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Judith G. Greenberg

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INSIDER TRADING AND FAMILY VALUES

JUDITH G. GREENBERG*

I. INTRODUCTION

For the past eighteen years, since the Supreme Court’s decision in Chiarella v. United States,1 lawyers, securities traders, and commentators have been uncertain as to the reach of section 10b of the Securities Exchange Act of 1934.2 A number of cases, read

* Professor of Law, New England School of Law; L.L.M. Harvard University, 1979; J.D. University of Wisconsin Law School, 1972; B.A. Cornell University, 1969. This article is dedicated to the memory of my late colleague and friend, Mary Joe Frug, who explored unlikely places for the effects of gender. In addition, I would like to thank Russell Engler, Theresa Gabaldon, Terri O'Neill, and Elizabeth Spahn for helpful comments; Sandra Sells, Liz Marcus, and Michelle Caprini-Slayton for research assistance; and, my family for their support in all ways.

2. 15 U.S.C. § 78j(b) (1994). The statute reads:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
   
   (b) To use or employ, in connection with the purchase or sale of any security
   . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

   Id.
Pursuant to the powers given it by this statute, the Securities and Exchange Commission adopted Rule 10b-5 which provides:
   It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
   (a) To employ any device, scheme, or artifice to defraud, [or]
together, appear to call for a narrow interpretation of the section. This narrowing impulse could be said to begin with Chiarella in which the Supreme Court held that there was no violation of the insider trading rules because the information used in the trade in that case was not obtained in breach of a duty owed to the firm whose shares were traded.\(^3\) Subsequently, in Dirks v. SEC,\(^4\) the Court found no violation on the part of an analyst who passed information of a large-scale fraud to his clients without the intent to obtain personal gain from relaying the information. Both of these cases, simply by finding no violation of the insider trading rules, indicate areas to which section 10b does not apply. Taken together, Chiarella and Dirks appear to require a close connection between the source of the information and the firm whose shares were traded, as well as a breach of a fiduciary duty, motivated by personal gain, to the source of the information. These two decisions limited the coverage of section 10b and made it more difficult for the Securities and Exchange Commission (SEC) to prosecute people who learned of an impending takeover bid from their employer, the bidder, and then used that information to trade in shares of the target.\(^5\) In an era of mergers and hostile tender offers, this was a significant restriction on the power of the SEC.\(^6\)

\(^{(c)}\) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.


3. In Chiarella v. United States, 445 U.S. 222 (1980), the Court refused to rule on whether the misappropriation theory was authorized by statute because the theory had not been presented to the jury that convicted Vincent Chiarella. See id. at 236. Chief Justice Burger, in his dissent, argued in favor of adoption of the misappropriation theory. See id. at 239 (Burger, J., dissenting). Three other Justices also indicated their sympathy for the theory. See id. at 238 (Brennan, J., concurring); see id. at 245 (Blackmun, J., and Marshall, J., dissenting).


5. Indeed, the SEC adopted Rule 14e-3 to deal with exactly this situation. This rule was challenged and upheld in United States v. O'Hagan, 117 S. Ct. 2199 (1997).

6. The Supreme Court's other insider trading decisions over the past 20 years have, in general, reinforced the impression that it was narrowing the scope of section 10b. In Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), the Court held that censure was required under section 10b, even for private actions. This eliminated the possibility of bringing actions against firms that had been merely negligent, including those that had negligently monitored the offending firm. One year after Ernst & Ernst, in Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977), the Court held that the insider trading prohibition applied only to deceptive breaches of fiduciary duty, not to all breaches of such duties. Finally, in Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994), the Court held that a private plaintiff could not maintain a suit for aiding and abetting under section 10b. Although these are not the only Supreme Court cases relating to insider trading in the past two decades, they certainly could be read to indicate that the Court would be hostile to any significant
In contrast, the Circuit Courts, led by the Second Circuit, developed a line of misappropriation cases that expanded the coverage of section 10b. These cases held that one who traded on nonpublic information in breach of a duty owed to the source of that information was guilty of insider trading. This represented a dramatic expansion of the traditional view of insider trading articulated in Chiarella. The misappropriation theory made it possible to prosecute employees like Chiarella who took information from their employers and traded in the shares of another firm. From its adoption in 1981 by the Second Circuit, until the Fourth Circuit's decision in United States v. Bryan in 1995, no circuit court had rejected the misappropriation theory. Bryan was followed quickly by the Eighth Circuit's similar position in United States v. O'Hagan. These two decisions raised questions about the viability of the misappropriation theory — questions that were set to rest by the Supreme Court's recent reversal of the Eighth Circuit in United States v. O'Hagan.

The Court's decision in O'Hagan resolved the question of whether section 10b encompasses the misappropriation theory of insider trading. It does. The decision did not resolve the larger questions as to just how broadly either the misappropriation theory or the traditional theory of insider trading could be applied. These questions remain unanswered. O'Hagan defined the misappropriation theory as prohibiting "a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty owed to the source of that information." This represented a dramatic expansion of the traditional view of insider trading articulated in Chiarella.

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10. See, e.g., SEC v. Materia, 745 F.2d 197 (2d Cir. 1984) (enjoining employee of financial printer, like Chiarella, from trading on information obtained from his employer).
11. 58 F.3d 933 (4th Cir. 1995).
12. See SEC v. Cherif, 933 F.2d 403 (7th Cir. 1991) (adopting misappropriation theory); SEC v. Clark, 915 F.2d 439 (9th Cir. 1990) (adopting misappropriation theory); Rothberg v. Rosenbloom, 771 F.2d 818 (3d Cir. 1985), cert. denied, 481 U.S. 1017 (1987) (finding liability based on the misappropriation theory without explicitly mentioning the theory).
13. 92 F.3d 612 (8th Cir. 1996).
14. 117 S. Ct. 2199 (1997). Hereinafter, all references to O'Hagan are to the Supreme Court decision.
15. See id. at 2205.
of a duty of loyalty and confidentiality . . . ”16 Does that mean that in misappropriation cases only those who have historically been recognized as “fiduciaries” of the firm which is the source of the information will be prohibited from engaging in insider trading? This would include directors, officers, and some employees of the business. O'Hagan need not be read as extending beyond this since James O'Hagan was a lawyer at the law firm from which he took the information. The term “fiduciary” could also easily include trustees of a trust or executors of an estate. But would a psychiatrist who traded on information obtained from a patient be guilty of insider trading under O'Hagan?17 Does this fit within the Court’s idea of a fiduciary? Would there be insider trading under O'Hagan if a husband traded on information derived from his wife in direct violation of a promise of secrecy given to the wife?18 Are the insider trading rules violated if the information comes from the trader’s father instead of his wife?19

These fundamental questions remain to be decided even after O'Hagan. The crucial issue is who can violate the insider trading rules and through what activities? O'Hagan refers to “fiduciary[s]” and a “breach of a duty of loyalty and confidentiality.”20 Chiarella, on the other hand, refers to a “fiduciary or other similar relation of trust and confidence . . . “21 What exactly does this language mean? O'Hagan did not clarify this issue, nor do the commonly invoked explanatory paradigms for corporate and securities law — law and economics, and fairness. Law and economics commentators originally advocated the complete elimination of the prohibition on insider trading on the grounds that increased trading would improve the efficiency of the market.22 Naturally, supporters of this position made no effort to examine the breadth of particular insider trading rules since they claimed the whole structure was illegitimate. This discussion set the agenda for more recent law and economics commentators who have continued to argue over whether the

16. Id. at 2207.
22. See infra notes 110-21 and accompanying text (discussing Henry Manne’s work).
prohibition is justified and, if so, under what circumstances.23 Even this later generation of law and economics commentators focuses very little on the interpretation of the existing rules constructing the insider trading prohibition.24

In contrast to the law and economics commentators, there are others who reject efficiency as the appropriate structuring factor behind securities policy and, instead, advocate that insider trading law should emphasize fairness (often defined as equal access to information).25 Some of these commentators broadly defend the prohibition on insider trading, calling for the SEC to further define its parameters, but not attempting to account for specific rules.26 Others invoke particular ideas of fairness to justify and limit the insider trading rules.27 Unfortunately, however, this is exactly the position that the Supreme Court rejected in its decisions in Dirks and Chiarella.28

This article proposes another way of understanding the detailed contours of insider trading law. It is my contention that the lines the courts have drawn, defining which types of relation-


24. Even when they propose new rules, these commentators tend to focus on the market characteristics of liquidity or informational availability, not on who is an insider under the courts' various formulations of the rules. See, e.g., Gilson & Kraakman, supra note 23; Georgakopoulos, supra note 23.


27. See Brudney, supra note 25 (arguing for a rule that precludes exploitation of unerodable informational advantages); Schepele, supra note 25 (arguing for a Rawlsian conception of fairness as a basis for testing the rules).

28. See infra notes 222-31 and accompanying text (discussing Chiarella and Dirks).
ships violate the insider trading rules, are influenced by the courts' conceptions of gender roles, and the closely related realms of market and family. This is not a claim that the courts are consciously discussing gender when they discuss insider trading but, rather, that gender is one of the concepts that structures the ways we think about other, seemingly unrelated, issues. Furthermore, this is not a claim that efficiency and fairness are irrelevant to insider trading law. Indeed, one of my points is that they too assume gendered meanings in the context of insider trading law. It is my claim that ideas about gender, through their connection to the concepts of market and family, play a part in forming insider trading law. Insider trading law is understood to be law of and for the market, but not the family. Thus, concepts of "family" work to determine the limits of insider trading law.

This should not be surprising. After all, our thinking is structured by many basic dichotomous pairs, and man and woman are two of the important structuring ideas in our culture. We use these categories as ways of thinking about ourselves and others, as well as about abstractions. Before turning to how ideas about men and women, and market and family, structure the law of insider trading, I want to show how they work in other areas. One place where these ideas are crucial in determining our beliefs is in our perceptions of the world. For example, Mary Joe Frug began an essay on sexual equality and difference with the following anecdote of a woman watching a male friend shop for a suit:

Although the man chose a suit which was too short in the arms, too long in the legs, and too tight in the pants, he looked at his reflection in the mirror and said with cheerful confidence, "This looks great. Send for the tailor." The woman reported realizing that if she had been in his position she would have looked at


30. See MARGARET MEAD, SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES (1935); JULIET MITCHELL, PSYCHOANALYSIS AND FEMINISM 45-52 (1974) (describing the importance to Freud's work of the categories male and female); TORIL MOI, SEXUAL/TEXTUAL POLITICS (1985) (discussing the importance of the male/female dichotomy in literary criticism); MARY JOE FRUG, POSTMODERN LEGAL FEMINISM 111-24 (1992) (showing how ideas of male and female structure impossibility doctrine in contract law).
herself in the mirror and said, "This looks terrible. My arms are
too long, my legs are too short and my rear is too fat."³¹

In this story, she described the way in which our ideas of ourselves
as men or women play a role in creating who we are. Sometimes
our identities conform to the gender norms and sometimes they are
formed in resistance to them. Either way, without these two
categories, we would see ourselves, and the world, differently from
how we currently do.³²

Gender categories also affect how we think about subjects that
are less obviously gendered than ourselves. A brief look at some of
these subjects may help us to see how gender functions as a
structuring concept in the area of insider trading law. We tend to
associate subjects that are rational, active, powerful, independent,
or principled with men, and subjects that are emotional, passive,
weak, or personalized with women.³³ Several different scholars
have shown how our understanding of science, a subject that we
might otherwise not see as influenced by ideas about gender, is
indeed so influenced. Emily Martin’s work demonstrates how
gender categories affect our empirical observations of the reproduc-
tive system.³⁴ The human reproductive system has traditionally
been viewed as involving innumerable active, strong sperm and one
passive, but receptive, egg. The model for fertilization has been one
in which the sperm "swim" toward the egg, and, ultimately,
penetrate the egg and "activate [its] developmental program."³⁵ The
egg simply receives it. When described in these terms, we can see
the way in which the male's sperm is associated with typical male
characteristics of action, power, and independence, while the

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31. FRUG, supra note 30, at 3.
32. See JUDITH BUTLER, GENDER TROUBLE 2 (1990) (describing how linguistic systems
come to "produce" the subjects they claim to describe). See also 1 MICHEL FOUCAULT, Right
33. See FRANCES OLESEN, The Sex of Law, in THE POLITICS OF LAW 453 (David Kairys ed.,
rev. ed. 1990). See also GENDER/BODY/KNOWLEDGE 3 (Alison M. Jaggar & Susan R. Bordo
eds., 1989) (tracing the dualisms back to the Cartesian framework of knowledge).
34. See Emily Martin, The Egg and the Sperm: How Science Has Constructed a Romance
Based on Stereotypical Male-Female Roles, in FEMINISM AND SCIENCE 103 (Evelyn Fox Keller
& Helen E. Longino eds., 1996). See also Patricia Y. Miller & Martha R. Fowkes, Social and
Behavioral Constructions of Female Sexuality, in SEX AND SCIENTIFIC INQUIRY 147 (Sandra
Harding & Jean F. O’Barr eds., 1987) (showing that studies of sexual behavior have been
influenced by culturally prescribed understandings of men and women); Elizabeth Spahn &
Barbara Andrade, Mis-Conceptions: The Moment of Conception in Science, Religion, and Law,
32 U.S.F. L. REV. 261 (1998) (surveying numerous descriptions of sperms and eggs and
showing the influence of ideas about gender).
35. Martin, supra note 34, at 106.
woman's egg has the traits normally connected with women such as passivity, weakness, and dependence.\textsuperscript{36} Similarly, theories from biological evolution also bear the marks of gender ideology. They tend to tie female sexuality to reproduction, never admitting the possibility that women's sexuality might operate autonomously from men's.\textsuperscript{37} Autonomy, after all, is one of those characteristics associated with men, not women. In short, even scientific processes cannot be understood outside of the categories which we use for making sense of the world.\textsuperscript{38} While the workings of the body may appear completely natural, they, like the rest of the world, require interpretation.\textsuperscript{39}

The advantage of a gender-conscious analysis is that it can illuminate issues or gaps that otherwise are hidden beneath the "naturalness" of our thoughts about gender. We think it is normal that sperm, the male reproductive product, should be the active force because we associate action and aggressiveness with men. Thus, this interpretation is unlikely to be questioned. This article undertakes a gender-conscious analysis of insider trading law. A

\textsuperscript{36} More recently, however, researchers have discovered that the forward force of the sperm is really very weak — that it could not penetrate the egg by virtue of this force. Instead, the egg produces chemicals that cause the sperm to stick to it. Clearly the paradigm had to be revised. Nevertheless, according to Martin, the effect of male and female imagery in interpreting the scientific data remained strong. See Martin, \textit{supra} note 34, at 108-09. The new researchers described the sperm as shooting out and harpooning the egg. In short, the sperm, associated with men, remained active, powerful, and aggressive. \textsuperscript{37} See Elisabeth A. Lloyd, \textit{Pre-Theoretical Assumptions in Evolutionary Explanations of Female Sexuality}, in \textit{FEMINISM AND SCIENCE}, \textit{supra} note 34, at 92 (describing biologists' assumption that female orgasm is dependent on intercourse with men). \textsuperscript{38} See Susan R. Bordo, \textit{The Body and the Reproduction of Femininity: A Feminist Appropriation of Focault}, in \textit{GENDER/BODY/KNOWLEDGE}, \textit{supra} note 33, at 13 (showing the body as a product of culture); Sandra Harding, \textit{The Science Question in Feminism} 82-110 (1986) (demonstrating the influence of thinking through dichotomized categories on studies of the evolutionary process). For further examples of the effect of thinking in dichotomized, gender-identified categories on science, see also Helen Longino & Ruth Doell, \textit{Body, Bias, and Behavior: A Comparative Analysis of Reasoning in Two Areas of Biological Science}, in \textit{SEX AND SCIENTIFIC INQUIRY}, \textit{supra} note 34, at 175-86 (detailing endocrinological studies of sex differences); Ruth Bleier, \textit{Science and Gender: A Critique of Biology and Its Theories on Women} 80-109 (1984) (criticizing the effort to derive "gender-related" conduct from the effects of sex hormones).

The categories that science uses for classifying different species are also gendered. The category "mammal" includes those higher animals with breasts. Thus, women's specific attributes are used to connect us to the animal world. In contrast, the term \textit{homo sapiens} separates us from the animals. It means "wise man." See Anne Fausto-Sterling, Book Review, 21 SIGNS 172, 173 (1995) (reviewing Londa Schiebinger, \textit{Nature's Body: Gender in the Making of Modern Science} (1993)). \textsuperscript{39} See \textit{Frug}, \textit{supra} note 30, at 128-29. The effort to create a feminist discourse by interpreting the female body is at the core of "French Feminism." See generally \textit{FRENCH FEMINIST THOUGHT} (Toril Moi ed., 1987); \textit{NEW FRENCH FEMINISMS} (Elaine Marks & Isabelle de Courtivron eds., 1980).
focus on gender illuminates the otherwise unrecognized boundaries that limit the extent of insider trading law: it does not extend beyond the male-identified market into the women's realm of family. In addition, a gender conscious perspective unmasks the emphasis on breaches of fiduciary duties as being merely a device to deflect attention from the tension between two important values connected to the market: equality and efficiency. Finally, a gender conscious analysis allows us to predict that courts will favor interpretations of insider trading law that are consistent with the image of the ideal market as well as outcomes that privilege concepts that are identified with male characteristics. Thus, a gender-conscious analysis helps us to understand aspects of insider trading law that have previously remained hidden from view as part of the natural order of things.

Part Two will explore the contrast between markets and families as organizational milieux. It describes both in accordance with the separate spheres ideology of the late nineteenth century. It is this ideology that explicitly establishes the links between men and markets, and women and families. The ideology of the modern securities market tracks the description of the market within the separate spheres conception. Behavior often associated with men, such as independence and self-interest, is appropriate in the arena of the market and specifically encouraged in securities markets.

Part Three focuses on United States v. Chestman in which the Second Circuit for the first time identified a factual setting that limited the extent of insider trading doctrine. Going against established law and the facts of the case in front of it, the court went out of its way to indicate that the family-based setting of Chestman was not an appropriate context for finding a violation of the insider trading rules. This is a central case in the effort to confine insider trading law, a market doctrine, to the market. Failure to delineate the line between the market and the family in this rigorous manner might make it unclear which behaviors were appropriate where. Such a blurring of the line, and consequent failure to pursue one's own self-interest doggedly within the market, would increase inefficiency within the markets and ultimately put the entire system at risk. Thus, drawing the line on the expansion of insider trading before it engulfed family interactions is ideologically crucial to the maintenance of our market system. It is also intimately interrelated to our understanding of the divide between men and women.

Part Four displays the simultaneous flexibility and power of gender-associated ideas. Both efficiency and equality are market/male-associated norms. However, within insider trading law, the values of efficiency and equality become pitted against each other. One can have either an efficient market or one with equal access to information but not both. In this struggle, efficiency assumes a male position while equality becomes associated with the female. Chiarella and Dirks represent efficiency's triumph over equality — a triumph to be expected given efficiency's association with the male. The triumph of efficiency is masked, however, by the refocusing of the emphasis on relationship. Indeed, we are more than willing to focus attention on the concept of relationship because it has been imported from the realm of family. Sitting there as it does in the center of the masculine-identified law of insider trading, the idea of relationships appears anomalous. The importation of a concept usually associated with family into the center of insider trading law draws our attention in that direction and away from the domination of efficiency over equality within insider trading law itself.

Thus, this article shows how gender exercises a tremendous, hidden influence on the law of insider trading. It naturalizes certain characteristics of the market causing us to take their presence for granted and it makes the drawing of lines between the market and family appear unproblematic. Similarly, even within the ideal of the market, the tension between goals of efficiency and equality is understood, and the triumph of efficiency is accepted because of the realignment of equality with female and efficiency with male. Once these values are assigned to these new gendered positions, we expect efficiency to win out over equality.

Gender normalizes the privileging of one side over the other. Despite this, the gendered connection between efficiency and male characteristics, and equality and female characteristics is neither preordained nor required. Justice Ginsburg, in her opinion in O'Hagan, was able to reconstruct the misappropriation theory so that its adoption would strengthen, not undermine, the maleness of the market. This happened despite the misappropriation theory's earlier identification with equality. Characteristics that

41. This analysis of the assigning of genders to equality and efficiency as they interact in tension with each other is heavily influenced by MARY JOE FRUG, Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law, in POSTMODERN LEGAL FEMINISM, supra note 30, at 111-24 (discussing the gendered positions of two opposing interpretations of impossibility doctrine in contract law).

are most frequently associated with men, such as equality, can be reconceptualized as female; however, returning them to their initial valence is relatively easy. Gender, after all, is socially constructed, and can be socially reconstructed.

II. SEPARATE SPHERES IDEOLOGY: THE MARKET AND THE FAMILY: THEN AND NOW

Our perception of the market as male derives from the nineteenth-century's division of the world into the separate spheres of family and market. The woman's place was in the family, the man's place in the market. As a claim about the ideology of the market, this establishes a normative vision. However, it also influences our understanding of existent markets. The first section below describes the nineteenth-century separate spheres ideology of family and market. The second section discusses how this influence affects modern commentators' and courts' perceptions of activities in the market.

A. The Nineteenth-Century Ideology of Separate Spheres

Historians of the nineteenth century describe an ideology that dominated that period and divided life into two, separate spheres: home and market. Women were relegated to the home, with all of its pleasures and limitations, while the market was a man's world, also rewarding and constricting in its own ways. Much of the struggle of feminists in the second half of the twentieth century has been to overcome the constraints of this way of thinking. More than fifty percent of women with young children work outside of the home today and one even begins to read stories of men who devote their days entirely to the job of raising their children and keeping house. Yet, the old ideas about the nature of the market and the

43. For a full discussion of the idea of separate spheres, see generally NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835 (1977). See also Carole Pateman, Feminist Critiques of the Public/Private Dichotomy, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 284 (Stanley I. Benn & Gerald F. Gaus eds., 1983) (arguing that much of the separate spheres ideology and its approach to the family and the market derives from the work of John Locke).

44. See BUREAU OF LABOR STATISTICS, EMPLOYMENT CHARACTERISTICS OF FAMILIES: 1996. In 1996, both parents were employed in 63.9% of married couple households. See id. Also, 53.4% of mothers with children under the age of one year were employed in the labor force, while 63.3% of those with children two years of age were employed. See id. Approximately two million fathers stay home to raise their children full-time. See Stay-at-Home Fathers, Still a Rarity, NEWS & OBSERVER (Raleigh, N.C.), July 13, 1997, at A24. For other examples of stories about stay-at-home dads, see Diane Naughton, Being Dad Full
home continue to influence how we think about the world.

The "market" is an abstraction used to describe people's economic relations with one another.\(^4\) According to the ideology of separate spheres, the market was a man's world. This was so clear to nineteenth-century census takers that they could not even conceive of assigning occupations to women. Leonore Davidoff and Catherine Hall describe the process in nineteenth-century England whereby the census came to identify men, and only men, with particular occupations.\(^4\) Women and children were left unclassified, "from the impossibility of deciding whether females of the family . . . were to be classed as if of no occupation or of the occupation of the adult males of the family."\(^4\) It did not occur to the census takers that women might have independent occupations. Observers of the time also noted women's absence from the market. Alexis de Tocqueville, one of the most famous observers of nineteenth-century America, wrote, "American women never manage the outward concerns of the family or conduct a business . . . nor are they . . . ever compelled to perform the rough labor of the field . . . ."\(^4\) Thus, the ideology of separate spheres identified men, not women, with the market.\(^4\)


\(^{47}\) Id. at 230.


The men who traded within the market were, according to the classical economists, self-interested people. They acted to promote their own well-being, not out of a desire to assist others. Adam Smith, one of the first to articulate the classical basis of market theory, described self-interested behavior as "in the very nature of our being." According to Smith, men act when they perceive a bargain of any kind . . . . It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

Men acting in the market were also assumed to be rational. According to the classical economists, these rational men acted to increase pleasure rather than pain and to maximize their happiness. One man's pleasure would differ from another's but each could be expected to act to increase his own happiness. In addition to acting rationally, men, in the market, act anonymously and autonomously; in the market there is "little scope for social sentiments." They act on their own without pre-existing connections or duties to others.

Classical economists did not decry this self-interested market behavior. Instead, they considered "selfish and calculating" behavior in the market to be wholly appropriate. This was because they saw the market as a means of harnessing self-interest and turning it into a mechanism for the joint production of goods and


52. Id. at 140 (quoting Adam Smith, Wealth of Nations 22 (Kathryn Sutherland ed., Oxford Univ. Press 1993) (1776)).


54. Hollander, supra note 51, at 139. See Atiyah, supra note 50, at 295-97; Smith, supra note 51, at 3; Coase, supra note 53, at 541. In contrast, it is clear that classical economists recognized there are bonds that tie people to others outside of the market, but within their families. See Coase, supra note 51, at 534.

services. According to Ronald Coase’s description of classical economics, “The great advantage of the market is that it is able to use the strength of self-interest . . . so that those who are unknown, unattractive, or unimportant, will have their wants served.” Through bargaining with others, wants on both sides of a transaction are satisfied thus increasing the public welfare without any need for altruistic feelings towards others.

According to classical economists, the market is also non-hierarchical. All men, regardless of who they are, have wants that they try to satisfy, and all men are potential bargaining partners. Men in the market are not only equal vis-à-vis their potential ability to satisfy others’ wants, they are also equal in relation to the state. As a result, classical economics does not call for any state intervention in the market. Indeed, by assuming a highly competitive marketplace, even bargaining power among individuals could be seen as equal.

Under the separate spheres ideology, the home, the family, and women provided a direct contrast to the autonomous, self-interested nature of men and the market. Indeed, a home was often defined in direct opposition to the market. If the market intruded on the home in any way, it was not a true home. Thus, John Ruskin wrote,

[Home] is the place of peace . . . . In so far . . . as the anxieties of the outer life penetrate into it, and . . . the outer world is allowed by either husband or wife to cross the threshold it ceases to be a home; it is then only a part of the outer world which you have roofed over and lighted fire in.

Repeatedly, the home was referred to as a refuge from the market and rest of the world, not a part of that world.

Just as the market was identified with men, so the home was identified with women and families. One of the most important

57. Coase, supra note 53, at 544.
58. Historians also describe the actual changes experienced in the late eighteenth and early nineteenth centuries as a move from the patriarchal relations of master and servant to the more formally equal relations of employer and employee in the modern market. See COTT, supra note 43, at 66.
59. See Olsen, supra note 45, at 1502.
60. See ATIYAH, supra note 50, at 340. For a full discussion of the idea of equal bargaining power, see Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 614-24 (1982).
62. See COTT, supra note 43, at 64-68.
attributes of a nineteenth-century woman, according to the separate spheres ideology, was domesticity: "The true woman's place was unquestionably by her own fireside . . . [and] domesticity was among the virtues most prized" in women. A woman's place was quite clearly believed to be in the home, but also, her presence made it a home:

Wherever a true wife comes . . . home is always round her. The stars only may be over her head, the glow-worm in the night-cold grass may be the only fire at her foot, but home is wherever she is; and for a noble woman it stretches far round her, better than ceiled with cedar or painted with vermillion, shedding its quiet light far for those who else were homeless.

Unlike men, women were not supposed to be motivated primarily by their own interests or by the desire to make money. Nancy Cott describes women as having been thought to be "disinterested" both because they escaped from the competitive economic pressures of the market and because they were economically dependent on the men of their families. "Disinterested," in this context, meant that they were motivated in accordance with the interests of other members of their families, not their own. Women's work consisted in maintaining social contacts, keeping members of their families happy, and ensuring the moral virtue of their children and husbands. A nineteenth-century bride wrote, "In every thing I must consult the interest, the happiness and the welfare of My Husband . . . may it be my constant study to make him contented and happy, and then will my own happiness be sure." Disinterested women were supposed to be ready to

63. Barbara Welter, The Cult of True Womanhood: 1820-1860, 18 AM. Q. 151, 162 (1966); see also, MARY BETH NORTON, LIBERTY'S DAUGHTERS 3-9 (1980) (describing women's domestic roles in the eighteenth century); Mary S. Hoffschwelle, Women's Sphere and the Creation of Female Community in the Antebellum South: Three Tennessee Slaveholding Women, 50 TENN. HIST. Q. 80, 83-85 (1991) (describing women's domestic roles in the antebellum South); ANN DOUGLAS, THE FEMINIZATION OF AMERICAN CULTURE 63-64 (1977) (summarizing a popular novel of the 1850s in which a girl unsuccessfully tries to "participate in the 'wide, wide world' of masculine competition and business;" ultimately, she retreats to her home).
64. Millet, supra note 61, at 131.
65. See Welter, supra note 63, at 160; COTT, supra note 43, at 52-53.
67. Id.
68. Id. at 71 (emphasis in original) (quoting Diary of Eunice Hale Wait Cobb, vol. 1, p. 29, Sept. 10, 1822 (on file at the Boston Public Library)). For another example of women's orientation toward others in their families, examine the relationship between Emma and her father. See JANE AUSTIN, EMMA (James Kinsley ed., Oxford Univ. Press 1990) (showing a
"sacrifice everything at the altar of affection." Some modern feminists argue that women in the late twentieth century continue to identify their own interests with those of other members of their families.

Separate spheres ideology also contrasted women with men in that women were not seen to be rational creatures. Instead, they were sentimental and emotional. One woman doctor described men as having "robust intellects," while in women she recognized "tenderness and love... and devotional sentiment." Another woman wrote in 1875, "Women's thoughts are impelled by their feelings. Hence... the direct insight, the quick perceptions. Hence also their warmer prejudices and more unbalanced judgments, and their infrequent use of the masculine methods of ratiocination." Not surprisingly, these psychological characteristics fit well with women's primary work of tending to others' needs.

Women were responsible for the moral life of the family. It was up to them to provide a proper education for their children and to encourage their husbands to live a virtuous life. One minister said,

We look to you, ladies, to raise the standard of character in our own sex; we look to you, to guard and fortify those barriers, which still exist in society, against the encroachments of impudence and licentiousness. We look to you for the continuance of domestick purity, for the revival of domestick religion, for the increase of our charities, and the support of what remains of religion in our private habits and publick institutions.

good daughter's concern for her father's comfort, to the extent that she almost relinquishes marriage to the one she loves so as not to inconvenience her father).

69. COTT, supra note 43, at 64.
72. Id. at 16. See also Pateman, supra note 43, at 284; Carroll Smith-Rosenberg, Beauty, the Beast and the Militant Woman: A Case Study in Sex Roles and Social Stress in Jacksonian America, in 1 WOMEN AND POWER IN AMERICAN HISTORY, supra note 49, at 190 (describing women as innocent, defenseless, gentle, and passive).
73. See COTT, supra note 43, at 69-70, 118. See also JACQUELINE JONES, SOLDIERS OF LIGHT AND LOVE 109-11 (1980) (describing the role of Northern women in teaching morality to Black children in the post-Civil War South).
74. COTT, supra note 43, at 148.
Because women were not expected to be aggressive or powerful, they had no authority to require that others meet their moral expectations. Instead, they were expected to be able to "influence" the other people in their lives so that these others would act appropriately. It was expected that to achieve their goals, women might have to act in ways that were unexposed and secret. Ann Douglas termed this influence "less outspoken than insidious . . . [Women] proudly claimed . . . that they . . . wished to address the unconscious as much as the conscious life of their audience." Harriet Farley, an editor of the Lowell Offering, a magazine for the mill girls, defined her purpose as to "do good by stealth." Thus, although women were strongly associated with the inculcation of moral virtues, their own actions were not always seen as open and honest. Their role was to keep others on the high road of gentlemanliness, even if they themselves occasionally had to resort to work in secret.

Family relations within the separate spheres ideology are hierarchical. Unlike the market, the family is not a place for equals. Within the family, the wife and children are seen as subordinate to the husband. An ideal of early nineteenth-century marriage was that a mature husband would guide and advise a young wife, not that partners of similar ages would guide and advise each other. Even John Stuart Mill, the great defender of women's equality, does not question the patriarchal structure of the family. Long after the market had begun to dismantle class hierarchies in commercial relationships, the gender hierarchy remained an acceptable one in family relations.

Despite the fact that the separate spheres ideology treated the home and the market as distinct from one another, they were part of a single system. Christopher Lasch argued that as work became increasingly specialized and routinized, it became less of an end in

75. DOUGLAS, supra note 63, at 69.
76. Id. at 71.
77. See Welter, supra note 63, at 158-62 (describing submissiveness as a womanly virtue). See also DAVIDOFF & HALL, supra note 46, at 114-15 (making a connection between subordination and religious beliefs); Olsen, supra note 45, at 1504-07 (describing the hierarchical structure of families); Barbara Easton, Feminism and the Contemporary Family, in A HERITAGE OF HER OWN, supra note 49, at 558-60 (describing women's subordination to men in the nineteenth century); Anne C. Dailey, Constitutional Privacy and the Just Family, 67 TUL. L. REV. 955, 967-68 (discussing the continuing authority of parents over children).
78. See DAVIDOFF & HALL, supra note 46, at 327.
80. See ROSENBERG, supra note 71, at 3.
and of itself.81 Instead, work simply became a means to a satisfying life outside of work.82 The family provided a haven for those who worked in the cold, impersonal market. As one nineteenth-century pastor said,

It is at home, where man . . . seeks a refuge from the vexations and embarrassments of business . . . a relaxation from care by the interchange of affection . . . where is the treasury of pure disinterested love, such as is seldom found in the busy walks of a selfish and calculating world.83

Thus, one way in which the relationship between the market and the home can be interpreted is that the existence of a home — of a “separate sphere” — made it possible for men to endure their daily life in the market. A nineteenth-century essay on marriage expressed exactly this idea:

When he struggles on in the path of duty, the thought that it is for her in part he toils will sweeten his labors . . . Should he meet dark clouds and storms abroad, yet sunshine and peace await him at home; and when his proud heart would resent the language of petty tyrants . . . from whom he receives the scanty renumeration for his daily labors, the thought that she perhaps may suffer thereby, will calm the tumult of his passions, and bid him struggle on, and find his reward in her sweet tones, and soothing kindness, and that the bliss of home is thereby made more apparent.84

Another way to understand the relationship between the market and the home, however, is to conceive of them together as allowing men to express their whole range of emotions. While men in the market were expected to be calculating and self-interested, once they returned to their homes their warmer, more altruistic feelings could be expressed. Even Adam Smith admitted that men experienced great sympathy for members of their immediate families: “It approaches . . . to what he feels for himself.”85 Within

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81. CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BSEIGED 6-8 (1975).
82. See id.
83. COTT, supra note 43, at 64.
84. Id. at 69-70. See also, MARY P. RYAN, CRADLE OF THE MIDDLE CLASS 145-55 (1981) (describing the home as providing a private retreat from the tumult and heterogeneity of the market); GILLIAN BROWN, DOMESTIC INDIVIDUALISM 3 (1990) (describing the home as a site of permanency in contrast to the caprices of the market).
85. Coase, supra note 53, at 534.
the home, men were allowed to indulge in tears, and being "tender-hearted" at home was by no means considered inappropriate.\textsuperscript{86}

The existence of a home different and separate from the market allowed men to act one way in the market and a somewhat different way at home. In short, it created more possibilities for a range of emotions, allowing men to be fuller people than if they were limited to the emotions and styles of action permitted in the market. Nancy Cott argues:

\begin{quote}
[T]he canon of domesticity did not directly challenge the modern organization of work and pursuit of wealth. Rather, it accommodated and promised to temper them. The values of domesticity undercut opposition to exploitative pecuniary standards in the work world, by upholding a "separate sphere" of comfort and compensation . . . and fostering the idea that preservation of home and family sentiment was an ultimate goal.\textsuperscript{87}
\end{quote}

Thus, the existence of home and women, and their strong association with emotion and care for others, allowed the market to continue to exist with only a limited range of permissible behaviors. It made it possible for men to be competitive and self-serving within the market, knowing that they could indeed be more than this outside of the market.\textsuperscript{88} It also made it possible for us, as a society, to accept a market in which self-interest was the dominant motive. Without the separate, recognizable sphere of family, the market would appear reprehensible and undefensible. It is the existence of the separate sphere along side the market, that allows the market to continue to exist.

\textbf{B. The Securities Market as Ideal Market}

The concept of the ideal market has influenced the interpretation of the securities market so that, within the law of insider trading, the securities market is understood as having the characteristics of the ideal market. As such, it is already in opposition to the institution of the family. As in the idealized market of separate spheres, securities traders owe each other no duties. They act

\textsuperscript{86} See DAVIDOFF & HALL, supra note 46, at 111.

\textsuperscript{87} COTT, supra note 43, at 69. See also Welter, supra note 31, at 151 (explaining that the existence of "home" allows men to salve their consciences for participation in the materialistic market).

\textsuperscript{88} The market was also associated with the positive values of progress, self-reliance, and modernization. Olsen, supra note 45, at 1500. Like the existence of the home, these positive values had the effect of making the market ideologically viable. See id.
autonomously, motivated by their own self-interest. As with the ideal market, this pursuit of self-interest is seen as ultimately beneficial to everyone. Additionally, like the ideal market of separate spheres ideology, the securities market is also seen as populated by males. Finally, when cases raise issues about conduct within the market, they are resolved in ways that maintain the consistency with the idealized market. When market participants could be understood to act out of any of a number of motives, courts tend to see them as acting from personal self-interest, as the ideal image predicts that people will act within the market.

As with the market in general, traders in the securities market act autonomously from one another. As a general rule, there are no duties owed to other traders under Rule 10b-5. The Supreme Court made this rule very clear in Chiarella v. U.S. Chiarella, a “mark up man” for a financial printer, had figured out how to decipher crucial information purposely left temporarily blank in documents for corporate takeover bids. The SEC argued that, because he had information that other traders did not possess, he was trading on inside information in violation of Rule 10b-5. The Court rejected this argument.

The Court held that Chiarella owed no duties to the target company or to its shareholders. As to both, he was a complete stranger. It said,

No duty could arise from petitioner's relationship with the sellers of the target company's securities, for petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions.


91. See id. at 224.
Participants in the securities market are considered strangers to one another in the same way as participants in the ideal market of classical economics.

The same theme emerges in the cases dealing with insiders' liability to option traders under Rule 10b-5. Many courts have held that insiders who trade in corporate shares do not owe a duty to those who trade in options.93 Like the printer in Chiarella, option traders are denominated "strangers" to those insiders who have traded in corporate stock. Since they trade in different markets, there is no "transactional nexus" between defendant's trading and any losses the plaintiff may have suffered.94 As strangers, the trading insiders owe no duty to option traders.

Securities traders who owe no duties to others are naturally free to pursue their own self-interest. Indeed, as in the ideal classical market, not only are they at liberty to do so, but it is considered a positive good if they do. In Dirks v. SEC,95 the Supreme Court emphasized both the inevitability and the desirability of self-interested behavior.96 As part of its decision, the Court rejected the position advanced by the SEC that the mere possession of nonpublic information was enough to impose an obligation to disclose or abstain from trading.97

Despite this, the Dirks Court understood market efficiency as dependent on the analysts' work in ferreting out information that

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potential target in the market as "at arms length" and creating no fiduciary duty); William T. Allen, Professor Schepele's Middle Way, 56 LAW & CONTEMP. PROBS. 175, 177-78 (1993) (discussing the lack of moral obligation to others in anonymous markets).


96. See id. at 667. The Court's emphasis may seem ironic because, in deciding Dirks, it relied heavily on the claim that Dirck's informant, Secrist, received no personal benefit from passing the information on to Dirks. According to the Court, Secrist had not acted for personal gain. See id.

97. See id. at 658.
might otherwise only emerge more slowly.  It noted, "[T]he analyst's work redounds to the benefit of all investors." The Court recognized that market analysts do not work to uncover new information purely out of the goodness of their hearts. They work because to do so produces personal profit; they can sell via market letters any new information for which clients are willing to pay. If they could not profit from the information, they would, according to the Court, be less willing to search for it. Finding liability under Rule 10b-5 for anyone who had traded on material, non-public information would mean that the analysts would be unable to profit from their efforts. The Court said, "Imposing [such] a duty . . . could have an inhibiting influence on the role of market analysts, which . . . is necessary to the preservation of a healthy market." As in the ideal market, the Dirks Court's image of the securities market is that it is a place where traders act to advance their own interests and, in doing so, augment the general good.

Indeed, the Court recognized that, in general, an individual's most likely motive in passing on relevant, non-public information to another is personal profit. In Dirks, the Court quoted Victor Brudney's statement that "[T]he insider, by giving the information out selectively, is in effect selling the information to its recipient for cash, reciprocal information, or other things of value for himself . . . ." Brudney was arguing that tippees should be in the same position as the tippers who presumably have gained by divulging the information, but the basic understanding of why people act as they do in the market is unchanged; they want to make a profit for themselves.

The courts see the profit motive as so powerful that they are willing to assume it is the operative motive in many cases in which we would otherwise believe that the motive was predominately altruistic. The Supreme Court strengthened this assumption in

98. See id. at 658 n.17.
99. Id.
100. See id. at 658-59.
101. Id. at 658.
102. Id. at 664.
103. See Brudney, supra note 25, at 347-48.
104. See id. See also United States v. Libera, 989 F.2d 596, 600 (2d Cir. 1993) (stating that a tipper can be assumed to recognize that the tippee's interest in the inside information is "not for nothing").
105. Anthropologists and historians have long noted the curious connections between altruism and self-interest. See FRANZ BOAZ, THE KWAKIUTL OF VANCOUVER ISLAND (1909) (discussing the role of potlatches in an economy of gifts). See also KENNETH S. GREENBERG, HONOR AND SLAVERY (1996) (discussing the economic and hegemonic meaning of gifts in the antebellum South).
Dirks by linking the test for breach of a fiduciary duty in violation of the insider trading prohibition to "whether the insider personally will benefit, directly or indirectly, from his disclosure." As the Court recognized, this is not an easy standard to apply. Identifying pecuniary gain is difficult because the standard applies not only to situations involving present gain, but also to situations in which we can imagine that the disclosure might create some future pecuniary benefit to the tipper or trader. Thus, situations in which one's professional reputation improves as a result of the tip or trade, or in which one is saved the expense of a future gift of money, are included.

The same assumption, that people within the market act from motives of personal gain, animates the seminal work of Henry Manne. Manne emphasizes the benefits to society in general that will accrue from self-interested behavior on the part of each individual. Manne's work carries this one step farther, however, portraying the markets as sites for male activities. This creates yet another similarity to the ideal market. I do not mean to say that Manne overtly claims that only men can be brokers, traders,

106. Dirks, 463 U.S. at 662.
107. See id. at 664 ("Determining whether an insider personally benefits from a particular disclosure . . . will not always be easy for courts.").
108. See id. at 663.
109. See id. at 664. It is interesting that the Court endorses such a broad definition of pecuniary benefit in Dirks, a case in which it then disregards its own directives and finds that Dirks's tipper, Secrist, did not obtain such a benefit. The Court claims that Secrist did not benefit monetarily from tipping Dirks. See id. at 667. But this is far from clear. Secrist was a former officer of Equity Funding. See id. at 649. Although the Court does not indicate why he left his position, it must have recognized that if the departure was due to disagreements of any type between Secrist and Equity Funding, Secrist's reputation would undoubtedly improve if the scandalous information he was pushing was disclosed. See id. at 676 n.13 (Blackmun, J., dissenting).

Similarly, the Court is not inclined to focus its attention on the advantages that Secrist's gift of information provided to Dirks, although these may well have substituted for a monetary gift. Dirks discussed the tip with his clients, some of whom then sold their holdings of Equity Funding. See id. at 649. These sales were not transacted through Dirks's firm because it did not trade in Equity Funding, but some of those with whom Dirks spoke may have subsequently promised to direct business to Dirks's firm. Since he was paid on a commission basis, this would redound to his benefit. See id. at 676 n.13 (Blackmun, J., dissenting).

110. HENRY MANNE, INSIDER TRADING AND THE STOCK MARKET (1966). See also Dirks, 463 U.S. at 677 n.14 (1983) (Blackmun, J., dissenting) (noting this connection). This is an underlying assumption of all work in law and economics. See RICHARD A. POSNER, OVERCOMING LAW 17 (1995) (referring to "economic theory with all its normative as well as positive baggage, such as efficiency and wealth maximization"); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (4th ed. 1992) (economics assumes that man is a "rational maximizer of his . . . 'self-interest'").
111. See MANNE, supra note 110, at 1-15.
analysts or other market participants, any more than a nineteenth-century believer in the separate spheres ideology would have denied that women could ever participate in the market. Rather, I mean that when Manne thinks about the securities market, he thinks about it as populated by people with stereotypically male characteristics. Like the market of separate spheres ideology, Manne views the securities market as a man’s domain. Because we already have an ideal type of market in mind with these characteristics, it is that much easier for us to accept Manne’s position.

These claims about Manne’s work can be illustrated by an analysis of the portion of his book *Insider Trading and the Stock Market* which discusses insider trading.\(^{112}\) He argues that entrepreneurs play a special, innovative role within the modern corporation.\(^{113}\) For Manne, the question is how to compensate the entrepreneur’s work. According to Manne, neither salaries, profit-sharing plans, nor bonuses provide appropriate compensation.\(^{114}\) He notes, however, that insider trading “meets all the conditions for appropriately compensating entrepreneurs.”\(^{115}\) It allows the sale of information about the particular innovation without requiring that the insider be given a proprietary interest in the information. The sale price would be in relation to the expected value of the information. Thus, Manne sees insider trading as the appropriate way to compensate the entrepreneur. As a result, he argues against regulation of insider trading.\(^{116}\)

In order to be satisfied that entrepreneurs would consider the ability to trade on inside information as appropriate compensation, Manne had to develop a profile of the entrepreneur.\(^{117}\) His characterization tracks the depiction of men in separate spheres ideology.

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113. See MANNE, supra note 110, at 131-58.

114. See id. at 134-35.

115. Id. at 138.

116. See id. at 131-38.

117. See id. at 141-43.
Manne does not describe entrepreneurs in any detail, but his brief description runs as follows: an entrepreneur is self-confident, but not a good organization man.\textsuperscript{118} In this way, the entrepreneur is portrayed as a maverick, an independent actor. Relationships with others are not crucial to the entrepreneur's activities. In fact, while Manne recognized that entrepreneurs may occasionally be found in "older-style" family businesses, these were clearly not the settings in which he expected the entrepreneur to be located.\textsuperscript{119}

Perhaps the most salient feature of the entrepreneur described by Manne is that he is male. Manne repeatedly uses the male pronoun in writing about entrepreneurs.\textsuperscript{120} Of course, this is not surprising given that he was writing thirty years ago. But the male pronoun also fits the character of the person he is describing. For Manne, the entrepreneur's historical ancestor is the inventor in the attic while today's counterpart is the scientist in the laboratory.\textsuperscript{121}

Others who have examined similar images of the creative genius within the dominant American cultural imagination have noted that it is an image of men, acting in isolation.\textsuperscript{122} The entrepreneur is not an "organization man." Presumably this means that he does not easily accommodate others' needs and deficiencies. He cannot work well in a team. Similarly, his self-confidence emphasizes his self-sufficiency. He does not need others in order to be creative. His creativity, being unpredictable, comes not from working hard in conjunction with others, but rather from within himself. Manne's entrepreneur fits this model.

If we think of the stereotypes of men and women that are part of the separate spheres ideology, the entrepreneur, as described by Manne, is a man. Men work alone while women work within networks and to preserve relationships.\textsuperscript{123} Men are traditionally thought of as gruff and self-confident, while women are diffident

\textsuperscript{118} See id. at 141.
\textsuperscript{119} See id. at 142.
\textsuperscript{120} See, e.g., id. at 116, 118, 119, 120, 121. For Manne, all important participants in the market appear to be male, including managers and capitalists. See id. at 115, 119.
\textsuperscript{121} See id. at 127. Elsewhere, however, Manne distinguishes entrepreneurs from inventors on the grounds that the latter are really only innovative when they put their ideas into motion, a process that has become highly bureaucratized in the United States. See id. at 117.
\textsuperscript{122} See Kenneth Greenberg, Creativity: From Asexual to Sexual Production, in CREATIVITY AND LIBERAL LEARNING 35 (David Tuerck, ed. 1987). See also EVELYN FOX KELLER, A FEELING FOR THE ORGANISM (1983) (describing Barbara McClintock's work in isolation from the scientific community, as well as the way scientific knowledge depends on the interplay of many people's work).
\textsuperscript{123} See discussion of the ideal woman under a separate spheres ideology, supra notes 61-80 and accompanying text.
and insecure. Certainly, the world that Manne sees the entrepreneur inhabiting has traditionally been the work world of men: corporate managers, lawyers, investment bankers, scientists. Even today, the securities industry is dominated by men.\(^{124}\)

The final proof — if there ever is proof in this type of analysis — that Manne’s entrepreneur is male comes from Manne’s understanding of his motivation. Entrepreneurs, Manne asserted, are attracted to those positions offering them the “greatest opportunity . . . to make large, indefinite gains.”\(^{125}\) Unlike women, who are traditionally believed to be motivated by love or beauty, Manne’s male entrepreneur is motivated by the stereotypical male objective: money. It is this that makes insider trading, with its potential for large gains, the appropriate form of compensation. Manne’s entrepreneur is the classic profit-maximizing male.\(^{126}\)

Thus, Manne’s work clarifies the picture of the securities market as an idealized market consistent with the separate spheres ideology. The securities market, like the idealized market of classical economics, is seen as a place where people do not owe duties to others, where people act in pursuit of their own self-interest (to

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\(^{124}\) According to the Equal Employment Opportunity Commission, 39\% of securities professionals and 28\% of managers and officers are women. See Birger, supra note 89, at 25. At Merrill Lynch, approximately 16\% of brokers are women. See Patrick McGeehan, *Duo Pursues Sex-Bias Cases on Wall Street*, WALL ST. J., May 14, 1997, at C1. According to others, there are no firm statistics on the percentage of professional positions in the securities industry held by women, but women are probably underrepresented in the industry. See Miriam Hill, *Wall Street is Still Frontier for Women and Minorities*, PLAIN DEALER (Cleveland), May 24, 1997, at 2C; E-mail message from Pam Faber, Staff Adviser, Diversity Committee, Securities Information Association, to Professor Judith Greenberg, New England School of Law (July 15, 1997) (on file with Professor Judith Greenberg) (“There are no statistics available vis-à-vis the number of women in the securities industry.”). A rash of recent sex discrimination law suits have made clear the difficulties for women employees on Wall Street. See James T. Madore & Susan Harrigan, *Wolves Among the Bulls and Bears/Male Dominance Said to Promote Wall St. Abuses*, NEWSDAY, May 1, 1997, at A59; McGeehan, supra; John C. Coffee Jr., *Sex and the Securities Industry*, N.Y. L. J., May 29, 1997, at 5 col.1. See also Scheppelle, supra note 25, at 146 n.92 (justifying the use of the male pronoun to refer to insider traders in order to “call special attention to the fact that almost all the inside traders are men”).

\(^{125}\) MANNE, supra note 110, at 155.

\(^{126}\) Manne deals with the possibility that the insider will pass the information on to members of his family or others instead of selling it, as just another form of profit taking. “It is immaterial . . . that an individual may choose to take his gain in the form of additional wealth for his children rather than for himself . . . .” Id. at 157.

Further evidence that the market is a place for men, but not women, comes from the courts’ treatment of women who end up in the market. Frequently, they are portrayed as the innocent victims of their husbands’, brothers’, or fathers’ trading. The women themselves did not know or understand the market. They were simply relying on the men in their lives to guide them. It is the men, not the women, who are at home in the market. See, e.g., SEC v. Materia, 745 F.2d 197, 200 n.3 (2d Cir. 1984) (concluding that the wife neither knew nor should have known that the information conveyed to her was confidential).
the ultimate good of all), and where stereotypical male traits can be expected. Furthermore, Manne’s work is that much more believable to us because it fits within our idealized images of how a market ought to operate.

These images of the market also influence the courts as they decide cases. In Dirks, the Court held that there was no breach of a fiduciary duty, and therefore no violation of Rule 10b-5, unless the breach was for “personal gain.” This pronouncement, of course, needed to be interpreted in subsequent cases. Personal gain could have been interpreted to mean only pecuniary gain, but such a narrow interpretation would not have been consistent with the understanding of how men act within the market. They do not act out of the “womenly” motivations of friendship, love, or affection. Instead, separate spheres ideology says they act from self-interest. Consistent with this, the courts understand men in insider trading situations to be acting so as to advance their own interests. Tips that might otherwise have appeared to be passed on primarily out of friendship for the recipient are found to create liability because they are understood as having been made out of profit motives.

For example, in SEC v. Maio, Ferrero, an insider, had tipped Maio to a buying opportunity. 

Prior to this, Ferrero and Maio had been friends for approximately a decade. Even beyond this, Ferrero felt morally obligated to Maio because Ferrero’s close friend Palamara, on his deathbed, had asked Ferrero to look after Maio. The market tip at issue in the case was not the first gift of money that Ferrero had made to Maio. As the court noted, Ferrero’s tipping was “just one of many favors that [Ferrero] has done for Maio through the years by reason of their friendship.” There was nothing in the facts stated by the court that would lead one to believe that Ferrero would have received a monetary benefit from passing this tip to Maio, or that Maio would have been likely to be able to reciprocate. Instead, the tip was probably a genuine act of

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127. Dirks v. SEC, 463 U.S. 646, 659 (1983). See also id. at 662 (“The test is whether the insider personally will benefit, directly or indirectly, from his disclosure.”).

128. The Dirks court elsewhere points to a broad interpretation of “personal gain,” including within that phrase “a reputational benefit that will translate into future earnings,” and “a gift of confidential information to a trading relative or friend” because this "resemble[s] trading by the insider himself followed by a gift of the profits to the recipient.” Id. at 663-64.

129. 51 F.3d 623 (7th Cir. 1995).

130. See id. at 626-27.

131. See id. at 627.

132. Id. at 632.
friendship and an effort to fulfill Ferrero's moral obligations to Maio.

Despite this, the Seventh Circuit found that Ferrero had breached a duty in passing the information on to Maio. It cited the Supreme Court's "personal benefit" rule, and noted that "[t]he theory is that by disclosing information selectively the insider is, in effect, selling the information to its recipient for things of value to himself." Friendship, love, or affection never entered into the court's calculations as possible motives. It simply assumed, in line with the Supreme Court's dicta in Dirks, that market participants are motivated by the prospect of personal gain.

The insider trading rules require courts to determine the tipper's motivation in tipping. Given the ideal of a market in which participants act from self-interested motives, it is not surprising that the courts find facts that make the market of the real world appear consistent with the ideal. In doing so, however, they are undermining the original potential of Dirks' pecuniary gain requirement to narrow the reach of insider trading law. As the courts assume that traders' motives are always personal gain, the pecuniary gain requirement loses its meaning. More and more actions come to be seen as breaches of fiduciary duty violative of the insider trading prohibition. What remains constant, however, is the understanding that men in markets act in self interested ways. In this way, insider trading law helps to bolster the stereotypical images of men and women and their appropriate gender roles.

133. Id.
134. See SEC v. Gaspar, No. 83 Civ. 3037, 1985 WL 521 (S.D.N.Y. Apr. 16, 1985). Gaspar is another case in which the court has no trouble assuming a profit motive on the part of the tipper merely from the fact that he is a market player. The court found that the tipper "depended . . . on a constant exchange of information with [the tippee], from whom he also solicited professional opinions." Id. at *16. This meets the Dirks' pecuniary gain requirement. Gaspar could expect other tips to flow his direction as a result of this one. This sounds initially like a clear situation in which the tipper is expecting gain from the tippee. But the situation is more complicated. The tipper and the tippee "had a close personal relationship" that went back over 20 years. Id at *5. The court recognized that the tipper's motive may not have simply been pecuniary gain. It said, "At the very least, Gaspar's disclosures constituted a gift as described by the Court in Dirks." Id. at *16. Here, the court is arguing that even if Gaspar could not expect valuable tips in return for his, even if his was given without any prospect of monetary gain in return, as a gift it still, under Dirks, constitutes a violation of insider trading law. This is the case only if the court is willing to assume, with the Court in Dirks, that the motive underlying all actions in the securities market, even the giving of gifts, is personal gain or benefit. See also United States v. Libera, 989 F.2d 596, 600 (2d Cir. 1993) (holding that it is permissible to presume "tippee's interest in the information is, in contemporary jargon, not for nothing"); Donald C. Langevoort, The Demise of Dirks: Shifting Standards for Tipper-Tippee Liability, 8 Insights 23 (1994) (making the same point about Libera).
III. DEFINING THE LIMITS OF INSIDER TRADING: UNITED STATES V. CHESTMAN AND THE MEANING OF FAMILY

Viewing the securities market as an ideal market automatically establishes an opposition between it and the idea of family. This opposition defines the boundaries of each. Thus, as the courts try to determine the limits of insider trading, they necessarily confront the idea of family. This problem was especially acute for the courts developing the "misappropriation theory" because this theory reached situations in which material, nonpublic information was taken from sources who were not necessarily market participants.135 To maintain the integrity of the ideologically male market under the misappropriation theory, courts had to maintain the market's separation from the female-associated family. They had to draw a line between cases involving market participants and those involving family members. This line is difficult to draw because family members can also be market participants. This difficulty is dramatically illustrated in United States v. Chestman.136 An analysis of Chestman shows the importance of courts maintaining a clear line between market and family. Were this line to disappear, the distinction between family and market might be blurred, upsetting our notions of how to act in each realm and, thus, of male and female identity.

Chestman involved the sale of Waldbaum, Inc., a publicly traded company that owned a large supermarket chain.137 Robert Chestman was a stockbroker who had received material information about a pending, non-public change of control of Waldbaum's.138 His informant was Keith Loeb, a son-in-law of the Waldbaum family and nephew-in-law of Ira Waldbaum, the president and controlling shareholder of Waldbaum.139 Chestman traded on this information.

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135. See, e.g., United States v. Carpenter, 484 U.S. 19 (1987). The misappropriation theory differs from the traditional insider trading theory in that cases brought under the traditional theory involve a corporate insider who trades in securities of the firm of which he is an insider. Thus, the insider is a market participant, as is the firm that issued the securities. Even if the insider tips someone else who is a friend or family member, the line between market and family is unlikely to be implicated because there would be no liability if the tippee did not use the information to trade in the market. Under the traditional theory of insider trading, all parties are closely tied to the market, a fact which may not be true in misappropriation cases.
136. 947 F.2d 551 (2d Cir. 1991).
137. See Chestman, 947 F.2d at 555.
138. See id.
139. See id.
Keith Loeb had learned of the information in a rather round-about way. When Ira Waldbaum decided to sell his interest in the business, he offered to tender his sister's significantly smaller block of shares to save her the trouble of tendering after the public announcement. His sister, Keith Loeb's mother-in-law, told her daughter, Susan Loeb (Keith's wife), about the impending sale, cautioning her not to tell anyone, except Keith, because it might ruin the whole agreement. When Susan told Keith of the forthcoming sale of the business, she warned him keep the information confidential. He promptly turned around and told his broker, Chestman.

Ultimately, Chestman was convicted of securities fraud for violating Rule 10b-5. Loeb cooperated with the SEC's prosecution of Chestman. The Second Circuit, in an en banc opinion, held that Chestman's liability would depend on whether his source, Keith Loeb, could be found to have passed on the information in breach of a fiduciary-type duty owed either to the extended Waldbaum family or to Keith's wife, Susan. Claiming that "kinship alone does not create the necessary relationship," the court found that he had not breached a duty owed to either. There was no fiduciary duty owed to the family because they had never discussed confidential business information with him, the disclosure in this instance did not serve the interests of Ira Waldbaum or the company, and because his relationship with the family was not characterized by "influence or reliance" of any sort.

The court focused on a similar absence of "influence or reliance" to find, more surprisingly, that Keith had also not breached any duty to his wife in disclosing the information to Chestman. The court specifically distinguished between the breach of a fiduciary duty necessary for violation of Rule 10b-5 and "normal marital obligations." Violation of the latter, apparently, would not be sufficient to result in Rule 10b-5 liability. The court found that Keith had not breached any fiduciary-type duties because he had never expressly agreed to keep the information confidential, despite the fact that his wife had explicitly warned him not to tell. The court was unwilling to imply an agreement to keep the information confidential because her disclosure to him "served no purpose," "was

140. See id.
141. See id. at 564.
142. Id. at 570.
143. Id.
144. Id. at 571.
145. Id.
unprompted," and because their relationship was not one of "superiority," "reliance," or "dependence." In order for a fiduciary-type duty to exist between two people, the court believed that there had to be the type of power imbalance implied by these terms. In short, the court viewed Keith and Susan Loeb's marriage as being a marriage of autonomous, self-sufficient individuals — a truly modern marriage.

Unfortunately, the court's claim that there should not be liability in Chestman because there was no confidential relationship between Keith and Susan Loeb is belied both by the facts which show a relationship of dependence and reliance, and by a line of family law cases which frequently find that marriage creates a confidential relationship. In the Chestman case itself, the Second Circuit's opinion is replete with information that would lead one to believe that Susan Loeb relied on and was dependent on her husband to act on her behalf in financial matters. Keith Loeb and Robert Chestman first met because, according to the court, "Loeb decided to consolidate his and his wife's holdings in Waldbaum." According to the court, it was Keith, not his wife, who made the decision to consolidate. The facts do not even indicate that he consulted her before he made the decision. He was the active one while she was passive and dependent on him. Similarly, Keith was the one who met with Chestman and it was Keith who mailed Susan's birth certificate to Chestman when it was requested.

Over the years, Chestman executed several transactions in Waldbaum stock "for Keith Loeb." It does not appear that Chestman ever met or talked with Susan Loeb. From the court's description, one could assume that Keith had taken upon himself the job of dealing with the couple's financial matters, despite the fact that the Waldbaum money came from Susan's side of the family and that they jointly owned a large number of shares. In short, as far as family finances go, Susan appears to have been completely dependent on Keith and to have relied on him to act in the best interest of both of them. The court's conclusion that she was not

146. Id.
147. See id. at 568-69.
148. See id. at 555.
149. Id.
150. See id.
151. Id.
152. See id. at 579 (Winter, J., dissenting).
dependent on him for financial management appears ungrounded in the facts.

While Keith was occupied trying to make money through the market, Susan was carrying out the traditional wife's role. On the crucial day in November when Susan's mother went to the bank to recover her stock certificates and turn them over to Ira Waldbaum, Susan was busy carpooling the Loeb children around town.\(^{153}\) She only learned of the impending Waldbaum sale because she was concerned that her mother was not home when she tried to call. Knowing that her mother's health was poor, Susan pursued the matter, catching her mother at home the next day.\(^{154}\) Susan's mother told her of the upcoming sale only because Susan, out of concern for her mother's health, had pursued the matter of where her mother had been. Finally, Susan spilled the beans to Keith in the context of a discussion about what the upcoming sale would mean to their children.\(^{155}\) Thus, while Keith was engaged in "managing" the family's finances, Susan was driving children around, worrying about their futures, and fretting over her mother's health. In short, she was employed in the traditional wifely duties of caring for children and maintaining the couple's relations with others. This is not exactly the modern marriage that the court describes. Susan relied on Keith and was dependent on him, perhaps even subordinate to him in financial matters. In his communications with Loeb, he was acting on her behalf, as well as for himself. The court's conclusion that the relationship was not one of dependence and reliance comes as something of a surprise to the careful reader of the opinion.

Equally surprising is the court's conclusion that "marriage does not, without more, create a fiduciary relationship."\(^{156}\) To support this position, the court cited *United States v. Reed*,\(^{157}\) an insider trading case from the Southern District of New York. The *Chestman* court also noted that the *Reed* court had relied on G.G. Bogert's treatise on Trusts.\(^{158}\) These are peculiar sources for the court's finding that there is no confidential relationship in this case. In *Reed*, the court had refused to dismiss the indictment of Reed for insider trading based on information that he had received from his father, an insider. Although not a case involving a marriage

\(^{153}\) See id.
\(^{154}\) See id.
\(^{155}\) See id.
\(^{156}\) Id. at 568.
relational, the Reed court actually found exactly the type of confidential relationship between father and son that the Chestman court held not to exist between husband and wife.

Further, Bogert's treatise does not provide strong support for the Chestman court's position. Bogert does say, as the court quotes, that "mere kinship does not of itself establish a confidential relation." But this is preceded by a statement that "[f]requently" the relationship between the parties is so close in blood or marriage that "the letting down of all guards and bars is natural" and a court may find "that a confidential relation existed." Indeed, the finding of a confidential relationship is portrayed as the norm in Bogert's treatise, with exceptions to this norm existing when "relatives are hostile to each other or deal at arms length . . . and so are held not to have been in a confidential relation." The possible existence of such hostile relationships prevents Bogert from asserting that mere kinship alone creates a confidential relationship. Given the facts of Chestman, one would be inclined to think of Susan and Keith Loeb's relationship as the type in which all guards are let down, not one in which the parties were hostile to one another and dealing at arm's length. It is exactly the type of relationship in which, applying Bogert's analysis, there should be a finding of a confidential relationship.

It is also interesting that the Chestman court does not cite to any of the numerous divorce cases on the question of whether a confidential relationship exists within marriage. The factual context of these cases is somewhat different from the context of Chestman, indeed, the parties in a divorce have less reason to be trusting of each other than Susan and Keith Loeb did. Nevertheless, these cases invariably conclude that such duties are owed. Most of the cases involve disputes over property that the husband has tried to claim for his own. One case even involved a commercial relationship in which each spouse owned a company and the companies had done business with each other. The husband's business had gone bankrupt, owing money to the wife's firm. She

159. Chestman, 947 F.2d at 568 (quoting BOGERT, supra note 158, § 482, at 300-11).
160. BOGERT, supra note 158, § 482, at 298-300.
161. Id. § 482, at 311-319.
163. See, e.g., Cairo, 251 Cal. Rptr. at 731 (in which the wife signed a quitclaim deed, along with other documents her husband had presented to her, at her husband's request).
received a formal notice of the bankruptcy case which included a notice that creditors who were to be scheduled as disputed must file by a specified date. Her claim against her husband's business was for $378,000, but at some point it had been reduced on his books to $51,000, without informing her. When she received the notice of the bankruptcy proceeding, she asked him if she had to respond, and he said she did not need to because her claims were already scheduled. One would think that given the commercial nature of their relationship, something akin to caveat emptor would apply. But the court held that "the confidential relationship between husband and wife . . . entitles each to rely upon the representations of the other." According to the court, it was simply too difficult to disentangle their positions as husband and wife from their commercial relationships.

Given these cases, the lack of support in U.S. v. Reed for the Chestman court's position, and the facts of the Chestman case, the court's holding that Keith Loeb was not in a confidential relationship with either the Waldbaum family or his wife, and therefore did not misappropriate the information, runs contrary to both the facts and the law. This raises the question of why the court resolved the Chestman case as it did. Why did the Court work so hard to avoid liability for Chestman?

I believe the answer to this question is that the court sees the realms of market and family as diametrically opposed to each other. The insider trading rules are rules for a market. These rules should be applied within the setting of the market but not extended to relationships within the family. In this way, the ideal of family marks the limits of insider trading law. It becomes the boundary over which the structures of Rule 10b-5 must not leap.

In Chestman, the court tried to determine what, if anything, represents the limit on Rule 10b-5 liability. It did not recognize the way in which this limit is tied to the juxtaposition of market and family. According to Chiarella, there is no duty to disclose or abstain from trading under Rule 10b-5 without a fiduciary relation-

165. Id. at 94.
166. For a description of the traditional ideal of family, see supra notes 77-88 and accompanying text. Recently, the Circuit Courts have also articulated this concern for restricting insider trading law to the market through their emphasis on the requirement that the deceptive act be "in connection with the purchase or sale of any security." United States v. Bryan, 58 F.3d 933, 946 (4th Cir. 1994). In both Bryan and United States v. O'Hagan, 117 S. Ct. 2199 (1997), the courts held that there was no violation of the insider trading prohibition unless there was deception of the purchaser or seller of securities. This narrow interpretation of the "in connection with" requirement of Bryan ensured that the prohibition would be applied only in the most routine of market situations.
ship, or similar relationship of trust and confidence. In the context of the market, the term “fiduciary relationship” is meaningful to the Chestman court: “Tethered to the field of shareholder relations, fiduciary obligations arise within a narrow, principled sphere.” However, the court continued, “The existence of fiduciary duties in other common law settings . . . is anything but clear.” It concluded its analysis of misappropriation theory by saying it would tread cautiously, “lest our efforts to construe rule 10b-5 lose method and predictability, taking over the ‘whole corporate universe.’”

This is a strange fear for the court — the fear that the decision in Chestman may result in an encompassing of the entire corporate world. Chestman, after all, is a case that is not so much about the corporate world as about family relationships. Ira Waldbaum was willing to tender his sister’s shares for her because it would make her life easier. Susan Loeb learned of the sale of the family business only because of her concern for her mother’s health. Keith heard the information from her because she was his wife and because it would affect their children’s financial security. Why then does the court express its fear that liability in Chestman might result in Rule 10b-5’s taking over the entire corporate universe? Apparently this is the worst the court can imagine. The possibility that liability might extend to the world of the family is so extreme as to be unimaginable. Thus, in a case that does not involve disclosures within the corporate setting, and in which the court is adamant about keeping liability from the family setting, it nonetheless refers to the worst that could happen as the extension of liability to the “corporate universe.” In this way, family connotes all that is not the market.

The court itself recognized that there was a huge difference between the market and the family, and that this difference was crucial to the outcome in Chestman. At the beginning of its analysis of liability under Rule 10b-5, the court noted that it had “heretofore never applied the misappropriation theory . . . in the context of family relationships.” Later it said, “To date we have applied the [misappropriation] theory only in the context of employment

168. 947 F.2d 556, 566 (2d Cir. 1991).
169. Id.
170. Id. (quoting Santa Fe Indus. v. Green, 430 U.S. 462, 480 (1976) (coining the phrase “whole corporate universe.” Here the court’s concern was with the possible expansion of Rule 10b-5 to cover all breaches of corporate fiduciary obligations)).
171. Chestman, 947 F.2d at 564.
relationships.” Its efforts here to distinguish previous misappropriation cases indicate its recognition of the significance of the divide between the realm of market and that of family, and its reluctance to cross that divide.

The Chestman court's recognition of the divide between family and market is also demonstrated in its willingness to overturn United States v. Reed, the only previous misappropriation case in which liability under Rule 10b-5 had been found for disclosures made within a family setting. Although it did not actually overturn the case because neither of the parties had requested it to do so, the court does, on its own initiative, “limit Reed to its essential holding.” This strong action, again not on the request of either party, indicates how important it was to the court to state clearly that liability under Rule 10b-5 did not extend to family settings.

The court's preoccupation with the difficulties of applying the law of the market to family settings is also revealed by the concurring and dissenting opinions. Both Judge Winter, in dissent, and Judge Miner, in concurrence, emphasize the differences between family and market relationships. Judge Winter argues that the court's approach to liability under Rule 10b-5 is unrealistic in the requirements it places on family members who do not want their business-related comments repeated. In order to be protected, they must extract express promises of confidentiality from one another.

Under such a regime, parents and children must conceal their comings and goings, family members must cease to speak when a son-in-law enters a room, and offended members of the family must understand that such conduct is always related only to business.

Indeed, he argued that it would force family members to "behave like strangers toward each other . . . [and to] act as if there

172. Id. at 566. Similarly, the court in U.S. v. Willis, 737 F. Supp. 269 (S.D.N.Y. 1990), is careful to portray a case involving a therapist's breach of a patient's confidential disclosures as involving the patient's "financial investment in psychiatric treatment." Id. at 274. This makes it easier to analogize the case to others involving business relationships and to de-emphasize the fact that it involves a wife's divulging her husband's plans. The family aspects of the case can thus be ignored, and the border between market and family retained intact. See also U.S. v. Willis, 778 F. Supp. 205, 209 (S.D.N.Y. 1991).
174. Chestman, 947 F.2d at 569.
175. See id. at 580 (Winter, J., dissenting in part).
176. Id.
are no mutual obligations of trust and confidence . . . .”177 This is exactly how participants in a market act — as strangers to one another and with no pre-existing obligations toward each other. In other words, the crux of Judge Winter's disagreement with the court's opinion was that the court’s approach would force family members to treat each other as market participants do, thereby erasing the line between family and market.

Judge Miner concurred in the court’s decision in Chestman and, like Judge Winter, he was overtly concerned that any decision other than the one he supported might wreak havoc with his understanding of how families work. He, like Judge Winter, wanted to retain the informal way in which family members react to one another. He wondered, “How could family news be disseminated freely in an atmosphere where the members must be ultra-sensitive to whether ‘both the corporation and the family’ are seeking some measure of confidentiality ‘under the circumstances.’”178 He too focused on the affective life of the family, voicing his concern that if the court were to decide differently, family members would never again reveal secrets to others.179 The result would be that family relations would begin to mimic those of the market: isolated and autonomous. This is a result to be feared and avoided.

Judge Miner's image of the family took for granted that family relationships are fundamentally different from market relationships. Given family members' strong emotional ties to one another, and given their informal modes of interacting, he believed it made "little sense . . . to imply assurances that confidentiality would be maintained."180 The courts treat market relations differently. There, they have been perfectly willing to imply such assurances. In the Dirks case, the Supreme Court fictitiously created fiduciary relations for Rule 10b-5 purposes between various kinds of business professionals (such as accountants or lawyers) and shareholders.181 The Dirks Court imposed a fiduciary duty on these professionals who otherwise, barring contractual restrictions, would have been free to disclose whatever tidbits they had gleaned. It is not clear whether the Court imposed these obligations because it was concerned about the continuing relationship between the parties involved or about undermining their informal modes of interacting. Either of these could be important in situations involving accoun-

177. Id.
178. Id. at 582 (Miner, J., concurring).
179. See id.
180. Id. at 583.
tants or lawyers who have frequent repeat dealings with the same opposing parties. Regardless of the Court’s rationale in *Dirks*, it is surprising that Judge Miner rejects the idea of imposing obligations of confidentiality with so little discussion in the context of families.

Judge Miner’s reluctance to “imply assurances of confidentiality” within the family structure and the *Dirks* Court’s contrasting willingness to do so between professionals shows that the interactions within the family were seen as fundamentally different from those within the market. In the family, according to Judge Miner, confidences are to be exchanged freely, but keeping them depends on the parties’ relations to each other. In the market, confidences may be exchanged, but confidentiality is not expected voluntarily. It must be enforced through legal sanctions. In contrast, his position could also be interpreted as implying that relationships within the family are too important (or too fragile) to risk legal intervention.

Thus, the opinions in the *Chestman* case indicate two important ways in which ideas about family continue to influence the development of Rule 10b-5. First, family establishes a border to the market, and thereby to the reach of Rule 10b-5. This is not because families never engage in market transactions. Of course they do, and *Chestman* is an example of family members relating to each other and the market simultaneously. Rather, my point is that ideals of families and markets as two oppositional types affect our thoughts and beliefs about such seemingly irrelevant subjects as the reach of Rule 10b-5.

Second, the opinions in *Chestman* also show the differing characteristics that we assign to families and markets. Markets are characterized by relations among strangers who do not owe each other duties while families are the seats of our emotional lives. It is appropriate to act differently in each of these different settings. As Miner’s and Winter’s opinions demonstrate, the law is structured to accommodate and facilitate these different ways of acting by assigning each to its appropriate realm.

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The line between family and market does not exist in a firm, unchanging manner. Instead, it is constantly being recreated. The courts are part of this definitional process. In Chestman, the court found no liability under Rule 10b-5 because the duties, if there were any, that family members owed to one another were not the type of duties on which one could build an insider trading case. Reviewing a series of cases will help to identify the current definitions of family and market.

One of the few cases that, like Chestman, involves a discussion of family, is SEC v. Switzer.\(^{184}\) In Switzer, a corporate executive was overheard at a track meet talking to his wife about an out of town meeting to discuss the possibility of liquidating or otherwise disposing of a corporate subsidiary. The eavesdropper, Switzer, then traded on the information that he had heard, and spread the good word to some of his friends. The court held that the defendants had not engaged in insider trading. Rule 10b-5 would be violated only if a corporate insider had passed on the information in breach of a fiduciary duty, including benefitting pecuniarily from the tip. According to the court, the executive, George Platt, had not breached a duty in relaying to his wife the information that he was considering liquidating the company.\(^{185}\)

Instead, the court saw the discussion of this corporate news as relevant to Platt's family. His wife would be leaving town for a week the day after their discussion and they needed to discuss their family's plans for that week. Since they had children, it was their practice to try to arrange for one parent to be in town while the other was away.\(^ {186}\) In this way, passing the information on to his wife takes on the coloring of 'family' instead of business. Similarly, the court describes the conversation between husband and wife as one in which she is performing as a good wife, solicitous of his mental health:

[When G. Platt appears distracted, it is not uncommon for his wife to inquire of him what is on his mind. On these occasions, he will talk to her about his problems, even though she does not


\(^{185}\) See id. at 766. In terms of insider trading law, the case could have gone either way. The court could have found Platt to have breached a duty to Phoenix, the company to be sold or liquidated, by intentionally telling his wife the corporate news in a setting in which he could easily be overheard. He himself benefitted from the disclosure, as the court itself notes, by having the opportunity to talk to his wife about an issue that had been disturbing him. The benefit derived from the breach of the fiduciary duty need not be pecuniary. See Dirks, 463 U.S. at 663-64 (stating that the benefit may be reputational or a gift to another).

\(^{186}\) See Switzer, 590 F. Supp. at 762.
have an understanding of nor interest in business matters. On the day of the track meet, Phoenix [the corporation in question] was weighing upon the mind of G. Platt . . . prompting G. Platt to talk to his wife about it.\(^{187}\)

Here, she is described as the caring wife of separate spheres ideology. It is her job to provide solace and comfort to her husband as he deals with the troubles of the world. The interaction between husband and wife is thus placed squarely in the realm of family. Indeed, both Chestman and Switzer depict the relationships between spouses as focused primarily on family, not business, issues.

Yet, in other cases where familial relationships are involved, the courts have been more likely to see the issues as relating to business instead of family. \textit{U.S. v. Reed}^{188} involved a discussion between father and son of the affairs of a corporation of which the father was the chief executive. The son then traded on the information that he had learned. The court permitted the insider trading suit to go forward against the son. This case could have been understood in a manner very similar to Switzer since the father was relieving his own pent-up anxiety by discussing a troublesome business situation with his son. Gordon Reed, the father, was known to discuss his business problems regularly with his son,\(^{189}\) not unlike the discussions that G. Platt had with his wife.

The Reed court, however, did not portray the situation as involving therapeutic familial interactions. Instead, it categorized the relationship as a business one. Although it said that the father-son relationship was "particularly close," it also described them as having frequently discussed business affairs in an atmosphere in which it was understood that the son would respect the father's confidences.\(^{190}\) In fact, the SEC had initially alleged that the business confidences passed both ways, creating an image of the two advising each other on business.\(^{191}\) To further emphasize the business aspects of the relationship, the Chestman court retrospectively limited Reed "to its essential holding: the repeated disclosure

\(^{187}\) \textit{Id.} Consistent with her subordinate position under separate spheres ideology, the court referred to Mrs. Platt either by her role — wife — or by her given name, Linda. She is not called either Mrs. Platt or L. Platt, despite the fact that her husband is always (with only one exception) called G. Platt.

\(^{188}\) \textit{601 F. Supp. 685 (S.D.N.Y. 1985)}.

\(^{189}\) \textit{See id.} at 690.

\(^{190}\) \textit{Id.} This could also have been said about George Platt and his wife, Linda. \textit{See supra} text accompanying notes 186-88.

\(^{191}\) \textit{See Reed}, \textit{601 F. Supp.} at 690 n.6. This claim was ultimately dropped.
of business secrets between family members ...." The business aspects of the relationship in Reed were crucial to the Chestman court's understanding of it.

In contrast to Switzer, the Court treated Gordon Reed as if he had been using his son as a business consultant, not as an emotional therapist. This characterization was furthered by the Reed court's description of the son as the president of a family-owned land development company. This placed him squarely within the business world. We never learn what type of business Mrs. Platt was involved in, although it is unlikely that she was a full-time housewife. The Switzer court's failure to describe her outside interests made it easier to see her as a confidant, wife, and mother, and harder to view her as a business consultant. Similarly, the Chestman court's discussion of Susan Loeb left the impression that she was a full-time homemaker — certainly not a person likely to serve her husband as a consultant on the purchase of shares of stock.

Another case that falls on the business side of the line is Aschinger v. Columbus Showcase Co. This involved two brothers, each of whom had separately sold his shares back to the corporation when he retired. The defendant, Carl Sr., received a significantly higher price for his shares and, as Chairman of the Board, was also responsible for the negotiations on the corporation's behalf with the plaintiff, Ralph. Ralph claimed that the defendant had superior knowledge as to the shares' value at the time that the buy-back of Ralph's shares was occurring. The court found that the defendant did not breach any fiduciary duties that were owed to Ralph. It described Ralph as an active participant in the business of the corporation, a director, and the family member in charge of labor negotiations. As a result, it found that Carl Sr. had not violated Rule 10b-5. Aschinger viewed the brothers in terms of their business relationship and not in terms of their family relations.

Why is it that some cases involving family members are seen as outside of the scope of Rule 10b-5 while others are seen as subject to the demands of the rule? A review of the cases indicates that this may be because the courts conceive of family as involving heterosexual, marital relations. Cases like Chestman and Switzer are seen as involving this core familial relationship, whereas Aschinger and Reed do not. Relations between brothers, or between

194. 934 F.2d 1402 (6th Cir. 1991).
195. See id. at 1408.
fathers and sons, can more easily be characterized as market relations, in part, simply because they involve men. According to the separate spheres ideology, the market is a male venue. Thus, the cases that involve the transfer of business information between men are more easily seen as involving market relations than those that involve the transfer of information among members of a heterosexual couple. Or, to phrase the point differently, relations between men and women are understood as predicated on an underlying sexual attraction and emotional attachment. These are characteristics associated with the family. Thus, in deciding insider trading cases, the courts are necessarily defining the market's opposite: the family. Family, according to these cases, involves traditional marital relations. Other relations are easily characterized as business, even when they involve members of the same family.

This is further illustrated by the way the courts have handled cases that involve close friendships or other close personal relationships. These cases sit uneasily in the area between what would be colloquially considered family and what would be thought of as the market. Although these cases often involve family-type relationships in which the parties could each be expected to look out altruistically for the other's interests, the courts rarely categorize them as involving relationships on the family side of the line. Perhaps this is because they do not involve heterosexual relations, and thus it is harder for the courts to conceive of them as involving truly close personal relations. Instead, the relations in these cases are usually viewed as market relations.

For example, in one such case, SEC v. Tome, in which the parties and their wives had spent numerous weekends at each

196. But see SEC v. Moran, 922 F. Supp. 867 (S.D.N.Y. 1996) (finding no violation of Rule 10b-5 between a father and son). In this case, in which a broker-son was alleged to have tipped his father to inside information, the court noted that a crucial 43 minute conversation between the father and son may simply have involved a party that the parents wanted to hold and to which they wanted to invite their son and his then fiancée. See id. at 880. The court's willingness in this situation to recognize that the conversation may have stemmed from a familial relationship distinct from the market contrasts with both Aschinger and Reed.

197. See also, SEC v. Trikilis, No. CV 92-1336-RSWL (EEU), 1992 WL 301398 (C.D. Cal July 28, 1992) (regarding a female employee who tipped her aunt and was found liable for violating Rule 10b-5).

198. In many of these cases, the courts reinterpret the gifts and open flow of information that characterize the close relationships as a desire for individual, personal gain. See supra text accompanying notes 190-92. Once reinterpreted in this way, they fit within Dirks's requirements for trading in violation of Rule 10b-5.

other's homes, on each other's boats, and at one another's vacation houses, the male tipper openly expressed his affection for the male tippee. After the SEC began investigating, the tipper asked his wife to telephone the tippee's wife to say, "Don't worry. We love you . . . . The reason Edgar's not calling you is because he's being advised not to. But he still loves you." In another case, SEC v. Singer, the court described the personal relationship between the tipper and tippee as a "very close personal friendship:"

The two communicated many times a week, in person, by phone, or by fax, and socialized together approximately every quarter even though the two lived in different cities . . . . McLearnon [the tipper] characterized their relationship as so close that there was a "stream of consciousness . . . ."

Despite these statements revealing the clear personal warmth that existed between the men in both these cases, the courts found that insider trading had occurred. The courts did not characterize these relationships as existing on the family side of the line but, rather, as set within the market.

In Singer, the court emphasized the business side of the parties' relationship. In describing the connections between the two men, it referred first to the fact that an attorney-client relationship existed between them. Its initial description of the defendant is as a "deal lawyer" for the tipper's firm. Next it discussed the defendant's work on the tipper's personal legal matters. This is still a description of a business relationship. Only after it had emphasized their professional relationship by putting it first did the court discuss the personal relationship between the two of them. Even in the paragraph describing the depth of their personal relationship, the court referred repeatedly to the fact that the tipper relied on the defendant in connection with "business matters" and that they communicated on business matters several times a week. In this way, the court made clear that it viewed their relationship as one that existed within the world of the market, not the world of family.

200. Id. at 614.
202. Id. at 1161.
203. See id. at 1170.
204. Id.
205. See id.
206. See id. at 1169.
207. See id. at 1170.
Similarly, in Tome, the case in which the tipper expressed his "love" for the tippee and his wife, the court emphasized the business aspects of the relationship. It described the relationship as one in which the tipper, Bronfman, "considered [the tippee] sort of a European consultant to Seagram [the tipper's firm] generally,"208 and an "advisor [for] general business purposes."209 The court emphasized their business relationship by noting that the two men also undertook to be joint venturers in one investment.210 Finally, the court related the fact that Bronfman gave the tippee, Tome, a power of attorney and discretion over Bronfman's own personal account.211 This served to emphasize their business relationships. Although Bronfman appears to have been fond of Tome, the court denigrated the friendship. It described the Tomes as having promptly "ingratiated" themselves to the Bronfmans, and as having "callously" taken "shoddy" advantage of the Bronfmans' friendship.212 Again, the court placed a relationship involving significant affection within the realm of the market.

Cases can also sit in the netherland between family and market for other reasons. In United States v. Willis,213 a psychiatrist traded on inside information obtained from a patient. The information concerned the patient's husband's possible move to become CEO of BankAmerica. Needless to say, this is not a case involving a family relationship between the patient and her therapist. On the other hand, the confidential relationship between a patient and therapist can be very close to the ideal relationship between family members. As the court says, "It is difficult to imagine a relationship that requires a higher degree of trust and confidence than the traditional relationship of physician and patient."214

Despite this, the court emphasized the business aspects of the doctor-patient relationship. It focused on the business relationship between the patient and Dr. Willis, not on whatever personal or therapeutic ties may have existed between them. In discussing the

209. Id. at 604.
210. See id.
211. See id.
212. Id. at 602-03.
214. United States v. Willis, 737 F. Supp. 269, 272 (S.D.N.Y. 1990) ("Willis I"). Dr. Willis, the defendant, had even argued that his case did not fit easily within the normal conception of the market. He would have categorized cases by whether or not the patient was a member of the corporate world. See id. at 274. Subsequently, he argued that Chestman limited the misappropriation theory to fiduciary relationships within the securities markets. See Willis II, 778 F. Supp. at 208. This was a clear effort to put the doctor-patient relationship on the side of family instead of market.
damage that occurred as a result of Dr. Willis' trading, the court described the economic damage to the relationship, as opposed to a rupture in the personal relationship or damage to the patient's psyche.\textsuperscript{215} The doctor's disclosure and trading on the inside information is not considered injurious because the trust developed during the course of treatment has been destroyed, but rather because of the economic injury that might occur to the patient as a result of the disclosure of the information. The patient's husband's advancement might be jeopardized, the therapeutic relationship might need to be terminated, she might need to expend more money to find a new doctor, or the treatment time might be prolonged and costs thereby increased by the need to discuss the disclosures.\textsuperscript{216} The court is concerned here with the economic relationship between the patient and her doctor. This emphasis places the case on the market side of the family-market divide.

These cases, involving brothers, father and son, or therapist and patient, could have been interpreted as implicating either the closest relations outside of the market — family — or as focusing on the economic connections between the participants. In placing them within the market, the courts are defining both market and family. Market relations focus on economic concerns and take place between parties who are not invoking the personal ties between them. Family relations, in contrast, provide a respite from these topics. They involve a woman whose role is to perform wifely functions. Family relations are not those between brothers, between father and son, or between therapist and patient. Family, as it is defined by insider trading law, means only the relations between a couple in a heterosexual marriage.

Equally important, the courts' decisions leave no room between the realms of market and family. This leaves the dichotomy intact, and with it the privileged position of the market vis-à-vis the family. Undermining this dichotomy might undermine the preferred position of the market in our social lives. Market labor is compensated while labor within the family is not.\textsuperscript{217} Occupations involving the types of work traditionally associated with the family — nursing, teaching, cleaning — tend to be low paying. Even within the legal profession, family law is usually lower compensated.

\textsuperscript{215} See Willis I, 737 F. Supp. at 274.
\textsuperscript{216} See id.
and accorded less status than corporate law. Furthermore, it is the corporate world, not the world of the family, that is influential in politics. Maintaining the line between market and family is essential to the maintenance of this privileged position. For this purpose, it is not essential that there be equal numbers of cases on either side of the line. Subsuming cases like Tome, Singer, and Willis under the rubric of market will not weaken the "market" category. All that matters is that there is a realm, however small, on the other side. Family must continue to be separately delineated in order for the market to remain a privileged concept and practice.

IV. THE GENDERING OF EFFICIENCY AND FAIRNESS

The last section showed the way in which the courts, in deciding insider trading cases, divide the world into two opposing territories, family and market, with no space in between. This section will demonstrate the role these two gendered ideals play in the effort to identify a primary purpose for the insider trading prohibition. As has already been noted, some commentators believe the prohibition is necessary in order to ensure market efficiency. Others argue that the prohibition is not aimed at efficiency but, rather, is a means of producing fairness among traders. The Supreme Court in Dirks specifically rejected a fairness basis for the rule against insider trading, evinced some interest in the concept of efficiency, and focused on doctrine. The Court has clearly

218. See Jerome E. Carlin, Lawyers on Their Own 97 (1994) (stating that divorce law is held in generally low regard); Cynthia F. Epstein, Woman's Place 164 (1970) (noting that matrimonial law is often not considered "real law"); Cynthia F. Epstein, Women in Law 381 (2d ed. 1993) (documenting that the material rewards and professional prestige of family law practice are low); Louise G. Trubek, Embedded Practices: Lawyers, Clients, and Social Change, 31 Harv. C.R.-C.L. L. Rev. 415, 429 (1996) (recognizing the anti-family law attitudes of large law firms).

219. See, e.g., Corgill, supra note 23; Georgakopoulos, supra note 23; Gilson & Kraakman, supra note 23. But see Stout, supra note 23 (concluding that efficiency is not a goal worth nurturing).

220. See Brudney, supra note 25; Scheppele, supra note 25; Schotland, supra note 25.


222. See Dirks, 463 U.S. at 659 n.17.

223. See id. at 660-68 (discussing when an insider can be held liable for having breached his fiduciary duty to the shareholders of the corporation). See also Chiarella v. United States, 445 U.S. 222, 228 (1980) (explaining that a duty to disclose arises when one party has information that the other party is entitled to know "because of a fiduciary or other similar relation of trust and confidence between them") (quoting Restatement (Second) of Torts § 551(2)(a) (1976)).
stated that a determining element in deciding whether insider trading is prohibited is the relationship between either the trader or tipper and the shareholders of the firm whose shares were traded, or the relationship between the source of the information and the trader. 224

Thus, whether such a relationship exists has become a crucial question in insider trading cases. Focusing on relationships in the market context is an anomaly. We usually associate relationships with our families and personal lives instead of with the arm's length interactions we have with others in the market. Why have the courts chosen the concept of a relationship to serve such a crucial function instead of relying on a more market-compatible concept, such as the more limited "fiduciary"? It turns out that a relationship is important because it draws our attention to it and away from the underlying conflict between the market norms of efficiency and equality. 225

Equality, in this context, means equal access to material information 226 and is often referred to as "fairness." 227 Other components of the market norm of participant equality are the individuals' autonomy from one another, with no one subordinated to another. Only under these circumstances will they be able to trade freely and voluntarily. 228 The legitimacy of market transactions depends on the assumption that the parties have freely and voluntarily agreed. Furthermore, in an ideal market, participants are equal price-takers from the market. 229 No one's position is superior to anyone else's. Advocates of fairness as the fundamental value behind the insider trading prohibition believe that the law

\[224. \text{See Chiarella, } 445 \text{ U.S. at } 228; \text{ O'Hagan, } 117 \text{ S. Ct. at } 2207.\]
\[225. \text{See supra notes } 22-27 \text{ and accompanying text (elaborating on efficiency and equality as market-associated norms).}\]
\[226. \text{See Chiarella, } 445 \text{ U.S. at } 252 \text{ (Blackmun, J., dissenting) (calling insider trading "inherently unfair"); Scheppel, supra note } 25, \text{ at } 125 \text{ (equating equal access to information with fairness); Patricia H. Werhane, The Ethics of Insider Trading, } 8 \text{ J. Bus. Ethics } 841, 844 \text{ (1989) (viewing insiders as having unfair advantages over traders who do not have inside information).}\]
\[227. \text{See Scheppel, supra note } 25, \text{ at } 125 \text{ (using the word "fair" to refer to informational equality).}\]
\[228. \text{See Frank H. Easterbrook \& Daniel R. Fischel, The Economic Structure of Corporate Law 15 (1991) (explaining that utilitarians count each individual as one util); Posner, supra note } 51, \text{ at } 11 \text{ (noting that efficiency can only be determined by willingness to pay, which in turn can only be determined by observing voluntary transactions).}\]
should put traders in positions of informational equality vis-à-vis other traders.\textsuperscript{230}

Advocates of the goal of efficiency see the market as an allocational tool.\textsuperscript{231} The market will not be efficient, however, if there are no informational differentials to produce incentives to discover information. If market participants cannot capitalize on informational advantages, they will have no reason to locate the new information and bring it to the market's attention. Unequal access to information and the inequalities it produces are thus central to the idea of an efficient market.\textsuperscript{232} Unfortunately, the ideal of equality and the possibility of informational advantage conflict with each other. As Boyle's paradox states, "To postulate efficiency in the production of information we must assume away the incentive necessary to produce. To postulate the incentive is to make efficiency impossible."\textsuperscript{233}

These goals — fairness and efficiency — are gendered, with fairness being "female," and efficiency being "male." Efficiency is connected to men by its protective function toward the rest of the market. "Informed traders," Frank Easterbrook argues, "protect the uninformed. Because the price is set by the knowledgeable, it is quite safe to buy stock in ignorance."\textsuperscript{234} A similar protective function is traditionally associated with men. It is their role to protect their wives and children from harm.

\textsuperscript{230} See Scheppelle, supra note 25, at 125 (equating equal access to information with fairness).

\textsuperscript{231} See Roger J. Dennis, Materiality and the Efficient Capital Market Model: A Recipe For the Total Mix, 25 WM. & MARY L. REV. 373 (1984) (arguing that insider trading law should adopt the market concept of materiality to ensure a more efficient market); Jeffrey N. Gordon & Lewis A. Kornhauser, Efficient Markets, Costly Information, and Securities Research, 60 N.Y.U. L. REV. 761, 781 (1985) (noting that it is highly desirable for markets to be allocationally efficient); Joel Seligman, The Reformulation of Federal Securities Law Concerning Nonpublic Information, 73 GEORGE L.J. 1119 (1985) (stating that a disclosure or abstention rule encourages rapid dissemination of information and, thus, allocational efficiency).

\textsuperscript{232} See Dirks v. SEC, 463 U.S. 646 (1983) (recognizing that market analysts and their ability to trade on information that is not widely available play a crucial role in creating efficient markets); MANNE, supra note 110 (arguing that insider trading should not be regulated because it will create a more efficient market); EASTERBROOK & FISCHEL, supra note 228, at 256-57 (stating that insider trading may function as a signal to the market, increasing efficiency by moving market prices closer to what they would be with full information); Carlton & Fischel, supra note 112 (arguing for deregulation of insider trading to allow informational disparities to increase the market's efficiency).

\textsuperscript{233} See also id. at 1490 (describing the conflict as a "choice between an equal access view and a quasi-property rights view").

\textsuperscript{234} See also Hsiu-kwang Wu, An Economist Looks at Section 16 of the Securities Exchange Act of 1934, 68 COLUM. L. REV. 260, 269 (1968) (concluding that efficiency is the best protection for investors).
Fairness is connected to women. It is women, not men, who are thought to be the keepers of morality in our society, and "fairness" is a moral concept.\(^\text{235}\) When Henry Manne wanted to emphasize the moral indigation that some people feel at the thought that insider trading could be legalized, he used the comment of a female student. According to him, she "stamped her foot and angrily de-\(^\text{2}\)\(^\text{3}\)\(^\text{4}\) claimed, 'I don't care; it's just not right.'\(^\text{2}\) Use of a woman student's comment focuses attention on the connection between fairness arguments about insider trading law and women. It reaffirms the genderization of this claim. Finally, fairness arguments are also connected to women through the frequent accusation that such arguments involve "fuzzy" thinking.\(^\text{2}\)\(^\text{3}\) This is a charge that has often been leveled at women's moral thinking, which some argue does not use a hierarchical set of rules in the ways that men's moral thinking, does.\(^\text{2}\)\(^\text{3}\)\(^\text{3}\) Thus, calling fairness and equality arguments "fuzzy" tightens the associations between this type of argument and women.

The effect of this gendering of the arguments for efficiency and equality is twofold. First, we expect the two values to be in opposition to each other, with no room in between. One is, after all, generally believed to be either a man or a woman; one cannot be both, nor is there ideologically a third position.\(^\text{2}\)\(^\text{3}\)\(^\text{9}\) Second, the gendering of these values means that in any struggle between the two, we automatically expect the "male" position to triumph. We are therefore predisposed to accept efficiency over fairness as the prevailing value.\(^\text{2}\)\(^\text{4}\)\(^\text{0}\) And, of course, in both Chiarella and Dirks, that is exactly

\(^{235}\) See Dailey, supra note 77, at 967 (recognizing that nineteenth-century women were seen as having a special role in the preservation of moral values). See also Anne C. Dailey, Federalism and Families, 143 U. Pa. L. Rev. 1787, 1827 (1995) (noting that the domestic sphere is recognized as site for the formation of values).

In contrast, economists concerned with efficiency do not make any special claims as to efficiency's connection with ethics or morality. See, e.g., Harry Heller, Chiarella, SEC Rule 14e-3 and Dirks, 37 Bus. Law. 517, 531 (1982); Richard A. Posner, Economic Analysis of Law 4-5 (1973).

\(^{236}\) MANNE, supra note 110, at 233 n.42, quoted in Schepple, supra note 25, at 123.

\(^{237}\) See, e.g., Jonathan R. Macey, From Fairness to Contract, 13 Hofstra L. Rev. 9, 10 (1984) (describing fairness claims as "vague and ill-formed"); Easterbrook & Fischel, supra note 228, at 261-62 (ridiculing fairness arguments as illogical); Schepple, supra note 25, at 123 (decrying the charges of fuzziness that have plagued insider trading fairness arguments).

\(^{238}\) See Gilligan, supra note 70.

\(^{239}\) Much of postmodern thought is aimed at deconstructing exactly this dichotomy. See Butler, supra note 32, at 137-41 (showing that repeated gender performances through drag challenge ideas about gender); Eve Kosofsky Sedgwick, Epistemology of the Closet (1990) (deconstructing the hetero-homosexual dichotomy).

\(^{240}\) See Mary Joe Frug, Rescuing Impossibility Doctrine, 140 U. Pa. L. Rev. 1029, 1032 (1992) (explaining that the hierarchical nature of gender relations illuminates other debates).
what happens. Recognizing the gendered nature of the ideas of efficiency and fairness simply makes the triumph of efficiency over fairness appear natural and less objectionable.

The tension between equality and efficiency is further minimized by the emphasis that the courts have placed on the idea of "relationship" in the law of insider trading. Relationships are usually associated with family and not with markets where individuals generally do not owe duties to others. Yet, according to the Supreme Court in Dirks and Chiarella, the insider trading prohibition applies only if the trader used the information in breach of a fiduciary duty, or other similar relationship, owed to the corporation in whose shares he traded or to the source of the information. This formulation of the doctrine of insider trading has spawned a tremendous amount of litigation and discussion as to what counts as a "relationship." By focusing our attention in this way on relationships and through them on ideas about family that are clearly external to the market, we have avoided the need to define what type of market we want and what role insider trading law will play in the realization of that market.

The SEC first recognized insider trading as illegal in 1961 in the Cady, Roberts decision. That case involved a broker who learned from a colleague and corporate board member of Curtiss-Wright that it was going to reduce its dividend. The news had not yet been made public. The broker, in response to the non-public news, immediately sold shares for his discretionary accounts. The SEC found that this violated Rule 10b-5. It held that before trading, insiders have a duty to disclose material facts which are known to them because of their positions and which the outsiders do not know, but which would affect the outsiders' investment decisions. Unfortunately, the SEC's opinion did little to define under what

241. See the discussion of the characteristics of family, supra notes 77-88 and accompanying text. See also Scheppelle, supra note 25, at 138 (recognizing that the development of anonymous markets makes the development of "regular and permanent" relationships unlikely).

242. See Chiarella v. United States, 445 U.S. 222, 228 (1980) ("The duty to disclose arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'") (quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976)); Dirks v. SEC, 463 U.S. 646, 654 (1983) ("We were explicit in Chiarella in saying that there can be no duty to disclose where the person who has traded on inside information 'was not ... a fiduciary, [or] was not a person in whom the sellers [of the securities] had placed their trust and confidence.'") (citation omitted).


244. See id. at 911.

245. See id.
circumstances people with material, non-public knowledge must either disclose their knowledge or refrain from trading.

Initially, the SEC stated that the obligation derived from:

first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone, and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing.\textsuperscript{246}

This encouraged those analyzing the opinion to think in terms of a theory of equality — that is to say that the obligation to refrain from trading devolved on an insider if he had information that the outsider did not have. In short, the \textit{Cady, Roberts} case could easily be interpreted as creating liability for trading on unequal information.\textsuperscript{247} To allow some people to trade on material information that is not available to others would create a point of inequality that is inconsistent with the equality-based fairness ideal of the market. This flaw could be remedied through insider trading laws either by requiring the sharing of the information or by prohibiting those possessing the information from trading on it.

This emphasis on equality was not without its problems, however, since, if followed through to the fullest, it could create efficiency problems. A prohibition on trading on unequal information, if rigorously enforced, might destroy the market.\textsuperscript{248} In part for this reason, the equal information standard\textsuperscript{249} was rejected by the Supreme Court in \textit{Dirks v. SEC},\textsuperscript{250} when it held that there was no violation of the insider trading prohibition unless the trader had breached a fiduciary duty.\textsuperscript{251} Subsequent cases broadened the idea of duty to include relationships of trust and confidence.\textsuperscript{252} Such a relationship usually evokes images of connection, bonds, dependence, and family. A focus on relationship could be expected to eliminate any need to resolve the potential conflict between equality

\begin{footnotesize}
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\item \textsuperscript{246} Id. at 912 (footnote omitted).
\item \textsuperscript{247} See also \textit{SEC v. Texas Gulf Sulphur}, 401 F.2d 833, 847-52 (2d Cir. 1968) (basing the insider trading prohibition on the objective of ensuring traders "relatively equal access to material information").
\item \textsuperscript{248} See \textit{supra} notes 22-23, 231-32 and accompanying text.
\item \textsuperscript{249} See also \textit{supra} note 25 (proposing that equal access to information, not equal information, should be the principle behind insider trading law).
\item \textsuperscript{251} See \textit{Dirks v. SEC}, 463 U.S. 646, 654 (1983).
\item \textsuperscript{252} See, e.g., United States v. Chestman, 947 F.2d 551, 566 (2d Cir. 1991).
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and efficiency by deflecting attention from the structure of the market itself to the nature of the relationship required to invoke the insider trading prohibition.²⁵³

Courts repeatedly restate the Chiarella and Dirks requirement that there must be a relationship between the inside trader and the firm in whose shares he is trading, thus establishing this as a critical element of an insider trading case. However, given the inherent tension between the ideal market with its autonomous actors and the required relationship with its family connotations, it is not surprising that they have tended to gloss over any articulation of what counts for the establishment of such a relationship. This trend began in the Dirks case itself with its famous footnote fourteen which describes how someone without a previously existing relationship to the shareholders of the firm in whose shares he is trading could be considered an “insider” with a fiduciary duty under Rule 10b-5. The Court said,

Under certain circumstances . . . [the] outsiders may become fiduciaries of the shareholders. The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes . . . . For such a duty to be imposed, however, the corporation must expect the outsider to keep the disclosed nonpublic information confidential, and the relationship at least must imply such a duty.²⁵⁴

Thus, it would appear from this that in order for an “outsider” to become an insider under footnote fourteen, four conditions must be satisfied. He must have entered into a “special confidential relationship” concerning the “conduct” of the business; he must have been given access to the information “solely” for corporate reasons; he must be expected to keep the information confidential; and, the relationship must imply a duty to do so. The first and last of these requirements relate to the needed relationship, but neither describes it in any detail. Footnote fourteen leaves it to subsequent cases to do so.

Nevertheless, subsequent cases have not done so. For example, in SEC v. Maio, the Seventh Circuit affirmed a judgment against

²⁵³. See Olsen, supra note 45 (describing how strategies for reforming the market often involve ideas associated with the ideal of family).
tippees of a corporation's president.\textsuperscript{255} The court does not discuss what makes a corporate president an insider but, rather, simply takes for granted that he is. Although most people would expect a corporate president to be considered an insider, it would have been helpful if the court had identified the factors that made him so.\textsuperscript{256} Instead the \textit{Maio} court made liability dependent on the \textit{purpose} of the disclosure. The purpose was considered inappropriate if corporate information was used for personal reasons: "This test reflects the purpose of insider trading rules, which is to prevent the use of inside information for personal advantage."\textsuperscript{257}

In discussing purpose, the court was responding to the \textit{Dirks} rule that tipping is in breach of a fiduciary duty only if it is for the tipper's personal benefit. In \textit{Dirks}, this investigation of personal benefit is not supposed to occur in the place of a consideration of the nature of the underlying relationship but should, rather, supplement it. Despite the Supreme Court's mandate that the ethics of a relationship are crucial to liability under Rule 10b-5, the court in \textit{Maio} did not undertake any such discussion.

Furthermore, in several cases in which the trader or source of the tip serves as a consultant to the firm, the courts are quick to assume that this is also an "insider's" position. In \textit{SEC v. Gaspar},\textsuperscript{258} the court found that an employee of a brokerage firm negotiating on behalf of an acquiring firm had become a "temporary insider" merely by virtue of the expectation that he would keep confidential the corporate information that he had acquired.\textsuperscript{259} In doing so, the court's analysis satisfied two of the \textit{Dirks} requirements: he was given the information for corporate reasons, and he was expected to keep it confidential. The \textit{Gaspar} court never

\textsuperscript{255} 51 F.3d 623 (7th Cir. 1995).
\textsuperscript{256} For example, one could imagine the president of a closely-held corporation who had been frozen out of power, but retained the title. If she overheard and traded on nonpublic information derived from two shareholders who were currently part of the majority, would she have violated the insider trading rules?
\textsuperscript{257} \textit{Maio}, 51 F.3d at 632.
\textsuperscript{258} \textit{SEC v. Gaspar}, No. 83 Civ. 3037, 1985 WL 521 (S.D.N.Y. Apr. 16, 1985). \textit{See also} \textit{SEC v. Downe}, No. 92 Civ. 4092, 1993 WL 22126 (S.D.N.Y. Jan. 26, 1993) (alleging that the defendant, the leader of a potential investor group, acted in breach of his fiduciary duties to the corporation, which is sufficient without any discussion of the derivation of the fiduciary duty); \textit{SEC v. Ingram}, 694 F. Supp. 1437 (C.D. Calif. 1988) (regarding the defendant, a broker, who located a merger partner for a firm in whose shares he traded). In \textit{Ingram}, the court does note three facts which evidence a special relationship between Ingram and the firm, but the court does not say why these facts create a special relationship. \textit{See id.} at 1440.
\textsuperscript{259} \textit{See Gaspar}, 1985 WL 521, at *16.
considered whether there was a "special confidential relationship" or whether the relationship, by its nature, "impl[ied] . . . a duty."\footnote{260}

Similarly, in SEC v. Lund,\footnote{261} the court found Lund to be a temporary insider based on the Dirks footnote fourteen. Lund was a friend of Horowitz, the chief executive of P&F, a corporation in whose shares Lund ultimately traded. Horowitz had given Lund inside information in hope of inducing him to invest in P&F. In holding the defendant liable, the court noted that Horowitz and Lund were "long time friends and business associates" and that Horowitz told Lund of the investment possibility "because of this special relationship."\footnote{262} It went on to say, "The information was made available to Lund solely for corporate purposes. It was not disclosed in idle conversation or for some other purpose."\footnote{263} The court also noted that Horowitz expected the information to be kept confidential.\footnote{264} The court here covered the same two of the four bases established in the Dirks footnote that the Gaspar court did. Again, the court did not show that there was a "special confidential relationship" concerning the "conduct" of the business or that such a relationship with the business implied a duty to keep the information confidential. In short, the court confused Lund's personal relationship with Horowitz with the required relationship between Lund and the business.\footnote{265} The result is that the court managed to find Lund liable without elaborating at all on his relationship with the business.

Despite the Supreme Court's effort to make the presence of a "special relationship" the critical factor in determining whether there is insider trading, the lower courts have focused their attention elsewhere. As the above cases show, they have emphasized the expectation of confidentiality that accompanied the delivery of the information. This means that, although the Supreme Court tried to eliminate "equality of information" as an issue

\footnote{261. 570 F. Supp. 1397 (C.D. Cal. 1983).}
\footnote{262. Id. at 1403.}
\footnote{263. Id.}
\footnote{264. See id. See also Ingram, 694 F. Supp. 1437 (noting that the firm's president expected the merger consultant to keep negotiations confidential).}
\footnote{265. It is understandable that this confusion should occur because the underlying theory is that a trader can trade on inside information to his heart's content, consistently with the norms of the market, unless there is a relationship. Once there is a relationship, one automatically thinks in terms of the family in which the norms include caring for one another. Not surprisingly, the court, in thinking about relationships and duties to others, thought in terms of family and friends, instead of thinking in terms of the market in which duties are not normally owed. Cf. infra text accompanying notes 299-302 (explaining that a personal relationship does not create a duty).}
in insider trading cases, the idea has reentered the analysis through the back door with the concept of confidentiality. If the information is to be kept confidential, if others' access to it is restricted, then there is a violation of the insider trading law if one trades on it. In this way, the requirement of a relationship silently reinstates the norm of trader equality. Without saying so, this requirement recognizes the importance of at least one form of equality of access to information. In doing so, it reinforces the importance of the female-associated norm of equality. Thus, this requirement, which originally appeared to take the focus off of the tension between the norms of equality and efficiency, now serves as a surrogate for reinforcing the importance of equality of information as a standard.

Similarly, it turns out that equal access to information becomes a crucial concept in cases in which a shareholder in a closely held corporation wants to sell shares back to the corporation. In Aschinger v. Columbus Showcase Co., plaintiff and defendant were the two surviving members of the second generation of a family that owned the company. When the plaintiff retired, the defendant proposed that plaintiff sell his voting common stock to members of the third generation. Plaintiff did so without negotiating over the price. Six years later, when the defendant retired and sold his shares to his sons, he received a price that was more than 600% of what the plaintiff had received. Plaintiff sued, claiming that he had trusted his brother and, therefore, had not negotiated over price.

The court rejected the plaintiff's argument that because the defendant, at the time of the sale of plaintiff's shares, was still active in the business and more knowledgeable about the price of the shares, he owed the plaintiff a fiduciary duty. The court does not reject the idea that special knowledge would create a duty. Instead, it denied that the defendant had more information than the plaintiff. Repeatedly it asserted that the plaintiff and defendant had equal access to corporate information.

Camp v. Dema is another case involving the sale of shares of a closely held corporation in which the court determines whether

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266. 934 F.2d 1402 (6th Cir. 1991).
267. See id. at 1407 ("Both plaintiff and defendant were corporate insiders, who had equal access to information. ... Plaintiff ... held a position commensurate with that of defendant and had equal access to all the relevant information ... .") See also id. at 1408 ("A fiduciary relationship cannot be predicated on one party's allegedly superior knowledge of the facts surrounding a transaction when the relevant facts are readily available to both parties.").
268. 948 F.2d 455 (8th Cir. 1991).
there is a relationship of trust and confidence between the defendant and the plaintiff by looking at the information available to each of them. Camp and Dema were both directors and employees of the firm. When matters deteriorated between them, Camp’s employment was terminated and he agreed to sell back his shares. While those negotiations were underway, Dema began negotiations with a third party to sell the firm. The sale of Camp’s shares was completed without Camp learning of the possible sale of the firm. Once Camp learned of the potential sale, he sued, naming another director, Kidder, as an additional defendant. The court recognized that in order to determine whether Kidder had breached a duty to Camp in not disclosing the potential sale of the firm, it was essential to identify the characteristics of Kidder’s relationship to Camp. Again, access to information served a crucial role. The court found that Kidder’s access to information was no greater than Camp’s, and thus one of the crucial factors in establishing a fiduciary relationship was missing.  

The court’s focus on relationship in Chiarella and Dirks did not make equal access to information irrelevant. The questions of equal access simply became part of the analysis of whether a fiduciary-type relationship existed. Equality remains a crucial factor because it is a fundamental component of the ideology of relations within the market. We imagine markets in their paradigmatic form as involving interactions among equals, and therefore we look for, and find, these ideas of equality in cases involving trading on security markets. When there is equality among the parties to a transaction, the transaction fits easily within the norm for market transactions. Where the parties are not equal, the transaction does not fit our models and is easier to visualize as illegitimate.

The cases discussed above are “traditional” insider trading cases — cases in which the insider has traded on information in breach of a duty owed to the firm in whose shares he traded. The concept of relationship functions much the same in misappropriation cases as in the traditional 10b-5 cases described above. The misappropriation theory was developed primarily by the Second Circuit after the Supreme Court’s holding in Chiarella which found that Chiarella had not violated Rule 10b-5, despite the fact that he had traded with superior knowledge. The theory originated to

269. See id. at 461.
270. See supra notes 58-60 and accompanying text.
272. The misappropriation theory is usually traced to Justice Burger’s dissenting opinion in Chiarella. His concern was with the informational advantage that he believed one could
prevent trading where there was unequal access to information.\(^{273}\)
The misappropriation theory holds a defendant liable for trading on information in breach of a duty to the source of that information. It creates liability even in situations in which the trader owes no duty to the company in whose shares he is trading.\(^{274}\) Under this theory, a person in Chiarella’s position would be held liable for trading on the information received through the employer.\(^{275}\)

Like the traditional insider trading case, the misappropriation theory, as developed by the circuit courts, focuses on the insider’s

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In addition, the court in United States v. O’Hagan, 92 F.3d 612, 621 (8th Cir. 1996), rev’d 117 S. Ct. 2399 (1997), rejected the misappropriation theory because it found it inconsistent with the Supreme Court’s opinions in Chiarella and Dirks. According to the Eighth Circuit’s decision in O’Hagan, “[T]he courts which recognize the misappropriation theory seem to have validated it on the basis of the assumed unfairness of allowing an individual to trade securities on the basis of information which is not available to other traders.” Id.

\(^{274}\) See O’Hagan, 117 S. Ct. at 2203-04. See also United States v. Newman, 664 F.2d 12 (2d Cir. 1981) (involving employees of an investment banking firm trading on information about other firms obtained from their firm); SEC v. Materia, 745 F.2d 197 (2d Cir. 1984) (regarding an employee of a financial printer who traded on information about other firms); United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986) (regarding a Wall Street Journal employee who traded on information about other firms).

The misappropriation theory, as derived from Chief Justice Burger’s dissent in Chiarella v. United States, 445 U.S. 222, 244-45 (1980), focused on the “theft” of the information and the need to disclose that theft to other traders. It was less concerned with a breach of duty to the source of the information than the theory ultimately adopted by the Supreme Court in O’Hagan.

\(^{275}\) See, e.g., SEC v. Materia, 745 F.2d 197 (2d Cir. 1984) (holding liable under the misappropriation theory an employee of a financial printer who traded on information about other firms).
violation of a fiduciary duty or other similar relationship.\textsuperscript{276} Again, one would think that the exploration of the idea of relationship would be essential. As with the traditional insider trading cases, however, courts do not investigate the predicate relationships in any detail. Indeed, the Supreme Court’s decision in \textit{O’Hagan} pays very little attention to what constitutes the necessary relationship, although it reiterates the requirement for that relationship.\textsuperscript{277} The Court variously describes the relationship as that of a “fiduciary\ldots” in breach of a duty of loyalty and confidentiality\textsuperscript{278} and a “fiduciary-turned-trader’s deception of those who entrusted him with access to confidential information.”\textsuperscript{279} \textit{O’Hagan}, himself, is merely said to have breached a “duty of trust and confidence \ldots owed to his law firm.”\textsuperscript{280} Had O’Hagan traded in shares of his law firm’s client, Grand Metropolitan, he could undoubtedly have been held liable for insider trading under the \textit{Dirks} footnote fourteen.\textsuperscript{281} The Court in \textit{O’Hagan} appears to take for granted that O’Hagan had the necessary relationship to his source, however that relationship might be described.

Other courts prior to \textit{O’Hagan} had avoided having to delineate the required relationship by implying that the rules of contract law somehow govern the situation. Many misappropriation cases deal with traders who obtained their information from their employers, but who traded in shares of firms that were targets of the employers’ clients.\textsuperscript{282} In this type of setting, the obligation not to trade on confidential, non-public information can be grounded in the trader’s employment contract. Courts need not rely on or even describe a relationship between the source and the trader in order to provide the basis for insider trading liability. For example, in \textit{United States v. Carpenter}, the court used an entire

\begin{footnotes}
\item \textsuperscript{276} See \textit{United States v. Chestman}, 947 F.2d 551, 566-70 (2d Cir. 1991) (discussing the importance of a fiduciary-type duty).
\item \textsuperscript{277} See \textit{O’Hagan}, 117 S. Ct. at 2207.
\item \textsuperscript{278} Id.
\item \textsuperscript{279} Id.
\item \textsuperscript{280} Id. at 2208.
\item \textsuperscript{281} See supra note 254 and accompanying text.
\item \textsuperscript{282} See \textit{United States v. O’Hagan}, 117 S. Ct. 2199 (1987) (describing a trader who was an attorney in a firm hired by a bidder and subsequently traded in shares of the target); \textit{United States v. Newman}, 664 F.2d 12 (2d Cir. 1981) (involving co-conspirators who were employed by investment banking firms and traded in the shares of companies that were merger or takeover targets of their employers’ clients); \textit{SEC v. Materia}, 745 F.2d 197 (2d Cir. 1984) (concerning a trader who was employed by a financial printer whose clients were in the process of acquiring the targets in which the defendant traded); \textit{SEC v. Musella}, 578 F. Supp. 425 (S.D.N.Y. 1984) (regarding a defendant, an employee of a law firm, who disclosed information concerning targets of firm’s clients to other defendants).
\end{footnotes}
paragraph to discuss the Wall Street Journal's confidentiality policy. 283 Under this policy, employees were required to treat new market information learned by an employee through his or her employment as nonpublic and not subject to disclosure. Although the court in Carpenter sometimes referred to this duty as imposed on the employee because of his or her status as an employee, 284 at other times, the source of the duty was the employee's contract and negotiations with the employer. 285 Similarly, in SEC v. Callahan, the court emphasized that BusinessWeek, and its printer, Donnelley, both had rules requiring the magazine's contents be kept confidential. 286 Although the complaint alleged a breach of a fiduciary duty arising out of a relationship of trust or confidence, this was not really the source of the duty. Instead, the duty is derived from the employment agreement between the employer and the employees, including the confidentiality rules. 287 The employees had assumed this obligation as part of their employment agreement.

Since the obligation was contractually based, the context was clearly that of the market. If competition is not limited contractually, it is permitted and encouraged in the market, although the competitive edge should be gained through "skill, foresight, [and] industry." 288 In contrast, the "secreting, stealing, [or] purloining" of information is prohibited. 289 Within the family, "secreting, stealing, [and] purloining" are also negative terms, but so is competition in general. Thus, from Carpenter and Callahan, the basis of the obligation that the trader owes to the information's source is the trader's contractual, market-based connections to that source. The objection is not to competition but, rather, to taking the information in violation of an agreement not to do so. The trader is prohibited from acting on his special information because he

283. See United States v. Carpenter, 791 F.2d 1024, 1026 (2d Cir. 1986). See also United States v. Libera, 989 F.2d 596, 597-98 (2d Cir. 1993) (detailing a description of the confidentiality policy).
284. See Carpenter, 791 F.2d at 1028 n.5 (discussing the applicability of agency law).
285. See id. at 1031 (discussing the "employer-imposed" duty). See also United States v. Bryan, 58 F.3d 933, 941 n.2 (4th Cir. 1995) (rejecting the misappropriation theory, but upholding a guilty verdict for mail fraud for violating the oath Bryan had signed upon assuming office as director of West Virginia lottery).
287. See also SEC v. Gaspar, No. 83 Civ. 3037, 1985 WL 521, *16 (S.D.N.Y. Apr. 16, 1985) (finding that an employee owed a duty of confidentiality by virtue of employer's explicit policies); SEC v. Clark, 915 F.2d 439, 453 n.26 (9th Cir. 1990) (finding that the absence of a written confidentiality policy did not matter because the employee understood the policy).
288. Carpenter, 791 F.2d at 1031.
289. Id.
bargained away that advantage. In this setting, there is no conflict between the principle of equality and the possibility of unequal information because the opportunity to trade on uniquely known information was specifically relinquished upon assuming employment.

Most courts, however, do not explicitly name the employment contract as the basis of the duty owed to the source. Frequently, courts simply are not clear about the derivation of the duty. In some cases, it appears to be grounded in the employee's obligations as an agent for the employer. For example, in SEC v. Materia, the court notes that an agent is under a duty not to use information that he has acquired during the course of his agency. The court treats this as if it were conclusive of the duty question, but it is not. Materia did not simply use information that he obtained from his employer, a financial printer. Like Chiarella, he had to add a large measure of his own industry to this information in order to make it profitable. Employees are allowed to have businesses on the side, as long as those businesses do not compete with the employers. The court never discussed this issue, but simply assumed that Materia had breached a duty owed by virtue of agency law.

In SEC v. Cherif, the court cited the same section of the Restatement (Second) of Agency that the Materia court had cited. It found Cherif, a former employee, liable for divulging trade secrets. However, Cherif's situation was distinguishable from that of most employees who possess trade secrets because Cherif was not given the confidential information during his employment, but rather stole it after having been terminated from employment. The result was that the court chose equality at the expense of efficiency, but made this choice appear to have been required by the rules of agency law.

In other cases, the courts rely more strongly on the idea of a breach of "trust" between the employer and the employee when the

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290. See SEC v. Materia, 745 F.2d 197, 202 n.4 (2d Cir. 1984) (citing Restatement (Second) of Agency § 359 (1958)).

291. See Restatement (Second) of Agency § 393 (1958) (prohibiting competition as to subject matter of agency, but not prohibiting agent from undertaking other forms of business).

292. SEC v. Cherif, 933 F.2d 403, 411 (7th Cir. 1991). The court specifically rejected the employment contract as a basis for liability. This is because Cherif was no longer employed by the source of his information. He argued that the employment contract only prevented him from using information so long as he remained employed. See id.
employee trades on information obtained from the employer.\textsuperscript{293} This "trust" does not create a relationship over which the parties are likely to have bargained as they are the terms of employment or agency. Indeed, trust is a concept that is often not recognized in the theoretical descriptions of the way market participants interact.\textsuperscript{294} Instead, trust has an organic ring to it. The focus on "trust" moves the basis of the duty outside of the market and toward the realm of family relationships. The notion that employees may be in non-contractually based relationships of trust and confidence vis-à-vis their employers is used to mediate the inherent conflict between the market principles of equality (of information) and efficiency (through competition and the existence of informational inequalities).

The misappropriation cases that ground the duty in the agreement between the employer and the employee recognize that trading on inside information may be permissible under certain circumstances.\textsuperscript{295} This would depend on the agreed upon contractual terms. In contrast, the cases that find the duty to be based in a relationship of trust that one party has reposed in the other do not leave an opening for recognizing the legality of some insider trading. The misappropriation of the information is seen, "to put it bluntly,"\textsuperscript{296} as a theft of information,\textsuperscript{297} and theft is never acceptable. As a result, this understanding of the misappropriation

\textsuperscript{293} In both United States v. Newman, 664 F.2d 12, 16 (2d Cir. 1981), and Materia, 745 F.2d at 201, the opinions claim that the traders "breached the trust and confidence placed in them . . . ." \textit{See also} Cherif, 933 F.2d at 412 ("Cherif betrayed a trust."). Courts often combine these rationales, relying on some combination of employment contracts, agency, and breaches of trust.

Both Newman and Materia also assert that the employers' reputations "as a safe repository for client secrets" have been "sullied" as a result of the defendants' trading. Newman, 664 F.2d at 17; Materia, 745 F.2d at 202. This type of language, that focuses on the trust and confidence that the parties could have expected to have in one another and the "sullying" of the employers' reputations, is reminiscent of the language that was used during the heyday of separate spheres ideology for discussing a man's illicit sexual relationship with a woman who was not his wife. In this way, misappropriation invokes images of women, heterosexual relations, and of the violation of familial relationships.


\textsuperscript{295} See United States v. Carpenter, 791 F.2d 1024, 1031 (2d Cir. 1986) ("There are disparities in knowledge and the availability thereof at many levels of market functioning that the law does not presume to address."). Additionally, Rule 16(b) of the Securities Exchange Act implies that insider trading can be legal so long as the trades are not "short swing" trades.


\textsuperscript{297} See Newman, 664 F.2d at 17 (quoting Chiarella, 445 U.S. at 245 (Burger, J., dissenting)). \textit{See also} Materia, 745 F.2d at 199 ("Materia stole information . . . .").
theory of insider trading is fundamentally at odds with Dirks and Chiarella, which recognize the permissibility of some insider trading even if, as in Chiarella, one person's "trust" in another is thereby violated.298

As long as the fact patterns stuck pretty closely to the patterns of Chiarella, Newman, and Materia, they could be understood as either contractually based or based in agency law with all of its fiduciary aspects and trust connotations. Adding agency law to the contractual basis of the cases added relatively little since contract law was always available as an alternative explanation. Choosing a basis for the prohibition on insider trading was not essential. However, as the courts became faced with fact patterns that did not involve employees using information that was obtained from their employers, it became difficult to view the liability for trading as derived from a contractual relationship. In these cases the courts had to face more closely the question of how they should define "relationship" in misappropriation cases.

This brings us once again to United States v. Chestman,299 and its effort to determine whether the relationship between a husband and wife is one of "trust and confidence." In Chestman, the court articulated a series of rules for determining when such a relationship exits. First, the relationship must be one in which one party entrusts the other with confidences which are accepted as confidences by the other.299 A confidential relationship cannot be unilaterally created. Second, whether a confidential relationship exists turns to two crucial aspects of family relationships under separate spheres ideology: interdependancy and domination.300 The Chestman court, in discussing confidential relationships, noted that an important element is whether "[o]ne person depends on another —
the fiduciary — to serve his interests." A "fiduciary relationship involves discretionary authority and dependency . . . ."

This means that when courts investigate the characteristics of a fiduciary relationship in detail by focusing on domination and dependency, they will end up discussing the same subject that they were trying to excise from the discussion in Chiarella and Dirks. "Equality" reenters the analysis under the guise of a lack of equality. If the court finds that the parties to the relationship are not equal, then the court is one step closer to a finding of insider trading. As in traditional insider trading cases, the focus on relationship returns us to a covert examination of equality. It would be just as unfair to allow those with inside information to trade on that information if it were obtained as a result of non-market based relations (relations of trust and confidence involving domination and dependency) as it would if it were obtained in breach of a fiduciary duty owed to the issuer of the shares.

The Supreme Court's recent opinion in O'Hagan does little to alter this. James O'Hagan was a partner in a law firm which represented a tender offeror. He traded in shares of the target. The case decided the question of the legitimacy of the misappropriation theory, but it did not need to address the issue of what counts as a "relationship of trust and confidence." Nevertheless, the court's emphasis on O'Hagan's "deception of those who entrusted him" with information reinvokes the idea of fairness. Here, "deception" is tied to fairness and to equal access to information in two related ways. First, O'Hagan's conduct is characterized as deceptive in that he did not disclose his trading to the source of his information. Presumably, such disclosure would have had to

302. Chestman, 947 F.2d at 569. See also Reed, 601 F. Supp. at 712 ("[A] confidential relationship will be found to exist in those circumstances in which special confidence has been reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one investing the confidence.").

303. Chestman, 947 F.2d. at 569. See also SEC v. Downe, No. 92 Civ. 4092, 1993 WL 22126, *7 (S.D.N.Y. Jan. 26, 1993) (citing Chestman for the requirement that there must be reliance, de facto control, and dominance in order to have the required relationship of trust and confidence); SEC v. Mayhew, 916 F. Supp. 123, 130 (D. Conn. 1995) (finding no breach of a fiduciary-like relationship between defendant and source of information whose relationship was like "old boy networking" and did not involve control or dominance). Cf. Reed, 601 F. Supp. at 713 (noting that one party's dominance over the other is not necessary to find a confidential relationship).

304. Equality in this context is a significantly broader concept than the limited notion of equal access to information that the Court rejected in Chiarella and Dirks.

305. 117 S. Ct. 2199 (1997).

306. 117 S. Ct. at 2207.

307. The Court specifically noted that the disclosure obligation runs to the source of the information. It recognized that Chief Justice Burger, in his dissent in Chiarella, had
occur prior to the trading, and would have had to receive the source's consent. Since both of these are very unlikely given the confidential nature of the information involved, the "disclosure" requirement actually ensures that trading will occur on a more level informational playing field.

The second way that deception is tied to fairness and equal access to information is in the Court's repeated stress on the goal of the Securities and Exchange Act to secure "honest" markets. Unlike the Court's opinions in Dirks and Chiarella, the O'Hagan Court recognized that honesty in markets is tied to access to information. While it studiously avoided the use of the term "equal access," and while it recognized that "informational disparity is inevitable in the securities markets," it also identified as an evil the fact that "investors likely would hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law." This is an acknowledgment of the importance of ensuring a measure of equality in the access to information. If the information is obtained as a result of a relationship of "trust and confidence," it is particularly unlikely to be accessible to others.

Thus, it may be that O'Hagan will begin the rehabilitation of the equal access approach to insider trading. It may also begin the process of re-masculinizing the ideal of equal access. Justice Ginsburg, in her opinion in O'Hagan, ties the misappropriation theory to the functioning of the market. Not only is the misappropriation theory a legitimate interpretation of the Securities and Exchange Act because it would make the markets fairer, it will also improve their functioning. In the O'Hagan opinion, equality once again becomes a characteristic of the market. If it is known that some market traders have informational advantages that are due to the deceptive misappropriation of information, others will be reluctant to trade. Eliminating such advantages would bring the market

avocated an obligation that ran to those with whom the misappropriator was trading. This broader obligation, however, was not in front of the Court in O'Hagan because the government had not advocated that position. See id. at 2208 n.6. 308. The Court viewed the confidential information as "property," and its misappropriation as similar to embezzlement. See id. at 2208. One who takes another's property embezzles even if the taking is disclosed, although consent would probably be a defense. Thus, disclosure alone should not be enough to legalize insider trading. Consent should be necessary.

310. Id. at 2210.
311. Id.
312. See id. ("[I]nvestors likely would hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law.").
closer to the ideal by increasing the role of research and skill in market success. This would emphasize the autonomy and self-reliance of traders.

Justice Ginsburg's opinion thus serves to reintegrate the values of fairness and efficiency. Since Dirks, the Court has seen efficiency as a component of a well functioning market. Justice Ginsburg showed the role that fairness also plays in the market's functioning. By tying fairness to the market's functioning, she reconnects it with the male world. But O'Hagan was able to make this connection because it did not need to focus on the inside trader's relationship to his source. That relationship was one that was not problematic in the world of the market. Why should it matter to the source of the information, however, if the relationship is market-based or not? Either way, information gathered from a relationship of trust and confidence without disclosure of the intent to trade, and without the source's consent to that trade, will be "the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another." This leaves the Court, after O'Hagan, at an important crossroad. It can retain the relationship-based standard that the lower courts had adopted for limiting the breadth of the insider trading rule and for masking the conflict between the feminized goal of fairness and the masculinized goal of efficiency. To do so would be to undercut the fairness approach of O'Hagan. Or, the Court can continue down the road begun in O'Hagan of trying to integrate the goals of fairness and efficiency into one market. To do this may require it to move beyond the traditional market/family dichotomy.

V. CONCLUSION

Ideas about gender roles, the family, and the market are important to the structure of insider trading law in multiple interconnected ways. First, courts decide cases with reference to these gender roles. Market participants are expected to behave in stereotypically male ways. If it is unclear whether they have actually acted as anticipated when we create assumptions that they have, such as assuming that they act primarily for personal gain. In deciding insider trading cases, courts are willing to make these assumptions because they comport with the image of how men should act in the market. In fact, courts rarely even recognize that

313. See id.
314. Id. at 2208.
they have made any assumptions about motivation. These assumptions not only affect the outcome of insider trading cases, they also contain messages about how men are supposed to act in particular situations.

Similarly, because we understand the male realm of markets in opposition to the female realm of family, it would be anomalous to apply insider trading law to situations that we see as familial instead of as pertaining to the market. The result, as in Chestman,\(^{315}\) can be a rather tortured reading of past cases and present facts, in an effort to conceive of the familial setting as outside of the doctrinal requirements for liability under Rule 10b-5. Exactly where we draw the line between market and family is not crucial. Rather, what is important to keeping the two realms separate is that there be a line.

A gender-conscious analysis is also important because it allows us to identify issues in insider trading law that might otherwise appear to have been resolved. For example, Dirks and Chiarella appeared to have resolved the struggle between equal access and efficiency norms in favor of efficiency and against equal access. A focus on gender causes us to recognize that the idea of relationship is usually tied to families, not markets with their autonomous participants free of obligations to each other. “Relationship” appears out of place as a crucial concept in insider trading law.\(^{316}\) A gender-conscious approach to insider trading law signals that the misplaced concept should be investigated. Because of this, we are driven to ask how “relationship” is defined. Does its definition somehow redefine it in terms of the market instead of the family?

The study of relationship disclosed that the courts’ concern was primarily with questions of equal access to information, and that this had been rearticulated as a determinate of “relationship” in both traditional and misappropriation insider trading cases. A gender-conscious analysis allows us to understand and expect this. Equality is a characteristic associated with male-identified markets, not with the family. It is part of our ideal of the market. Banishing it entirely from the market would require an eventual reconstruction of that ideal. Since that does not appear to be happening, a gender-conscious analysis allows us to predict that the norm of equality will reappear in insider trading analysis, but perhaps under some other dress.

\(^{315}\) United States v. Chestman, 947 F.2d 551 (2d Cir. 1991).
\(^{316}\) Cf. MARY DOUGLAS, PURITY AND DANGER 2 (1966) (describing how dirt offends against order).
A gender-conscious analysis also allows us to predict that the meaning of "relationship" will continue to be grounds for struggle in insider trading law. *O'Hagan,* while somewhat reinstating the importance of fairness in insider trading law, did relatively little to define further the term "relationship." It left unresolved what the law of insider trading will be in situations like *United States v. Bryan.* In *Bryan,* the defendant traded on information that came from his employer, the West Virginia Lottery. *Bryan,* decided prior to the Supreme Court's decision in *O'Hagan,* rejected the misappropriation theory. Thus, it did not have to decide whether the misappropriation theory applied to breaches of relationships with those who were not in the market, or only to breaches of relationships with market participants. The Supreme Court in *O'Hagan* barely mentioned *Bryan,* leaving unresolved the question of how it would have been decided. Similarly, its discussion of section 10b mentioned *Chestman* only to note that several Circuit Courts of Appeal had adopted the misappropriation theory.

Thus, the question remains as to whether post-*O'Hagan* courts will draw the lines as to what constitutes actionable insider trading in the same place as the earlier courts had. A gender-conscious analysis allows us to predict that wherever the line is drawn, the determining factors will draw more on the question of access to information, and less on the quality of the trader's relationship with the source. The actual quality of the relationship cannot be investigated without delving into a series of emotional issues that are likely to resonate as female-identified or connected to ideals of the family. In contrast, focusing on the availability of information implicates the norm of equality, which can be returned to its original position as a male-identified market norm. This would make it appropriate for consideration in a market context.

*O'Hagan* creates an opportunity to reexamine the direction of insider trading law. We can continue along the old course, using relationship as a defining aspect of whether there has been an actionable breach of an insider's duty to disclose or abstain. This is likely to lead to a hardening of the line between markets and families, and a continued inability to talk openly about the role of equal access to information in discussing insider trading cases.

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317. 58 F.3d 933 (4th Cir. 1995) (rejecting the misappropriation theory).


Determinations of whether the required relationship exists would then turn on questions of expected confidentiality or domination. In the past, the former has served as a surrogate for a covert investigation of the ready availability of the information to other traders, while the latter has been mentioned and then ignored or rejected.\textsuperscript{320}

In contrast to this direction taken in the past, \textit{O'Hagan} creates the opportunity to begin a discussion of the role of equality of access to information in the securities markets. Unlike the discussion prior to \textit{O'Hagan}, which focused on the availability of the information to the insider and the individual with whom he traded, the post-\textit{O'Hagan} discussion can focus openly on access to information as it affects outsiders' perceptions of fairness and their confidence in the integrity of the market. Under this standard, \textit{Dirks} is an easy case. It is unlikely that market participants who do not pay for a market analyst's advice would expect to be in as good a position as those who do, even if the advice comes on subjects other than those for which they have specifically paid. \textit{Chestman} might be just as easy a case for finding liability since, presumably, traders would not have a lot of confidence in the market if the families of insiders were able to trade on information not available to them. Perhaps this is just a matter of asking what the outsider would have to do to obtain the information. Legal payments do not seem out of order while marrying for information does.

One important aspect of this analysis is that it would not draw a firm line between family and market in the way that the \textit{Chestman} court did. An even more crucial aspect of the analysis, however, is to remain conscious of the ways in which gender will become reinscribed on any new decisional criteria if we are not careful. For example, is differentiating between payment and marriage as a means of gaining access to information just another means of reiterating the market/family dichotomy? It will be hard work to define what makes investors confident about markets without recourse to this dichotomy.

Once we have overtly addressed the issue of equal access to information, the trader's relationship with his source or employing firm may no longer appear crucial. We may see it in its traditional garb of a family-connected idea in the realm of the market. But, perhaps the courts will believe that a violation of the norms of a particular relationship is a means of obtaining unequal access to

\textsuperscript{320} See \textit{supra} notes 148-57 and accompanying text (addressing the courts' discussion of domination in \textit{Chestman} and \textit{Reed}).
information. In that case, the nature of the relationship itself will have to be investigated. This would be a revolutionary move in that it would require the true investigation of a family-connected subject in the realm of the market. It would immediately, but perhaps only momentarily, destroy the border between markets and family. To do this, we would need to ask questions about the details of the relationship. Was Susan Loeb really dependent on Keith in financial matters? Would he be undermining her interests by trading? What about the relationship between the father and son in Reed? Is there any reason for these cases to come out differently? Similarly, was the relationship between Ronald Secrist and Equity Funding one that was close enough to create an implied understanding that there would be no disclosure of the information? Here again, we need to be careful of how the dichotomy between market and family influences our thinking. Are we quicker to understand the relationship as barring disclosure or self-advancement when it is familial than when it is a business relationship?

In sum, a gender conscious analysis would lead us to reconsider our approach to both relationships and access to information in deciding insider trading cases. In doing so, it would remind us that we must continually challenge the reinscription of gender dichotomies on the law.

Furthermore, constant interrogation would cause us, over time, to alter aspects of the definitions of family and market, and with them, aspects of the associated, prescribed gender roles. Insider trading law, as we have seen, plays a part in restating the definition of family. Despite recent occasional indications that the definition of family may be broadening elsewhere in the law,\textsuperscript{321} insider trading law, like much of the rest of society, continues to define it narrowly and to premise it on a heterosexual marriage.\textsuperscript{322} In this way, insider trading law plays a role in reinscribing a conservative social definition of family. This function of insider trading law is

\textsuperscript{321} See, e.g., Braschi v. Stahl Assocs., 543 N.E.2d 49 (N.Y. 1989) (defining "family" in rent control laws as including unmarried lifetime partners, not just those connected by blood or law); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (requiring the state to show compelling state interest for limiting marriage statute to heterosexuals); Baehr v. Miike, 910 P.2d 112 (Haw. Cir. Ct., Dec. 3, 1996) (finding that the state had failed to demonstrate a compelling state interest).

\textsuperscript{322} The furor created by Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), is an indication of how important the idea of heterosexual marriage remains to this society's definition of family. See also 28 U.S.C.A. 1738C (relieving states of full faith and credit obligation as to same sex marriages); 1 U.S.C.A. 7 (defining marriage for Acts of Congress or federal regulations as the "legal union between one man and one woman as husband and wife . . . ").
largely unrecognized, because in the absence of a gender conscious analysis of insider trading, it is invisible.

Thus, markets and families are intricately connected. Defining one defines the other. Insider trading law today is premised on retaining the difference between markets and families, men and women. As gender roles are redefined over time, insider trading law can also be expected to change. It is both defined by gender categories and has a part in defining those categories. As a result, it is unlikely that the courts will ever articulate a stable definition of insider trading. Conscious attention to the influence of gender, however, will allow courts to recognize that influence for what it is, and to reformulate doctrine so as to question the effects of arbitrary gender stereotypes. In doing so, courts dealing with questions about insider trading will necessarily be reformulating our most intimate notions about family and familial relationships.