Securities Exchange Act of 1934 — Insider Trading — Tippee Liability — Salman v. United States

The complex crime of insider trading — and the government's ability to prosecute those who would profit from confidential information — has relatively simple statutory roots: the Securities Exchange Act of 1934's section 10(b), which bans the "use . . . in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device."[1] From these humble origins has sprung an intricate doctrine that must protect everyday shareholders while still encouraging the collection and dissemination of market information by analysts and others. This elaboration of section 10(b) has occurred in the face of congressional silence; thus the doctrine has been shaped by agency rulemaking[2] and enforcement,[3] as well as by judicial interpretation. The Supreme Court has played a particularly prominent role in defining the crime of insider trading.[4] Last Term, in *Salman v. United States*,[5] the Supreme Court reaffirmed its longstanding "personal benefit" test for "tippee" liability — tippees being traders acting on disclosures of material nonpublic information made by insiders.[6] Though the decision was unsurprising given its alignment with clear precedent,[7] the narrow resolution of the case represents a missed opportunity to clarify a murky doctrine.

Bassam Salman's case began with his brother-in-law, Maher Kara, who worked at Citigroup as an investment banker focused on the healthcare industry.[8] As a result of his position at the bank, Maher had access to confidential information regarding mergers and acquisitions in the industry and disclosed much of this information to his brother Michael, who was a friend of Salman.[9] Though the information sharing was initially relatively innocuous — Maher sought guidance on the basis of Michael's chemistry expertise, and the two discussed firms researching cancer treatments after their father came down with the disease — Michael eventually began trading on the information disclosed by his brother.[10] Though Maher was at first oblivious to his

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[1] 15 U.S.C. § 78j(b) (2012).

[2] Most prominent is the SEC's Rule 10b-5. *See* Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (2017).

[3] *See* A.C. Pritchard, Essay, *The SEC, Administrative Usurpation, and Insider Trading*, 69 STAN. L. REV. ONLINE 55, 55 (2016).

[4] *See generally* Donna M. Nagy, Essay, Salman v. United States*: Insider Trading's Tipping Point?*, 69 STAN. L. REV. ONLINE 28, 29–31 (2016) (describing the "legal fictions," *id.* at 30, created by the Court over time to better define the crime).

[5] 137 S. Ct. 420 (2016).

[6] *See id.* at 423, 429; *see also* Dirks v. SEC, 463 U.S. 646 (1983) (establishing the test).

[7] *See, e.g.*, Nagy, *supra* note 4, at 28.

[8] *Salman*, 137 S. Ct. at 424.

[9] *Id.*

[10] *Id.*

brother's transactions, he soon learned of the trading and "began to assist" his brother through intentional disclosures of confidential information.[11] What Maher did not know was that his brother had been passing along the information to other friends, including Salman.[12] Trading on this information himself, Salman made over $1.5 million in profit before investigators uncovered the scheme.[13]

Salman was indicted and charged in the Northern District of California with four counts of securities fraud and one count of conspiracy to commit securities fraud.[14] A jury convicted Salman on all counts, and he was sentenced to thirty-six months in prison and ordered to pay over seven hundred thousand dollars in restitution.[15] After unsuccessfully moving for a new trial, Salman appealed.[16]

While his appeal was pending, the Second Circuit decided *United States v. Newman*.[17] That decision narrowed the scope of liability for tippees in insider trading cases — liability that the Supreme Court had established over three decades earlier in *Dirks v. SEC*.[18] Whereas under *Dirks*, the government had needed to prove only that the tipper "personally benefit[ted]" from disclosing nonpublic information,[19] the Second Circuit held in *Newman* that insider trading liability required more.[20] Specifically, the government needed to show "proof of a meaningfully close personal relationship" between the tipper and the tippee "that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."[21] Salman argued that the Ninth Circuit should follow *Newman*, which on his reading required more than merely evidence of a family connection.[22] According to Salman, the government had needed — and had failed —

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[11] *Id.*
[12] *Id.*
[13] *Id.* Salman was splitting these profits with a relative who executed the trades. *Id.*
[14] *Id.* at 424–25.
[15] *Id.* at 425.
[16] *Id.*
[17] 773 F.3d 438 (2d Cir. 2014).
[18] 463 U.S. 646 (1983).
[19] *Id.* at 664.
[20] *Newman*, 773 F.3d at 452.
[21] *Id.* *But see* United States v. Salman, 792 F.3d 1087, 1093 (9th Cir. 2015) (disagreeing with *Newman*). *Newman* involved the prosecution of two hedge fund investors who were at the ends of two long chains of tippers: insiders at technology firms had passed along confidential information to market analysts, who had in turn shared the information with their portfolio managers, including the defendants. *Newman*, 773 F.3d at 442–43. The Second Circuit found that the government had proffered insufficient evidence to support a finding either that the tippers had received any personal benefit from the provision of information, or that the tippers and defendants had the "meaningfully close personal relationship" needed to infer a personal benefit. *Id.* at 452.
[22] *Salman*, 792 F.3d at 1093.

to produce evidence showing the type of monetary gain, potential or otherwise, contemplated by *Newman*.[23]

The Ninth Circuit, however, rejected *Newman* and affirmed Salman's conviction.[24] Writing for the panel, Judge Rakoff[25] began by finding that Salman had not waived his sufficiency-of-the-evidence argument.[26] Turning, then, to the merits of the sufficiency claim, Judge Rakoff noted that the personal benefit requirement in *Dirks* is met not only when the tipper receives monetary gain, but also "where an 'insider makes a gift of confidential information to a trading relative or friend.'"[27] To the court, this "holding of *Dirks* govern[ed]" *Salman*.[28] Maher had testified that he intended to "benefit" Michael by disclosing the confidential information, making his actions "precisely" the type of conduct *Dirks* intended to proscribe.[29] And Salman knew that Maher was the original source of the information and could infer that Maher's disclosures were meant to benefit Michael, as he and Maher were quite close.[30] Accordingly, it was clear the jury had sufficient evidence to convict Salman.[31]

Judge Rakoff then addressed *Newman* directly. Given the "clear holding of *Dirks*" that a range of personal benefits satisfied its test, Judge Rakoff found *Newman* to be an impermissible departure from precedent.[32] And if *Newman* were to govern, insider trading could go unpunished so long as the tipper did not ask for any material benefit in exchange for the tip.[33] Rejecting such an outcome, Judge Rakoff reasserted the *Dirks* standard.[34]

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[23] *Id.*

[24] *Id.*

[25] Senior Judge Rakoff was joined by Judges Christen and Watford. Judge Rakoff was sitting by designation from the Southern District of New York.

[26] *Salman*, 792 F.3d at 1090. Though failure to include an argument in an opening brief is ordinarily grounds for waiver, Salman's omission was overlooked because his "failure to raise the issue properly did not prejudice the defense of the opposing party," as both parties briefed the issue and addressed it at oral argument. *Id.* (quoting United States v. Ullah, 976 F.2d 509, 514 (9th Cir. 1992)).

[27] *Id.* at 1093 (quoting Dirks v. SEC, 463 U.S. 646, 664 (1983)).

[28] *Id.* at 1092.

[29] *Id*. Maher had testified at great length as to his closeness with Michael, including specifically how he shared the confidential information so as to "benefit [Michael] . . . with the expectation that [Michael] would trade on it." *Salman*, 137 S. Ct. at 424.

[30] *Salman*, 792 F.3d at 1092. Michael testified that after befriending Salman, he always passed along Maher's tips. *Salman*, 137 S. Ct. at 425. Michael also testified that he had told Salman that Maher was the source of the information. *Id.*

[31] *Salman*, 792 F.3d at 1094.

[32] *Id.* at 1093 (citing *Dirks*, 463 U.S. at 664).

[33] *Id.* at 1094.

[34] *Id.* ("Proof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is sufficient to establish the breach of fiduciary duty element of insider trading."). Separately, Judge Rakoff rejected Salman's appeals regarding evidentiary issues at his trial, including claims that admission of a prejudicial interview violated his Confrontation Clause

After Salman appealed,[35] the Supreme Court affirmed.[36] Writing for a unanimous Court,[37] Justice Alito found that the Ninth Circuit had correctly applied the *Dirks* test.[38] Salman had raised three challenges to the Ninth Circuit's personal benefit formulation: First, he argued that the *Dirks* personal benefit test requires evidence that the tipper sought "to obtain money, property, or something of tangible value."[39] Second, he raised a more general concern that if the personal benefit test is satisfied by a broadly defined "gift," the crime of insider trading becomes unconstitutionally vague.[40] Finally, Salman contended that the constitutional implications of gift-based prosecutions are "especially troubling . . . for remote tippees" who are less likely to know the relationship between the original tipper and tippee and therefore less likely to know the reason for the original disclosure.[41]

Nonetheless, Justice Alito found that *Dirks* "easily resolve[d]" the case.[42] Justice Alito pointed to the *Dirks* Court's framing of the personal benefit test, noting that while the Court emphasized the role of objective facts in determining the existence of a personal benefit, it also specified that a tipper breaches a fiduciary duty by making a gift to a friend or relative.[43] To Justice Alito, the *Dirks* holding encapsulated precisely the conduct before the Court, and thus *Dirks*'s "rule [was] sufficient to resolve the case at hand."[44] The Court pointed out the incongruity that would arise if Salman's rule were to be upheld: while the law clearly prohibits an insider from trading on nonpublic information and then passing along the profits to a relative, an insider could avoid such liability by passing the information along to the relative and letting him conduct the trades.[45] For insider trading enforcement to function, then, *Dirks* must be read to include the latter scenario and, accordingly, the conduct at issue in *Salman*.[46] Justice Alito also briefly addressed the circuit split: the Court "agree[d] with the Ninth Circuit" that any reading

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rights and the Rules of Evidence, and that a jury instruction regarding "deliberate ignorance" was given in error. *See* United States v. Salman, 618 F. App'x 886, 888–91 (9th Cir. 2015).

[35] *See* Salman v. United States, 136 S. Ct. 899 (2016) (granting certiorari on the personal benefit question).

[36] *Salman*, 137 S. Ct. at 429.

[37] Justice Gorsuch had not yet joined the Court at the time of the decision.

[38] *Salman*, 137 S. Ct. at 424.

[39] *Id.* at 426.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 427.

[43] *Id.* (quoting Dirks v. SEC, 463 U.S. 646, 664 (1983)).

[44] *Id.*

[45] *See id.* at 428.

[46] *Id.* at 427–28.

of *Newman* that required proof of a monetary benefit must be "inconsistent with *Dirks*."[47]

Finally, Justice Alito rejected Salman's vagueness argument, finding that Salman had failed to show "that either § 10(b) itself or the *Dirks* gift-giving standard 'leav[es] grave uncertainty about how to estimate the risk posed by a crime.'"[48] Though he acknowledged that "even clear rules 'produce close cases,'"[49] Justice Alito held that *Dirks*'s "simple and clear" test for tippee liability fell short of unconstitutional vagueness in Salman's case.[50] Indeed, Salman's case was "in the heartland" of the conduct contemplated by *Dirks*: the Court did not need to tackle the "difficult" cases in deciding Salman's.[51] The Court thus affirmed the Ninth Circuit's judgment.[52]

The Court's holding was unsurprising, as Salman's trades do seem to fall squarely within *Dirks*'s "heartland";[53] the narrowness of the Court's unanimous opinion, however, means the case must be viewed as a missed opportunity. Insider trading doctrine has developed inconsistently: from its limited statutory roots, the doctrine has evolved through SEC enforcement and Supreme Court intervention. The result — especially in the tipper-tippee context — is a liability standard that fits awkwardly within traditional conceptions of fiduciary duty and leaves sufficient ambiguity to frustrate the SEC and market participants alike. In *Salman*, the Court had a variety of paths through which it might have helped to resolve at least some of this uncertainty. Yet the Court took none of these paths, affirming the status quo and leaving the doctrine to muddle on.

The complex modern doctrine of insider trading can be traced to *In re Cady, Roberts & Co.*,[54] an SEC enforcement action against a brokerage partner who had disclosed nonpublic information to other members of his firm. The SEC's ruling in that case established a wide-ranging crime, the elements of which were "conspicuously absent" from both the statute and Rule 10b-5.[55] The SEC's vision was based on what is known as the "parity of information" theory of insider trading, by which

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[47] *Id.* at 428. Justice Alito also addressed Salman's argument that "many insider-trading cases . . . involved insiders who personally profited through the misuse of trading information," whereas evidence of such a profit for Maher was absent in Salman's case. *Id.* To Justice Alito, such an "observation does not undermine the test *Dirks* articulated and applied." *Id.*

[48] *Id.* (quoting Johnson v. United States, 135 S. Ct. 2551, 2557 (2015)).

[49] *Id.* at 429 (quoting *Johnson*, 135 S. Ct. at 2560).

[50] *Id.* at 428–29. Justice Alito also noted the rule of lenity was inapplicable to Salman, as he had failed to show the kind of "grievous ambiguity" required to invoke the rule. *Id.* at 429 (quoting Barber v. Thomas, 560 U.S. 474, 492 (2010)).

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] 40 S.E.C. 907 (1961).

[55] Pritchard, *supra* note 3, at 57.

anyone in possession of material nonpublic information must disclose that information to the public or refrain from trading.[56]

The Supreme Court's centrality in shaping the doctrine began shortly thereafter in *Chiarella v. United States*,[57] when it rejected this parity approach in favor of one focused on the breach of a duty.[58] The Court's mission since has been to define the exact contours of the duty breached when insider trading occurs. In *Chiarella*, the Court took its first crack at defining the doctrine by announcing what has come to be known as the "classical" theory[59]: the relevant breach was one of fiduciary duty, wherein the insider had failed to disclose material information and thus had breached a duty of "trust and confidence" owed to the shareholders on the other side of a trade.[60] *Dirks*, decided three years later, further narrowed the category of defendants subject to the relevant fiduciary duty. In *Dirks*, the defendant had received a tip from a whistleblower exposing a large-scale fraud, prompting him to inform both the media and other investors of the tip.[61] After the tipped-off investors sold their shares of the fraudulent company and the share price collapsed, an SEC investigation of Dirks led to a guilty verdict.[62] The D.C. Circuit affirmed that Dirks had breached his duty to disclose by not revealing the fraud to the public or refraining from trading.[63] The Supreme Court, however, disagreed: insiders could breach their fiduciary duties only if they received personal benefits from their disclosure.[64] A disclosure of material nonpublic information without receipt of such a benefit did not trigger the requisite breach of fiduciary duty.[65]

The classical theory as expounded in *Chiarella* and applied to the tippee context in *Dirks* stood alone for nearly fifteen years, until the Supreme Court endorsed a companion vision of the relevant fiduciary duty — known as the "misappropriation" theory — in *United States v.*

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[56] *See* Donna M. Nagy, *Beyond* Dirks*: Gratuitous Tipping and Insider Trading*, 42 J. CORP. L. 1, 10 (2016).

[57] 445 U.S. 222 (1980). The Supreme Court's first intervention into insider trading actually occurred soon after *Cady, Roberts* in *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963), but there the Court endorsed the SEC's view. *See id.* at 195; *see also* Pritchard, *supra* note 3, at 58.

[58] *Chiarella*, 445 U.S. at 230, 235.

[59] *See generally* Nagy, *supra* note 56, at 10–13.

[60] *Chiarella*, 445 U.S. at 228; *see also* Zachary J. Gubler, Essay, *Reframing* United States v. Salman, 165 U. PA. L. REV. ONLINE 1, 3 (2016).

[61] Dirks v. SEC, 463 U.S. 646, 649–50 (1983).

[62] *See id.* at 650–51.

[63] *See id.* at 652.

[64] *Id.* at 663–64. The tippee must also have known of the breach to be liable. *Id.* at 660.

[65] *Id.* at 663–64; *see also* Nagy, *supra* note 56, at 11. In dissent, Justice Blackmun took issue with the personal benefit test, emphasizing that the duty had nothing to do with the insider's motives (to personally gain, for example) and everything to do with the insider's "actions and their consequences on the shareholder." *Dirks*, 463 U.S. at 674 (Blackmun, J., dissenting).

O'Hagan.[66] There, the Court held insider trading liability accrued where the defendant had "misappropriate[d] confidential information for securities trading purposes, in breach of a duty owed to the source of the information."[67] Thus the breach of this duty, too — not just that owed to shareholders by insiders — could serve as the basis for insider trading liability.[68]

The Court's trilogy of insider trading cases has left a muddled doctrine in its wake, with *Dirks* fitting particularly awkwardly into the fiduciary framework. Even accepting the fiduciary duty–based liability standard for tippees — itself a stretch — the personal benefit test is both poorly defined and a non sequitur within the doctrine.[69] The misappropriation theory of *O'Hagan*, meanwhile, would seem to obviate the need for such an awkward accommodation; the competing theories and their uncertain applications, moreover, leave a great deal of uncertainty over how and when liability attaches for market participants and regulators.

The cause of this doctrinal confusion could well be timing: the misappropriation theory was developed only in the aftermath of *Dirks*, where the Court — and Justice Powell, the author of the *Dirks* majority opinion — were bound to the strict confines of *Chiarella*'s conception of insider trading as fundamentally a breach of the fiduciary duty of "trust and confidence" owed to shareholders.[70] The *Dirks* Court, as Professor Donald Langevoort notes, had to "fiduciarize" tippees in some way, as a tippee owed no obvious fiduciary duty to other shareholders.[71] And from that exercise emerged the personal benefit test, a means to establish that "the actions of tipper and tippee are knit together closely enough to charge the tippee with breach of the tipper's fiduciary duty."[72] Under *Dirks*, the fiduciary duty does not originate with the tippee, but instead is imparted on the tippee by a tipper who benefits from the sharing of nonpublic information. Yet there is no sound reason to assume that the accretion of a personal benefit to the tipper must impose a duty on the

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

[67] *Id.* at 652.

[68] *See id.* at 653; *see also* Gubler, *supra* note 60, at 5.

[69] *See* Richard A. Epstein, *Returning to Common-Law Principles of Insider Trading After* United States v. Newman, 125 YALE L.J. 1482, 1488 (2016) (decrying the personal benefit test as a conceptually incoherent "red herring" in insider trading law). *But see* Jonathan R. Macey, Essay, *The Genius of the Personal Benefit Test*, 69 STAN. L. REV. ONLINE 64, 70 (2016) (defending the personal benefit test as a useful delineation between tips undertaken for fraudulent purposes and those that serve "a valid corporate purpose").

[70] Chiarella v. United States, 445 U.S. 222, 230 (1980).

[71] Donald C. Langevoort, Essay, *Informational Cronyism*, 69 STAN. L. REV. ONLINE 37, 41 (2016); *see also* Dirks v. SEC, 463 U.S. 646, 654–55 (1983) (acknowledging *Chiarella*'s fiduciary duty requirement and the challenges of such a requirement for "policing tippees").

[72] Langevoort, *supra* note 71, at 41; *see also* Gubler, *supra* note 60, at 4 ("The purpose [of the personal benefit test] is to bridge the gap that exists when trying to prove fraud in a tipper-tippee case under the classical theory.").

tippee, much less the relevant fiduciary duty necessary for insider trading liability to attach.[73] The personal benefit test was a creative form of line drawing, meant to separate whistleblowers from fraudsters. Indeed, *Dirks* may actually be illustrative of the mantra that "hard cases make bad law": the Court's effort to carve a liability exception for corporate-fraud whistleblowers out of its fiduciary duty–based insider trading offense was a difficult piece of judicial improvisation.[74] And that maneuver has resulted in the muddled personal benefit test, an unclear standard that understandably culminated in the divergent applications seen in *Newman* and *Salman*.

Practitioners, too, have found the personal benefit test unworkable. Enforcement agencies, on one side, "have chafed" under the "unnecessarily restrictive" *Dirks* standard.[75] The SEC's frustration with *Dirks* contributed to its development of the misappropriation theory eventually adopted by the Court in *O'Hagan*, which provided a means of evading the evidentiary challenges of *Dirks*.[76] And on the other side, the government's enforcement of the test has given rise to concerns that it is criminalizing conduct not contemplated by the statute[77] and gradually pushing the definition of a personal benefit beyond recognition.[78] Moreover, the increasingly common prosecution of

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[73] In fact, Justice Powell's use of "personal benefit" as the test for when a tipper's disclosure crosses into a breach of fiduciary duty seems to stem primarily from a footnote in the SEC's *Cady, Roberts* opinion discussing the original purposes of the Securities and Exchange Act. *See Dirks*, 463 U.S. at 662 ("This standard was identified by the SEC itself in *Cady, Roberts*: a purpose of the securities laws was to eliminate 'use of inside information for personal advantage.'" (quoting *In re* Cady, Roberts & Co., 40 S.E.C. 907, 912 n.15 (1961))).

[74] Langevoort suggests that the need to fit the facts of *Dirks* into *Chiarella*'s framework meant that the *Dirks* test was far from an "ad hoc judicial expression of preferred insider trading policy" but instead was the result of Justice Powell's line drawing. Langevoort, *supra* note 71, at 41.

[75] *Id.* at 38–39. As Langevoort notes, Justice Powell's efforts to protect the informational value of market analysts preceded the modern understanding of the types of conflicts of interest these analysts often face; the balance of interests underpinning *Dirks*, then, may be overly tipped toward their protection. *Id.* at 40. *But see* Jill E. Fisch, Essay, *Family Ties:* Salman *and the Scope of Insider Trading*, 69 STAN. L. REV. ONLINE 46, 47 (2016) (contending that the government has utilized *Dirks* "aggressively to bring insider trading charges against tippees in a variety of circumstances"). Meanwhile, Congress, in one of its rare forays into insider trading theory, expressed concern over the potential impact of *Dirks* on the SEC. *See* H.R. REP. NO. 98-355, at 14 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 2274, 2287 (discussing the impact of *Dirks* in the context of the Insider Trading Sanctions Act of 1984, Pub. L. No. 98-376, 98 Stat. 1264). Nonetheless, apparently "mollified by *Dirks*'s 'unique facts,'" Congress opted not to legislatively modify *Dirks*, focusing instead on increasing penalties for insider trading to bolster deterrence. Nagy, *supra* note 56, at 28 (quoting H.R. REP. NO. 98-355, at 14).

[76] *See* Langevoort, *supra* note 71, at 41–42.

[77] *See* Pritchard, *supra* note 3, at 62.

[78] *See, e.g.*, Macey, *supra* note 69, at 64 ("[T]he SEC has persistently sought to minimize the role of the personal benefit test in insider trading law, thereby stretching the limits of its delegated power under securities law."); Brian Neil Hoffman & Kevin C. McAdam, *Holland and Hart Discuss* Newman *Cert., a Potential Tipping Point for Insider Trading Liability*, CLS BLUE SKY BLOG (Aug. 25, 2015), http://clsbluesky.law.columbia.edu/2015/08/25/newman-cert-a-potential-tipping-

remote tippees, as in *Newman*, raises concerns regarding notice and the requisite scienter for traders far downstream from the original insider.[79]

With these concerns in the background, the Court had reason to clarify insider trading doctrine in *Salman*. And several options were available to provide greater clarity than did the Court's narrow opinion. Some have argued, for example, that *Newman* and *Salman* were "easily reconcilable": the familial and close-knit nature of *Salman* meant its tipper-tippee connection was fundamentally different from the professional and relatively convoluted informational chains prosecuted in *Newman*.[80] Accordingly, the Court might have approved *Newman* while still finding the *Salman* relationship sufficiently close to accrue liability under *Dirks*. Preserving *Newman* could have provided needed security for investment analysts and others who facilitate the flow of market information, as under that approach, a tip from a mere acquaintance, without the required pecuniary gain on the part of the tipper and awareness on the part of the tippee, could not lead to prosecution.[81]

Outside of endorsing *Newman*, a more transformative path was available to the Court. Rather than continuing to wedge tippee liability into the awkward fiduciary construct of *Chiarella* and *Dirks*, the Court had the chance to acknowledge the impact of *O'Hagan* and the misappropriation theory on insider trading doctrine. Specifically, the Court could have recognized that the line drawing meant to be accomplished by the *Dirks* test has been largely obviated by the misappropriation theory's application to those who have breached a duty beyond merely that owed to shareholders.[82] The relevant duty no longer needs to be passed from tipper to tippee. Instead, liability could turn on the tippee's own set of duties contemplated in *O'Hagan*. An embrace of the misappropriation theory in the tippee context — and the concurrent diminution of the personal benefit test — would provide doctrinal clarity, give the SEC an achievable prosecutorial target, and

point-for-insider-trading-liability/ [https://perma.cc/ESU6-FQZ9] ("For decades after *Dirks*, the DOJ and SEC employed the personal benefit test expansively to pursue tippees who had received inside information from friends, relatives, or even casual acquaintances in exchange for virtually nothing tangible in return.").

[79] *See* Hoffman & McAdam, *supra* note 78 (discussing enforcement against "long tipping chains"); *see also, e.g.*, SULLIVAN & CROMWELL LLP, *SALMAN V. UNITED STATES*: SUPREME COURT ADDRESSES SCOPE OF CRIMINAL INSIDER-TRADING LIABILITY FOR TIPPEES 3 (2016), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Salman_v_United_States_Supreme_Court_Addresses_Scope_of_Criminal_Insider_Trading_Liability_for_Tippees.pdf [https://perma.cc/FB6K-6S75] (identifying the requisite mental state of a downstream tippee as an "unanswered important question[]" in *Salman*'s aftermath).

[80] Macey, *supra* note 69, at 71; *see also* Fisch, *supra* note 75, at 52–53 (suggesting that while *Salman* should be affirmed, *Newman* also fits within *Dirks*'s limitations and should remain intact).

[81] Fisch, *supra* note 75, at 53.

[82] *See* Gubler, *supra* note 60, at 5–6.

protect those tippees so removed from the tipper as to prevent a finding of fraud under the misappropriation theory.

Lastly, even an opinion that held exactly what the Court's did, but also provided an updated justification for the personal benefit test, would have solved some of these problems. Neither our knowledge of the role of analysts in market efficiency nor the Court's own understanding of insider trading has been static in the decades since *Dirks*. A reaffirmation of *Dirks* could have meaningfully fleshed out the instances in which the judiciary believes the passing of information furthers a "legitimate corporate purpose" and thus should escape liability.[83] Such an elaboration of the type of conduct the personal benefit test shields would have at least provided clarity to the SEC and market analysts, even if it would not have resolved the doctrine's theoretical incongruities.

By reaffirming *Dirks* and repudiating the Second Circuit's attempt to raise the prosecutorial bar for proving tippee liability, the Court ignored these problems in both insider trading theory and practice. Justice Alito's opinion accomplished this task in a hyperefficient manner, pointing, like Judge Rakoff's opinion below, only to the language in *Dirks* prohibiting disclosure to a "trading relative or friend" to resolve the case.[84] Justice Alito expended no ink discussing the rationale, legal or otherwise, for the *Dirks* rule or why the Second Circuit had stretched the rule too far. And while such a narrow holding carries some appeal,[85] the lingering shortcomings of insider trading doctrine — as well as the Court's particularly central role in shaping that doctrine — mean *Salman* must be viewed as a missed opportunity.

Insider trading doctrine, then, remains murky. The personal benefit test will continue to sit awkwardly within the Court's dual fiduciary duties framework, while both market participants and the SEC will continue to operate under an uncertain liability standard. The Court's reluctance to tackle these doctrinal issues directly may, however, produce an unintended benefit: If the incoherence of the doctrine leads to increasingly untenable prosecutions — or, as the SEC would surely suggest, increasingly untenable *non*prosecutions — pressure may well mount on Congress to intervene and finally provide a proper definition for the offense of insider trading.

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[83] *See* Macey, *supra* note 69, at 66.

[84] *Salman*, 137 S. Ct. at 427 (emphasis omitted) (quoting Dirks v. SEC, 463 U.S. 646, 664 (1983)).

[85] For example, the opinion's narrowness jibes with a minimalist approach to judicial decisionmaking, the frequently asserted belief that the courts' role is to decide only those issues that are squarely before them. *See generally, e.g.*, Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996). And given Justice Alito's noted comfort with minimalism, *see, e.g.*, NASA v. Nelson, 562 U.S. 134, 148 n.10 (2011) (rejecting a call to decide a background constitutional question and "leav[ing] broader issues for another day"), the narrowness of *Salman*'s holding is unsurprising. *Cf.* Pritchard, *supra* note 3, at 60 (predicting that "if the Court remain[ed] shorthanded" a narrow holding was "a possibility").