securities fraud statute.⁹⁸ In fact, after the Department of Justice issued a Field Guidance Memorandum interpreting the Title 18 securities fraud provision as a mere “complement” to existing securities fraud statutes, Senator Leahy wrote a letter to Attorney General John Ashcroft lamenting that the Memorandum did not “point out the many advantages of the new criminal provision,” including freedom from the “often problematic intent requirements” associated with prosecuting “willful” violations of the securities laws and regulations.⁹⁹ These legislative materials support the *Blaszczak* court’s decision to treat Title 18 securities fraud differently than Title 15 securities fraud.

All courts to consider the elements of Title 18 securities fraud have reached this same conclusion. Before *Blaszczak*, the few courts to interpret the Title 18 securities fraud statute had agreed that the Title 18 securities fraud statute was modeled on the other Title 18 fraud statutes rather than the Title 15 securities fraud statutes. In *United States v. Melvin*, a court in the Northern District of Georgia found that “the text and legislative history of 18 U.S.C. § 1348 clearly establish that it was modeled on the mail and wire fraud statutes, not on the Exchange Act.”¹⁰⁰ In *United States v. Motz*, the defendants, the prosecution, and a judge in the Eastern District of New York all agreed that 18 U.S.C. section 1348 was modeled on the Title 18 mail and wire fraud statutes such that the “Court’s analysis should be guided by the caselaw construing those statutes”¹⁰¹ rather than the Title 15 statutes.

The courts that have heard Title 18 securities fraud cases have also specifically ruled that the government need not prove the elements of the *Dirks* personal benefit test to secure a conviction for insider trading under Title 18. In *United States v. Mahaffy*, the Eastern District of New York decided a case

98. See, e.g., S. REP. NO. 107-146, at 2 (2002) (“This legislation aims to prevent and punish corporate and criminal fraud . . . [i]n the wake of the continuing Enron Corporation . . . debacle”); but see Brief of Amici Curiae Law Professors at 10, *United States v. Blaszczak*, 947 F.3d 19 (2d Cir. 2019) (Nos. 18-2811(L), 18-2825(CON), 18-2878(CON)) (arguing that 18 U.S.C. section 1348 was meant to give prosecutors greater flexibility to prosecute insider trading by, among other things, 1) omitting the mailing an interstate wire requirements found in the mail and wire fraud statutes 2) omitting the Exchange Act’s requirement that the fraud scheme occur “in connection with the purchase or sale” of a security, and 3) increasing the statutory sentencing maximum for securities fraud—not by omitting the *Dirks* personal benefit requirement).

99. See DAVID MILLS & ROBERT WEISBERG, *WHITE COLLAR CRIME* 237 (2019) (quoting *White Collar Crime: Leahy Faults Ashcroft Guidance on Implementation of Sarbanes-Oxley Act*, 71 *Crim. L. Rep. (BNA)* at 583 (Aug. 14, 2002)).

100. *United States v. Melvin*, 143 F. Supp. 3d 1354, 1375 (N.D. Ga. 2015) (internal quotations omitted) (quoting *United States v. Motz*, 652 F.Supp.2d 284, 294, 296 (E.D.N.Y. 2009)).

101. 652 F. Supp. 2d at 296; see also *United States v. Brooks*, No. 06 Cr. 550, 2009 WL 3644122, at *4 n.5 (E.D.N.Y. Oct. 27, 2009) (finding that section 1348 “is guided by cases interpreting the mail and wire fraud statutes”).

brought under the Title 18 securities fraud statutes. The defendants had tipped confidential information belonging to their brokerage firm employers to day-traders, who used the information to strategically purchase securities based on the brokerage firm's pending client orders.¹⁰² The court described the elements necessary to convict the defendants under section 1348 as "(1) fraudulent intent, (2) a scheme or artifice to defraud, and (3) a nexus with a security."¹⁰³ The court did not mention either *Dirks* or the personal benefit test.

In *United States v. Slawson*, the court explicitly declined to impose the *Dirks* test onto Title 18 securities fraud convictions. In *Slawson*, a defendant indicted under 18 U.S.C. sections 1343 and 1348 sought to dismiss the indictment for failure to allege that he knew that either of the alleged tippers received any personal benefit in connection with passing along the material, non-public information.¹⁰⁴ The court rejected the defendant's argument, noting that he "ha[d] not offered a single legal authority applying [section 10(b) and Rule 10b-5] case law to the Title 18 security fraud violations alleged in [the] indictment."¹⁰⁵ The court went further, stating affirmatively that "[a]bsolutely nothing in the language of § 1348 or any case this court found setting forth the elements for either subsection of that statute makes reference to proving, much less alleging, that a defendant . . . knew the identities of individuals providing material, non-public information, knew that these individuals breached their duty by making the disclosures, and knew that these individuals received a benefit for their actions."¹⁰⁶ The court in *United States v. Melvin* echoed the *Slawson* court's reasoning, declining to impose the *Dirks* test onto Title 18 securities fraud convictions and noting that "the overarching purpose of the statute was to broaden the range of conduct proscribed by existing federal securities laws."¹⁰⁷

The Second Circuit's decision in *Blaszczak*, then, aligns with all available judicial precedent in declining to impose the *Dirks* personal benefit test onto the Title 18 securities fraud statute. The next Part argues that uniqueness of the *Blaszczak* decision lies not in its holding that *Dirks* does not apply to Title 18 securities fraud, but rather its move towards uniting insider trading law under Title 15 and Title 18 under the "embezzlement" theory of fraud and implying that the personal benefit test does not apply under *either* Title 15 or Title 18 cases brought under that theory.

102. *United States v. Mahaffy*, No. 05-CR-613, 2006 WL 2224518, at *1 (E.D.N.Y. Aug. 2, 2006).

103. *Id.* at *12.

104. *United States v. Slawson*, No. 1:14-cr-00186-RWS-JFK, 2014 WL 5804191, at *3 (N.D. Ga., Nov. 7, 2014), *adopted* 2014 WL 6990307 (N.D. Ga. Dec. 10, 2014).

105. *Id.* at *6.

106. *Id.*

107. *United States v. Melvin*, 143 F. Supp. 3d 1354, 1375 (N.D. Ga. 2015) (quoting *United States v. Motz*, 652 F.Supp.2d 284, 294 (E.D.N.Y. 2009)).

III. THE BLASZCZAK COURT'S ENDORSEMENT OF A UNIFIED "EMBEZZLEMENT" THEORY OF INSIDER TRADING

In *Blaszczak*, the Second Circuit seemed to join the Title 15 and Title 18 securities fraud statutes under a unified "embezzlement" theory of fraud—a confluence of the embezzlement theory of fraud the Supreme Court relied on in *Carpenter v. United States* in upholding insider trading convictions under the Title 18 mail and wire fraud statutes and the misappropriation theory the Supreme Court first applied to Title 15 insider trading prosecutions in *O'Hagan*.¹⁰⁸ The embezzlement theory specifically applies when a person breaches a duty to the source of the information via the act of embezzlement—"the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another."¹⁰⁹ Although in *O'Hagan* and *Carpenter*, the Supreme Court applied the embezzlement theory of fraud to Title 18 and Title 15 cases separately, the *Blaszczak* court became the first to bring these theories together.

A. The Blaszczak Court's Move to Unite Title 15 and Title 18 Securities Fraud Under a Common Theory of "Embezzlement"

The embezzlement theory of securities fraud stems from the Supreme Court's decision in *Carpenter v. United States*, a case decided pre-*O'Hagan* and heavily cited in the *Blaszczak* decision. In *Carpenter*, a writer for the Wall Street Journal passed information about the contents of his market-moving advice column to two stockbrokers in advance of publication.¹¹⁰ These stockbrokers then "bought and sold stocks based on the column's probable impact on the market and shared their profits" with the columnist.¹¹¹ Though the Court was equally divided on whether the defendants' conduct violated the Title 15 securities laws, it affirmed their convictions under the Title 18 mail and wire fraud statutes. The Court found that embezzlement, or "the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another,"¹¹² is a species of fraud prohibited by the Title 18 statutes—and that confidential information is a type of property capable of being embezzled.¹¹³ Thus, in *Carpenter*, the Supreme Court upheld convictions based on insider trading conduct under Title 18 regardless of whether the same conduct would be prohibited under Title 15.

In *O'Hagan*, decided more than ten years later, the Supreme Court explicitly

108. *United States v. Blaszczak*, 947 F.3d 19, 35 (2d Cir. 2019) (holding that for both the Title 15 and Title 18 securities fraud statutes, the term "'defraud' encompasses the so-called 'embezzlement' or 'misappropriation' theory of fraud").

109. *Grin v. Shine*, 187 U.S. 181, 189 (1902) (citation omitted).

110. *Carpenter v. United States*, 484 U.S. 19, 20 (1987).

111. *Id.*

112. *Id.* at 27 (quoting *Shine*, 187 U.S. at 189) (internal quotations omitted).

113. *Id.*

drew from *Carpenter* in endorsing the misappropriation theory as applied to the Title 15 securities statutes. The Court found that a tipper violates the securities laws when he or she breaches a duty owed to the source of the information by misappropriating the information for his or her own use, and noted that this type of fraud was “of the same species” of the type of fraud at issue in *Carpenter*—the type of fraud “akin to embezzlement.”¹¹⁴ *Carpenter*, then, laid the foundation for using the later-enacted Title 18 securities fraud statute as a separate vehicle for bringing insider trading prosecutions under the embezzlement theory of fraud, while *O’Hagan* recognized the embezzlement theory of fraud as a species of the misappropriation theory applicable to the Title 15 securities fraud statutes.

In *Blaszczak*, the Second Circuit drew from both *Carpenter* and *O’Hagan* to become the first Court of Appeals to endorse a unified “embezzlement” theory of fraud that applies under *both* Title 15 and Title 18 when a tipper fraudulently appropriates, to his or her own use, a company’s confidential information “in breach of a fiduciary duty or similar duty of trust and confidence.”¹¹⁵ Judge Richard Sullivan wrote for the court:

We begin by noting what the Title 18 and Title 15 fraud provisions have in common . . . these provisions prohibit, with certain variations, schemes to defraud. For each of these provisions, the term “defraud” encompasses the so-called “embezzlement” or “misappropriation” theory of fraud. According to this theory, “[t]he concept of ‘fraud’ includes the act of embezzlement, which is ‘the fraudulent appropriation to one’s own use of the money or goods entrusted to one’s case by another.’” The undisclosed information misappropriation of confidential information, in breach of a fiduciary or similar duty of trust and confidence, “constitutes fraud akin to embezzlement.”¹¹⁶

In holding that both Title 18 and Title 15 encompass the embezzlement theory of fraud, the *Blaszczak* court went farther than the Supreme Court in *O’Hagan*—it found the embezzlement theory of fraud as applied to Title 18 in *Carpenter* to not be merely the same species of fraud contemplated by the Title 15 misappropriation theory, but the same kind.¹¹⁷ While the court’s language does not endorse replacing the classical theory of insider trading with the embezzlement theory, it does pave the way for a much broader application of the embezzlement theory. Under the *Blaszczak* court’s approach, prosecutors could bring insider trading cases under both the Title 18 and Title 15 securities fraud statutes based on an embezzlement theory without having to satisfy the most onerous element of the classical theory—the *Dirks* personal benefit test.

114. *United States v. O’Hagan*, 521 U.S. 642, 653-64 (1997).

115. *United States v. Blaszczak*, 947 F.3d 19, 35 (2d Cir. 2019) (quoting *O’Hagan*, 521 U.S. at 654).

116. *Id.* (internal quotations and citations omitted).

117. *See also* *United States v. Pinto-Thomaz*, 352 F. Supp. 3d 287, 295-96 (defining all of insider trading as “a variation of the species of fraud known as embezzlement.”).

B. The Blaszczak Court's Holding that the Personal Benefit Test Has No Application Under the "Embezzlement" Theory of Fraud

After endorsing a unified "embezzlement" theory of insider trading, the *Blaszczak* court made a surprising move—it implied that the government need not prove the elements of the *Dirks* personal benefit test when it brings an insider trading case under the embezzlement theory across either the Title 15 or Title 18 securities fraud statutes. The court wrote:

Once untethered from the statutory context in which it arose, the person-benefit test finds no support in the embezzlement theory of fraud recognized in *Carpenter*. In the context of embezzlement, there is no additional requirement that an insider breach a duty to the owner of the property, since it is impossible for a person to embezzle the money of another without committing a fraud upon him. Because a breach of duty is thus inherent in *Carpenter's* formulation of embezzlement, there is likewise no additional requirement that the government prove a breach of duty in a specific manner, let alone through evidence that an insider tipped confidential information in exchange for a personal benefit.¹¹⁸

The Court thus recognized that whether or not a tipper receives a personal benefit in exchange for his or her tip is irrelevant for the embezzlement species of fraud, which is based on the act of misappropriating—or "stealing"—the information in violation of a duty to the information's owner.¹¹⁹ In holding that the *Dirks* test has no relevance for securities fraud cases brought under "embezzlement" theory of fraud, the Second Circuit became the first federal court of appeals to imply that the *Dirks* test may be unnecessary for prosecuting insider trading under this theory regardless of whether the government charges the defendant under Title 15 or Title 18. This development would severely limit the application of the *Dirks* personal benefit test to cases involving corporate insiders—cases brought by the government under the "classical theory."

This position may have roots in an earlier line of cases analyzing Title 15 securities fraud, which, until *Blaszczak*, had fallen out of favor.¹²⁰ In *SEC v. Willis* and *SEC v. Musella*, cases decided in the late eighties and early nineties, the Southern District of New York initially held that the misappropriation theory does not require application of the personal benefit test even in Title 15 cases.¹²¹

118. *Blaszczak*, 947 F.3d at 36 (internal quotations omitted).

119. *Id.* (holding that the "personal-benefit test finds no support in the embezzlement theory of fraud recognized in *Carpenter*").

120. See Merritt B. Fox & George N. Tepe, *Personal Benefit Has No Place in Misappropriation Tipping Cases*, 71 SMU L. REV. 767 (2018) (arguing that tippers can breach their duty to the source of the information under the misappropriation theory regardless of "whether or not the tipper received a personal benefit"); see also Donald C. Langevoort, "Fine Distinctions" in *Insider Trading*, 2 COLUM. BUS. L. REV. 429, 451 (2013) (suggesting that "there was ample room for misappropriation to develop as a separate and distinct concept of 'stolen property' fraud, and not just as a different way of looking at to whom the fiduciary duty is owed").

121. See *S.E.C. v. Willis*, 777 F. Supp. 1165, 1172 n.7 (S.D.N.Y. 1991) (requiring no

The Second Circuit seemed to agree with this initial instinct to limit the application of *Dirks* to cases brought under the classical theory.¹²² For instance, in *United States v. Chestman*, a misappropriation case based on a husband's misappropriation of material, non-public information learned from his wife, the Second Circuit did not analyze whether the husband tipped the information in exchange for a personal benefit.¹²³ Instead, the court focused solely on whether the tipper breached a duty owed to his family or his wife "based on a fiduciary or similar relationship of trust and confidence," and whether the tippee knew that such a breach had occurred.¹²⁴ Concurring in part and dissenting in part, Judge Winter ventured to further define the difference between the theory of fraud governed by the *Dirks* personal benefit test and the theory of fraud elucidated in *Carpenter*. He noted that:

The *Dirks* rule is derived from securities law, and its limitation to information obtained through breach of fiduciary duty is . . . influenced by the need to allow persons to profit from generating information about firms so that the pricing of securities is efficient. The *Carpenter* rule, however, is derived from the law of theft or embezzlement, and a tippee's liability may be governed by rules concerning the possession of stolen property.¹²⁵

By this logic, tippee liability under the misappropriation, or embezzlement, theory has no connection to whether the tipper received a personal benefit in exchange for the tip. The SEC itself has advanced this position, arguing that in cases brought under the misappropriation theory, the tipper need not receive a personal benefit in exchange for tipping the information.¹²⁶

But over time, the tide turned. Several courts decided that the "personal benefit" requirement should apply in Title 15 misappropriation cases, and the argument that cases brought under the embezzlement theory should be treated differently fell into disfavor.¹²⁷ The Second Circuit ruled in a civil case, *S.E.C. v.*

personal benefit test in misappropriation cases); *S.E.C. v. Musella*, 748 F. Supp. 1028, 1038 n.4 (S.D.N.Y. 1989) ("The misappropriation theory of liability does not require a showing of a benefit to the tipper.").

122. See *United States v. Libera*, 989 F.2d 596, 600 (2d Cir. 1993) (noting, in dicta, that "[t]he tipper's knowledge that he or she was breaching a duty to the owner of confidential information suffices to establish the tipper's expectation that the breach will lead to some kind of a misuse of the information").

123. See *United States v. Chestman*, 947 F.2d 551, 564 (2d Cir. 1991) (en banc).

124. *Chestman*, 947 F.2d at 564.

125. *Id.* at 581 (Winter, J., concurring in part and dissenting in part); see also Zachary J. Gubler, *Reframing United States v. Salman*, 165 U. PA. L. REV. ONLINE 1, 5 (2016) ("[T]he original logic supporting the personal benefit requirement under the classical theory is simply nonexistent under the misappropriation theory.").

126. See, e.g., Gubler, *supra* note 142 (citing Brief of the Securities and Exchange Commission, Appellee at 40-46, *S.E.C. v. Yun*, 327 F.3d 1263 (11th Cir. 2003) (No. 01-14490-HH), 2001 WL 34455703, at *40-46).

127. See, e.g., *S.E.C. v. Yun*, 327 F.3d 1263 (11th Cir. 2003) (finding the personal benefit requirement to apply in misappropriation cases); *S.E.C. v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (noting disagreement about "whether benefit to a misappropriating tipper is a required element of section 10(b) and Rule 10b-5 liability").

Obus, that the personal benefit requirement does apply to cases brought under the misappropriation theory,¹²⁸ and in a subsequent criminal case, *United States v. Newman*, seemed to affirm the same position.¹²⁹ The Eleventh Circuit also refused to “construct[] an arbitrary fence between insider trading liability based upon [the] classical and misappropriation theories,” finding that the *Dirks* personal benefit test applies in both classical and misappropriation insider trading cases.¹³⁰ The court reasoned that under both theories, “the tippee is under notice that he has received confidential information through an improper breach of a duty of loyalty and confidentiality” and “the harm to the securities market from such trading” is the same.¹³¹ Because “the position of a tippee is the same whether his tipper is an insider or an outsider, it makes ‘scant sense’ for the elements the SEC must prove to establish a § 10(b) and Rule 10b-5 violation to depend on the theory under which the SEC chooses to litigate the case.”¹³² The Second Circuit and Eleventh Circuit’s opinions shifted the weight of judicial opinion towards requiring application of the personal benefit test in both classical and misappropriation cases.

Yet the Second Circuit’s decision in *Blaszczak* appears to revive the earlier line of Second Circuit cases holding that the personal benefit test has no application to the misappropriation theory of securities fraud. Citing *Carpenter*, the Second Circuit in *Blaszczak* effectively severs the *Dirks* “personal benefit” requirement from insider trading cases brought pursuant to the embezzlement theory under either the Title 15 or Title 18 securities fraud statutes by noting that “[b]ecause a breach of duty is . . . inherent in *Carpenter*’s formulation of embezzlement, there is likewise no additional requirement that the government prove a breach of duty in a specific manner, let alone through evidence that an insider tipped confidential information in exchange for a personal benefit.”¹³³ The Second Circuit’s decision also returns to a line of reasoning articulated by Justice Blackmun in *Dirks* and the Supreme Court in *Carpenter* that the tipper’s receipt of a personal benefit “makes no difference” to the injury caused by the misuse of another’s information.¹³⁴ By finding the embezzlement theory of

128. See *S.E.C. v. Obus*, 693 F.3d 276, 285-88 (2d Cir. 2012) (articulating the standard for tipper and tippee liability and finding that “the Supreme Court’s tipping liability doctrine was developed in a classical case . . . but the same analysis governs in a misappropriation case”).

129. *United States v. Newman*, 773 F.3d 438, 446 (2d Cir. 2014) (deciding a “classical” insider trading case but noting in dicta that “[t]he elements of tipping liability are the same, regardless of whether the tipper’s duty arises under the ‘classical’ or the ‘misappropriation’ theory”), *abrogated on other grounds by* *Salman v. United States*, 137 S. Ct. 420 (2016).

130. *Yun*, 327 F.3d at 1275.

131. *Id.* at 1276.

132. *Id.*

133. *United States v. Blaszczak*, 947 F.3d 19, 36 (2d Cir. 2019).

134. *Dirks v. SEC*, 463 U.S. 646, 672-74 (1983) (Blackmun, J., dissenting). Justice Blackmun in *Dirks* noted, “[t]he fact that the insider himself does not benefit from the breach does not eradicate the shareholder’s injury. It makes no difference to the shareholder whether

insider trading applicable to cases brought under both Title 15 and Title 18, and finding the *Dirks* test not to apply in such cases, the Second Circuit in *Blaszczak* potentially freed prosecutors from proving the *Dirks* personal benefit elements in any case brought under the embezzlement theory, regardless of whether the defendant is charged with violating Title 15 or Title 18.

The next Part explores the doctrinal inconsistencies and policy issues that remain under the *Blaszczak* court's approach to expanding the reach of the embezzlement theory of insider trading and diminishing the scope of *Dirks*.

IV. THE EMBEZZLEMENT THEORY'S REMAINING DOCTRINAL AND PRACTICAL PROBLEMS

The growing prominence of the embezzlement theory of insider trading liability has several advantages. It simplifies insider trading law by de-emphasizing the need for courts to determine the difference between "classical" and "misappropriation" cases and which elements the government must prove for each. In some cases, it allows the government to successfully prosecute remote tippees where prosecution under the classical theory would be nearly impossible due to the need to prove that the remote tippee knew that the original tipper tipped the information in exchange for a personal benefit. However, the attempt to bracket most of insider trading law under the embezzlement theory highlights several unresolved doctrinal inconsistencies and broader policy issues.

A. The Tension Between the Policy Considerations Animating *Dirks* and the Embezzlement Theory of Liability

The Second Circuit's implied holding that the "personal benefit" requirement does not apply in Title 15 insider trading cases brought under the embezzlement theory highlights the tension between the policy goals animating the Court's decision in *Dirks* and the expansion of the embezzlement theory of liability. In *Dirks*, the Supreme Court held that a key purpose of the Title 15 securities fraud laws was to "eliminate the use of insider information for personal advantage,"¹³⁵ but registered its concern that "[i]mposing a duty to disclose or abstain solely because a person knowingly receives material non-public information from an insider and trades on it could have an inhibiting influence on the role of market analysts."¹³⁶ Recognizing that "[i]nvestment analysts are crucial players in the mechanisms of marketplace efficiency that lead to optimal allocations of capital resources," the Supreme Court intended *Dirks* to

the corporate insider gained or intended to gain personally from the transaction; the shareholder still has lost because of the insider's misuse of non-public information." 463 U.S. at 674 (Blackmun, J., dissenting); see also *Carpenter v. United States*, 484 U.S. 19, 26-27 (1987).

135. *Dirks*, 463 U.S. at 662 (citation omitted).

136. *Id.* at 658.

“[e]ncourage[] their search for information” so that a “greater amount of useful and accurate information” would be “reflected in the prevailing market price of the issuer’s securities, to society’s benefit” while also preserving liability for insider trading for personal gain.¹³⁷ The Supreme Court thus developed the *Dirks* personal benefit test as a way to “distinguish when trading on the basis of tips from insiders is beneficial and should be permitted, versus when such trading is harmful to markets and should be banned.”¹³⁸ The Court’s fear was that absent some limiting principle for insider trading liability, stock analysts would be overly wary of using information they receive from corporate insiders, and corporate insiders would be overly wary of sharing the information in the first place. The Court worried that this would harm the efficiency of market pricing, which “redounds to the benefit of all investors.”¹³⁹

Allowing the government to prosecute insider trading under the embezzlement theory without proving the *Dirks* personal benefit elements might undermine market efficiency by chilling the same types of behavior that the Supreme Court in *Dirks* sought to protect.¹⁴⁰ The *Blaszczak* decision may heighten this risk (depending on whether you believe the *Dirks* test to be effective, or in the need to protect the activities of market analysts)¹⁴¹ because it

137. See Donald C. Langevoort, *Investment Analysts and the Law of Insider Trading*, 76 VA. L. REV. 1023, 1024 (1990) (arguing that because the “expected efficiency gains” from encouraging investment analyst trading are open to question, and there are myriad conflicts of interest inherent in the investment analyst disclosure process, encouraging informal analyst contacts has questionable benefits for securities markets).

138. Macey, *supra* note 61, at 27; see also Tai H. Park, Newman/Martoma: *The Insider Trading Law’s Impasse and the Promise of Congressional Action*, 25 FORDHAM J. CORP. & FIN. L. 1, 27 (explaining the *Dirks* test as based on the theory that “if institutional analysts could be liable for insider trading merely because they passed [material, non-public information] on to their investing clients,” they will avoid contact with corporate representatives, hindering the market efficiencies gained from such contact re: the pricing of a corporation’s stock).

139. *Dirks*, 463 U.S. at 658 n.17; see also *United States v. Martoma*, 894 F.3d 64, 81-82 (Pooler, J., dissenting) (accepting this “efficiency” rationale). In *Martoma*, Judge Pooler expressed the need to “protect persons outside the company such as an analyst or reporter who learns of insider information from the threat of prosecution for uncovering information about securities issuers just because they also traded on it.” *Id.* at 81.

140. See Macey, *supra* note 61, at 39 (“[T]o the extent that some trading benefits capital markets by exposing fraud and making the prices of financial assets more accurate, it should be encouraged because the increased accuracy of stock prices improves allocative efficiency and increases societal wealth.”); see also *S.E.C. v. Yun*, 327 F.3d 1263, 1275-76, 1279 (11th Cir. 2003) (expressing concern that not requiring a showing of personal benefit in misappropriation cases would permit the government to ignore precedent under the classical theory completely and render *Dirks* “a dead letter”); Daniel R. Fischel, *Insider Trading and Investment Analysts: An Economic Analysis of Dirks v. Securities and Exchange Commission*, 13 HOFSTRA L. REV. 127, 129 (1984) (explaining that “market professionals create societal benefits by reducing problems of asymmetric information faced by competing sellers of securities and by monitoring the actions of corporate managers”).

141. See Gubler, *supra* note 125, at 2 (“[T]he personal benefit requirement is an obsolete vestige of a time when the Supreme Court’s theory of insider trading was very different from what it is today.”); Donald C. Langevoort, *Informational Cronyism*, STAN. L. REV. ONLINE 37,

allows prosecutors to bring insider trading cases under the embezzlement theory without limiting their targets to individuals who tipped information for a personal benefit, or who traded on information with the knowledge that the insider tipped the information for a personal benefit. *Blaszczak* can be read to still require proof of the *Dirks* personal benefit elements in securities fraud cases brought under the classical theory—cases involving corporate insiders—and thus far, courts largely have not applied the misappropriation theory to “classical” insider trading cases.¹⁴² But scholars have argued that “every classical insider trading case can easily be recast as a misappropriation case” where the insider, who owes a duty of loyalty to the corporation, misappropriates information belonging to the corporation by trading on confidential corporation information without prior authorization or notice.¹⁴³ If the government can prosecute insider trading under the embezzlement theory, under either Title 15 or Title 18, without needing to prove the elements of the *Dirks* personal benefit test, it is difficult to see why they would not take this approach—especially with the Second Circuit’s implied endorsement.¹⁴⁴ Such an approach would substantially diminish the importance of *Dirks*, and diminish the efficiency protections *Dirks* may provide for the securities markets through encouraging the activities of market analysts.

43 (2016) (noting the SEC’s later adoption of Regulation FD in 2000, which took “direct aim at the kind of selective disclosure to analysts that Justice Powell . . . had treated as an unqualified good”); *id.* at 44 (arguing that “heavy-handedness on the personal benefit prong is unnecessary when there is a fair insistence on awareness of the breach”); *see also* PREET BHARARA ET AL., REPORT OF THE BHARARA TASK FORCE ON INSIDER TRADING 3 (2020), <https://perma.cc/7URP-T4VF> (noting that although “a small number of economists and commentators have touted purported benefits of allowing insider trading . . . [t]his argument ignores . . . the critical importance of the ownership interest in the inside information”).

142. Zachary J. Gubler, *A Unified Theory of Insider Trading Law*, 105 GEO. L.J. 1225, 1230 (2017); *see also id.* (citing *Steginsky v. Xcelera Inc.*, 741 F.3d 365, 370 n.4 (2d Cir. 2014) (stating that the misappropriation theory is not applicable to insider trading cases involving corporate insiders); *S.E.C. v. Talbot*, 530 F.3d 1085, 1091 (9th Cir. 2008) (“The misappropriation theory reaches trading by corporate outsiders, not insiders”); *S.E.C. v. Maio*, 51 F.3d 623, 631 (7th Cir. 1995) (“Classical theory applies to trading by *insiders* . . . [m]isappropriation theory extends the reach of Rule 10b-5 to outsiders”); *S.E.C. v. Bauer*, 42 F. Supp. 3d, 923, 931 (E.D. Wis. 2014) (“This court is not aware of any authority supporting the extension of the [misappropriation] theory to the facts of this case where, at all times, [defendant] was a corporate insider.”).

143. *See* Gubler, *supra* note 125, at 7 (arguing that the “misappropriation theory . . . should be viewed as the single, unified theory of American insider trading law”); Gubler, *supra* note 142, at 1255 (“[A]pplying the misappropriation theory to the classic case of insider trading, liability would attach only if the insider owed a duty of loyalty to the corporation, as indeed they do.”).

144. If more courts begin to uphold insider trading convictions without requiring proof of the *Dirks* elements, it is unclear whether Congress would react by passing legislation re-imposing the *Dirks* requirement. Two bills introduced in Congress in 2015, the “Ban Insider Trading Act of 2015” and the 2015 “Stop Illegal Insider Trading Act,” would have eliminated the need for the government to prove the elements of *Dirks* in prosecuting insider trading, but the “Insider Trading Prohibition Act,” introduced in 2019, included the *Dirks* personal benefit standard. H.R. 1173, 114th Cong. (2015); S. 702, 114th Cong. (2015); H.R. 2524, 116th Cong. (2019).

B. Inconsistencies Between the Text of the Title 15 Securities Laws and the Embezzlement Theory

As argued in Part III, The Second Circuit's decision in *Blaszczak* solidifies a growing trend in the courts towards re-focusing insider trading liability under the embezzlement theory of securities fraud. Yet the courts advocating for this approach have not adequately dealt with the problem of reconciling the text of the Title 15 securities fraud laws with the embezzlement theory's primary goal of protecting a company's property rights in information. The text of Title 15 focuses on prohibiting deception and manipulation for the protection of investors. Title 15 is entitled "Employment of Manipulative and Deceptive Devices" and specifically prohibits use of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."¹⁴⁵ Correspondingly, Rule 10b-5 prohibits employing "any device, scheme, or artifice to defraud."¹⁴⁶ Title 15, then, specifically proscribes deceptive conduct, not breaches of fiduciary duty, or theft.¹⁴⁷ The misappropriation theory, however, centers around protecting a company's property rights in its own material, non-public information.¹⁴⁸ While the Supreme Court has held that the "deception" element of Title 15 is satisfied in a misappropriation case by the breach of a fiduciary duty to the source of the information, this fraud seems incidental to what the embezzlement theory is really targeting—the conversion of property that results when a person misappropriates a company's confidential information to his or her own use.¹⁴⁹

The idea that the embezzlement theory serves the "investor protection" goals of the Title 15 securities laws strains the most natural reading of the text. The Supreme Court in *O'Hagan* did draw a slim connection between the misappropriation theory and the policy goals of the Title 15 securities laws,

145. 15 U.S.C. § 78j (2018).

146. 17 C.F.R. § 240.10b-5.

147. Cf. *United States v. Newman*, 664 F.2d at 18 (finding investor protection not to be the "sole purpose" of the federal securities laws).

148. See Donna M. Nagy, *Reframing the Misappropriation Theory of Insider Trading Liability: A Post-O'Hagan Suggestion*, 59 OHIO ST. L.J. 1266-67, 1266 n. 211 (1998) (citing authorities articulating the property-rights based rationale for the misappropriation theory of insider trading).

149. See Bainbridge, *supra* note 46, at 1591 ("[T]he insider trading prohibition ought to be viewed as a means of protecting property rights in information, rather than as a means of preventing securities fraud."); see also Donald C. Langevoort, *Words from on High About Rule 10b-5: Chiarella's History, Central Bank's Future*, 20 DEL. J. CORP. L. 865, 897 (1995) ("The law of insider trading suggests an almost organic capacity to impose liability for the unfair exploitation of someone else's information."); Gubler, *supra* note 142, at 1252-53 (arguing that "[t]he difficulty in identifying the deceptive element of the misappropriation theory" lies in the fact that "it is not at all clear that fraud or deceit is what motivated agency law's ban on an agent profiting from the agency relationship itself. In fact, that rule seems to be more of a variation on the property law rule of conversion.").

noting that the misappropriation theory promotes investor confidence because “investors likely would hesitate to venture their capital in a market where trading based on misappropriated non-public information is unchecked by law.”¹⁵⁰ However, although investors may profit incidentally from the embezzlement theory, the real beneficiaries of the theory are the corporations whose information rights it protects.¹⁵¹ The injury that arises when a person embezzles a company’s confidential information to his or her own use thus stems not from the deceptive act, but from “the conversion of the information by the misappropriator for his own profit.”¹⁵² Some scholars have argued that protecting a corporation’s property rights in information would serve chiefly to incentivize the corporation to produce valuable, market-moving information.¹⁵³ For instance, in *Chestman*, Judge Ralph Winter explained that “[i]f the law fails to protect property rights in commercial information . . . less will be invested in generating such information.”¹⁵⁴ But incentivizing companies to produce valuable commercial information has little to do with protecting investors who invest in the securities markets. The embezzlement theory, then, is an uneasy fit for the Title 15 securities laws, which explicitly state their purpose of investor protection.

C. The Embezzlement Theory Is Too Narrow to Capture All Types of Harmful Insider Trading

Another problem with the move to re-center insider trading liability around the embezzlement theory is that the embezzlement theory fails to capture all types of insider trading that can harm the securities markets. Scholars have noted that the “lack of a clear and consistent theory of insider trading liability compromises the government’s ability to achieve these objectives in

150. *United States v. O’Hagan*, 521 U.S. 642, 658 (1997); *see also* Seligman, *supra* note 34, at 1115 (“The primary policy reason for proscribing trading while in possession of material non-public information is to make investors confident that they can trade securities without being subject to informational disadvantages.”).

151. *Cf.* *Milton v. Freeman*, Colloquium, *Foreword*, 61 *FORDHAM L. REV.* S-1, S-4-5 (1993) (arguing that the construction of Rule 10b-5 urged by proponents of the misappropriation theory is inappropriate because the purpose of Rule 10b-5 was investor protection); Nagy, *supra* note 148, at 1273 (arguing that harm caused by the misappropriator’s deception is “actually caused by the misappropriator’s use of the misappropriated information in securities trading rather than by the misappropriator’s fraudulent nondisclosure to the source.”).

152. Bainbridge, *supra* note 46, at 1611.

153. *Id.* at 1606 (“The rationale for assigning the property right to the firm is precisely the same as the rationale for prohibiting patent infringement or theft of trade secrets: protecting the economic incentive to produce socially valuable information.”).

154. *United States v. Chestman*, 947 F.2d 551, 576-77 (2d Cir. 1991) (en banc) (Winter, J., concurring in part and dissenting in part); *see also id.* at 577-78 (“Once activity in a stock reaches an unusual stage, others may guess the reason for the trading—the corporate secret. Insider trading thus increases the risk that confidential information acquired at a cost may be disclosed.”).

prosecutions” that do not involve a breach of fiduciary duty.¹⁵⁵ For example, while the embezzlement theory is broader than the classical theory in that it extends liability to persons who do not owe a duty to the corporation’s shareholders but rather to the source of the information, it still fails to capture the scenario where a complete stranger steals a corporation’s material, market-moving information and trades on it. In other words, when a stranger steals confidential information from the source of the information, the embezzlement theory does not apply because the stranger owes no duty to the source and has not “deceived” the source in any way.¹⁵⁶

The embezzlement theory’s tie to a breach of fiduciary duty creates a situation where the SEC continues to bring actions against strangers who steal corporate information and engage in insider trading, viewing these strangers as violating the securities laws,¹⁵⁷ but courts, applying the traditional principles of the embezzlement theory endorsed in *O’Hagan*, may refuse to uphold liability. For example, in *SEC v. Dorozhko*, a hacker gained access to a corporation’s quarterly earnings report by hacking into an investor relations firm’s secure server.¹⁵⁸ The SEC concluded that the defendant’s conduct in illegally gaining access to the computer databases met the “deception” requirement of Rule 10b-5.¹⁵⁹ However, the Southern District of New York ruled that the defendant’s activity did not violate the Title 15 securities laws for lack of breach of fiduciary duty.¹⁶⁰ The Second Circuit remanded the case to the district court to determine whether “the computer hacking in [the] case involved a fraudulent misrepresentation that was ‘deceptive’ within the ordinary meaning of Section 10(b).”¹⁶¹ It noted that whether the hacker’s conduct was “deceptive” within the meaning of the Title 15 securities laws would turn on whether the hacker affirmatively misrepresented his identity, or whether he merely exploited a weakness in the computer code.¹⁶² The former would count as deception under Title 15, while the latter would be “mere theft.”¹⁶³ If we accept that the goal of

155. Donna M. Nagy, *Insider Trading and the Gradual Demise of Fiduciary Principles*, 94 IOWA L. REV. 1315, 1365 (2009).

156. See Langevoort, *supra* note 120, at 458; see also Transcript of Oral Argument at 5, *United States v. O’Hagan*, 521 U.S. 642 (1997) (No. 96-842), 1997 WL 182584.

157. The SEC has brought several cases against computer hackers who gain access to confidential, market-moving information through illegally accessing a company’s computer data. See *S.E.C. v. Dorozhko*, Litigation Release No. 20349, 91 S.E.C. Docket 2514 (Oct. 30, 2007), 2007 WL 3168187; *Blue Bottle Ltd. & Stokes*, Litigation Release No. 20018, 90 S.E.C. Docket 268 (Feb. 26, 2007), 2007 WL 580798; *S.E.C. v. Lohmus Haavel & Viisemann*, Litigation Release No. 19450, 86 S.E.C. Docket 1591, (Nov. 1, 2005), 2005 WL 2861257.

158. *S.E.C. v. Dorozhko*, 574 F.3d 42, 43 (2d Cir. 2009).

159. *S.E.C. v. Dorozhko*, Litigation Release No. 20, 249, 91 S.E.C. Docket 2514 (Oct. 30, 2007), 2007 WL 3168187.

160. *S.E.C. v. Dorozhko*, 606 F. Supp. 2d 321, 323-324 (S.D.N.Y. 2008), *vacated* 574 F.3d 42 (2d Cir. 2009).

161. *Dorozhko*, 574 F.3d at 51.

162. *Id.*

163. *Id.*

the securities laws is to maintain investor confidence in the securities markets, this result is incongruous. When a stranger to the source of inside information steals that information and trades on it, the securities market is harmed. Yet, because the misappropriation theory is limited to those persons with a “fiduciary-like nexus to the information’s source,” it may not always capture insider trading by these strangers.¹⁶⁴

The embezzlement theory also fails to address the scenario in which an individual owing a fiduciary duty to the source of the information simply informs the source that he or she intends to trade on the information (the “brazen fiduciary” scenario), or, relatedly, the scenario in which an individual owing a fiduciary duty to the source of the information receives the source’s permission to trade on the insider information. The Supreme Court explicitly removed these categories of traders from liability under Title 15 in *O’Hagan* in recognizing that “the deception essential to the misappropriation theory involves feigning fidelity to the source of the information.”¹⁶⁵ Yet, if the goal of insider trading law is to bolster investor confidence in the securities markets, it makes no sense to excuse these categories from liability under the securities laws; either type of trading would tend to reduce investor confidence in the securities markets.¹⁶⁶ The embezzlement theory, as currently interpreted, is thus underinclusive of several harmful types of insider trading. The next part discusses an opportunity for prosecutors to argue for a new approach to insider trading under the Title 18 securities laws that avoids many of these difficulties, drawing from the Second Circuit’s decision in *Blaszczak*.

V. A NEW APPROACH TO PROSECUTING INSIDER TRADING

There are two ways to approach untangling the inconsistencies in insider trading law in the wake of *Blaszczak*: appealing to Congress to pass a new statute specifically criminalizing insider trading, or using the *Blaszczak* decision as a

164. Nagy, *supra* note 155, at 1320.

165. *United States v. O’Hagan*, 521 U.S. 642, 655 (1997).

166. Gubler, *supra* note 142, at 1231; *Id.* at 1263 n.220 (citing Roberta S. Karmel, *Outsider Trading on Confidential Information—A Breach in Search of a Duty*, 20 CARDOZO L. REV. 83, 95 (1998) (arguing that the implication in *O’Hagan* that insider trading liability does not reach the case of the brazen fiduciary is “the weakest part of the Court’s opinion simply because it fails to tie the ban against insider trading to the overarching disclosure policies of the securities laws that mandate disclosure to public investors”)); Nagy, *supra* note 148, at 1256 (arguing that the misappropriation theory “fails to provide a theory that would extend section 10(b) and Rule 10b-5 liability to cases involving . . . fiduciaries who disclose to their principals the fact that they intend to use confidential information in a subsequent securities transaction”); Painter et al., *supra* note 68, at 179 (arguing that the misappropriation theory allows “a fiduciary to trade on material, non-public information with the consent of the principal”); Bainbridge, *supra* note 46, at 1605 (“If we are really concerned with protecting investors and maintaining their confidence in the market’s integrity, the inside trader’s identity ought to be irrelevant . . . from the investor’s point of view, insider trading is a matter of concern because they have traded with someone with superior access to information.”).

springboard for revisiting the types of conduct that count as “fraud” under the Title 18 securities fraud statute. As scholars have argued, the first approach is the simplest.¹⁶⁷ A new statute could encompass all trading that harms securities markets, without regard to whether a fiduciary duty has been breached, by prohibiting trading based on wrongfully misappropriated insider information without a concurrent disclosure to the public. Scholars argue that “[g]iven its concern with investor confidence and market integrity,” the Supreme Court should originally have “employed a broader theory that captured insider trading by non-fiduciary thieves and fiduciaries who disclose their intention to trade.”¹⁶⁸ For example, a bill introduced in 1987, the “Insider Trading Proscriptions Act of 1987,” would have made it unlawful:

For any person, directly or indirectly, to purchase, sell, or cause the purchase or sale of, any security, while in possession of material, non-public information relating thereto (or relating to the market therefor), if such persons knows that such information has been obtained wrongfully, or that such purchase or sale would constitute wrongful use of such information.¹⁶⁹

This provision has the advantage of criminalizing insider trading that occurs after a non-fiduciary steals material, non-public information, as well as insider trading by corporate fiduciaries and those who owe a duty to the source of the information. All such trading can be characterized as “wrongful,” and is thus illegal. This approach also differs from the “parity of information” approach rejected by the Court in *Chiarella* because it would criminalize only failure to disclose wrongfully obtained information. This limitation would alleviate the Supreme Court’s concern in *Dirks* that an overly broad theory of liability for insider trading would hinder the legitimate activities of market analysts.¹⁷⁰ However, Congress has so far declined to pass any legislation defining the bounds of insider trading liability.¹⁷¹

167. Nagy, *supra* note 155, at 1321 (“[I]t would be far better to replace the classical and misappropriation theories with a federal statute that defines and directly prohibits the offense of insider trading.”); *Id.* at 1366 (citing Marc I. Steinberg, *Insider Trading Regulation—A Comparative Analysis*, 37 INT’L LAW. 153, 162 (2003) (“[C]ountries abroad have adopted detailed and specific legislation defining the parameters of the insider trading proscription.”)).

168. Nagy, *supra* note 155, at 1336.

169. S. 1380, 100th Cong. (1987).

170. Nagy, *supra* note 155, at 1374 (“[U]nlike a ‘parity of information’ rule, which could operate to discourage diligent research and legitimate searches for information, a duty to disclose wrongfully obtained information disallows only those informational advantages that serve ‘no useful function except [the trader’s] own enrichment at the expense of others.’”) (quoting *Chiarella v. United States*, 445 U.S. 222, 241 (1980) (Burger, C.J., dissenting)); see also John F. Barry, *The Economics of Outside Information and Rule 10b-5*, 129 U. PA. L. REV. 1307, 1364 (1981) (“A privilege to exploit information improperly obtained would reduce the incentive to invest in legitimate information production by exacerbating free rider problems and by placing on producers the risk of misappropriation.”).

171. See H.R. REP. NO. 100-910, at 11 (1988) (“[T]he court-drawn parameters of insider trading have established clear guidelines for the vast majority of traditional insider trading cases . . . a statutory definition could potentially be narrowing, and in an unintended manner facilitate schemes to evade the law.”); cf. *Musick, Peeler & Garrett v. Employers Ins. of*

Another approach to solving these myriad doctrinal and practical inconsistencies would involve persuading the courts to adopt a different meaning of “fraud” for purposes of the Title 18 securities fraud statute. The text of Title 18 is broad enough to support multiple meanings of fraud; it simply criminalizes “defraud[ing] any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934.”¹⁷² While courts, including the *Blaszczak* court, have already found “fraud” under Title 18 to encompass the same embezzlement theory of fraud requiring a breach of duty to the source of the insider information, prosecutors could argue that the language of the Title 18 statute is broad enough to support multiple definitions of fraud.

The *Blaszczak* court’s decision provides support for this approach. Using the *Blaszczak* court’s finding that the Title 18 securities fraud statute “was intended to provide prosecutors with a different—and broader—enforcement mechanism to address securities fraud than what had been previously provided in the Title 15 fraud provisions,” prosecutors could argue that courts should find Title 18 to encompass a theory of fraud untethered to the concept of fiduciary duty altogether.¹⁷³ In his *Chiarella* dissent, Chief Justice Burger suggested such a theory, arguing that the Title 15 securities laws should be read to “mean that a person who has misappropriated non-public information has an absolute duty to disclose that information or refrain from trading,”¹⁷⁴ regardless of whether the misappropriator owed a duty to the shareholders or to the source of the information. He noted that while analysts may use their “experience and skill in securing and evaluating relevant information,” that rule “should give way when an informational advantage is obtained . . . by some unlawful means.”¹⁷⁵ He argued that the Title 15 securities laws supported this broader meaning of fraud because they were designed to “reach *any* person engaged in *any* fraudulent scheme,” not just “corporate insiders.”¹⁷⁶ Under this definition of fraud, the

Wausau, 508 U.S. 286, 292 (1993) (“The federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and the definition of the duties it imposes.”). Two bills introduced in Congress in 2015, the “Ban Insider Trading Act of 2015” and the 2015 “Stop Illegal Insider Trading Act,” would have eliminated the need for the government to prove the elements of *Dirks* in prosecuting insider trading, but the “Insider Trading Prohibition Act,” introduced in 2019, included the *Dirks* personal benefit standard. H.R. 1173, 114th Cong. (2015); S. 702, 114th Cong. (2015); H.R. 2524, 116th Cong. (2019). None of these bills passed.

172. 18 U.S.C. § 1348 (2018).

173. *Id.* at 36-37.

174. *Chiarella*, 445 U.S. at 240 (Burger, C.J., dissenting); *see also* Nagy, *supra* note 155, at 1226-27 (“[T]he unlawful act of misappropriating information from its rightful owner triggers an obligation to disclose to other investors in the marketplace or to abstain from trading based on that misappropriated information.”).

175. *Chiarella*, 445 U.S. at 239-240 (Burger, C.J., dissenting).

176. *Id.*

injury lies not to the company whose information has been misappropriated, but to the investors, who have been injured by trading in ignorance of the misappropriated information.¹⁷⁷ Although the Court rejected this broader reading of fraud for Title 15 insider trading cases,¹⁷⁸ it has not ruled conclusively on the meaning of fraud for the Title 18 securities fraud statutes, leaving prosecutors free to argue for a “fraud on investors” theory in Title 18 cases. Moreover, this broader definition of fraud comports with the *Blaszczak* court’s interpretation of the legislative history of Title 18, which reveals an intent to give prosecutors a broader tool for prosecuting insider trading.¹⁷⁹

Moreover, the *Blaszczak* court’s holding that “fraud” for purposes of Title 18 encompasses the embezzlement theory of fraud—which requires breach of duty to the source of the information—does not wholly foreclose a broader interpretation of “fraud” for purposes of Title 18. Instead, the Second Circuit held that the term “defraud” as used in Title 18 *encompasses* the embezzlement theory of fraud, not that the term “defraud” *exclusively* references the embezzlement theory of fraud.¹⁸⁰ Similarly, it held that “the concept of fraud *includes* the act of embezzlement,” not that fraud under Title 18 *must necessarily* mean embezzlement.¹⁸¹ In fact, the Second Circuit rejected the defendant’s argument that “the term ‘defraud’ should be construed to have the same meaning across the Title 18 fraud provisions and Rule 10b-5,”¹⁸² lending support to the idea that “fraud” under Title 18 need not be wholly circumscribed by Title 15 case law. Because the Second Circuit in *Blaszczak* did not limit the meaning of “fraud” under Title 18, it left open the possibility of redefining fraud under Title 18 to include the “fraud on the investors” theory—a move that could resolve many inconsistencies in current insider trading law.

Prosecutors could also successfully argue that a “fraud on investors” theory has several advantages that the embezzlement theory does not. First, because it covers all instances in which a person misappropriates a company’s non-public information and trades on that information without disclosing it to the public, it would impose liability on both the “brazen fiduciary” and on a stranger who steals a company’s non-public information but who owes no fiduciary duty to that company. The defendant in *Dorozhko*, then, would be liable under the “fraud on investors” theory where he may not be under the embezzlement theory. Second, a “fraud on the investors” theory might even alleviate the fears of the *Dirks* Court that an overly broad theory of insider trading would discourage the

177. See Nagy, *supra* note 155, at 1227.

178. See *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 16 (2d Cir. 1983); cf. Nagy, *supra* note 155, at 1305-10 (arguing that the Supreme Court’s decisions in *Chiarella*, *Dirks*, and *O’Hagan* do not foreclose applicability of the “fraud on investors” theory in Title 15 insider trading cases).

179. See Part III, *supra*.

180. *United States v. Blaszczak*, 947 F.3d 19, 35 (2d Cir. 2019). *Id.*

181. *Id.* (internal quotations omitted) (quoting *Carpenter*, 484 U.S. at 27).

182. *Id.*

legitimate activities of market analysts. For instance, Donna Nagy argues that unlike the “parity of information” approach that the Court rejected in *Dirks* and *Chiarella*, “a duty to disclose allows only those informational advantages that serve ‘no useful function except [the trader’s] own enrichment at the expense of others.’”¹⁸³ Finally, a theory of “fraud on the investors” better comports with the logical purpose of the securities laws: protecting investors who engage in securities transactions. The Supreme Court itself has stated that “[d]efrauded investors are among the very individuals Congress sought to protect in the securities laws.”¹⁸⁴ If prosecutors were to use the language in *Blaszczak* suggesting that “fraud” has different meanings across the Title 15 and Title 18 securities fraud statutes, they could dispense with the current messiness of insider trading law under Title 15 and bring fairly straightforward cases against those who wrongfully misappropriate inside information and trade on that information without disclosing it to the market, regardless of whether the tipper has breached a fiduciary duty.

CONCLUSION

The Second Circuit’s decision in *Blaszczak* is important not just for its holding that the *Dirks* personal benefit test does not apply to the Title 18 securities fraud statute, but also its implied, much broader holding that the *Dirks* personal benefit test does not apply to cases brought under the embezzlement theory of fraud. Because this holding would allow the government to prosecute securities fraud under either Title 15 or Title 18 without proving the elements of the *Dirks* personal benefit test, at least in cases involving corporate “outsiders” rather than corporate “insiders,” the *Blaszczak* court’s approach may precipitate a shift in the importance of *Dirks* for future insider trading prosecutions. The defendants in *Blaszczak* have now petitioned for a rehearing en banc. It remains to be seen whether the Second Circuit’s decision will be upheld, and whether the federal courts will continue to simplify insider trading law under the embezzlement theory, potentially rendering *Dirks* obsolete.

But apart from allowing prosecutors to bring misappropriation or embezzlement insider trading cases under Title 15 or Title 18 without having to prove the elements of *Dirks*, the *Blaszczak* court’s recognition that “fraud” does not have the same meaning across the Title 15 and Title 18 securities fraud statutes also paves the way for a new approach to prosecuting insider trading altogether. By imputing onto the Title 18 securities fraud statutes the idea, originating in the Supreme Court’s interpretation of the Title 15 securities laws, that “fraud” must necessarily comprise of a breach of fiduciary duty, prosecutors and courts have unnecessarily saddled the Title 18 securities fraud statute with

183. Nagy, *supra* note 155, at 1374 (quoting *Chiarella v. United States*, 445 U.S. 222, 241 (1980) (Burger, C.J., dissenting)).

184. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983).

the same doctrinal inconsistencies that continue to plague Title 15 securities law. By arguing for a definition of “fraud” under the Title 18 securities fraud statutes that encompasses “fraud on investors,” occurring when securities traders fail to disclose to investors wrongfully obtained material non-public information, prosecutors could simplify prosecutions of persons who engage in insider trading using wrongfully misappropriated information. This new approach would ensure that insider traders are liable under the securities fraud laws for all types of harmful insider trading—not just those types of insider trading involving breach of a fiduciary duty.