Summer 1988

The Ethics of Insider Trading

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THE ETHICS OF INSIDER TRADING

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The quickest way to become famous is often to become infamous, as arbitrageur Ivan Boesky has recently discovered. Prior to November 1986, Mr. Boesky was well-known within the financial community, but largely unknown outside it. That changed dramatically following revelations that he and Dennis Levine, a merger specialist with the investment banking firm of Drexel Burnham Lambert, Inc., had made tens of millions of dollars in the stock market by using Mr. Levine's advance knowledge of impending takeovers by Drexel clients. Today, after disgorging $50 million in profits, paying $50 million in penalties, and receiving a jail sentence,[1] Mr. Boesky is a living symbol of one of the least admired, and least understood, financial practices in America: insider stock trading. Legal and moral condemnation is heaped upon insider trading with uncommon hostility,[2] and often with little discrimination: Legal prosecution and social opprobrium await both the corporate manager caught trading on information about his own firm and the investment banker caught trading on information regarding his clients. In recent years, the Securities and Exchange Commission has cast an increasingly broad net for persons trading on nonpublic information,[3] and there are no signs that its enthusiasm or moral fervor are dampening.[4] While other forms of business conduct, such as price fixing, are also subject to both

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1. *See* SEC v. Boesky, No. 86 Civ. 8767 (S.D.N.Y. Nov. 14, 1986); Wall St. J., Nov. 17, 1986, at 1, col. 6.

2. *See* Cox, *Insider Trading and Contracting: A Critical Response to the "Chicago School,"* 1986 DUKE L.J. 628, 628 ("American jurisprudence abhors insider trading with a fervor reserved for those who scoff at motherhood, apple pie, and baseball.") (footnote omitted).

3. *See* Wall St. J., Feb. 6, 1987, at 20, col. 3 ("Since 1981, the Securities and Exchange Commission has brought 125 insider trading cases, as compared with 77 during the previous 47 years."). The net has snared, *inter alia*, investment analysts, *see* Dirks v. SEC, 463 U.S. 646 (1983); football coaches, *see* SEC v. Switzer, 590 F. Supp. 756 (W.D. Okla. 1984); and financial columnists, *see* Carpenter v. United States, 108 S. Ct. 316 (1987), although the federal courts cut short the fishing expedition in the first two cases.

4. A 1987 editorial by former SEC chairman John Shad, warning of increased government enforcement efforts, carried the imposing title *Insider-Trading Caveat: In the End, Only Ethics Pays*. Wall St. J., Feb. 6, 1987, at 20, col. 3.

criminal prosecution and widespread public disapproval, none seem to raise moral hackles in quite the same way as insider stock trading. A systematic treatment of the moral issues that arise, or have been thought to arise, from insider trading may therefore prove useful in understanding and evaluating this phenomenon.

In the nearly three decades since the Commission began using Rule 10b-5[5] to restrain stock trading on nonpublic information, a wealth of literature on the subject has been produced. The catalyst was Professor Henry Manne's 1966 book *Insider Trading and the Stock Market*,[6] which argued that transactions of the sort then coming under legal scrutiny—trading by corporate employees on advance knowledge of favorable new infor-

5. *See* 17 C.F.R. § 240.10b-5 (1987). Rule 10b-5 proscribes the use in interstate commerce of "any device, scheme, or artifice to defraud . . . or . . . any act, practice, or course of business which operates as a fraud or deceit upon any person, in connection with the purchase or sale of any security." *Id.* at § 240.10b-5(a), (c). The rule was promulgated in 1942 pursuant to section 10(b) of the Securities and Exchange Act of 1934, which outlaws the "use or employ[ment], in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance . . . ." 15 U.S.C. § 78j(b) (1982). The first intimation that the Commission viewed this rule as a general prohibition against trading on nonpublic information came in a 1961 enforcement action against an agent of a broker-dealer. *See In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961). A federal appellate court approved an even broader application (and thereby gave a formal go-ahead to both the Commission and private plaintiffs) seven years later. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). As a matter of statutory interpretation, the use of section 10(b) to regulate insider trading is at best a dubious enterprise, *see* Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 56-59 (1980); Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 317-20, though the damage by now is surely irreversible. Similar problems may plague Rule 14e-3, 17 C.F.R. § 240.14e-3 (1987), which prohibits insider trading in connection with tender offers. *See* Morgan, *Insider Trading and the Infringement of Property Rights*, 48 OHIO ST. L. J. 79, 87-88, 113 (1987).

Other, more limited forms of regulation stand on surer legal footing. Section 16(b) of the 1934 Act explicitly allows corporations to recover profits from short-swing purchases and sales of their shares by statutorily defined insiders. *See* 15 U.S.C. § 78p(b) (1982). Some states have common law rules requiring corporate insiders to disclose information concerning their firms to shareholders in certain face-to-face stock transactions, even in the absence of an inquiry from the outsider. *See, e.g.*, Dawson v. National Life Ins. Co., 176 Iowa 362, 157 N.W. 929 (1916) (officers and directors trading in shares of their company have a fiduciary duty of disclosure to their shareholders); Fisher v. Pennsylvania Life Co., 69 Cal. App. 3d 506, 138 Cal. Rptr. 181 (1977) (duty to disclose when the insider stands in a special relationship of trust to the outside shareholder). Even these rules, however, have not generally extended to the use of nonpublic information in impersonal transactions on exchanges. *See* Bainbridge, *The Insider Trading Prohibition: A Legal and Economic Enigma*, 38 U. FLA. L. REV. 35, 38 (1986); Walker, *The Duty of Disclosure by a Director Purchasing Stock from His Stockholders*, 32 YALE L. J. 637, 640-41 (1923). *But see* Diamond v. Oreamuno, 24 N.Y.2d 494, 301 N.Y.S.2d 78, 248 N.E.2d 910 (1969).

6. H. MANNE, INSIDER TRADING AND THE STOCK MARKET (1966).

mation about their firms[7]—improve market efficiency,[8] can be a necessary and appropriate means of compensating corporate entrepreneurs,[9] and cannot be prevented anyway.[10] Professor Manne's call for a critical examination of the rationale for restraints on insider stock trading brought forth a flood of academic comment,[11] to which Professor Manne responded in 1970.[12] Following this brief flurry, interest in the underlying justification of rules against insider trading seemed to wane during the 1970s, as federal regulation of the practice became a *fait accompli* and legal attention turned to the details of regulation under Rule 10b-5.[13] The discussion was revived late in the 1970s, however, in the wake of the government's ultimately unsuccessful criminal prosecution of Vincent Chiarella, an employee of a financial printer, for trading on advance knowledge of takeovers about to be undertaken by his firm's clients.[14] Because Mr. Chiarella was far removed from the sort of person ordinarily thought of as an insider—the directors, officers, and

7. Professor Manne's book issued just as the famous *Texas Gulf Sulphur* case, involving the discovery of a fabulously rich ore deposit, was making its way through the courts. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

8. H. MANNE, *supra* note 6, at 77-110.

9. *Id.* at 111-58.

10. *Id.* at 163-69.

11. *See* Hetherington, *Insider Trading and the Logic of the Law*, 1967 WIS. L. REV. 720; Mendelson, *The Economics of Insider Trading Reconsidered*, 117 U. PA. L. REV. 470 (1969); Schotland, *Unsafe at Any Price: A Reply to Manne*, Insider Trading and the Stock Market, 53 VA. L. REV. 1425 (1967); Baum, *Book Review*, 1967 DUKE L. J. 456; Garrett, *Book Review*, 43 NOTRE DAME LAW. 465 (1968); Jennings, *Book Review*, 55 CALIF. L. REV. 1229 (1967); Kripke, *Book Review*, 42 N.Y.U. L. REV. 212 (1967); Marsh, *Book Review*, 66 MICH. L. REV. 1317 (1968); Painter, *Book Review*, 35 GEO. WASH. L. REV. 146 (1966); Poser, *Book Review*, 53 VA. L. REV. 753 (1967); Sommer, *Book Review*, 54 A.B.A. J. 692 (1968); Vogt, *Book Review*, 16 BUFFALO L. REV. 520 (1967); Weston, *Book Review*, 35 GEO. WASH. L. REV. 140 (1966); Wright, *Book Review*, 21 SW. L. J. 405 (1967).

12. *See* Manne, *Insider Trading and the Law Professors*, 23 VAND. L. REV. 547 (1970) [hereinafter *Law Professors*]. Professor Manne's response provoked a further exchange between himself and the SEC's solicitor. *See* Ferber, *The Case Against Insider Trading: A Response to Prof. Manne*, 23 VAND. L. REV. 621 (1970); Manne, *A Rejoinder to Mr. Ferber*, 23 VAND. L. REV. 627 (1970).

13. *See, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (only purchasers or sellers of securities can bring private causes of action under section 10(b)); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (no damages liability under section 10(b) in the absence of intent to deceive, manipulate, or defraud); Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) (unless deception or manipulation is involved, section 10(b) does not prevent majority shareholders from freezing out a minority, even in breach of a fiduciary duty). During this period, a number of courts also refused to impose common law liability for the use of nonpublic information in impersonal exchange transactions. *See* Freeman v. Decio, 584 F.2d 186 (7th Cir. 1978) (applying Indiana law); Schein v. Chasen, 313 So. 2d 739 (Fla. 1975).

14. *See* Chiarella v. United States, 445 U.S. 222 (1980), *rev'g* 588 F.2d 1358 (2d Cir. 1978).

large shareholders subject to section 16 of the Securities and Exchange Act[15]—this case made especially clear the need for consideration of the purposes, effects, and limits of anti-insider trading rules. The result has been a "second wave" of scholarship paying increasing attention to some of the broad theoretical aspects of insider stock trading.[16]

Both the first (post-Manne) and second (post-*Chiarella*) waves of scholarship are predominantly concerned with the economic issues raised by Professor Manne in 1966. However, the question of the "fairness" of insider stock trading has haunted discussions of the subject from an early date and refuses to go away. Both the pre-Manne and first-wave eras were heavily tinged with moralism, but ethical analysis did not get much beyond simple expressions of disapproval, whether in academia,[17] the legislature,[18] or the courts.[19] Professor Manne

15. *See* 15 U.S.C. § 78p(a) (1982).

16. *See, e.g.*, Aldave, *Misappropriation: A General Theory of Liability for Trading on Nonpublic Information*, 13 HOFSTRA L. REV. 101 (1984); Anderson, *Fraud, Fiduciaries, and Insider Trading*, 10 HOFSTRA L. REV. 341 (1982); Bainbridge, *supra* note 5; Barry, *The Economics of Outside Information and Rule 10b-5*, 129 U. PA. L. REV. 1307 (1981); Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322 (1979); Carlton & Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983); Cox, *supra* note 2; Dooley, *supra* note 5; Easterbrook, *supra* note 5; Haddock & Macey, *A Coasian Model of Insider Trading*, 80 NW. U. L. REV. 1449 (1986); Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117 (1982); Macey, *From Fairness to Contract: The New Direction of the Rules Against Insider Trading*, 13 HOFSTRA L. REV. 9 (1984); Morgan, *supra* note 5; Scott, *Insider Trading: Rule 10b-5, Disclosure and Corporate Privacy*, 9 J. LEGAL STUD. 801 (1980); Solinga, *A Proposed New Regime of Insider Trading Regulation*, 14 SEC. REG. L.J. 99 (1986); Titus & Carroll, *Netting the Outsider: The Need for a Broader Restatement of Insider Trading Doctrine*, 8 W. NEW ENG. L. REV. 127 (1986); Warren, *Who's Suing Who? A Commentary on Investment Bankers and the Misappropriation Theory*, 46 MD. L. REV. 1222 (1987); Wimberly, *Corporate Recovery of Insider Trading Profits at Common Law*, 8 CORP. L. REV. 197 (1985); Note, *Insider Trading at Common Law*, 51 U. CHI. L. REV. 838 (1984). This list includes only those works cited elsewhere in this article; a full list is easily twice as long.

17. The tone was set by Professor Wilgus in an early treatment of duties of disclosure in face-to-face stock transactions:

> That the director may take advantage of his position to secure the profits that all have won, offends the moral sense; no shareholder expects to be so treated by the director he selects; no director would urge his friends to select him for that reason; that the law yet allows him to do this, does more to discourage legitimate investment in corporate shares than almost anything else, and allows the fiction of the corporate entity to obstruct instead of advance justice.

Wilgus, *Purchase of Shares of Corporation by a Director from a Shareholder*, 8 MICH. L. REV. 267, 297 (1910). *See also* Lake, *The Use for Personal Profit of Knowledge Gained While a Director*, 9 MISS. L. J. 427, 444 (1937) ("Conscience condemns the director who acquires information of facts materially affecting the value of the stock through his position, and who buys from his fellow shareholder without disclosing it.") (discussing face-to-face transactions); Rubin & Feldman, *Statutory Inhibitions Upon Unfair Use of Corporate Information by Insiders*, 95 U. PA. L. REV. 468, 468 (1947) ("The invidious character of such trading is emphasized by the fact that the profit so obtained by the managers was not

disparagingly, but accurately, described the writings of this period as consisting of " 'it's just not right' propositions,"[20] so named for "an anonymous law student, who, during a classroom discussion of the subject, stamped her foot and angrily declaimed, 'I don't care; it's just not right.' "[21]

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disclosed to the real owners of the corporation, to wit, the stockholders, and because it was often obtained at their expense."). Professor Manne's 1966 defense of insider trading was subjected to a moral barrage in the ensuing five years which, if anything, was even less enlightening. *See* Ferber, *supra* note 12, at 622 (economic analysis of insider trading is essentially irrelevant because in enacting section 10(b) "Congress was attempting to improve the morality of the marketplace"); Garrett, *supra* note 11, at 470 ("[a] lawyer can hardly resist the conclusion that what appears to be a clear evil should not be condoned for the sake of an economic theory"); Jennings, *supra* note 11, at 1234 ("inside information . . . fairly belongs to all of the shareholders"); Loss, *The Fiduciary Concept As Applied to Trading by Corporate "Insiders" in the United States*, 33 MOD. L. REV. 34, 36 (1970) (decrying Professor Manne's "apparent scorn for the moral element"); Mendelson, *supra* note 11, at 492 (economic objections to insider trading are "reinforced by considerations of fairness"); Painter, *Rule 10b-5: The Recodification Thicket*, 45 ST. JOHN'S L. REV. 699, 714 (1971) (insider trading "is simply not right although we may not be precisely sure why this is so") (footnote omitted); Poser, *supra* note 11, at 754 ("Manne believes that an 'analysis' is needed in order to determine whether insider trading should be prohibited"); Schotland, *supra* note 11, at 1429 ("It seems paradoxical that we should be urged to reverse the views and law with which we have moved into today's prosperity and, now that we have unprecedented resources for effectuating our views of fairness, that we should be urged to allow—indeed, to encourage—practices long deemed unfair and unlawful"); Weston, *supra* note 11, at 145 (insider trading "results in an inequitable transfer of wealth from outsiders to insiders"). These are not the *conclusions* of the moral arguments advanced by these authors; they *are* the arguments.

18. The Senate Report accompanying the 1934 Securities and Exchange Act decried "the unscrupulous employment of inside information" by officers, directors, and large shareholders, whose positions "enable[d] them to acquire and profit by information not available to others." S. REP. No. 1455, 73d Cong., 2d Sess. 55 (1934). The House Report similarly spoke of the "[e]xploitation of . . . ignorance by self-perpetuating managements in possession of inside information," H.R. REP. No. 1383, 73d Cong., 2d Sess. 5-6 (1934), and declared that "men charged with the administration of other people's money must not use inside information for their own advantage." *Id.* at 13. That was as much explanation of the immorality and unfairness of insider trading as Congress provided. *See* H. MANNE, *supra* note 6, at 8-10.

19. In the context of face-to-face transactions between officers or directors and shareholders, see Dawson v. National Life Ins. Co., 176 Iowa 362, 375, 157 N.W. 929, 933 (1916) ("a knowledge of the law is not required to enable one to appreciate the moral wrong perpetrated by a corporate officer with knowledge acquired by virtue of his position in profiting on the ignorance of a stockholder."); Taylor v. Wright, 69 Cal. App. 2d 371, 381, 159 P.2d 980, 984-85 (1945) (the majority rule of no duty of disclosure even in face-to-face transactions "offends the moral sense, and is contrary to our modern concept of the duty of a director towards those he represents"). In none of these cases did analysis proceed beyond a bare assertion of moral wrongdoing. Early federal cases and administrative decisions were much to the same effect. *See, e.g., Speed v. Transamerica Corp.*, 99 F. Supp. 808, 829 (D. Del. 1951); *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 (1961). *See generally* Macey, *supra* note 16, at 13-19 (thoroughly discussing the fairness rationale underlying the early development of the use of Rule 10b-5 to regulate insider trading).

20. H. MANNE, *supra* note 6, at 15.

21. *Id.* at 233 n.42. Professor Manne was even less charitable with respect to the moral arguments advanced against his book. In his 1970 response to critics, he began a section entitled (and one can hear the sigh) *Morals, Morals, Morals* by complaining:

Second-wave writers have addressed moral issues with somewhat more care,[22] but even they have not, as a rule, done more than to identify some very general moral premises or approaches that can be used to analyze insider stock trading. While that alone is a quantum leap beyond what came before it, the persistent vagueness of moral argumentation in this area makes analysis of the issue extraordinarily difficult. Nonetheless, the extant arguments are a valuable starting point insofar as they provide useful insight into the kinds of moral questions that insider trading is typically seen to raise.[23] Some of these questions arise from the specific character of stock transactions, but most involve broad issues concerning trading on superior information that cannot be limited to such a narrow context. In general, there is no evident reason why trading on superior information concerning stock values should be thought to raise different moral issues than trading on superior information concerning any other commodity, such as a house with a concealed defect, a shipload of corn, or a hogshead of tobacco—all of which have received considerable attention in the moral and legal literature on contracts. Appropriately, the ethical arguments traditionally advanced in this wider context largely parallel the arguments found in the literature specifically dealing with insider stock trading. Those arguments, whether their proponents recognize it or not, raise some of the most long-lived and fundamental problems of moral philosophy, which have little to do with the intricacies of the stock exchange.

"Morals, someone once said, are a private luxury. Carried into the arena of serious debate on public policy, moral arguments are frequently either a sham or a refuge for the intellectually bankrupt." *Law Professors*, *supra* note 12, at 549. *See also id.* at 548 ("The 'discovery' of ethical and moral issues and a recurrent insistence on this approach strike me more as an outgrowth of frustration than of cogent analysis."); *id.* at 557 ("Moral fervor, whether held by fundamentalist ministers, or by law professors, is not easily shaken by rational argument."); *id.* at 581 ("Moral indignation is [often] used as a cover for unanalyzed conclusions."); *id.* ("The main trouble with moral escalation is that it is so frequently fatuous."). Of one critic who said to him personally, " 'We didn't need any book on insider trading. I know it's wrong, and that's all there is to it,' " *id.*, Professor Manne commented: "As far as I know . . . no one has adduced actual evidence that this person is God." *Id.*

22. *See, e.g.*, Bainbridge, *supra* note 5, at 55-61; Carlton & Fischel, *supra* note 16, at 880-82; Easterbrook, *supra* note 5, at 324-30; Macey, *supra* note 16, at 15-19. Interestingly, none of these more careful writers are openly sympathetic to moral arguments against insider stock trading. Far from it.

23. One can also find references to ethics or fairness in modern cases and congressional reports, but they contain no useful analysis. *See, e.g.*, Dirks v. SEC, 463 U.S. 646, 654, 661 n.21 (1983); *id.* at 672-73, 676-77 (Blackmun, J., dissenting); H.R. REP. No. 355, 98th Cong., 1st Sess. 5 (1983).

Of course, I do not purport to resolve those age-old problems here. It is enough for now merely to identify the kinds of issues that proponents of the various moral approaches to insider trading need to address if their positions are to be taken seriously. I suggest, as does much of the current literature, that insider trading can profitably be understood as a question of property rights in information,[24] and I outline a possible normative foundation for a property rights view that would condemn insider trading that makes use of someone else's information without his consent. So understood, the ethics of insider trading are merely a particular, and unexceptional, application of wider moral principles governing marketplace transactions, and one's ethical views of the practice are likely to be determined by one's general perspective on the morality of markets.[25]

I. Is Insider Trading Always Wrong?

When most people speak of insider trading, they have in mind transactions involving stocks or other securities. A person who buys a rare work of art, knowing more about it than the seller, is not generally thought of as an inside trader, and he is not likely to be criminally pursued by a Paintings and Sculptures Commission. An economist would find this puzzling. The economist conceives insider trading to be "trading by parties who are better informed than their trading partners. Thus, insider trading in an economic sense includes all trades where information is asymmetric."[26] Nothing in this definition sug-

24. *See, e.g.*, Carlton & Fischel, *supra* note 16, at 863-66; Easterbrook, *supra* note 5, at 331-38; Macey, *supra* note 16, at 30-47, 63-64; Morgan, *supra* note 5, at 80.

25. Throughout this discussion, I speak of "morality," "ethics," and "fairness" interchangeably, and do not distinguish among comments that other people have made using any of these terms. This may obscure an important distinction between moral arguments. Moral statements can be either claims concerning proper individual conduct or claims concerning *rights* (or both). For example, saying that it is morally permissible for A to do X can mean either that a code of individual conduct applicable to A gives moral sanction to X or that no one is entitled to prevent A from doing X. If it means the latter, then doing X may still be morally wrong for A; his *right* to do it does not *make it right* for him to do so. *See* Thomasson, *Rights, Justice, and Discrimination*, 11 Harv. J. L. & Pub. Pol'y 805 (1988). Thus, when someone says that X is immoral, one cannot conclude that he means that X should be illegal. And by the same token, someone who does not believe that X should be illegal may nonetheless mean that he does not think it immoral. My focus here is on principles of individual conduct, but because the arguments of other writers often move quickly from law to policy to ethics and back again, the distinction between *right* and *rights* at times is unavoidably blurred.

26. Carlton & Fischel, *supra* note 16, at 860.

gests any special emphasis on stock transactions. Nor does it presuppose any special relationship between the traders: A person is an economic insider merely by virtue of knowing something about his own intentions that his (perhaps faceless) trading partner does not know, but would consider relevant if he did.[27] Any contract in which there is less than full effective equality of information between the parties is an instance of insider trading. Of course, in fashioning legal rules one might conclude that the special role that capital markets play in the economy justifies treating insider stock trading differently than insider sculpture trading. One might even find *moral* differences if one has a purely consequentialist moral outlook—premised, for example, on maximizing wealth, utility, or pleasure—and the macroeconomic effects of insider stock trading and insider sculpture trading are seen to be materially different. But any moral theory not based on some form of "macroconsequentialism" will have a difficult time finding morally relevant distinctions between transactions involving stocks and other commodities. An unqualified moral objection to "insider trading" in its broad sense will therefore find fault with any failure of one trading party to insure that the other is as informed as he about all material aspects of the transaction. The moral wrongfulness of trading on inside information regarding stock values is then a special case of a more general principle applicable to all contracts premised on asymmetrical information.

Two writers generally critical of attempts to analyze insider stock trading in moral terms, Judge Frank Easterbrook and Professor Manne, have recognized, but quickly dismissed, the possibility that someone could use a sweeping condemnation of informational inequality as a predicate for moral disapproval of insider stock trading. In perhaps the most ambitious of the second-wave attempts to address moral objections to insider stock trading, Judge Easterbrook has examined four possible conceptions of unfairness in that context, all of which he finds

27. This "materiality" requirement should not be confused with the *legal* requirement of materiality under the federal securities laws. A fact is material for purposes of the proxy rules under section 14(a) of the 1934 Act, 15 U.S.C. § 78n(a) (1982), and the insider trading rules "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Basic Inc. v. Levinson, 108 S. Ct. 978, 983 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). Economic materiality is determined by the subjective mental state of the individual actor: If someone deems the position of the planets or what his trading partner had for breakfast to be relevant to his investment decisions, then those facts are material.

wanting either because of substantive inadequacies or because they do not seem to reflect what those who express fairness concerns have in mind. Two of those conceptions—that unfairness may result when nondisclosure leads to trading at "incorrect" prices that do not fully reflect all existing information,[28] and that "it is unfair for one person to trade with another unless the two are equally knowledgeable about the subject of the deal"[29]—amount to condemnations of all informational inequality.[30] Judge Easterbrook rejects these egalitarian conceptions as inconsistent with principles of contract law, which permit trading on some informational disparities[31]; as destructive of incentives to produce valuable information[32]; and as inconsistent with most people's moral sense, which "accept[s] as fair the fact that people trade on some kinds of informational advantages."[33] Professor Manne has treated such arguments even more brusquely. Like Judge Easterbrook, he observes that trading on superior information is generally permitted as a matter of contract law. And like Judge Easterbrook, he perceives such trading to be well within most people's understanding of fairness. Consider the case of a corporation purchasing land, either as a location for a new plant or because of valuable mineral deposits that it knows lie beneath the property. "Typically, with all the secrecy of the CIA planning an assassination, the company will send its agents out to purchase land as discreetly as possible."[34] Not only are these transactions legal in the absence of affirmative misrepresentations, but when he

28. *See* Easterbrook, *supra* note 5, at 326.

29. *Id.* at 329.

30. Judge Easterbrook also suggests that unfairness in stock trading might mean unequal treatment for shareholders, as when some shareholders sell their shares to insiders possessing undisclosed good news while others retain their shares, *see id.* at 324, or the obtaining of gains by insiders that would otherwise go to shareholders. *See id.* at 327. He rejects the first definition because there is no good reason to think that trading by insiders causes selling shareholders to sell. Even if it does, as Professor Scott earlier pointed out, *see* Scott, *supra* note 16, at 808-09, the possibility that an outsider will eventually trade against better-informed insiders will have been anticipated by the market and reflected *ex ante* in share prices. *See* Easterbrook, *supra* note 5, at 324-26. The second definition begs the question by assuming that it is somehow wrong or unfair for managerial insiders to receive a portion of their compensation in the form of trading profits. *See id.* at 327-29. Judge Easterbrook concludes that attempts to define fairness and to construct arguments against insider trading based upon it "get us nowhere." *Id.* at 330.

31. *See id.* at 326 ("The law of contracts permits such trading. It is called shrewd bargaining").

32. *See id.* at 330.

33. *Id.* at 326.

34. *Law Professors*, *supra* note 12, at 550.

wrote these words in 1970 Professor Manne did "not know of any commentator who has ever classified this as immoral conduct."[35] Lawyers, he warns, "should be very circumspect about characterizing the utilization of superior information as immoral. That is, after all, their stock in trade."[36]

Nonetheless, that is precisely what some lawyers—or at least some legal scholars and moralists—have done. Professor Levmore, almost as though in explicit defiance of Professor Manne and Judge Easterbrook, has embraced a strong form of the "equality of information" conception of fairness, defining transactions as fair "when insiders and outsiders are in equal positions. That is, a system is fair if we would not expect one group to envy the position of the other."[37] In other words, fairness requires the absence of insider trading in the economic sense. This moral conception is "attractive,"[38] Professor Levmore argues, because it reflects "the 'golden rule' of interpersonal behavior—treating others as we would ourselves,"[39] which he takes to underlie traditional fiduciary concepts.

Because the notion of a legal rule forbidding all trading on superior information strikes the Anglo-American legal mind as absurd, it is easy to give arguments such as Professor Levmore's a casual dismissal. That is a serious mistake. While Professor Levmore has not sought to ground his view of fairness in a wider philosophical tradition, he is by no means the first person broadly to question the morality of trading on superior information. Professor Manne and Judge Easterbrook, in assuming that no one would ever condemn all insider trading as immoral, do not adequately distinguish between legal and ethical rules. Anglo-American contract law has never forbidden all trading in the absence of full disclosure,[40] and, to

35. *Id.*

36. *Id.* at 551.

37. Levmore, *supra* note 16, at 122 (footnote omitted). Recognizing that this ideal, while having the virtue of clear definition, is perhaps too "ambitious" and "elusive," *id.*, to serve as a legal standard, Professor Levmore uses it solely as one ground of comparison (along with economic costs and benefits) of alternative regulatory patterns.

38. Levmore, *supra* note 16, at 122.

39. *Id.* at 122-23.

40. A discussion of precisely when the law forbids such trading is beyond the scope of this article. The most thorough treatment of the issue from an economic standpoint is Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978). *See also* G. BOWER, THE LAW RELATING TO ACTIONABLE NON-DISCLOSURE AND OTHER BREACHES OF DUTY IN RELATIONS OF CONFIDENCE AND INFLUENCE (1915); 2 J. KENT, COMMENTARIES §§ 482-91 (4th ed. 1840); J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 204-12 (3d ed. 1842); W. STORY, A TREATISE ON THE LAW OF CON-

paraphrase Professor Manne, I know of no modern commentator who has suggested that it should. Professor Levmore in particular does not go nearly that far.[41] As both he and Judge Easterbrook point out, and as many of the older authorities recognized,[42] a rule of law invalidating all trades based on asymmetrical information would have substantial effects on incentives to produce valuable information. But behind the legal veneer one finds an ancient and powerful tradition of *moral* suspicion of *all* trading on informational disparities, which the law has, sometimes unhappily, suppressed in the interest of commercial efficiency. Those who find it hard to take Professor Levmore's moral position seriously should consider that the intellectual history of the ethics of "insider trading" does not begin in 1910,[43] or even with the birth of the modern corporation, but in the first century B.C., and it begins right where Professor Levmore has picked up.

A. *An Intellectual History of the Ethics of Informational Equality*

The morality of insider trading, in its economic sense of trading on asymmetrical information, has been the subject of spirited debate among philosophers and legal scholars for centuries. The issue was raised over two thousand years ago by Cicero in a passage that was once a jurisprudential classic but has all but vanished from modern scholarship.[44] In order to explore apparent conflicts between the moral and the expedient (with an eye to showing them to be merely apparent),[45] Cicero posed two hypothetical situations involving insider trading. Imagine an honest merchant who is bringing grain from Alexandria to Rhodes, where famine conditions prevail and he can expect to sell his grain at a very favorable price. He knows that

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TRACTS §§ 643-49 (5th ed. 1874); G. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS: BEING AN INQUIRY HOW CONTRACTS ARE AFFECTED IN LAW AND MORALS BY CONCEALMENT, ERROR, OR INADEQUATE PRICE (1825); Goldfarb, *Fraud and Nondisclosure in the Vendor-Purchaser Relation*, 8 CASE W. RES. L.J. 5 (1956); Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1 (1936); Levmore, *supra* note 16, at 132-42.

41. *See id.* at 122, 159.

42. *See* Hays v. Meyers, 139 Ky. 440, 443, 107 S.W. 287, 288 (1908); J. KENT, *supra* note 40, at § 485; Keeton, *supra* note 40, at 74-75; G. VERPLANCK, *supra* note 40, at 22-23.

43. *See* Wilgus, *supra* note 17.

44. Cicero's argument and its subsequent criticisms were noted in passing by Barry, *supra* note 16, at 1361 n.206.

45. See M. CICERO, DE OFFICIIS Bk. III (W. Miller trans. 1968), especially chapters ii-iii, vii-vii, xix-xxxiii.

several other ships laden with grain are on their way to Rhodes; if the Rhodians also learn of their imminent arrival, the demand for the merchant's own grain will fall. "[I]s he to report the fact to the Rhodians or is he to keep his own counsel and sell his own stock at the highest market price?"[46] Cicero's second example is the eternally recurring case of the vendor who sells a building with a hidden defect.[47] Consider an honest man offering for sale a house with "certain undesirable features of which he himself is aware but which nobody else knows,"[48] such as vermin in the bedrooms or poor construction. "[I]f the vendor does not tell the purchaser these facts but sells him the house for far more than he could reasonably have expected to get for it, I ask whether his transaction is unjust or dishonourable."[49]

Cicero presented both sides of these questions through an imaginary dialogue between the Stoic philosophers Diogenes and Antipater; the latter argues for full disclosure, the former defends the moral right to silence (though not to misrepresentation). The argument concerning the Alexandrian grain merchant remains unequalled today in its breadth and clarity.

> "I have imported my stock," Diogenes' merchant will say; "I have offered it for sale; I sell at a price no higher than my competitors—perhaps even lower, when the market is overstocked. Who is wronged?
>
> "What say you?" comes Antipater's argument on the other side; "it is your duty to consider the interests of your fellowmen and to serve society; you were brought into the world under these conditions and have these inborn principles which you are in duty bound to obey and follow, that your interest shall be the interest of the community and conversely that the interest of the community shall be your interest as well; will you, in view of all these facts, conceal from your fellow-men what relief in plenteous supplies is close at hand for them?"
>
> "It is one thing to conceal," Diogenes will perhaps reply;

46. *Id.* at Bk. III, ch. xii.

47. This problem arises in the law with enough frequency and in enough manifestations to fill a book. Indeed, an entire annotation has been devoted to cases involving nondisclosure of termite infestations. *See* Annotation, *Duty of Vendor of Real Estate to Give Purchaser Information as to Termite Infestation*, 22 A.L.R.3d 972 (1968). Roman law in Cicero's time required the real estate vendor to disclose all known defects, but did not require full disclosure by other vendors. *See* M. CICERO, *supra* note 45, at Bk. III, chs. xvi-xvii.

48. *See id.* at Bk. III, ch. xiii.

49. *Id.*

> "not to reveal is quite a different thing. At this present moment I am not concealing from you, even if I am not revealing to you, the nature of the gods or the highest good; and to know these secrets would be of more advantage to you than to know that the price of wheat was down. But I am under no obligation to tell you everything that it may be to your interest to be told."
>
> "Yea," Antipater will say, "but you are, as you must admit, if you will only bethink you of the bonds of fellowship forged by Nature and existing between man and man."
>
> "I do not forget them," the other will reply; "but do you mean to say that those bonds of fellowship are such that there is no such thing as private property? If that is the case, we should not sell anything at all, but freely give everything away."[50]

The argument over disclosure of building defects takes much the same form. Antipater castigates the seller who would allow the buyer to purchase hastily without knowledge of the defects:

> "[I]f this is not refusing 'to set a man right when he has lost his way' (a crime which at Athens is prohibited on pain of public execration), what is? It is even worse than refusing to set a man on his way; it is deliberately leading a man astray."[51]

Diogenes counters that the vendor in no way compels the buyer to purchase. "He advertised for sale what he did not like; you bought what you did like."[52] As long as the purchaser can exercise his own judgment, there can be neither fraud nor breach of moral obligation.

Cicero sided with Antipater: "I think, then, that it was the duty of that grain-dealer not to keep back the facts from the Rhodians, and of this vendor of the house to deal in the same way with his purchaser."[53] Full disclosure is both moral and expedient. It is moral for essentially the reasons given by Antipater: "[T]here is a bond of fellowship . . . which has the very widest application, uniting all men together and each to each."[54] It is expedient because of the effect of nondisclosure on one's honor. The person who fails to disclose what he knows "would be no candid or sincere or straightforward or upright or honest man, but rather one who is shifty, sly, artful,

50. *Id.*
51. *Id.* at Bk. III, ch. xiii.
52. *Id.*
53. *Id.*
54. *Id.* at Bk. III, ch. xvii.

shrewd, underhand, cunning, one grown old in fraud and subtlety. Is it not inexpedient to subject oneself to all these terms of reproach and many more besides?"[55] In sum, concluded Cicero, "it is not in accord with Nature that anyone should take advantage of his neighbor's ignorance."[56]

Cicero's examples have inspired much comment. Between the thirteenth and seventeenth centuries, three of the major continental writers in the natural law tradition—Aquinas, Grotius, and Pufendorf—considered them and reached essentially identical conclusions that differed in some respects from Cicero's. They all found a duty to disclose facts pertaining to the actual thing that is the subject of the contract, such as the defects in a building,[57] but no moral duty to disclose "circumstances which do not affect the thing itself; as if any one knows that there are many ships on their way bringing corn."[58] Grotius noted that disclosure by the grain merchant would be "kind and laudable; often so far, that it cannot be omitted without violating the rule of charity,"[59] and Aquinas agreed that for the merchant to disclose or lower his price "would be exceedingly virtuous on his part,"[60] but both maintained that nondisclosure would not violate principles of justice by leading to an

55. *Id.* at Bk. III, ch. xiii.

56. *Id.* at Bk. III, ch. xvii.

57. *See, e.g.*, T. AQUINAS, SUMMA THEOLOGICA pt.II-ii, q.77, art. 3 (Fathers of the English Dominican Province trans. 1947) (where a good's defects are not manifest, "judgment of them is not sufficiently left with the buyer unless such defects be made known to him"); 2 H. GROTIUS, ON THE LAW OF WAR AND PEACE ch. xii, § ix (W. Whewell trans. 1853) ("he who makes a contract about any thing, ought to make known the faults of the thing so far as he knows them, which is not only the usual rule of Civil Laws, but also agreeable to the nature of the act"); S. PUFENDORF, ON THE LAW OF NATURE AND NATIONS Bk. V, ch. III, §§ ii-iii (B. Kennett trans. 1710) (full disclosure of defects is necessary to the assignment of a just price). Aquinas allowed for nondisclosure of defects as long as the goods would be useful to someone, even if not the buyer, and "provided the seller take as much as he ought from the price." T. AQUINAS, *supra*, at pt. II-ii, q. 77, art. 3. That is, as long as the price actually reflects the quality of the goods, selling without disclosure of defects does not place on the buyer "an occasion of danger or loss." Id. This suggests that the obligation of disclosure in these circumstances, the source of which is somewhat hazy, is based on the inability to arrive at the "just price" when all extant information concerning the goods is not available to the parties.

58. H. GROTIUS, *supra* note 57, at ch. xii, § ix. *See* T. AQUINAS, *supra* note 57, at pt. II-ii, q. 77, art. 3 (the grain merchant "does not seem to act contrary to justice though not stating what is going to happen," because there is no defect in the goods that makes them less valuable than they seem at the time of sale); S. PUFENDORF, *supra* note 57, at Bk. V, ch. III, § iv ("the Merchant, did not act unjustly, in saying nothing of the Ships, that were coming. For Justice only obliges us to expose, what immediately concerns the Thing itself").

59. H. GROTIUS, *supra* note 57, at ch. xii, § ix.

60. T. AQUINAS, *supra* note 57, at pt. II-ii, q. 77, art. 3.

unjust price. Pufendorf generally agreed with this assessment, but went to somewhat greater lengths to defend the morality of nondisclosure by the grain merchant. Morality, in his view, "does not oblige me, to do another Man a Courtesy *gratis*, except he be in extreme Want of it,"[61] which was not the case with the wealthy Rhodians, who may have lacked corn but had no shortage of money. In addition, the loss to the merchant would have been far greater than the gain to any individual Rhodian, and one cannot expect men to endure that kind of sacrifice. "For, provided the Love of Money does not tempt the Merchants to cheat us, we may easily excuse them from what the Law of Courtesy and Good-nature may seem to oblige them to."[62]

Pothier, in his 1806 treatise on the law of sales,[63] agreed that there is a duty, in morals if not in law, to disclose defects pertaining to the thing which the contract concerns,[64] and that no enforceable legal duty of disclosure should be imposed on the grain merchant,[65] but only partially accepted the conclusion that the grain merchant satisfies his moral obligations by not misrepresenting the facts. While conceding that Cicero's full-disclosure position "is somewhat difficult to maintain even in the forum of conscience,"[66] Pothier also found "some difficulty, in the forum of conscience, in excusing the injustice of a profit"[67] under the particular circumstances of Cicero's example. By keeping his peace about matters that are *sure* to lead to a very dramatic reduction in the value of the grain in the immediate future, the merchant seeks to obtain from the Rhodians more than the equivalent of what he gives.

Kent was appalled by the moral laxity of his Christian predecessors. As a matter of law, he agreed with the prior writers that

61. S. PUFENDORF, *supra* note 57, at Bk. V, ch. III, § iv.

62. *Id.*

63. R. POTHIER, TRAIT DU CONTRAT DE VENTE (1806).

64. *Id.* at §§ 233-39 (quoted in Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178, 185-87 n.*c* (1817)). Pothier specifically took issue with Aquinas' view that nondisclosure is proper as long as the seller does not use the absence of disclosure to obtain a higher price for the article than he would otherwise receive, *see* note 57, *supra*, calling this position "unjust, since, as the vendor is perfectly at liberty to sell or not to sell, he ought to leave the vendee perfectly at liberty to buy or not to buy, even for a fair price, if that price does not suit the buyer . . . ." *Id.* at § 237 (quoted in *Laidlaw*, 15 U.S. (2 Wheat.) at 187 n.*c*).

65. *See id.* at § 241 (quoted in *Laidlaw*, 15 U.S. (2 Wheat.), at 188 n.*c*).

66. *Id.*

67. *Id.* (quoted in *Laidlaw*, 15 U.S. (2 Wheat.), at 189 n.*c*).

Cicero's high moral rules are "of too severe and elevated a character for practical application, or the cognizance of human tribunals,"[68] but in the forum of conscience he found it "a little singular . . . that some of the best ethical writers under the Christian dispensation, should complain of the moral lessons of Cicero, as being too austere in their texture, and too sublime in speculation, for actual use."[69]

A very different view was taken by Verplanck in an 1825 treatise. Contrary to what he (unlike Kent) saw as the intimations of the civil law writers, Verplanck denied "that either party is bound in conscience, *or even by a delicate and fastidious honour*, to communicate to the other . . every circumstance regarding the business, which the buyer has an interest in knowing."[70] Examples can be multiplied of cases in which persons acquire superior knowledge through skill or industry; for example, a person who invents a new, cheaper method of working marble thereby acquires knowledge of a probable future increase in the value of the raw material. These advantages "are the necessary and lawful stimulants of that activity which, in the search after private profit, opens a thousand springs of prosperity and plenty for the use of all; and within just limits, are as free from moral guilt as they are fruitful of public utility."[71]

These examples by no means exhaust the consideration given by older writers to the ethics of absolute informational equality,[72] nor do they fully disclose the possibly varying moral

68. J. KENT, *supra* note 40, at § 491 (footnote omitted).

69. *Id.*

70. G. VERPLANCK, *supra* note 40, at 75 (emphasis added).

71. *Id.* at 79. According to Verplanck, the "just limits" are reached when there is a common understanding that no advantage will be taken even of superior skill. *See id.* at 127. Williston's position on nondisclosure is virtually identical. *See* 12 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1498, at 385-86 (3d ed. 1970).

72. Rutherforth insisted that the Alexandrian merchant had a duty to disclose his information because in the absence of disclosure one could not discover the just price. *See* T. RUTHERFORTH, INSTITUTES OF NATURAL LAW 113-14 (2d ed. 1832). Paley is sometimes regarded as a proponent of absolute informational equality, *see* G. BOWER, *supra* note 40, at 595 & n.*u*; J. STORY, *supra* note 40, at § 205 n.1 (3d ed. 1842), but the passage cited in support of this position speaks only to the designed concealment of defects in the thing being sold. *See* W. PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY Bk. III, pt.1, ch. vii (10th ed. 1821). Some writers were content to observe that ethics is broader than law, *see* J. STORY, *supra* note 40, at §§ 204-05; W. STORY, *supra* note 40, at § 644, and that Anglo-American courts do not require full disclosure "[h]owever correct Cicero's view may be of the duty of every man, in point of morals, to disclose all facts to another, with whom he is dealing, which are material to his interest . . . " J. STORY, *supra* note 40, at § 205. *See also* Goldfarb, *supra* note 40, at 41 (hinting that all nondisclosure might be immoral).

premises underlying these discussions,[73] but they hopefully demonstrate that the broad egalitarian conception of fairness advanced by Professor Levmore, while fully accepted by only a few moralists, requires more serious consideration than Professor Manne or Judge Easterbrook are prepared to give. It is a doctrine of great power and long standing, and accordingly may have an influence well beyond the extent of its formal acceptance.

B. *Informational Equality and Unselfishness*

Advocates of full disclosure, past and present, have advanced essentially a single argument in support of their position: It is every person's duty to serve his fellow men and to place their interests, if not above his own, then at least on the same level. Professor Levmore, the modern champion of informational equality, endorses the weaker formulation of this argument, grounding a general moral obligation of disclosure on "the 'golden rule' of interpersonal behavior—treating others as we would ourselves."[74] This rule is perhaps more felicitously phrased as "treating others' interests as we would our own," which avoids the embarrassment to the golden rule posed by masochists and risk-preferrers.

Once the imperative is framed as treating the interests of others equally with our own, Professor Levmore's charge that insider trading is unfair becomes clear. By disclosing all that we know to the other party, we better allow him to assess the transaction from the standpoint of his own interests. Although we may benefit from nondisclosure, he will benefit from disclosure (assuming that the benefits of having the information made available exceed the costs of evaluating it). To use superior information thus places our own advantage above that of the person with whom we are trading. However, this formulation of the principle—treating our own interests *equally* with those of others—is of no use for analyzing insider trading. If A possesses information that B would like to have, A has two choices: disclose or not disclose. Unless A can prefer the welfare of

73. *See* Schneewind, *Pufendorf's Place in the History of Ethics*, 72 SYNTHESE 123 (1987) (comparing and contrasting Pufendorf's moral theory with that of Grotius and, to a lesser extent, Aquinas).

74. Levmore, *supra* note 16, at 122-23. Kent did not explain his position, but his invocation of Christian ethics on behalf of Cicero indicates that he probably took the same view.

either himself or B, he has no means (absent some substantive moral principle independent of the golden rule) for determining whether to disclose or not disclose. If he prefers his own welfare to B's, he will not disclose (again absent some independent substantive reason supporting disclosure). If he prefers B's welfare to his own, he will disclose and absorb the cost of the foregone opportunity. If he is indifferent between his own welfare and B's, then by definition he has no basis for preferring disclosure to nondisclosure. The golden rule as expressed by Professor Levmore serves at most as a formal side-constraint on other moral principles; by itself, it says nothing about insider trading.

In order to generate a rule of decision, Professor Levmore's golden rule must be joined to a theory that allows human interests to be ranked or aggregated in some fashion: If A's interest in the information ranks higher than B's, he should not disclose; if the reverse is true, he should; and if C's interest outranks them all, perhaps A should disclose to C, who would then suppress the information from B. The golden rule in such a case is construed only to require that A not rank his own interests above B's merely because they are his own. Neither Professor Levmore nor any other proponent of informational equality has proposed such a theory. Nor can one be inferred from their views, as the range of theories that can be put to this task of interest-ordering is endless.[75] However, while different theories of interest-ordering will surely single out different classes of transactions for moral disapproval, it is inconceivable that any plausible theory would lead to the conclusion that insider

75. Classical utilitarianism, for instance, is an interest-ordering theory that complies with the golden rule by prescribing that one's own utility count in the utilitarian calculus no more and no less than anyone else's. *See* J. MILL, UTILITARIANISM 22 (O. Piest. ed. 1957) ("In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. 'To do as you would be done by,' and 'to love your neighbor as yourself,' constitute the ideal perfection of utilitarian morality."). More recently, R.M. Hare has used golden rule considerations as a key element in a sophisticated argument for a form of utilitarianism, *see* R. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT (1981); Hare, *Ethical Theory and Utilitarianism*, in UTILITARIANISM AND BEYOND 23, 26-29 (A. Sen & B. Williams eds. 1982), and there is a noted tendency for the golden rule to lead to utilitarianism when applied to multilateral cases. *See* R. HARE, *supra*, at 108-11; Pollock, *Formal Moral Arguments*, 53 PERSONALIST 25, 39 (1972); Robins, *Two Precepts of Morality*, 54 PERSONALIST 340, 346-47 (1973). However, other ordering principles are surely possible. For example, one could say that insider trading is morally permissible only when it serves the interests of the neediest, wisest, or strongest individual affected by the transaction. Presumably, any such principle would be consistent with the golden rule as long as one evaluates one's own need, wisdom, or strength by the same standards as that of others.

trading is always wrong—can it be that the interests of the person with whom one is trading will *always* turn out to be paramount? Hence, if a moral obligation of disclosure in all circumstances is thought to follow from the principle that we should love our fellow man, it must come from an ethic that adopts the stronger version of the golden rule and commands us not merely to love our neighbors as ourselves, but to place the interests of our neighbors *above* our own—to be, in other words, not merely *un*selfish, but *anti*selfish, or altruistic.

It is not clear, however, that even the strong form of this principle establishes that all insider trading is immoral. That principle determines only the proper relationship between oneself and the rest of the world; it does not tell us how the rest of the world should be ordered, and thus provides no guidance in multilateral cases. For example, one can strictly comply with the golden rule of preferring others' interests to one's own by using superior information to benefit third parties. It is no answer to say that such judgments of the relative worth of others' interests are simply impermissible because disrespectful of the equal autonomy of all persons. In addition to being inconsistent with the inferior ranking of one's own interests, that mandate would make obvious the golden rule's uselessness as a moral guide—it is impossible simultaneously to serve all of the relevant interests of four billion different people.[76] Again, then, in order to know whether insider trading is permitted or forbidden by the golden rule, it is necessary to have a substantive moral theory that goes beyond the rule's essentially formal constraints and tells us when it is permissible to allow the interests of some persons to take priority over the interests of others. And again, it is unlikely that any such theory will condemn all insider trading.

The same difficulties confront Antipater's suggestion that insider trading is always immoral because people have an obliga-

76. The point is recognized by Professor Kennedy, a modern altruist. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1718 (1976) ("[T]he altruist is unwilling to carry his premise of solidarity to the extreme of making everyone responsible for the welfare of everyone else."). Professor Kennedy offers possible criteria for identifying those instances in which a duty to serve arises, but states no justification for those criteria. *See id.* The utilitarian solves the problem either by aggregating interests in some macroconsequentialist fashion, as in the traditional formulation, or by prescribing that the actor should imagine himself simultaneously possessing the (prudent) preferences of all relevant persons, which he can then choose among without giving extra weight to his own. *See* Hare, *supra* note 75, at 26.

tion to serve society. That sounds imposing, but what does it mean? Society consists of individuals. Serving society thus means serving some set of individuals, which raises anew the question of which individuals one is to serve. Moreover, if serving society consists of maximizing wealth or pleasure—popular conceptions in no way excluded by Antipater's statement of the principle—it is far from obvious that at least some forms of insider trading, and perhaps even the forms specifically condemned by Antipater, do not achieve this end. In other words, in order to give this view content, one needs a substantive conception of what constitutes service to society. It will then be an empirical question whether that conception is well- or ill-served by insider trading, either generally or in specific forms. A conclusion that insider trading never serves society seems improbable.

At this point, even an altruist who does not have a substantive principle of interest-ordering may well object that this is all too easy, and more than a little unfair. Following the golden rule involves "*treating* others' interests as we would (or superior to) our own." That is, it focuses not merely on the consequences of action—whether the interests of others were advanced as much or more than our own—but also on the *intention* to benefit others. Indeed, for many people intentions play a major role in moral theory, and for some they explicitly play a decisive role.[77] Thus, if the golden rule is to be used as a basis for condemning all insider trading as immoral, it must be reformulated once again: It is not enough that a person act in such a way as to advance the interests of others (however "others" and "interests" are understood); he is required in addition, or perhaps instead, to *intend* to benefit others. But once more, if all that is necessary is an intention to benefit *someone* else, the objection is not to insider trading as such but to insider trading for personal advantage. The new golden rule is satisfied as long as one intends by trading on superior information to benefit third parties, or perhaps even the other party by dramatically showing him the consequences of laxity and inadequate investment in the production of information.

77. *See* I. KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 61 (H. Paton trans. 1964) ("It is impossible to conceive anything at all in the world, or even out of it, which can be taken as good without qualification, except a *good will*") (emphasis added).

C. *An Egoistic Interlude*

Unless tied to a substantive principle of interest-ordering, the altruistic formulation of the golden rule does not determine which transactions are morally good. But when given an intentionalist interpretation it does single out a clearly identifiable class of transactions as immoral: those undertaken for personal gain. While that is not the position desired by informational egalitarians, it is a result of no small moment. Few would advocate enacting such a rule into the statute books, but its appeal as a moral ideal is widespread.[78] Accordingly, the substance of this ethical position should be addressed more directly than I have done thus far. In principle, the substantive issue can be joined either by criticizing the affirmative case advanced in favor of altruism or by setting forth an alternative. In practice, only the latter option is available. Altruism tends to be defended—when it is in fact defended rather than taken for granted—essentially on the ground that its alternatives are unacceptable, or even unthinkable.[79] This means that the best, and indeed the only feasible, rebuttal to Antipater, Cicero, Kent, and Professor Levmore is to suggest an acceptable alternative. Accordingly, I suggest one here, though without even a cursory attempt at justification—a task well beyond the scope of this article and my present means. Nonetheless, advancing a positive theory, even if only by assertion, provides a useful reference point for further discussion. It is also a necessary counterpoint to those such as Professor Dworkin who serenely declare that a person's conduct "*of course* . . . has no inherent moral value if he acts with the intention of benefiting only

78. For centuries, a long string of philosophers has forcefully asserted that personal benefit is the very antithesis of morality. *See From the Special "Horror File,"* OBJECTIVIST, Aug. 1971, at 12-16 (collecting fifteen centuries of such views). In principle, self-interested conduct can be viewed simply as non-moral or as affirmatively immoral, though in practice the two views converge. If moral weight is given to the effect of one's action on others (which will surely be the case with any theory that opposes morality and self-interest), some other person complains that your conduct has damaged him, and your only reason for acting is self-interest, then even if self-interested conduct is non-moral, the moral detriment of your action is offset by no positive moral consideration.

79. This is a large statement, particularly for someone who is not a philosopher. Nonetheless, I stand by it. At some level, the paucity of affirmative arguments for altruism is inevitable, as it is difficult to imagine how one could ever convince someone not already persuaded that he should act in disregard of his own interests because they are his own. *See* Dwyer, *Criticisms of Egoism*, 56 PERSONALIST 214, 227 (1975) ("the prospect of a legitimate argument for the 'virtue' of self-sacrifice is about as unlikely as the discovery of a contradiction somewhere in the universe").

himself."[80]

As the argument of Antipater demonstrates, the notion that the individual's highest moral calling and obligation is service to others is ancient, pre-dating Christianity. But the opposite view—that the individual's highest moral calling and obligation is service to himself—has equally ancient roots in the classical Greek tradition of *eudaimonism*, a term with no generally recognized English equivalent, but which is often translated as "the view that the end of life consists in happiness, conceived of as an all-round, balanced, long-range type of well being, in distinction from pleasure."[81] A modern eudaimonist defines the root term, eudaimonia, as "the condition of living in harmony with one's daimon or innate potentiality, 'living in truth to oneself.' It is marked by a distinctive feeling that constitutes its intrinsic reward and therefore bears the same name as the condition itself."[82] A eudaimonistic ethic holds that each person ought to live in accordance with his human nature, part of which is common to all persons (that which makes him human) and part of which is unique to him as an individual.[83] His moral task is to identify that human excellence that is distinctively his own—that is, his daimon[84]—and the principles of conduct that will allow him to develop that excellence and flourish as a person. Modern advocates of eudaimonism often refer to it as classical egoism[85]—egoism because the ultimate justification for conduct is (*contra* Professor Dworkin) the advancement of the self's rightly understood interests, and classical because the underlying conception of selfhood is grounded in Greek essentialism. Another descriptive term is rational egoism, which reflects both the objective character of the moral enterprise (an individual can be profoundly mistaken as to what aspects of his nature he ought to actualize and how best to actualize them)

80. Dworkin, *Is Wealth a Value?*, 8 J. LEGAL STUD. 191, 211-12 (1979) (emphasis in original). *See also* I. KANT, *supra* note 77, at 61-68 (only actions performed from a motive of duty rather than from inclination or self-interest have moral worth).

81. *See* 1 W. JONES, A HISTORY OF WESTERN PHILOSOPHY 369 (2d ed. 1970).

82. D. NORTON, PERSONAL DESTINIES: A PHILOSOPHY OF ETHICAL INDIVIDUALISM 216 (1976).

83. *See generally id.* at 3-41.

84. *See id.* at 14.

85. *See* Den Uyl & Rasmussen, *Life, Teleology, and Eudaimonia in the Ethics of Ayn Rand*, in THE PHILOSOPHIC THOUGHT OF AYN RAND 63, 77 (D. Den Uyl & D. Rasmussen eds. 1984); Machan, *Recent Work in Ethical Egoism*, 16 AM. PHIL. Q. 1, 1 (1979) [hereinafter *Ethical Egoism*]; *see generally* Machan, *The Classical Egoist Basis of Capitalism*, in THE MAIN DEBATE: COMMUNISM VERSUS CAPITALISM 139 (T. Machan ed. 1987).

and the crucial role of reason, man's defining attribute, as an essential constituent of every individual's distinctive excellence or daimon.

Although eudaimonism provides the interest-ordering principle lacking in the versions of the golden rule criticized earlier, one cannot in the abstract specify a precise content for a eudaimonistic ethic, because each person has unique potentialities that, in the particular circumstances in which he finds himself, ought to be actualized if he is to flourish as a person. But the compactly-stated principle that each individual ought to use his reason to seek " 'self-fulfillment within the range of available possibilities' "[86] provides a means for assessing the propriety of conduct for any given set of concrete circumstances. Moreover, the principle is true for all persons, because it is grounded in the nature of man.

As is true of any moral theory, to defend rather than describe eudaimonism would obviously require addressing an enormous range of issues: What does it mean, either epistemologically or metaphysically, to say that man has a nature? And so what if he does? Is this not the naturalistic fallacy in action? As a variant of egoism, is eudaimonism even coherent as a moral theory? Does it not ignore the social character of man's development? And what about [the reader may fill in the blank] as a better alternative? These and others are good questions, to which eudaimonistic moral philosophers have sought to give good answers.[87] It is enough for the limited purpose of taking issue with Antipater *et al.* to emphasize that eudaimonism differs materially from both hedonism and psychological egoism. The principal modern criticisms of egoism—that it is incoherent as a moral theory[88] or leads to unacceptable social conse-

86. Machan, *supra* note 85, at 151.

87. *See* D. NORTON, *supra* note 82; A. RAND, THE VIRTUE OF SELFISHNESS: A NEW CONCEPT OF EGOISM (1964); Den Uyl & Rasmussen, *supra* note 85; Den Uyl & Rasmussen, *Nozick on the Randian Argument*, 59 PERSONALIST 184 (1978); Machan, *The Classical Egoist Basis of Capitalism*, *supra* note 85; *Ethical Egoism*, *supra* note 85; Mack, *How to Derive Ethical Egoism*, 52 PERSONALIST 735 (1971); Mack, *Egoism and Rights*, 54 PERSONALIST 5 (1973) [hereinafter *Egoism and Rights*]; Rasmussen, *Essentialism, Values and Rights: The Objectivist Case for the Free Society*, in THE LIBERTARIAN READER 37 (T. Machan ed. 1982). An epistemological foundation for the eudaimonistic theory of human nature is found in A. RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY (1979). Norton, alone among these authors, does not draw on Rand's work.

88. *See* J. RAWLS, A THEORY OF JUSTICE 131-36 (1971); *Ethical Egoism*, *supra* note 85, at 2-3, 6-7, 10. It is often said that egoism fails to provide a guide to conduct, "for if everyone is authorized to advance his aims as he pleases, or if everyone ought to advance his own interests, competing claims are not ranked at all and the outcome is

quences[89]—are aimed at species of egoism that tell the individual "to advance his aims as he pleases."[90] Even if those criticisms are valid in that context, they do not so readily dispose of egoistic theories in the classical mode. Eudaimonism, for example, instructs the individual to seek to develop social relations and institutions that take advantage of the numerous opportunities for individual flourishing available only in society, including those means of flourishing generally viewed as non-economic, while minimizing the risks to personal development posed by the proximity of other active moral agents, who share the human faculty of reason and have their own moral tasks to perform. It is of course a long leap from this prescription to particular conclusions about the way people ought to treat each other. The point is merely that to brush off egoism as necessarily "antisocial, callous, anticommunitarian"[91] reflects a very narrow conception of a person's interests that is alien to the classical egoist tradition. The charges may prove to be true, but proof is necessary. Similarly, because eudaimonism conceives of the self's interests objectively rather than subjectively (it is not true that a person ought to pursue whatever he happens to want at the time), it is at least not as obvious as some critics have assumed that egoism is necessarily non-universalizable and must fail to guide conduct in a social setting.[92]

The point of this excursion into egoistic moral theory should not be misunderstood. The unfortunate fact is that once the question of who is to be the beneficiary of moral conduct is broached, there are a finite number of options—yourself, your-

determined by force and cunning." J. RAWLS, *supra*, at 136. *See also* K. BAIER, THE MORAL POINT OF VIEW: A RATIONAL BASIS OF ETHICS 189-90 (1958) (if B and K are egoists seeking the same elective office, for K to prevent B from eliminating him would be both right, because consistent with K's duty to promote his interests, and wrong, because inconsistent with B's performance of his duty).

89. *See Ethical Egoism*, *supra* note 85, at 12-13. The argument from unacceptability generally takes the form (in varying degrees of sophistication) of something like: " 'Oh, so you believe that an individual may do anything he pleases, without regard for the rights of others—he may exploit, brutalize, rape, murder, if he so chooses—with no obligation to consider anything but his own desires.' " Branden, *Rational Egoism—Continued*, 51 PERSONALIST 305, 305 (1970). For examples of arguments by academics that do not differ greatly from this caricature, see *Ethical Egoism*, *supra* note 85, at 5, 9.

90. J. RAWLS, *supra* note 88, at 136.

91. Machan, *supra* note 85, at 143. *See generally* D. NORTON, *supra* note 82, at 275-309.

92. One must also guard against defining universalizability in ways that beg the question against egoism. On egoistic premises, "value" is a relational concept. Something can only be valued *by* or valuable *to someone*. Accordingly, one cannot convict egoism of incoherence by invoking examples that assume the absolute or intrinsic value of some good or action. *See Egoism and Rights*, *supra* note 87, at 10-11.

self equally with others, others, and no one—from which one *must* choose. The widest, most sweeping moral arguments historically advanced against insider trading choose either the second option (which typically leads to macroconsequentialism) or the third. I mean only to remind the reader that the relevant choice set also includes the first.

D. *Eudaimonism and Insider Trading*

If it seems fanciful to inquire whether an egoistic or eudaimonistic ethic would condemn all, or even most, instances of trading on superior information, consider that Cicero, unlike his foil Antipater, justified his universal opposition to nondisclosure at least partially on grounds that can readily be cast in egoistic terms. Cicero's mission was to show that there is no true conflict between the moral and the expedient. By taking advantage of superior information, he argued, one opens oneself up to charges of slyness, dishonesty, etc. "Is it not inexpedient to subject oneself to all these terms of reproach and many more besides?"[93] Is it not, in other words, contrary to one's rational self-interest to incur the disapproval of your fellows by engaging in practices they will deem unsavory?

Granting the factual premise that disapproval will follow, the eudaimonistic answer, at least, is no. If the disapproval comes from fellows whose judgment one respects, then it is a serious matter that might well prompt reconsideration. But social disapproval, even from those whom one values, is not itself sufficient reason for action or inaction. Central to the eudaimonistic ethic is the virtue of *integrity*. The term has a broader meaning than it does in ordinary discourse; it means, in effect, living truly to one's nature.[94] "To thine own self be true," in other words, is something that eudaimonists take literally. The opinions of others are not irrelevant—they might be right and we wrong as to what is self-fulfilling conduct, and maintaining relations with them is affirmatively good—but the touchstone must be our own development as individuals, and final responsibility for our choices is non-delegable. Disclosure of superior information may well be the right answer for a given individual in a given case—if, for example, he has promised to disclose, or

93. M. CICERO, *supra* note 45, at Bk. III, ch. xiii.
94. *See* D. NORTON, *supra* note 82, at 8-20.

failing to disclose would seriously damage someone of great importance to him—but it is not the right answer simply because the opinions of others say so. Specifying when disclosure is proper is impossible, because the character of the eudaimonistic principle precludes making such particularized judgments without knowing the identity of the individual in question and his concrete circumstances. One can say, however, that nondisclosure is not necessarily wrong simply because it will lead to individual profit. We are physical beings in a material world, and wealth is a good thing vital to our flourishing (even though we are capable of using it unwisely). All else being equal, and even some other things being unequal, it is morally right to obtain more of it rather than less. It remains to ask whether particular means for obtaining wealth are morally appropriate, but the fact of profit is a moral plus, not a minus.

II. The Equal Access Rationale

If insider trading is not immoral merely by virtue of being insider trading or self-interested, then the next step is to try to identify particular classes of morally objectionable transactions. One prominent candidate is the class of transactions in which the parties are not merely unequal in their *possession* of information, but also in their *access* to that information. This has been a very popular moral position specifically with respect to insider stock trading. Elements of it can be found in the congressional reports accompanying the 1934 Securities and Exchange Act[95]; it was the explicit rationale for the court decision that initiated the modern era of insider stock trading regulation[96]; and at least two Supreme Court Justices have endorsed it.[97] It has also received substantial academic support. Professor Brudney, perhaps the foremost advocate of this approach, seeks to focus attention on transactions utilizing "unerodable informational

95. *See supra* note 18.

96. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) (a rule against insider trading can be grounded "on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information"). *See also id.* at 852; Scott, *supra* note 16, at 806 ("The 'equal access to information' view of fairness became the dominant approach, although some other conceptions were still alluded to from time to time in the cases").

97. *See* Chiarella v. United States, 445 U.S. 222, 247 (1980) (Blackmun, J., dissenting, joined by Marshall, J.).

advantages that one trader has over another"[98]—that is, informational asymmetries that cannot be overcome by any amount of skill or resources because it would violate legal or corporate restrictions to disclose the information to public investors.[99] Professor Brudney finds in this unerodability the source of the widespread intuitions of the unfairness of insider stock trading.[100] This perceived unfairness lies not merely in the informational advantage, which might be possessed by a clever or diligent outsider and is not by itself morally troublesome, but in "the fact that it is an advantage which cannot be competed away since it depends upon a lawful privilege to which an outsider cannot acquire access."[101] Professor Aldave similarly ascribes intuitions of unfairness to equal access concerns.[102]

Like the full disclosure theory, the equal access view has an impressive historical pedigree in the wider context of contract law. The moral issue was framed, though not answered, in *Laidlaw v. Organ*,[103] perhaps the most famous insider trading case (in the economic sense) to reach the Supreme Court. During the War of 1812, New Orleans was subjected to a naval blockade. News of the war's end was brought to the city from the British fleet on the night of February 18, 1815, by three men, one of whom made it public the following morning. Shortly before that public release, one Mr. Organ learned the news from his partner, the brother of one of the three men. Mr. Organ then purchased from Laidlaw & Co. a substantial quantity of tobacco, which he rightly expected to increase in value when it became known that the naval blockade was ended. Before the deal was struck, one of Laidlaw's agents asked Mr. Organ "if there was any news which was calculated to enhance the price or value of the article about to be purchased."[104] Mr. Organ evidently gave no reply.[105] When news of the peace treaty became public, and the price of New Orleans tobacco duly rose, Laidlaw refused to deliver the goods. Mr. Organ

98. Brudney, *supra* note 16, at 376.

99. *See id.* at 354-55.

100. *Id.* at 346 ("The inability of a public investor with whom an insider transacts on inside information ever lawfully to erode the insider's informational advantage generates a sense of unfairness").

101. *Id.*

102. *See* Aldave, *supra* note 16, at 123.

103. 15 U.S. (2 Wheat.) 178 (1817).

104. *Id.* at 183.

105. *Id.* at 188-89, 193, 194.

sued to compel delivery, and the trial court instructed the jury to find in his favor.

Laidlaw appealed to the Supreme Court, and succeeded in obtaining a new trial. The Court, in an opinion by Chief Justice Marshall, held that each party to a contract "must take care not to say or do any thing tending to impose upon the other,"[106] and that the jury must be allowed to decide whether Organ had "impose[d]" on Laidlaw. Although the case thus holds that mere nondisclosure can constitute fraud under the proper circumstances, it is best known for its dictum. In addition to arguing that Mr. Organ's silence in the face of Laidlaw's pointed inquiry about tobacco values was fraudulent, Laidlaw's counsel urged upon the Court the broader rule that any "[s]uppression of material circumstances within the knowledge of the vendee, *and not accessible to the vendor,* is equivalent to fraud, and vitiates the contract,"[107] citing as authority Pothier's discourse on the law and morals of nondisclosure.[108] Mr. Organ's counsel assumed *arguendo* that his client's conduct was immoral, but defended his legal right to withhold his information. "Human laws are imperfect in this respect," was the argument, "and the sphere of morality is more extensive than the limits of civil jurisdiction. The maxim of *caveat emptor* could never have crept into the law, if the province of ethics had been co-extensive with it."[109] Mr. Organ practiced no legal deceit upon Laidlaw "unless rising earlier in the morning, and obtaining by superior diligence and alertness that intelligence by which the price of commodities was regulated, be such."[110]

Chief Justice Marshall declared that "[t]he question"[111] presented by the case was "whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor."[112] He answered it in favor of Mr. Organ, in a one sentence discussion: "It would be difficult to circumscribe the contrary doctrine [the one urged by Laidlaw] within proper limits,

106. *Id.* at 195.
107. *See id.* at 184-85 (emphasis added).
108. *See* text accompanying notes 63-67.
109. *Laidlaw*, 15 U.S. (2 Wheat.) at 184-85.
110. *Id.* at 193.
111. *Id.* at 195. This characterization was patently false, as the case's actual holding conclusively proves.
112. *Id.* at 195.

where the means of intelligence are equally accessible to both parties."[113]

While Chief Justice Marshall and Laidlaw's counsel thus disagreed as to whether or not Mr. Organ's information regarding the end of the War of 1812 was "accessible" to Laidlaw (a disagreement discussed below), they both considered the question of accessibility to be relevant. Kent did as well, stating as a legal maxim that suppression of material facts "in cases in which both parties have not equal access to the means of information . . . will be deemed unfair dealing, and will vitiate and avoid the contract."[114] He immediately took it back in a footnote, declaring that the rule, "though one undoubtedly of moral obligation,"[115] is "perhaps too broadly stated, to be sustained by the practical doctrines of the courts."[116] Nonetheless, enough courts have stated the principle as positive law in either holding or dicta[117] to enable a legal encyclopedia to express it as black-letter law.[118] While it is possible to offer an economic explanation for these cases,[119] it is also possible that they were driven, at least in part, by something akin to Professor Brudney's view of fairness. Hence, the equal access theory is a prime contender for a moral position from which to condemn at least some forms of insider trading.

But what is meant by "access"? The importance of this question is illustrated by the evident disagreement between Chief Justice Marshall and Laidlaw's counsel over whether Mr. Organ's inside information was equally accessible to Laidlaw. It surely was accessible in the sense that Laidlaw's failure to obtain it was not due to any threat of legal sanctions. It was not

113. *Id.* at 195 (emphasis added).

114. J. KENT, *supra* note 40, at § 482. *See also id.* ("As a general rule, each party is bound to communicate to the other, his knowledge of material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation.").

115. *Id.*

116. *Id.* at § 482 n.*a.* The qualifying footnote limited the rule to cases in which the parties are in some special relationship, "by confidence reposed, or otherwise." *Id.*

117. *See* Camp v. Camp, 2 Ala. 632, 635-36 (1841) (citing Kent); Gutelius v. Sisemore, 365 P.2d 732, 735 (Okla. 1961) (dictum); Obde v. Schlemeyer, 56 Wash. 449, 452-53, 353 P.2d 672, 674-75 (1960).

118. *See* 37 AM. JUR. 2D *Fraud and Deceit* § 148 (1968) ("There is abundant authority to the effect that if one party to a contract or transaction has superior knowledge, or knowledge which is not within the fair and reasonable reach of the other party and which he could not discover by the exercise of reasonable diligence, or means of knowledge which are not open to both parties alike, he is under a legal obligation to speak") (footnotes omitted). The abundant authorities cited for this proposition do not all support it, but the claim is not unfounded. *See* Brudney, *supra* note 16, at 355 n.110.

119. *See* Kronman, *supra* note 40, at 23.

accessible in the sense that Laidlaw had no inside contacts who were prepared to reveal the information prior to its public release and no other obvious means of discovering it. Professor Brudney, recognizing the importance of defining access properly,[120] adopts the former approach. In his view, informational advantages should be unusable when those who do not possess the relevant information cannot obtain it lawfully, "no matter how great may be their diligence or large their resources."[121] His proposed legal rule (which appears also to be his moral rule) would

> deny an informational advantage to those who seek to use otherwise nonpublic information which they are precluded by legal restrictions from disclosing to public investors. And it may appropriately extend to those who, while not precluded by law from waiving their informational advantage, derive it from sources who will not make it public, so that the public cannot lawfully obtain it.[122]

Thus, if a corporate insider learns information that the corporation, for its own business reasons, does not want to disclose to the public, and that is therefore not lawfully available to noninsiders, it would be unfair for him to trade on that information.

Judge Easterbrook has answered this argument by claiming that a distinction between lawful and unlawful access necessarily breaks down because access is always a matter of costs:

> People do not have or lack "access" in some absolute sense. There are, instead, different costs of obtaining information. An outsider's costs are high; he might have to purchase the information from the firm. Managers have lower costs (the amount of salary foregone); brokers have relatively low costs (the value of the time they spent investigating); Sherlock Holmes also may be able to infer extraordinary facts from ordinary occurrences at low cost. The different costs of access are simply a function of the division of labor. A manager (or a physician) always knows more than a shareholder (or patient) in some respects, but unless there is something unethical about the division of labor, the difference is not unfair.[123]

120. *See* Brudney, *supra* note 16, at 354-55.
121. *Id.* at 354.
122. *Id.* at 355 (footnote omitted).
123. Easterbrook, *supra* note 5, at 330.

This analysis has been widely followed,[124] and with good reason. Legal barriers do not hermetically seal off information; they only restrict the methods that can be used to obtain it. If information is not public because the corporation exercises a legal right to withhold it, the outsider is not legally forbidden from acquiring the information; he is merely forbidden from acquiring it by any methods other than buying it from the corporation or becoming an insider. Neither course may be very practical or attractive, but that is surely true of the overcoming of many nonlegal barriers as well. If Mr. Organ gleaned his knowledge of a prospective increase in tobacco prices from subtle signals that only a twenty-year veteran of the tobacco markets would recognize, that information is, in every real sense, unavailable to me unless I purchase it from him or someone equally skilled. The price of acquiring that information on my own is twenty years, and even if I am willing to pay it, it will not help me this time around. An equal access theory must explain why inequality in some means of access to information is morally significant while other inequalities are not. Conceivably, one could attach special significance to those methods of obtaining information that involve the exercise of skill and diligence, but it is not clear why this focus would lead to an "equal access" approach rather than to a more general theory of property rights in information. Furthermore, unless one can argue that it requires no skill or diligence to become a corporate insider or to acquire enough funds to purchase information, the distinction is especially unpromising in the context of insider stock trading. Other distinctions can be drawn based on the perceived costs of certain access barriers, which prevent all but a select few who have the necessary wealth, talent, or a well-placed brother-in-law from obtaining the information, but that is less an indictment of the lack of access than it is of the distribution of wealth, talent, and brothers-in-law. That is, unless the real force motivating an unequal access objection is concern about wealth distribution, there does not appear to be any plausible principle that can distinguish good access barriers from bad ones.

One could, of course, condemn all inequality of access, whether legal or economic. However, the moral difference be-

124. *See* Solinga, *supra* note 16, at 105-06; Note, *supra* note 16, at 848-49.

tween this position and one requiring equality of position is not evident. And if it is unfair always to take advantage of superior access to information, one must ask why. The only answer that comes to mind is that one should not take advantage of another's relative ignorance, whether real or potential, which brings us back to Cicero, Antipater, and Professor Levmore. Those who found their moral theory attractive will not have gotten this far.

A first cousin of the equal access theory is the view that insider stock trading is unfair because it is akin to a casino game in which insiders have a percentage advantage and outsiders are therefore systematically harmed.[125] In an analysis that has proved very influential,[126] Professor Scott contends that this argument has "surprisingly little substance"[127] when viewed *ex ante* from the perspective of the market rather than *ex post* from the perspective of an individual trader. Investors are fully aware of the possibility of insider trading and will not participate in the market unless they are compensated for the nondiversifiable risk they bear by potentially trading against insiders with superior information.[128] It is true that this will mean an across-the-board reduction in share prices, which may be an undesirable economic consequence, but that is not an argument about fairness, but about "whether a lower level of risk and uncertainty would benefit the society as a whole."[129] That turns on whether the decrease in share prices is outweighed by the incentives to produce valuable information, efficient stock pricing, and efficient managerial compensation that insider trading might provide.[130] The merit of Professor Scott's argument is perhaps best measured by the subsequent disappearance from the literature of "harm to outside shareholders" as a *moral* (as opposed to economic) ground for disapproving of insider stock trading.

125. *See* Scott, *supra* note 16, at 807-08.

126. Professors Carlton and Fischel claim that it is "in some sense a complete response to the claim that investors are exploited by insider trading." Carlton & Fischel, *supra* note 16, at 881. It is also endorsed in Easterbrook, *supra* note 5, at 325.

127. Scott, *supra* note 16, at 809.

128. *Id.* at 808-09.

129. *Id.* at 809.

130. Professor Scott concludes that any gains from a rule prohibiting insider stock trading would be far outweighed by these efficiencies and the rule's enforcement costs. *See id.* at 809-14.

III. Insider Trading as Theft

Another way to distinguish informational advantages on which it is moral to trade from those on which it is not is by reference to the manner in which the advantages were acquired. Rather than focussing on the state of the world—whether there is equality of information or of access to information between the parties—this approach concentrates on the process by which the present state of affairs was reached.[131]

A. *Toward a Property Rights Approach to Insider Trading*

In his treatise on contract law, Verplanck made reference to the conflicting intuitions produced by a case like *Laidlaw v. Organ*. Taking advantage of ignorance looks like dirty pool at first glance. But when one focuses on cases in which superior information was acquired by skill, effort, or intelligence, an insistence on full disclosure seems troubling indeed,[132] not merely because of the clear economic consequences of restricting the ability to profit from information gained through a deliberate search (rather than theft or casual discovery),[133] but from a moral standpoint as well. Does morality really require "that before I can deal with my indolent neighbor, I should communicate to him all my private plans, my long-sighted views of the future state of the market, my surmises—in short, all the results of that knowledge and address which have been the hard earned acquisitions of my own industry and activity?"[134] Professor Titus and Peter Carroll have played on the same intuitions in the context of insider stock trading, noting that "we rarely begrudge persons the opportunity to trade upon informational advantages developed through their own lawful industry and effort,"[135] but do begrudge them the opportunity to trade on information obtained by unjust or improper means.[136] Information obtained by chance or luck is harder to deal with

131. The distinction between "historical" and "end-result" principles of justice is attributable to R. Nozick, Anarchy, State and Utopia 153-55 (1974).

132. *See* G. Verplanck, *supra* note 40, at 7-11, 75-78.

133. *See* Kronman, *supra* note 40, at 12-18.

134. G. Verplanck, *supra* note 40, at 9.

135. Titus & Carroll, *supra* note 16, at 133-34. *See also* Aldave, *supra* note 16, at 122 ("We would probably agree that anyone is entitled to exploit any information that he has developed through special insight or diligent effort"). Professor Keeton, whom Professor Titus and Mr. Carroll cited, took essentially the same view with respect to contract law in general. *See* Keeton, *supra* note 40, at 25-26.

136. *See* Titus & Carroll, *supra* note 16, at 133.

intuitively,[137] but they make the call in favor of a legal (and hence, one assumes, a moral) duty to disclose.

If one assumes that an affirmative justification for allowing trading on superior information must be found,[138] then the exercise of skill or the expenditure of effort is an understandable candidate for that role. But it appears to be only a first approximation of what the Verplankian intuition is driving at. Skill and effort alone are plainly not enough, as *Chiarella* demonstrates. Mr. Chiarella was employed by Pandick Press, a financial printer which produced, among other things, announcements of corporate takeovers. Pandick's customers understandably wanted their identities and those of the targets to be kept secret in advance of the announcement, so when the documents were first set for printing, the names of the relevant companies were concealed by codes or blank spaces. Mr. Chiarella was able to deduce the correct names from the context and the number of letters coded or left blank, and (at least until he was caught, fired, and prosecuted) successfully traded on this information. Mr. Chiarella's uncovering of the concealed identities of the acquirors and targets in the merger announcements sent to his employer may well have been a feat of skill and diligence unmatched in the annals of financial printing, but all of the writers who emphasize skill and effort would roundly condemn his conduct. And suppose a person works hard for his information and then gives or sells it to his worthless nephew. Is it wrong for the nephew to reap trading profits because he did nothing tangible to earn the information, and indeed may have done nothing useful or productive in his entire life? The answer is surely that the relevant skill and effort is not that of Mr. Chiarella or the nephew, respectively, but of the client and the producer. In other words, what really drives this view is a theory of property rights in information, with skill and effort serv-

137. *Compare* Aldave, *supra* note 16, at 122-23 (we generally do not begrudge others the use of information obtained by luck) *with* Keeton, *supra* note 40, at 26 (legal duties of disclosure should more readily be imposed with respect to information "obtained by mere chance and not because of any exceptional knowledge, skill, or effort"); *see also* Titus & Carroll, *supra* note 16, at 134 (complaining of conflicting intuitions).

138. The unstated assumption that insider stock trading must be affirmatively justified runs through much of the literature. *See, e.g.*, Wright, *supra* note 11, at 408, 410. Professor Painter assumes it openly: "Since Manne's demonstration that insider trading does little harm to the investor is, if anything, only of neutral significance, some more affirmative policy reasons must be given to justify insider trading." Painter, *supra* note 11, at 149. Why the burden of either proof or persuasion should be on the defender of insider trading is not obvious to me.

ing not as a necessary or relevant characteristic of the particular trader at the time of the trade, but at most as a means for determining who initially acquired the moral right to use and dispose of the information.

The property rights approach has become increasingly popular as a means for analyzing the economics of insider trading, but it has a normative side as well. In an influential article, Professors Carlton and Fischel argue that under a wide range of conditions, insider trading is economically efficient and thus increases the size of the corporate pie, just as do efficient managerial salaries or bonuses. Hence, "shareholders would voluntarily enter into contractual arrangements with insiders giving them property rights in valuable information."[139] While this is framed as an economic argument that is consistent with independent notions of fairness,[140] it can sensibly be understood as a claim that a transaction is fair if it represents the outcome of a voluntary allocation of property rights. A contractual analysis, in other words, suggests a conception of fairness in stock trading that depends upon the means by which information is acquired. Legal theories based on this conception have surfaced under the generic name of "misappropriation" theories, indicating that the wrong involved is trading on information obtained by some improper or illegal means.[141]

Professor Macey has openly defended such a theory in normative terms.[142] He contends that information morally belongs to the person or entity that created it, so that if a corporation creates information regarding a takeover, it has every right to

139. Carlton & Fischel, *supra* note 16, at 882.

140. *Id.* at 881-82.

141. Four Supreme Court Justices endorsed such a theory of Rule 10b-5 liability in *Chiarella*. *See* 445 U.S. at 239 (Brennan, J., concurring in the judgment); *id.* at 239-40 (Burger, C.J., dissenting); *id.* at 245 (Blackmun, J., dissenting, joined by Marshall, J.); and the SEC advanced it forcefully in *Carpenter v. United States*, where it garnered four votes. See Brief for the United States at 35-49, Carpenter v. United States, 108 S. Ct. 316 (1987). Academics, like the Court, are split on the question. *Compare* Aldave, *supra* note 16, at 124 ("The misappropriation theory provides a logical and coherent framework") *with* Warren, *supra* note 16, at 1248 ("The misappropriation theory . . . works a serious distortion of rule 10b-5 jurisprudence"). *Cf.* Macey, *supra* note 16, at 47-63 (noting that the misappropriation theory is in tension with doctrines governing standing, damages, enforcement, and disclosure obligations, and preferring the theory to the doctrines).

142. Professor Aldave also gives an explicit moral defense of a misappropriation theory, arguing that it "comports well with our intuition about what is wrong with trading on nonpublic information." Aldave, *supra* note 16, at 122. However, unlike Professor Macey, she grounds that intuition in the equal access concerns emphasized by Professor Brudney. *See id.* at 123.

use that information as it sees fit, including giving the right to trade on that information to its employees as part of their compensation and prohibiting its use by others.[143] The source of this moral right (and hence the moral wrong of misappropriation) is ambiguous. After invoking a Lockean theory under which creators of wealth are ethically entitled to possess it,[144] Professor Macey then proceeds to frame his discussion in terms of the functional role of property rights in promoting economic efficiency and wealth creation.[145] When discussing appropriate legal rules, Professor Macey makes sole reference to what can broadly be called wealth-maximization concerns,[146] focusing entirely on encouraging the production of valuable information.[147] Professor Macey's mixing of legal and moral concerns makes it difficult to distinguish the two in his argument, but what appears to emerge from his discussion is a qualified moral case against using someone else's property right without consent,[148] and moral sanction of trading on the basis of information that one has properly acquired.

Before pursuing the normative aspects of a property rights approach further, some important features of such an approach should be emphasized. First, on a property rights view, *trading* on stolen information is only secondarily wrong; the principal wrong is the theft. Second, one must keep separate two very different propositions: that it is morally wrong to trade on information that does not belong to you, and that it is morally right to trade on information that does. The first, which amounts to "Theft is wrong," is as close to an uncontroversial moral proposition as one is going to get. People will disagree about what constitutes theft, but as long as some conception of

143. *See* Macey, *supra* note 16, at 28-29. *See also* Morgan, *supra* note 5, at 100 (analysts who create new information ought to be regarded as the owners of that information).

144. *See* Macey, *supra* note 16, at 28 & n.98.

145. *See id.* at 28-33.

146. *See id.* at 28 n.98 ("Locke's analysis is particularly appropriate here because a corporation that makes a tender offer expends great resources to do so . . . . [The existence of] rules prohibiting insiders from trading decreases the production of such information"); *id.* at 30 ("Legal rules should be developed that insure the optimal production of information"); *id.* at 32 ("The legal system need not assign property rights in information in ways that do not maximize society's welfare").

147. *See id.* at 36-37. Professor Macey notes that distributional considerations, while perhaps relevant in other contexts, have never been thought sufficient to sustain rules against insider trading. *See id.* at 32-33 n.115.

148. The qualification pertains to trading on information that could not be the subject of a legal contract, such as information concerning a corporation's fraudulent activities. *See id.* at 39-41.

ownership is accepted as valid, the wrongfulness of theft follows for all but the most dogged noncognitivists. The second proposition—that it is morally right to trade on information that you own—is another matter. A eudaimonist, at least, while perhaps not wishing to deny a person the legal right to trade on his information, would hardly say that any noninvasive use he chooses to make of it is morally right. One can always misuse one's assets, whether they be talents or information. For those who accept this distinction, a property rights approach will at most mark out a class of transactions that is clearly wrongful, but will not preclude further moral criticism of insider trading that passes this first line of attack.

B. *A Lockean Theory of Insider Trading*[149]

The central issue for a property rights approach to the ethics of insider trading is to identify who owns the relevant information. Verplank's intuitive view that emphasizes the role of skill and effort in the acquisition of information draws on a powerful tradition associated most prominently with John Locke and his labor theory of property rights: Self-owning persons acquire exclusive rights to property by mixing their labor with the resources of nature.[150] However, the only prior writer on insider trading explicitly to invoke Locke is Professor Macey, who does so with respect to information concerning takeovers. The offeror has a right to information concerning its own plans, he says, "because a corporation that makes a tender offer expends great resources to do so. Information that a target company is an appropriate target may be said to exist in a 'state of nature,'

149. The term "Lockean" is used here in a loose, almost poetic sense to denote any theory of property rights that involves principles of acquisition, possession, and exchange that fall roughly within the tradition of classical liberalism. It does not refer to the specific theory advanced by John Locke, and in particular does not necessarily encompass Locke's theological assumptions or his qualification that appropriation of goods from the state of nature is proper only if as good and as much is left for others. There is much to be said for reserving the term "Lockean" for theories that do directly harken back to John Locke, but the term has come to signify (with no adequate substitute) a whole tradition, much as the terms "Kantian" and "Marxist" no longer necessarily refer to positions advanced by Kant or Marx, or even positions *consistent* with their views. *Cf.* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 104 n.4 (1979) ("I . . . [use] the term 'Kantian' to refer to a family of related ethical theories that, rejecting any form of consequentialism, instead premise themselves on notions of human autonomy and self-respect. Such theories need not resemble very closely the thought of Immanuel Kant"); Tushnet, *Is There is a Marxist Theory of Law?*, 26 NOMOS 171, 185 (1983) (justifying a metaphorical use of the term "Marxist").

150. *See* J. LOCKE, THE SECOND TREATISE OF GOVERNMENT 16-30 (Peardon ed. 1952).

to use Locke's analysis."[151]

Professor Macey's invocation of the Lockean appropriation principle invites elaboration.[152] Suppose that company A determines that B is an appropriate target for a takeover by A. Shortly thereafter, C, an investment analyst, independently comes to the same conclusion, based on his general knowledge of the relevant markets and publicly disclosed information concerning the two firms. If the information concerning B's target status is literally in a "state of nature," then by the Lockean theory A appears to have appropriated that information when it first discovered it through effort. If C then trades on that information, even after independent discovery, it seems that he is an interloper.

This result, however, is an illusion, which is dissolved by close attention to the meaning of "information." Information, or knowledge, does not exist independently of human cognition. Facts exist, but facts do not become information until they are grasped by a human mind. A's information concerning B's target status (or, more precisely, the information possessed by those persons working on behalf of A) is not, strictly speaking, the same good as C's information, precisely because it is the information of A rather than of C. Put another way, information is inherently relational, and is therefore always at least in part a human creation. This creative aspect is the Lockean basis[153] for property rights in information. Indeed, it does traditional Lockeanism one better. Information is not merely appropriated by people from a state of nature; people affirmatively bring it into being *ex nihilo*. This can be seen most clearly with respect to information concerning a person's own plans, which obviously does not exist until the person generates it, but the principle is applicable to all information.

This analysis provides a clear basis for assessing the moral propriety of trading on information that is acquired "casually" rather than from extended effort or deliberate search. Under close examination, the distinction between casually and deliberately acquired information breaks down. It always requires

151. Macey, *supra* note 16, at 28 n.98. The Lockean view of property rights also seems to be implicit in the argument of Professor Morgan. *See* Morgan, *supra* note 5, at 100.

152. These remarks should be viewed as tentative explorations and not as a fully-developed theory of property rights in information.

153. *See supra* note 149.

some effort to assimilate data into usable form. Without the human act of assimilation, the information never exists, just as an apple sitting on a tree is not an economic good until some person becomes aware of its potential uses.[154] In sum, it would be wrongful for C to use A's knowledge without A's consent, but not to use knowledge independently formed from an examination of objective facts.[155]

One of the uses that owners are traditionally able to make of their property is to transfer it to others.[156] Hence, once information has been properly acquired, the owner is entitled to sell it or give it away. Similarly, he is entitled to enter into contingent agreements for the transfer of future information he may acquire through creation or contract. For example, those who form a corporation or other collective economic entity can be viewed as agreeing that any resources, including information, created by them in the course of conducting the entity's affairs will be disposed of in accordance with the terms of the collective agreement. Employees of the firm can also be seen as exchanging the prospective fruits of their creation for some other value—perhaps a fixed, and hence more certain, salary. From explicit or tacit agreements of this kind, the firm acquires a property right in the information generated in the course of its business. The firm, in turn, is then entitled to dispose of that information as it wishes, subject to whatever limitations are im-

154. The fact that some human action is always necessary to convert objects (or facts) into goods means, as a practical matter, that a Lockean theory and a "first possession" theory will not materially differ. Whoever creates information will necessarily also be the first to possess it. For reasons not relevant here, a first possession analysis is analytically superior, notwithstanding the protestations of Professors Alexander and Schwarzschild that "the first possession principle is a ludicrous candidate for an ultimate moral principle." Alexander & Schwarzschild, *Liberalism, Neutrality, and Equality of Welfare vs. Equality of Resources*, 16 PHIL. & PUB. AFF. 85, 87-88 (1987). If first possession is truly taken as an "ultimate" principle, then it is indeed woefully inadequate and indeterminate, as well as absurd. But as a social manifestation of a more basic moral theory (for example, eudaimonism), which can circumscribe its boundaries and give it content in dubious cases, the first possession principle can be a rule of great power. Professors Alexander and Schwarzschild are correct to note that these "necessary supplemental premises," *id.* at 88, have yet to be provided. They will still be correct when this article concludes.

155. *See* Morgan, *supra* note 5, at 100:

> [T]he analyst who combines public information and company interviews to set forth an analysis and reach conclusions has not usurped or stolen anything; he or she has created new information—the analysis and conclusions—based on other information that he or she was given or that was already in the public domain.

(footnote omitted)

156. *See* RESTATEMENT OF PROPERTY § 1 (1936).

posed by the network of contracts comprising it. It can withhold it, trade upon it, or sell or give it back to some of its employees or shareholders.

The moral inquiry with respect to insider stock trading thus centers on where the network of contracts between the firm and its shareholders, suppliers, lawyers, accountants, investment bankers, printers, and so on, places the right to trade on the information.[157] Locating the right may be a difficult problem whenever the contracting parties have not specifically addressed the question, as will often be the case. But it is the sort of problem that lawyers are familiar with, and the way to solve it is clear enough: One tries to approximate what the parties would have said had they spoken.[158] If one assumes that persons who form a corporation intend, unless they state otherwise, to maximize the value of the economic entity, then it makes sense to choose a default rule in interpreting their contracts that allocates a right to trade on inside information to managers (or whoever) whenever it would maximize the value of the firm to do so, perhaps by substituting insider trading profits for less efficient compensation devices. Determining when that is the case may be a complicated inquiry, but it is hardly an impossible one, as the impressive efforts of recent scholars demonstrate.[159] The principal danger is placing too narrow a focus on economic efficiency. If moral opposition to insider trading, whether reasoned or unreasoned, is truly widespread, then it is possible that shareholders, if specifically asked about it, would refuse to allow insiders to trade even when it was demonstrably efficient to do so. Admittedly, there is no credible evidence to suggest that shareholders are willing to pay good money to indulge whatever moral aversion to insider trading they may have,[160] but if one is serious about interpreting contracts to achieve what the parties would have done had they considered all relevant issues, then one must at least look

157. The same principles should govern an inquiry into the ethics of insider trading in other contexts. Neither the Alexandrian grain merchant nor the owner of the defective house stole their information. While nondisclosure may be wrong in either case, it is not wrong because of any act of misappropriation.

158. Concededly, this is a debatable view of the purposes of contract law. I assume it here. *See generally* Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

159. *See, e.g.*, Haddock & Macey, *supra* note 16 (shareholders will want to allow insider trading whenever someone other than themselves would otherwise reap the benefits of the firm's information).

160. *See* Dooley, *supra* note 5, at 44-47.

to see whether such evidence exists.[161]

The property rights approach provides a basis for assessing the conduct of Mssrs. Boesky, Levine, and Chiarella. All, to put it bluntly, are crooks. Mr. Chiarella was specifically instructed by his employer not to trade on information about his client's plans—a condition that the clients were free to require of their printer. Mr. Levine's clients similarly did not agree that Drexel Burnham Lambert employees would be free to trade on valuable information that they disclosed in order to allow the investment banker to perform its job, and one would strongly surmise that they intended that no such trading would take place.[162] Mr. Levine was thus a garden-variety thief, and Mr. Boesky, who traded on the information and split the profits with Mr. Levine, was a fence. It is not clear why clients of investment bankers need a federal agency to protect their interests when state law would seem to fit the bill quite well, but as a moral matter, at least, Mr. Boesky and Mr. Levine deserve their infamy.

On the other hand, the more pedestrian cases of managers or directors trading on information about their firms (or on information about other firms acquired from insiders of those firms) are more problematic. Automatic condemnation of such trading is appropriate on a property rights view only if there is good reason to believe that all corporate employment contracts contain tacit prohibitions on insider trading. That is a large claim, and one that is unlikely on its face. Without entering into the economic debates that have occupied the attention of most second-wave writers, the most likely answer is surely that some contracts are best read to forbid such trading and some to permit it.[163] One can argue about where presumptions ought to

161. This point was first made by Bainbridge, *supra* note 5, at 67.

162. If information about a prospective takeover leaks out, the price of the target company's stock will likely rise, which may increase the price that the acquiring company will ultimately have to pay if it is also engaging in open-market purchases in advance of the takeover. More importantly, it may tip off the target, giving it additional opportunities to organize defensive tactics. The activity of Mr. Boesky and Mr. Levine, in addition directly to increasing the demand for the target stocks, might (so the Drexel clients could have believed) have increased the risk of such leakage. On the other hand, it may be to the acquiror's advantage to have selected arbitrageurs tipped off, on the assumption that once they have acquired target stock, they will help to assure that the takeover is consummated. *See* Wall St. J., May 19, 1987, at 3, col. 2. I know of nothing to suggest that the Boesky-Levine transactions were of this latter variety.

163. *See* Haddock & Macey, *supra* note 16, at 1450-51, 1467.

lie, but this is not an area in which one would naturally expect to find all-or-nothing answers.

The problems with the Lockean property rights approach, whether based on principles of acquisition by creation or on first possession, are legion. Why initially assume self-ownership?[164] Why not assume that all assets, including all persons and their talents, skills, and efforts, constitute a common fund?[165] How can unilaterally mixing one's labor with anything, or getting to an item first, confer rights against the rest of the world?[166] With respect to tangible goods, how much labor or possession is needed to confer ownership? Is visual contact or mental contemplation enough (these are surely ways of putting resources to human uses)?[167] Does a defect in the chain of title based on a long-past misappropriation taint all subsequent titles? What, in other words, is the baseline for assessing the morality of future contractual exchanges? And what are the moral—and, importantly, the epistemological and metaphysical—foundations for a Lockean, or any other, theory of natural property rights?[168] Those who believe, as I do, that something like a Lockean or first-possession approach flows from eudaimonism have sought to address at least some of these questions;[169] I will not explore here whether they have done so successfully.[170] At the very least, the property rights approach

164. *See* Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1227 (1979).

165. *See* Kronman, *Contract Law and Distributive Justice*, 89 YALE L. J. 472, 493 (1980).

166. *See* Epstein, *supra* note 164, at 1227-28.

167. *See* Alexander & Schwarzschild, *supra* note 154, at 88.

168. *See* Scheffler, *Natural Rights, Equality, and the Minimal State*, 6 CAN. J. PHIL. 59, 62 (1976).

169. *See* T. MACHAN, HUMAN RIGHTS AND HUMAN LIBERTIES (1975); Machan, *supra* note 85; Machan, *A Reconsideration of Natural Rights Theory*, 19 AM. PHIL. Q. 61 (1982); Mack, *Egoism and Rights Revisited*, 58 PERSONALIST 282 (1977); *Egoism and Rights*, *supra* note 87; Rasmussen, *supra* note 87.

170. One point, though, can be made without straying too far. Professor Kronman has argued that all such efforts to defend a theory of libertarian rights are doomed, because claims of right that invoke individual liberty can be justified only by "deploying a contestable theory that cannot itself be verified or disproven by simply looking to see what is the case." Kronman, *supra* note 165, at 483-84 (footnote omitted). That is, the concept of individual liberty, which must be defined if talk of libertarian rights is to be useful, necessarily draws its meaning from a disputable and disputed evaluative framework, and "[t]he question which is the 'best' definition is thus open to argument. The libertarian's failure to provide such an argument for his definition of individual liberty is criticized in [Scanlon, *Nozick on Rights, Liberty, and Property*, 6 PHIL. & PUB. AFFAIRS 3 (1976)]." Kronman, *supra* note 165, at 483 n.29. First, the essential contestability of rights claims is, to put it simply, contested by many libertarians of a eudaimonistic stripe, who reject the epistemological roots of Professor Kronman's theory of contestability. Second, Professor Scanlon did not generically criticize "[t]he libertarian's" failure to provide an adequate account of individual liberty; he criticized a particular

provides a coherent way of thinking about insider trading, and of singling out an identifiable class of transactions for moral disapproval.

C. *Property and Efficiency*

It is perhaps surprising to discover that no previous writers have actually advanced a Lockean moral theory of insider trading. It is true that many commentators have stated that insider stock trading should be understood in terms of the contractual allocation of property rights in information between firms and individuals.[171] But none, including Professor Macey, have sought to ground property rights in a natural rights framework of acquisition and exchange. After an initial reference to Locke, Professor Macey argues for legal rules "structured in such a way as to create incentives for individuals to use resources efficiently."[172] Even the right of the acquiring corporation to prevent others from using its knowledge of its own impending tender offer is ultimately grounded in the need to "provide the proper incentive for corporations to 'create' the information by conducting research activities."[173] The other principal advocates of a property rights approach—Professors Carlton and Fischel, Judge Easterbrook, and Professor Manne—have similarly urged efficient allocations of property rights, so that even if their arguments are recast in normative terms to reflect ethical disapproval of theft, their positions are not Lockean even in the loosest sense of that term.[174]

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libertarian's failure to do so—a failure which that libertarian openly acknowledged. *See* R. NOZICK, *supra* note 131, at *xiv*.

This latter point is symptomatic of the tendency of legal scholars to treat Robert Nozick as representative, if indeed not exhaustive, of libertarian thought. It is a bad tendency. First, libertarianism is a sufficiently diverse viewpoint that trying to select a single representative is a dubious undertaking. Second, if one must be selected, Professor Nozick, whose influence within libertarian circles is in fact quite small, is an odd choice. Tibor Machan, for example, has spent nearly two decades tirelessly addressing the ethical and epistemological questions that Professor Nozick is so often criticized for passing over. See generally Machan, *Considerations of the Libertarian Alternative*, 2 HARV. J.L. & PUB. POL'Y 103 (1979), which makes many of these points. (Professor Kronman also cites Professors Hayek, Buchanan, and Epstein as libertarians, *see* Kronman, *supra* note 165, at 473 n.8, none of whom would shun the label, but all of whom are probably better denoted as classical liberals).

171. *See* Carlton & Fischel, *supra* note 16, at 861-65; Haddock & Macey, *supra* note 16, at 1463-67; Macey, *supra* note 16, at 27-32; *Law Professors*, *supra* note 12, at 579-81; Morgan, *supra* note 5, at 94-101.

172. Macey, *supra* note 16, at 31.

173. *Id.* at 28 n.98.

174. Because these are discussions of legal policy, it is possible that some of these

Obviously, if a system of property rights based on natural law is efficient, the practical difference between a Lockean and an efficiency-based property rights approach is minimal.[175] The conceptual difference, however, is enormous. Professor Macey's legal inquiry focuses on means of "*[a]ssigning* [p]roperty [r]ights in [i]nformation,"[176] which he thinks should be employed to encourage the production of valuable information. Professor Manne, in turn, chastises some of his critics for failing to recognize that "property is no more nor less than the rights and obligations recognized by law."[177] This talk of "assigning" rights is anathema to Lockeans. In the natural rights tradition, at least some property rights exist, as the name suggests, by virtue of nature, not by the grace of the law. Legal institutions can enforce or fail to enforce those rights, but the rights exist whether the law assigns them to their rightful possessors or not. In other words, the Lockean response to Professor Macey's claim that the law "need not assign property rights in information in ways that do not maximize society's welfare"[178] is, "If natural rights and society's welfare are in conflict, oh, yes, it does."

There is a grand irony in the efficiency approach to insider stock trading. Those who adopt it are often viewed by their critics as ardent champions of insider trading, because they generally would permit corporate insiders to trade profitably when it is efficient to do so (and the shareholders have not said otherwise). They are also often seen as opponents of morality, in both a normative and a positive sense. But determining the allocation of property rights, and therefore at least in part the morality of insider trading, by reference to the maximization of society's welfare, involves the same form of reasoning that Antipater used to condemn all insider trading. Antipater argued that it is the moral duty of every individual to serve society. Efficiency theorists agree; they merely take a macrocon-

writers would prefer a Lockean approach in the abstract, but think it more likely to fall on deaf ears than an appeal to efficiency. This kind of slippage is unavoidable whenever legal and ethical analyses are merged.

175. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 5 (1985) ("libertarian and utilitarian justifications of individual rights . . . , properly understood, tend to converge in most important cases").

176. Macey, *supra* note 16, at 37 (emphasis added).

177. *Law Professors*, *supra* note 12, at 550 (footnote omitted). *See also* Bainbridge, *supra* note 5, at 35 ("The law of insider trading is society's attempt to allocate the property rights to information produced by a firm.") (footnote omitted).

178. Macey, *supra* note 16, at 32.

sequentialist approach to the issue, and conclude that society is best served by a broader range of insider trading than Antipater believed. The eudaimonist is equally unhappy in either case.

IV. Insider Trading and Fiduciary Duties

All of the arguments considered thus far can be applied to trading on superior information concerning any commodity; there is nothing special about stocks from the standpoint of either the egalitarian, equal access, or property rights approaches. It is possible, however, to construct moral arguments against some forms of insider trading that are more narrowly tailored to the stock trading context. Common law rules governing insider stock trading often distinguish face-to-face transactions between insiders and shareholders from impersonal transactions on exchanges: Courts have been much more willing to find duties to disclose in the former situation than in the latter.[179] This is not surprising, as in face-to-face deals moral questions can arise from the relationship between the traders as well as from the character of the transaction. Trustees, for example, have both moral and legal obligations of disclosure when dealing with their beneficiaries; indeed, labels such as "trustee," "agent," and "fiduciary" serve in part to identify just those relationships that carry such obligations.[180]

Some early moral objections to insider stock trading seem to have been based on the premise that corporate officers and directors are fiduciaries with respect to their shareholders, and therefore owe both legal and moral duties of disclosure, at least in transactions where both parties are known to each other.[181] This fiduciary notion was one of the themes emphasized in the legislative history of section 10(b);[182] it surfaced in some of the early cases imposing limited duties of disclosure on corporate insiders;[183] and it was touched on by Professor Brudney.[184] More recently, Professor Anderson has explicitly framed the

179. *See supra* note 5.

180. *See* C. Fried, Contract As Promise: A Theory of Contractual Obligation 84 (1981).

181. Lake, *supra* note 17, at 444; Wilgus, *supra* note 17, at 297.

182. *See* H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934) ("men charged with the administration of other people's money must not use inside information for their own advantage").

183. *See supra* note 19.

184. *See* Brudney, *supra* note 16, at 343-44.

moral issue in fiduciary terms, suggesting that the unfairness of insider stock trading

> is usually described in terms of betrayal of fiduciary responsibilities or abuse of position, or the use of an illegitimate trading advantage. In other words, the intuitive objection to insider trading is based not on the failure to disclose to a particular individual but on the general practice of using corporate information for personal benefit.[185]

Professor Anderson's thesis recasts somewhat the traditional fiduciary conception; under her formulation, those wronged by insider trading are not the individual investors with whom the insider deals, but "the whole class of shareholders, investors, or clients who reasonably demand that those given access to valuable information for the benefit of others refrain from engaging in self-dealing or using the information to take unfair advantage of those very persons who placed them in their privileged positions."[186] This recasting is necessary if the fiduciary principle is to have the bite one suspects its proponents would like. If limited to the relationship between officers or directors, and shareholders (or officers or directors, and firms), it says nothing about the morality of insiders selling to uninformed outsiders who are not shareholders, or about non-employees such as Mr. Chiarella and Mr. Boesky buying from uninformed shareholders, even in face-to-face transactions.

The expanded fiduciary notion, however, appears to be more a rationalization than a rationale. The key question, as Professor Anderson has framed the issue, is to determine when a demand that persons refrain from using information to their personal advantage is reasonable. The utility, if any, of a fiduciary principle is that it purportedly provides some independent means of determining when this demand represents a legitimate expectation. If instead there is said to be a fiduciary duty whenever the expectation is legitimate, then the fiduciary principle is a mere label for a conclusion reached through some other substantive moral principle.

Even when limited to its traditional context, in which there is

185. Anderson, *supra* note 16, at 353-54 (footnote omitted).

186. *Id.* at 373. It is not clear whether this passage reflects Professor Anderson's own views or is merely a description of what she believes Professors Brudney and Dooley's position to be. *Cf.* Wimberly, *supra* note 16, at 224-30 (advocating corporate recovery of insider trading profits based on the insider's fiduciary relationship to the corporation).

a fiduciary relationship between officers or directors and their corporation (*not*, one should note, between officers or directors, and shareholders in their capacity as buyers or sellers of stock), the fiduciary principle is not a promising vehicle for moral analysis. The relationship between a corporation and its employees is governed by contract. Therefore, a fiduciary approach reduces to a property rights approach: If the contract forbids the employees from trading, then trading is wrong; if not, not (unless some other reason for condemning the transaction can be found). One could perhaps distinguish the approaches by arguing that there is something in the insider-firm relationship that no contract can alter. However, this amounts either to a very dubious theory of inalienability (it is difficult to imagine why a firm's right to trade on information about itself should be inalienable), or to a view that shareholders must be treated as wards or incompetents,[187] which is an odd way to characterize pension funds and insurance companies, who are likely to be the uninformed outsiders that the insiders are victimizing. In any event, if shareholders are incompetent to protect their interests and thus cannot contract away the right to trade on inside information, it is difficult to understand why they should be able to enter into valid contracts of any sort.

V. Some Thoughts on Distribution

In a generally sympathetic review of *Insider Trading and the Stock Market*, Professor Painter took an essentially sociological view of insider trading. He emphasized that Professor Manne's abstract economic analysis, which looks to the effects of insider trading on conceptually identifiable groups such as outside shareholders as a class,[188] was unlikely to move those who conceive of insider trading rules in investor-specific terms—that is, as means of protecting "the 'Mrs. Surowitzes' of this world."[189] This is an important insight. Draw a mental picture of Mrs. Surowitz. Now draw a mental picture of an inside trader. On one side I would guess is a widow of modest means, with little busi-

187. Professor Manne makes reference to what he calls "the 'bumpkin' theory of outside shareholders. That is, these people should be treated somewhat as wards in chancery or profligates who would waste their valuable assets while their needy families starve and languish at home." H. Manne, *supra* note 6, at 8.

188. *See id.* at 3.

189. Painter, *supra* note 11, at 153-54 (footnote omitted) (referring to Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966)).

ness sense. On the other side is a balding, cigar-chomping executive in an expensive suit, or perhaps a younger sharpy with a perpetual cynical grin. These caricatures may have no basis in fact; in the real world, the outsider is likely to be a pension fund or insurance company and the insider could be a struggling inventor. Nonetheless, while I have no evidence to support it, I strongly suspect that something like the image I have drawn drives much of the moral opposition to insider stock trading: Insiders are rich and strong while outsiders are poor and weak, and insider stock trading is wrong because it generally transfers wealth from the poor to the rich.

Professor Macey anticipated this suggestion, pointing out that "no one has ever suggested either permitting or banning insider trading on the basis that it serves to transfer wealth from one group to some other, somehow more deserving group."[190] That is essentially true of insider *stock* trading specifically,[191] but one lesson of this inquiry is that insider trading is in most cases a general question of contract doctrine, not an issue uniquely pertaining to corporate securities. In that wider context, those who view contract law as an attractive vehicle for alleviating what they see as an inequitable distribution of wealth surely would not exclude regulation of insider trading from their arsenal.[192] The equal access objection in particular may, as noted earlier, be a distributional objection in another guise. Exploring possible distributional approaches to insider trading is a task for another day, both because the extent to which distributional goals motivate opposition to insider stock trading is purely a matter of speculation and because questions of distributive justice cannot possibly be addressed here. I touch on the issue, however, in the hope that those who do have distributional doubts about insider stock trading will make them explicit in the future.

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190. Macey, *supra* note 16, at 33 n.115.

191. Professor Weston raised distributional concerns in passing. *See* Weston, *supra* note 11, at 144-45.

192. Professor Kronman suggests that all advantages that some traders have over others, whether of strength, skill, wealth, or information, can morally be used only when such advantage-taking will, in the general run of cases, work to the benefit of those on the short end of the stick. *See* Kronman, *supra* note 165, at 478-97. As applied to insider stock trading, this rule might well approximate the results of a property rights approach, either efficiency-based or Lockean. In fact, it *is* a property rights approach, albeit with an initially odd-sounding allocative principle.

VI. Is That All There Is?

If one counts noses, the most popular moral argument against insider trading is none of those discussed above; it is simply a gut-level expression of disapproval—to use Professor Manne's term, foot-stamping.[193] The modes of expression are numerous: "offen[se] [to] the moral sense,"[194] "a sense of unfairness,"[195] or "it's just not right."[196] Professor Manne had little patience with these bare assertions of intuitive disapproval,[197] and he is not alone in complaining about their imprecision and analytic sterility.[198] I share this assessment. But can these objections really be dismissed that easily? Two foot-stampers have explicitly raised this question, and while they have done no more than raise it, their comments amount to a defense of argument-by-assertion with which all normative legal scholarship must, at some point, come to grips.

Professor Manne attributed the low quality of discussions of insider trading prior to his book to the fact that economists had not paid specific attention to the subject, leaving it to lawyers and legal scholars unaccustomed to thinking in functional, economic terms, and whose analysis would thus naturally "reflect their notion of the fairness of the transaction simply from the point of view of the two individuals involved."[199] Professor Painter argued that this approach, with its emphasis on the desires and expectations of ordinary investors, is too deeply ingrained in society and the law for Professor Manne's scientific analysis to prevail, however superior that analysis may be.[200] Professor Painter recognized that this "appeal to the conscience of the community"[201] does not really represent an ana-

193. *See supra* notes 17-19.

194. Wilgus, *supra* note 17, at 297.

195. Brudney, *supra* note 16, at 346.

196. H. Manne, *supra* note 6 at 233 n.42.

197. *See supra* note 21.

198. *See* Easterbrook, *supra* note 5, at 324 ("I suspect that few people who invoke arguments based on fairness have in mind any particular content for the term."); Scott, *supra* note 16, at 805 ("Judging by the opinions and commentaries, unfairness is one of those qualities that exists in the eye of the beholder and elicit little effort at explanation.").

199. H. Manne, *supra* note 6, at 3.

200. *See* Painter, *supra* note 11, at 155 (techniques of investor protection "cannot concentrate on the interplay of gross and impersonal economic forces to reach a result which to the individual is morally indefensible in terms of his normal expectations of the market place").

201. *Id.* at 159.

lytic advance over foot-stamping, but he questioned—without answering—whether any such advance is *possible*:

> But, after all, what is morality? Attempts to provide a "rational" foundation for moral judgments have a way of being unconvincing. The whole philosophy of ethical judgments has a pedantic quality which escapes the ordinary individual who merely stamps his, [*sic*] or her foot and declares, inarticulately [*sic*] that "I don't care, it's just not right." Like Samuel Johnson's reply to the sophistry of Bishop Berkeley, reactions of this type have a simplicity and immediacy which make up for their lack of theoretical respectability. Even if the content of moral statements be primarily emotive, which is doubtful, a satisfactory morality must be emotionally satisfying—that is, must appeal to the multitude who, not being entrepreneurs, must give implicit approval to the entrepreneurs in their insider trading. And Manne's analysis hardly appears to have achieved that result. However, his great contribution has been to show us that foot-stamping may not be enough in this area.[202]

Alone among the second wave commentators, Gerard Wimberly unashamedly stamped his feet, grounding ethical opposition to a broad range of trading practices on "[m]orality, a modern sense of 'it's just not right,' and a feeling that the director has no claim to the profits from confidential information."[203] In response to anticipated charges of emotionalism, Mr. Wimberly answered: "But if emotion is not a proper source of business ethics, one wonders whence else 'ethics?' "[204]

It is easy to dismiss Professor Painter and Mr. Wimberly as "know-nothings." However, their questions about the foundations of moral judgments, irritating as they are, are fair ones.[205] To criticize someone, whether a law student, a legal scholar, or a philosophy professor, for merely asserting "I don't care; it's just not right," one needs to have something more helpful to offer.

The problem can be framed more generally: If bare assertions of moral outrage are unacceptable argumentation in legal scholarship, then what is acceptable? When confronted, this question proves to be distressingly difficult. For starters, it

202. *Id.* at 159.
203. Wimberly, *supra* note 16, at 224.
204. *Id.* at 224 n.102.
205. As is Professor Leff's: "How can one ground any statement in the form, 'It is right to do X' in anything other than the quicksand of bare reiterated assertion?" Leff, *Book Review*, 29 STAN. L. REV. 879, 880 (1977).

would surely be acceptable to argue that a particular ethical proposition can be derived from a provably correct moral theory.[206] Of course, an argument of that kind would have to address a number of foundational philosophical issues. For example, one prerequisite for such an argument is the specification of an appropriate epistemological standard for determining moral truth. That is, we need to know how to recognize the correct theory when we come across it. The search for moral truth will take very different paths if one is searching for deductions from self-evident premises beyond even Descartes's ability to doubt,[207] for examples of what is generally thought of by wise people as the good,[208] or for anything in between. Hence, questions of epistemology are logically prior to questions of ethics; to determine whether and how ethical truths are attainable requires a more general theory of human knowledge. That, in turn, requires consideration of metaphysics—of the nature of man, his cognitive faculty, and the world in which he lives. In short, in order to defend normative statements in an unambiguously adequate fashion, one needs an integrated, validated philosophical system, which can then be brought to bear on the specific moral question one faces, such as the ethics of insider stock trading.

The legal writer who successfully applied this method would not only have written a treatise, but would also be a serious contender for the title of the greatest philosopher who ever lived. It requires an impressive feat of philosophical integration even to incorporate by reference the work of others who one believes have provided such a system. At a minimum, that requires an independent grasp of the system, down to the level of metaphysics, sufficient to determine its adequacy. This is not to say, or even to suggest, that the enterprise of constructing or recognizing a rational ethical system is impossible in general or beyond the capacity of legal scholars in particular. Indeed, I

206. This assumes that rational proof of substantive moral propositions is both possible and meaningful, an issue that philosophers have debated for centuries and that has increasingly come to the attention of legal scholars. *See* D. LYONS, ETHICS AND THE RULE OF LAW 11-35 (1984); J. MURPHY & J. COLEMAN, THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 72-73, 102-06 (1984); Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L. J. 1229; Leff, *supra* note 204; Moore, *Moral Reality*, WIS. L. REV. 1061 (1982).

207. *See* Descartes, *Meditations on the First Philosophy*, in THE RATIONALISTS 112-17 (1974).

208. Rightly or wrongly, this method is often attributed to Aristotle. *See generally* ARISTOTLE, NICHOMACHEAN ETHICS Bk. 1 (M. Ostwald trans. 1962).

emphatically believe the contrary, and even believe that moral knowledge can satisfy a correspondence as opposed to coherence standard of truth.[209] It is only to say that it is a big job, especially for a lawyer. It is conceivable that the ethical, epistemological, and metaphysical problems of the ages will be solved by an article in a twentieth-century, English-language law journal. But I rather doubt it.

So, if the hapless lawyer cannot produce in his article a compelling demonstration of moral truth, then what? One possibility is silence: If you can't *prove* your normative utterances, they are no more useful than bare assertions of moral outrage, so shut up and do something positive and constructive for a change. But recognizing the practical difficulties (without conceding the theoretical impossibility) of one extreme need not push us to the other so quickly. Perhaps arguments that are not themselves compelling can nonetheless serve as useful links in a longer, even centuries long, chain of knowledge. To make the case for silence it would be necessary to show that nothing fruitful can possibly come of normative discourse in the absence of full-blown philosophical validation of each proferred proposition. That is unlikely.

So the problem is to find an acceptable kind and level of argument that is noncomprehensive but nonetheless useful. One approach is to substitute in place of rational validation such things as, to take Judge Posner's suggestions, "basic formal criteria of adequacy, such as logical consistency, completeness, definiteness, and the like,"[210] consistency with our moral intuitions,[211] or contribution to the survival or prosperity of society.[212] As Judge Posner recognizes, these standards at most can only provide a basis for rejecting moral views, not for accepting them.[213] But that at least is something, and it has in fact been the usual way in which legal scholarship has dealt with the

209. A correspondence theory of truth conforms to what I suspect most people outside academia have in mind when they talk about truth: correspondence or agreement with objective facts of reality. A coherence theory makes the criterion of truth some form of consistency or fit with other propositions. Correspondence theorists can and do employ coherence arguments; the dispute is over whether there is some ultimate criterion of truth outside the propositional system.

210. *See* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 110 (1979).

211. *See id.*

212. *See id.* at 110-11.

213. *See id.* at 110. *See also* J. MURPHY & J. COLEMAN, *supra* note 194, at 67 n.65, 101 (discussing how coherence as a criterion can refute but not validate a theory).

problem of moral justification (when it has dealt with it). More specifically, the tendency has been to rely heavily on Judge Posner's second criterion: consistency with "widely shared ethical intuitions."[214] Indeed, Judge Posner and many others see in this criterion the very *raison d'etre* for moral theorizing,[215] and writers on insider stock trading appear to have relied on it implicitly.[216] The method differs from foot-stamping, to which it bears more than a family resemblance, in that particular intuitions are not taken for granted, but are analyzed and tested for consistency with more fundamental ones. The theoretical task is to derive a framework that accounts for the widest possible set of our most strongly felt intuitions, that allows conflicts between intuitions to be resolved in some orderly fashion, and that can serve as a tool in hard cases where our intuitions are unclear.

While this does in a sense provide a means of saying less

214. Posner, *supra* note 210, at 110. A sample of works that explicitly rely, sometimes with great reluctance, on intuitions as the basis for moral judgment would fill volumes. The popularity of this approach has no doubt been helped along by the enormously influential work of John Rawls, who has produced perhaps the most sophisticated application of this methodology. *See* J. RAWLS, *supra* note 88. Professor Rawls employs a method of reasoning from moral intuitions in which we have a great deal of confidence ("considered judgments") to a theory that yields those intuitions, and back again to the initial judgments if the theory required to yield them offends other strongly held intuitions. *See id.* at 19-21, 47-50. There is of course more to it than this, but not all that much more. Professor Rawls is engaging in a kind of transcendental deduction: we begin with (provisional) knowledge of certain moral propositions, in the form of considered judgments, and the task of ethics is to construct a theory that shows *how* those judgments are true. He allows the initial considered judgments to be revised as the theory is developed, but there is nothing to guide that process of revision except other considered judgments, or perhaps even an aesthetic sense of what a "pleasing" theory would consist of. Professor Rawls and others may be correct (though I think not) that that is the best we can do, *see id.* at 576-81; Moore, *supra* note 205, at 1112-13, but the fact remains that calling a moral intuition a "considered judgment" makes it no less of an intuition unless one can prescribe *substantive* standards to govern the process of consideration, a possibility that Professor Rawls explicitly rejects. *See* J. RAWLS, *supra* note 88, at 578-79. Professor Rawls does claim to have nonarbitrary standards for determining when an intuitive judgment is a considered one, *see id.* at 47-48, but those standards affect only *which* intuitions serve as the ultimate moral touchstones. It should be noted that Professor Rawls has specifically cautioned against too hastily using his methodology to derive principles of individual conduct rather than historically contingent political principles. *See* Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 224-25, 245 (1985).

215. *See* Posner, *supra* note 210, at 111:

> [W]hat is desired in an ethical theory, I believe, is not a basis for abandoning those fundamental ethical precepts that all of us accept, if not always obey, but rather a structure which organizes our intuitions and provides guidance in dealing with ethical issues where our intuitions are uncertain.

See also PHILOSOPHY OF LAW, *supra* note 194, at 83, 101.

216. For examples of what appear to be intuitionist methodologies, see Aldave, *supra* note 16, at 122; Brudney, *supra* note 16, at 346; Levmore, *supra* note 16, at 122-23.

than everything but more than nothing about moral matters, and I have even tacitly relied on it myself at times, it is a troublesome approach even apart from its substantive limitations.[217] Its utility depends upon a threshold degree of overlap between the intuitions of author and audience. If one person intuits X and another intuits Y, they can engage in advocacy at various levels, on the assumption that X or Y will be abandoned if shown to be inconsistent with more basic intuitions, but at some point the parties will arrive at foundational intuitions that are not revisable, because they form the baseline against which other intuitions are judged. Those who plant their feet in different foundations simply have nothing to say to each other. Intuition-based coherence arguments, in other words, solve the problem of moral discourse by limiting the audience to those who agree with a sufficiently broad range of the author's intuitive assumptions to avoid the posing of too-embarrassing questions.[218] Moreover, intuitions are not irreducible primaries. They are reflections of automatized value judgments, which in turn can be the product of reasoned philosophizing, sloppy thinking, or social osmosis.[219] On the assumption that the former is relatively uncommon, reliance on intuitions thus creates a strong bias in favor of whatever values happen to be dominant in the existing culture. Those seeking to challenge a reigning consensus are placed at a serious disadvantage.[220]

Even greater problems plague every similar method that seeks to sidestep substantive questions of right and wrong. If our answer to the foot-stampers is that, unlike them, "we are seeking good reasons for one moral position as opposed to others,"[221] we have to know what count as good reasons. Is it a sufficient reason to reject a theory that it leads to conclusions that are "ethically unacceptable to many of us"?[222] If so, one is back to coherence with intuitions, and the problem of defining the appropriate "us." Is degree of completeness a reason for

217. *See* R. HARE, *supra* note 75, at 12, 40.

218. *Cf.* J. RAWLS, *supra* note 88, at 580-81 (discussing how justification, as distinct from formal proof, necessarily proceeds at some level from consensus).

219. *See* D. LYONS, *supra* note 206, at 16.

220. *See* Baier, *Justification in Ethics*, 28 NOMOS 3, 11 (1986) ("what counts as a refutation for some, e.g., that the theory has moral consequences which would be rejected by commonsense morality, would be calmly accepted by others as the inevitable and indeed desirable result of moral progress").

221. D. LYONS, *supra* note 206, at 32.

222. *See* Hammond, *Book Review*, 91 YALE L.J. 1493, 1507 (1982).

preferring one theory to another? This is a plausible standard only if any answer, even a wrong one, is preferable to none, which is hardly obvious. If an ethical system serves as a basis for decision-making, then gaps in the system will require adoption of some second-order decision method. A complete system is only preferable to an incomplete one if there is some independent reason to think that the additional answers provided by the more complete theory are better than the answers yielded by whatever second-order decision method will be used to supplement the incomplete one. Much the same can be said of definiteness as a virtue: Is a definite but wrong answer better than an incomprehensible one? And it is not possible to avoid forever basic substantive questions about the proper *focus* of moral theory. Someone who believes that morality consists of principles to guide persons in fulfilling their own natural destinies as individuals[223] will find very different considerations to be "good reasons" for adopting or rejecting an ethical theory than someone who believes that a person's act "has no inherent moral value if he acts with the intention of benefiting only himself."[224]

In the end, there is no good substitute for a sound argument.[225] Lest the foot-stampers begin celebrating too early, however, this leads to no more dramatic a conclusion than that normative discourse in legal scholarship must often be evaluated by standards drawn from sources other than moral theory. Part of the purpose of writing or speaking is to make one's thoughts available to others for their use and comment. This sharing of ideas enhances the likelihood that one's own work

223. *See, e.g.*, D. NORTON, *supra* note 82; A. RAND, *supra* note 87.

224. Dworkin, *supra* note 80, at 211-12.

225. Professor Barnett points out that even if we do not definitively know which reasons are good ones, "we are not frozen in our tracks until philosophers settle the question. We must act and evaluate both without ironclad principles and without criteria for evaluating the principles at our disposal." Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J. L. & PUB. POL'Y 271, 280 n.19 (1987). But the need for action does not provide a means for setting aside metaethical questions; it merely sets the stage for the existentialist, whose central argument is that we are indeed condemned to choose in the absence of any demonstrable standards. Professor Barnett suggests that even without standards "there are both wise and foolish ways to proceed," *id.*, and that one can profitably look to the knowledge tacitly reposed in us through "our evolved and ever-evolving traditions." *Id.* That is a metaethical claim of no small significance. Perhaps on a utilitarian model of ethics the long survival of a practice would be good evidence of its moral worth, but otherwise reference to traditions (which traditions?) appears to reduce to an appeal to widely shared moral intuitions.

will be advanced and holds out the prospect that others will better be able to pursue their endeavors in light of one's insights, questions, and errors. Normative discourse can thus be evaluated as good or bad *as writing or discourse* at least partially in terms of how well it achieves these ends. From this perspective one can derive many of the formal properties often considered relevant in evaluating competing moral claims—such as logical consistency, clarity, comprehensiveness, and so on—not necessarily as moral virtues, but as virtues of legal or moral writing. This standard at least allows one to criticize and then ignore writers who express their intuitive judgments about insider trading without even indicating what practices they are objecting to. Such unfocused foot-stamping is not necessarily "wrong" on this view, but neither is it in any obvious sense *helpful*. Thus, the least one can expect from lawyers in the way of normative discourse is to be able to understand what they are discussing.

One can even go further and reject and ignore *focused* foot-stamping. A request for explanation of a moral judgment, pursued relentlessly, will eventually result in a demand for elaboration of a full philosophical system, but a more limited demand for identification of a normative premise on which the judgment is based is more easily justified. If I think that a practice is morally wrong, but have nothing to offer beyond that observation, it is difficult to see what purpose is served by expressing that observation. Presumably I am not inviting comment, because by hypothesis there is nothing to comment on other than a declaration of my mental state. Others can agree or disagree with my observation, but unless the mere fact of my belief is somehow relevant (as it would be, for example, to a moral theory that depends on the number of legal writers who express views on a subject), no one's intellectual enterprise is going to be advanced by my outburst, least of all my own. Even focused foot-stamping, in other words, provides nothing to talk about; and while that may not be an argument that will impress moral philosophers, it does constitute a basis for rejecting its adequacy as legal or moral writing. On the other hand, a suggestion that nothing more than foot-stamping is possible *does* advance debate; that is an affirmative proposition whose persuasiveness and implications can be explored, and which expresses something more than the mental state of the speaker.

Things are even better if one can state a premise that underlies one's moral judgment and can explain what "good reasons" were found to support it; the implications of that premise can be explored, and the proferred reasons can be examined by those who have their own substantive criteria.

Of course, it is open to a foot-stamper to respond that it is not significantly more interesting to know someone's unproven premise or theory than to know his emotional reaction to some not-fully-defined practice. But that means only that one should not expect all that much in the way of moral wisdom from lawyers or legal scholars—or, for that matter, from economists, historians, longshoremen, or anyone else who does not engage, with considerable time and certifiable genius, in the enterprise of moral philosophy.[226] It is a long leap from that premise to approval, or even tolerance, of foot-stamping.

VII. Conclusion

This analysis has raised many questions and answered few. That is neither avoidable nor regrettable; ethics, even when done by lawyers rather than philosophers, is a complicated subject. Those who find attractive some version of the moral theory of Cicero and Antipater are well on their way to an answer to the moral question of insider trading, and not just with respect to stocks. Property rights theorists, whether of a Lockean or social-efficiency bent, have a means of identifying at least one major class of transactions deserving of moral disapproval: trading on stolen goods. Beyond that, few conclusions can be drawn, except that, as with most ethical questions, the moral approach to insider trading that can attract a clear consensus has yet to be advanced.

226. There may also be very little cause for expecting much more from moral philosophers. *See* Baier, *supra* note 220, at 11 ("Admittedly, commonsense morality does not provide a clear, unambiguous, and well-grounded method for 'validating' our moral opinions, but moral theory has done worse") (footnote omitted).