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Notes

UNITED STATES V. BLASZCZAK BRINGS INSIDER TRADING LAW TO A TIPPING POINT

MICHAEL T. BYRNE*

“When contemplated in its extreme, almost any power looks dangerous.”1

I. THE TIP-OFF: AN INTRODUCTION TO INSIDER TRADING LAW

Public confidence in the fairness and integrity of the stock market is necessary for the market to properly function.2 If people believe they are trading at a disadvantage against market participants who possess inside information, they will likely choose to save or spend their hard-earned capital elsewhere.3 This makes the enforcement of insider trading law vital to the preservation of the stock market and the economy at large.4

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3. See United States v. O’Hagan, 521 U.S. 642, 658–59 (1997) (explaining that permitting insider trading would deter public from investing in securities); H.R. REP. No. 100–910, at 8 (1988) (speculating public investors will likely remove their money from market when they feel market is “rigged against [them]”). The public generally and reasonably assumes that securities prices are based on all publicly available data. See H.R. REP. No. 100–910, at 8.

4. See H.R. REP. No. 100–910, at 8–9 (examining damaging effects of insider trading on stock market). An important purpose of the Securities Exchange Act of 1934, which is the traditional source of insider trading liability, is to ensure “honest securities markets and thereby promote investor confidence.” O’Hagan, 521 U.S. at 658 (citing 17 C.F.R. pt. 240 (1980)). Given the essential position of the stock market within the U.S. economy, according to the Federal Register, unchecked insider trading may cause undesirable economic effects such as increased market volatility, decreased liquidity, and an increased cost of capital for businesses, while another commentator notes that these undesirable economic effects include less dependable information and more incentive for dishonest behavior by insiders. See Selective Disclosure and Insider Trading, 65 Fed. Reg. 51715, 51731 (Aug. 24, 2000) (to be codified at 17 C.F.R. pts. 240, 243, and 249) (first citing Michael J. Fishman & Kathleen M. Hagerty, Insider Trading and the Efficiency of Stock Prices, 23 RAND J. ECON. 106 (1992); then citing Michael Manove, The Harm From Insider Trading and Informed Speculation, 104 Q.J. ECON. 823 (1989)); and then citing Saul
Given the notoriety of insider trading schemes, it may seem obvious that insider trading is unlawful. Yet federal securities law does not expressly forbid insider trading; rather, insider trading liability is based upon several federal antifraud provisions that generally prohibit securities fraud. Thus, courts have largely shaped insider trading law by interpreting these antifraud provisions. Courts’ varying interpretations have produced widespread ambiguity and have led to the inconsistent application of insider trading law across jurisdictions.

The Securities Exchange Act of 1934 (the Exchange Act) provides various prohibitions of securities fraud under Title 15 of the United States Code (Title 15). Both civil and criminal enforcers have traditionally employed Section 10(b) of the Exchange Act (Section 10(b)) together with U.S. Securities and Exchange Commission (SEC) Rule 10b-5 (Rule 10b-5) in insider trading cases. Accordingly, these Title 15 securities fraud pro-
visions have served as the prime source of the confusion involving insider trading law. While there are some particular gray areas that need clarity and consistency, years of case law and Supreme Court precedent have at least put legal authorities and securities market participants on notice as to what to generally expect in insider trading cases.

In 2002, Congress added a new wrinkle to insider trading law by introducing a criminal statute, 18 U.S.C. § 1348 (Section 1348), which broadly outlaws securities fraud under Title 18 of the United States Code (Title 18). Congress enacted Section 1348 to provide criminal authorities with greater flexibility when pursuing insider trading actions. In doing so, however, Congress failed to define the elements or requirements necessary for convictions under Section 1348, leaving courts to wrestle with its vague prohibition of defrauding schemes in connection with securities trading.

Importantly, Section 1348 did not replace the Title 15 provisions, and it applies to only criminal cases. Accordingly, criminal authorities such as the Department of Justice (DOJ) now have the ability to utilize both the traditional Title 15 provisions and Section 1348 when pursuing insider trading charges, while civil authorities like the SEC may use only the traditional Title 15 provisions. Prosecutors have continued to rely on Title 15 as the primary vehicle for both civil and criminal insider trading actions.

lent securities transactions relating to “manipulative and deceptive devices”); Steve Thel, Taking Section 10(b) Seriously: Criminal Enforcement of SEC Rules, 2014 COLUM. BUS. L. REV. 1, 10–11, 29–30 (2014) (discussing role of Section 10(b) and Rule 10b-5 in insider trading actions).

11. See generally BHA R A RA ET AL., supra note 8 (repeatedly referencing Title 15 securities fraud provisions in detailing lack of clarity in insider trading law).

12. See, e.g., Peter J. Henning, What’s So Bad About Insider Trading Law, 70 BUS. L. AW. 275, 757 (2015) (arguing insider trading “has arrived at a fairly well-settled meaning that is not difficult for judges and juries to apply,” while noting that “insider trading is hardly alone in the pantheon of federal offenses, especially those considered white-collar crimes, that can be criticized as confused or a theoretical mess”).


14. See 148 CONG. REC. S7418–01 (daily ed. July 26, 2002) (statement of Sen. Leahy) (“[Section 1348 is] intended to provide a flexible tool to allow prosecutors to address the wide array of potential fraud and misconduct which can occur in companies that are publicly traded.”).

15. See § 1348 (broadly prohibiting securities fraud).

16. See id.; 148 CONG. REC. S7418–01 (daily ed. July 26, 2002) (statement of Sen. Leahy) (“This provision would create a new 10-year felony for defrauding shareholders of publicly traded companies. The provision would supplement the patchwork of existing technical securities law violations with a more general and less technical provision . . . .”).


Section 1348 case law, while limited, demonstrates courts’ struggles to identify where the Title 15 provisions overlap with Section 1348 and where they diverge.¹⁹ One area of confusion has been whether courts should apply Title 15 insider trading precedent to inform decisions in Section 1348 cases.²⁰ For example, one context where insider trading liability arises is when a corporate insider (tipper) provides confidential information to a third party (tippee), who may then trade securities based on that information.²¹ The Supreme Court has established the tipper must receive a “personal benefit” in exchange for disclosing the information in order for either tippers or tippees to be liable under Title 15.²² Nevertheless, it remains unclear whether the personal benefit requirement is necessary in tipper-tippee cases under Section 1348.²³

This Note analyzes the United States Court of Appeals for the Second Circuit’s application of Section 1348 to insider trading in United States v. Blaszczak.²⁴ In Blaszczak, the Second Circuit held the longstanding personal benefit requirement for tipper-tippee insider trading cases brought under Title 15 does not apply to similar actions brought under Section 1348.²⁵ This Note argues that while the Second Circuit’s interpretation of


¹⁹. See Tom Hanusik, Rebecca Monck Ricigliano, & Nimi Aviad, The Rise of Insider Trading as a Title 18 Offense, 53 REV. SEC. & COMMODITIES REG. 49, 54 (2020) (indicating Section 1348 insider trading case law is limited and therefore Title 15 is more often employed in such actions).
²⁰. See Woody, supra note 17, at 616–17 (recognizing general disagreement and lack of applicable case law regarding whether Section 1348 should be utilized in insider trading cases).
²¹. See, e.g., 18 DONALD C. LANGEVOORT, INSIDER TRADING REGULATION, ENFORCEMENT AND PREVENTION § 4:1 (2020) (noting both the tipper and tippee may be held liable for insider trading).
²⁴. 947 F.3d 19 (2d Cir. 2019).
Section 1348 appears reasonable at first glance, the statute’s text and legislative history—as well as policy considerations—indicate the court should have recognized the personal benefit requirement in Section 1348 tipper-tippee insider trading cases.\textsuperscript{26} Part II of this Note explains the disjointed developments of insider trading law that set the stage for Blaszczak. Part III provides the facts and legislative history of Blaszczak. Part IV recounts the Second Circuit’s reasoning in reaching its holding. Part V critically analyzes the Second Circuit’s holding and argues courts should require Title 15 elements such as a personal benefit under both Title 15 and Section 1348 until Congress or the Supreme Court decide otherwise. Finally, Part VI considers the potential ramifications and impact of the Blaszczak decision on insider trading law.

II. APPROACHING THE TIPPING POINT: INSIDER TRADING LAW BACKGROUND

Since its enactment in 1934, the Exchange Act has served as the backbone for both civil and criminal insider trading enforcement.\textsuperscript{27} Yet, because the Exchange Act neither mentions insider trading by name nor expressly forbids trading on inside information, courts have done the heavy lifting in developing insider trading law.\textsuperscript{28} The resulting case law has been filled with disagreement and gray areas.\textsuperscript{29} In the wake of the infamous financial scandals of the early 2000s, Congress added even more uncertainty by enacting Section 1348, which generally criminalizes securities fraud but fails to explicitly prohibit or define insider trading.\textsuperscript{30} To appreciate the significance of Blaszczak, it is important to understand how

\textsuperscript{26} For an argument that the Second Circuit should have recognized the personal benefit requirement in Section 1348 tipper-tippee insider trading cases, see infra Part V.

\textsuperscript{27} See, e.g., Hazen, supra note 6 (recognizing insider trading liability is a product of the Exchange Act’s antifraud provisions).


these separate, yet inherently related, securities fraud provisions overlap and diverge.

A. Title 15 Securities Fraud Provisions

The Exchange Act regulates securities trading in the United States. Congress enacted the Exchange Act to maintain “fair and honest [securities] markets” and to negate the “use of inside information for personal advantage.” Further, the Exchange Act created the SEC, providing it with “broad authority over all aspects of the securities industry,” including civil enforcement powers.

The Exchange Act contains several antifraud provisions. Section 10(b) and Rule 10b-5 are the traditional provisions utilized together to create both civil and criminal liability for insider trading violations. Section 10(b) provides that it is unlawful for any person, directly or indirectly . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors.

The SEC promulgated Rule 10b-5, which prohibits any person from “employ[ing] any device, scheme, or artifice to defraud” or “engag[ing] in any act, practice, or course of business which operates or would operate as


34. See generally §§ 78a–78qq.

35. See § 78j(b); 17 C.F.R. § 240.10b-5 (2020); see also Hanusik, Ricigliano, & Aviad, supra note 19, at 50 (discussing Section 10(b) and Rule 10b-5 are employed for insider trading actions). The Exchange Act is a hybrid statute in that violations may result in both civil and criminal penalties. See Margaret V. Sachs, Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934, 2001 U. ILL. L. REV. 1025, 1026–27 (2001) (using Exchange Act as an example of a hybrid statute that is enforceable in both criminal and civil actions).

36. § 78j(b).
a fraud or deceit upon any person, in connection with the purchase or sale of any security.” 37

B. Insider Trading Liability

Under the Title 15 securities fraud provisions, enforcers can establish insider trading under two separate theories of liability: the classical theory and the misappropriation theory. 38 Under either theory, tippers and tippees may be held liable for insider trading. 39 Tipper-tippee liability arises when a corporate insider discloses, or “tips,” confidential information to a third party who uses that information to trade securities. 40 One key requirement in tipper-tippee cases brought under Title 15 is that the tipper (the insider) must receive a “personal benefit” for divulging the confidential information. 41 Several courts have debated exactly what amounts to a “personal benefit,” but the Supreme Court continues to uphold the personal benefit requirement nonetheless. 42

1. Classical Theory of Insider Trading Liability

Classical insider trading liability applies “when a corporate insider trades in the securities of his corporation on the basis of material, nonpublic information” (MNPI). 43 Therefore, classical liability is premised on the

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37. 17 C.F.R. § 240.10b-5 (2020). The SEC first recognized insider trading as a violation of these antifraud provisions, specifically Rule 10b-5, in an SEC administrative court case. See Cady, Roberts & Co., 40 S.E.C. at 910–11 (finding that insiders have “duty to disclose material information” that may result in unfair investing advantage, and breach of that duty constituted “a device or scheme, an implied misrepresentation, and an act or practice” under Rule 10b-5).


39. See Langevoort, supra note 21 (acknowledging the now well-settled principle that tipper-tippee liability arises under both theories).


42. See Salman v. United States, 137 S. Ct. 420, 427–29 (2016) (reinforcing the personal benefit requirement from Dirks); Andrew Carl Spacone, The Second Circuit’s Curious Journey Through the Law of Tippee Liability for Insider Trading: Newman to Martoma, 24 ROGER WILLIAMS U. L. REV. 1, 2 (2019) (discussing how courts such as the Second Circuit have struggled to define what constitutes personal benefit); infra notes 78–79 and accompanying text.

43. O’Hagan, 521 U.S. at 651–52. A corporate insider is any person with a fiduciary duty to shareholders of the corporation. See Chiarella v. United States, 445 U.S. 222, 228 (1980). A person has such a duty when the person has a relationship of trust and confidence with shareholders. Id.; see also Hostert, supra note 40, at 708 (summarizing classical insider trading liability). In addition to corporate insiders, classical insider trading liability extends to fiduciaries serving as temporary insiders—such as underwriters, accountants, attorneys, and consultants—of a company. See Dirks, 463 U.S. at 655 n.14.
insider’s breach of duty to shareholders.44 For example, a Chief Executive Officer (CEO) may possess MNPI that will likely boost the corporation's stock price when it is publicly announced. If the CEO buys the company's stock before the information is released, without disclosing this information to stockholders, the CEO would be liable for insider trading.

2. Misappropriation Theory of Insider Trading Liability

The misappropriation theory (also called the embezzlement theory) of liability is central to the Blaszczak decision, thus, a deeper dive into its development is warranted. Two Supreme Court cases are particularly authoritative. Carpenter v. United States45 laid the initial foundation for the misappropriation theory in Title 15 insider trading cases.46 United States v. O'Hagen47 later solidified the misappropriation theory’s place in insider trading law and defined the theory as it is known today.48

In Carpenter, a Wall Street Journal (the Journal) reporter’s misappropriation of confidential, prepublication information served as the basis for Title 15 insider trading liability.49 The reporter wrote a daily column about stocks, which did not contain any MNPI but “had the potential of affecting the price of the stocks which it examined.”50 The reporter and his fellow defendants entered into a scheme to buy or sell stocks—based on the probable market impact of the information—before the column was published.51 The lower courts found that the reporter’s breach of confidentiality to the Journal—based on the Journal’s policy that it held the exclusive right to use the column’s content prior to its publication—amounted to a Title 15 violation because the reporter defrauded the Journal “in connection with” a purchase or sale of securities.52 The Supreme

44. See, e.g., O'Hagan, 521 U.S. at 651–52 (“The classical theory targets a corporate insider’s breach of duty to shareholders with whom the insider transacts . . . .”); SEC v. Obus, 693 F.3d 276, 284 (2d Cir. 2012) (“Under the classical theory of insider trading, a corporate insider is prohibited from trading shares of that corporation based on material non-public information in violation of the duty of trust and confidence insiders owe to shareholders.”). When corporate insiders fail to publicly disclose material information in their possession, they are generally prohibited from trading in the corporation’s stock. Zachary J. Gubler, A Unified Theory of Insider Trading Law, 105 GEO. L.J. 1225, 1228 (2017).
46. See generally id. (basing insider trading liability on misappropriation of MNPI).
47. 521 U.S. 642.
48. See generally id. (finding misappropriation theory liability appropriate in insider trading cases and noting the Court addressed “fraud of the same species in Carpenter”).
49. See Carpenter, 484 U.S. at 21–24. The defendants were also charged with Title 18 mail and wire fraud violations. See id. For a further discussion of the mail and wire fraud issues in Carpenter, see infra notes 53, 87.
50. See Carpenter, 484 U.S. at 22. The reporter often interviewed corporate executives to inform his point of view. See id.
51. See id. at 23.
52. See id. at 24.
Court evenly split on the Title 15 charges, thus, affirming the lower courts’ judgments with no further analysis.\textsuperscript{53} The \textit{O’Hagan} decision engrained the misappropriation principles from \textit{Carpenter} into insider trading law.\textsuperscript{54} The defendant in \textit{O’Hagan} was a partner at a law firm that represented a company in its potential tender offer to shareholders of Pillsbury Company.\textsuperscript{55} The defendant’s work did not involve his firm’s support of the tender offer, but he learned about it from a coworker and subsequently purchased Pillsbury stock, which spiked after the tender offer was publicly announced.\textsuperscript{56} The Court found it could not hold the defendant liable for insider trading under the classical theory because the defendant (1) was not an insider, and (2) did not owe a duty of trust and confidence to Pillsbury shareholders.\textsuperscript{57}

Nevertheless, the Supreme Court held the defendant violated the Title 15 securities fraud provisions.\textsuperscript{58} The Court asserted “[t]he undisclosed misappropriation of [MNPI], in violation of a fiduciary duty . . . constitutes fraud akin to embezzlement . . . .”\textsuperscript{59} The Court further explained the misappropriation theory prohibits corporate outsiders from trading on the basis of MNPI in breach of their duty of trust and confidence to the source of the MNPI, rather than their duty to shareholders.\textsuperscript{60} Misappropriators (the outsiders who receive and trade on the MNPI) are liable for insider trading under Title 15 when they breach “loyalty and confidence.\textsuperscript{60}
tially, [which] defrauds the principal of the exclusive use of that information.”61 Because the defendant in *O’Hagan* breached the duty he owed to his law firm and their client—the sources of the MNPI—when he made stock trades based on the MNPI, the Court found him liable for Title 15 insider trading under the misappropriation theory.62

3. **Tipper-Tippee Situations**

Insider trading liability may arise under either theory of liability in tipper-tippee situations.63 This occurs when an insider or misappropriator provides MNPI to an outsider who may trade securities based on that information.64 Tippers owe a fiduciary duty either to their company’s shareholders (classical theory) or to the source of the inside information (misappropriation theory).65 Tippers may be liable for breaching this fiduciary duty when they share MNPI with a tippee.66

Recipients of the tips who trade on the MNPI may also be liable for insider trading.67 Tippees assume the tippers’ fiduciary duties and are liable when (1) they trade on the basis of MNPI, (2) the tippers breached a fiduciary duty by sharing the MNPI, and (3) the tippees know or should have known the tippers breached a fiduciary duty.68 Notably, if a tippee receives MNPI and shares the MNPI with an additional person—referred to as a remote tippee—the remote tippee may be held to these same standards.69

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61. *Id.* at 652.
62. See *id.* at 652, 654, 656, 660, 665–66 (explaining misappropriation under Title 15 requires deception and connection to securities trade, and that the defendant met this criteria).
63. See Langevoort, *supra* note 21 (asserting tipper-tippee liability arises under classical and misappropriation theories).
66. See Hostert, *supra* note 40, at 709–10. A tipper is liable for insider trading when: “(1) the tipper had a duty to keep material non-public information confidential; (2) the tipper breached that duty by intentionally or recklessly relaying the information to a tippee who could use the information in connection with securities trading; and (3) the tippee knew or should have known the tippers breached a fiduciary duty.” *SEC v. Obus*, 693 F.3d 276, 289 (2d Cir. 2012).
67. See *Obus*, 693 F.3d at 289. Similar to the liability standard for a tipper, a tippee is liable for insider trading when:
(1) the tipper breached a duty by tipping confidential information; (2) the tippee knew or had reason to know that the tippee improperly obtained the information (i.e., that the information was obtained through the tipper’s breach); and (3) the tippee, while in knowing possession of the material non-public information, used the information by trading or tipping for his own benefit.

*Id.*
68. See Dirks v. SEC, 463 U.S. 646, 660 (1983). A tippee may be liable only if the tipper breached his or her fiduciary duty; if a court finds there is no fiduciary breach by the tipper, the tippee cannot be liable for insider trading. See *id.* at 662 (“[A]bsent a breach by the insider, there is no derivative breach.”).
69. See Eisenberg, *supra* note 28. A remote tippee is anyone who indirectly obtains MNPI, meaning the remote tippee is removed from the initial tipper by
4. Personal Benefit Requirement in Tipper-Tippee Cases

The Supreme Court created the personal benefit element for tipper-tippee insider trading cases in *Dirks v. SEC*. The personal benefit requirement states a tipper must receive a “direct or indirect” personal benefit from the disclosure of MNPI to be liable for insider trading under the Title 15 securities fraud provisions. The requirement is meant to preserve the flow of information from corporate insiders to market analysts—as investors often rely on analysts’ assessments to make informed investment decisions. Importantly, tippee—and even remote tippee—liability is contingent on the original tipper receiving a personal benefit for divulging the MNPI; if the court finds that the original tipper received a personal benefit, the tippee may be held liable—but only if the tippee or remote tippee knows or should have known that the tipper acted for the tipper’s own personal benefit.

The Supreme Court has articulated a broad and somewhat opaque standard for what constitutes a personal benefit. *Dirks* provides several examples of how a personal benefit may be established, including when a tipper receives “a pecuniary gain or a reputational benefit that will translate into future earnings.” Courts may infer such benefits from “objectionable or more people. See Kathleen Coles, The Dilemma of the Remote Tippee, 41 GONZ. L. REV. 181, 183–84, 184 n.18 (2006).

70. 463 U.S. 646 (1983); see id. at 662.

71. See id. at 662–63. It is well-settled that the personal benefit requirement applies regardless of whether the tipper is accused of insider trading under the classical or misappropriation theory. *See Salman v. United States*, 137 S. Ct. 420, 425 n.2 (2016) (assuming the personal benefit requirement applies to both theories, though not conducting thorough analysis of the issue); LANGEVOORT, supra note 21 (acknowledging lower courts have tended to view *Salman* as sufficient authority to apply personal benefit test under both theories).

72. See *Dirks*, 463 U.S. at 658–59 (indicating that flow of information to market analysts is “necessary to the preservation of a healthy market”).

73. See *Salman*, 137 S. Ct. at 427; see also United States v. Newman, 773 F.3d 438, 448 (2d Cir. 2014) (“[W]ithout establishing that the tippee knows of the personal benefit received by the insider in exchange for the disclosure, the Government cannot meet its burden of showing that the tippee knew of a breach.”), abrogated on other grounds by *Salman*, 137 S. Ct. 420; Eisenberg, supra note 28 (explaining remote tippees must know or should have known “that the source of the information breached a duty and acted for his or her personal benefit”). This standard makes it easier for remote tippees to escape liability. *See Eisenberg*, supra note 28 (“Remote tippees often will not know enough about the circumstances surrounding the original tip for the government to charge or prove that level of culpability.”).

74. See *Dirks*, 463 U.S. at 663–64 (discussing personal benefit requirement and noting that “[d]etermining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts”); see also *Salman*, 137 S. Ct. at 423–28 (defending *Dirks*’s personal benefit requirement but recognizing that it is merely a “guiding principle” (internal quotation marks omitted) (quoting *Dirks*, 463 U.S. at 664)).

75. *Dirks*, 463 U.S. at 663.
tive facts and circumstances” such as “a relationship between the insider and the recipient that suggests a quid pro quo from the latter, or an intention to benefit the particular recipient.” Dirks also specifies that the personal benefit requirement is satisfied “when an insider makes a gift of confidential information to a trading relative or friend.”

Although the guidelines provided in Dirks are conceptually useful, their broadness can present difficulties in application. For example, courts have substantially struggled to determine just how close a relationship must be to be considered a “trading relative or friend.” There are additional ambiguities related to the personal benefit requirement that vary across jurisdictions, but for the purposes of this Note, it is sufficient to appreciate that even almost forty years post-Dirks, courts have failed to consistently establish the parameters of what constitutes a personal benefit.

Even though courts have struggled to define personal benefit, the Supreme Court has clarified some contexts in which a tipper does not satisfy the personal benefit element. In Salman v. United States, the Court rejected the contention that “a gift of confidential information to anyone, not just a ‘trading relative or friend,’ is enough to prove [insider trading].” In Dirks, the Court dismissed charges against the defendant tippee because the tipper—who shared MNPI with the defendant to expose...

76. Id. at 664.
77. Id. When a tipper gifts inside information to a “trading relative or friend,” “the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds.” Salman, 137 S. Ct. at 428.

78. See Salman, 137 S. Ct. at 425, 428 (declining to either reject or adopt Second Circuit’s “meaningfully close personal relationship” standard from Newman—nor attempting to define what comprises such a relationship (quoting United States v. Newman, 773 F.3d 438, 452 (2014))). Compare Newman, 773 F.3d at 452 (requiring a “meaningfully close personal relationship” between tipper and tippee), with United States v. Martoma, 869 F.3d 58, 69 (2d Cir. 2017) (finding that after Salman, “Newman’s ‘meaningfully close personal relationship’ standard was ‘no longer good law’”), opinion amended and superseded, 894 F.3d 64 (2d Cir. 2017), and Martoma, 894 F.3d 64 (2d Cir. 2017) (rescinding earlier outright rejection of the meaningfully close personal relationship standard but weakening its relevance).

79. See Donald C. Langevoort, Watching Insider Trading Law Wobble: Obus, Newman, Salman, Two Martomas, and a Blaszczak, 89 FORDHAM L. REV. 507, 508–10, 521–22, 528 (2020) (discussing courts’ lack of consistency in defining personal benefit, especially within the Second Circuit); Thomas A. Zaccaro, Dina Ellis Rochkind, Nicolas Morgan, & Lily Lysle, The Insider Trading ‘Mess’ Congress Is Trying To Fix, PAUL HASTINGS (May 16, 2019) (noting circuit courts have reached opposing interpretations of what amounts to a gift of confidential information in recent years, with courts “sometimes expanding it and other times limiting it”).

80. 137 S. Ct. 420 (2016).
81. Id. at 426 (emphasis added) (citing Brief for United States at 27, Salman, 137 S. Ct. (2016) (No. 15-628)). The Supreme Court also clarified that a pecuniary gain is sufficient, but not necessary, to establish a personal benefit. See id. at 427–28.
But in practice, courts fail to find a personal benefit only in very narrow contexts, such as when the tipper and tippee have essentially no relationship other than the alleged tip.83 Again, the line is unclear, but some commentators argue the personal benefit requirement has become so attenuated that it has been reduced to a mere formality and should be eliminated altogether.84

C. Section 1348 Securities Fraud

In 2002, Congress enacted Section 1348, a criminal statute under the Sarbanes–Oxley Act that broadly prohibits securities fraud.85 Section 1348 makes it a crime to “knowingly execute[ ] or attempt[ ] to execute, a scheme or artifice . . . to defraud any person in connection with . . . any security.”86 In enacting Section 1348, Congress sought to lessen the burden on criminal prosecutors to prove securities fraud by eliminating his-
torically specific Title 18 requirements, such as “the element that the mails or wires were used to further the scheme to defraud.” Congress intended to provide added flexibility in criminal securities fraud cases by allowing criminal authorities to avoid some of the technicalities of the Title 15 provisions.

Crucially, Section 1348—in addition to the Title 15 securities fraud provisions—is available to criminal prosecutors for securities fraud issues such as insider trading, but it is not available to civil enforcers such as the SEC. Section 1348 supplements, but does not replace, the Title 15 securities fraud provisions in criminal cases. Though criminal authorities have used Section 1348 for insider trading actions, Congress did not provide specific guidelines as to what constitutes insider trading under the statute. Given the lack of clear direction from Congress and the lack of precedential case law involving Section 1348, the boundaries of insider

87. S. REP. NO. 107-146, at 30 (2002). Congress also identified the need for flexibility to protect investors from fraudulent schemes yet to be seen or defined. See id. at 20 (“[Section 1348] is intended to provide needed enforcement flexibility . . . to protect shareholders . . . against all the types [of] schemes and frauds which inventive criminals may devise in the future.”). The Title 18 mail and wire fraud statutes forbid the use of the mail or wire communications as part of a “scheme . . . to defraud.” See §§ 1341, 1343. Because almost all securities transactions involve the use of either mails or wires (or both), criminal authorities have successfully utilized these statutes to supplement Title 15 (and later Section 1348) securities fraud charges in insider trading actions brought under the misappropriation theory. See William K.S. Wang, Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tipping, 70 U. MIAMI L. REV. 220, 234–45, 254–64, 298 (2015) (explaining application of Title 18 mail and wire fraud statutes to insider trading cases); see also Carpenter v. United States, 484 U.S. 19, 20, 24, 28 (1987) (relying on misappropriation theory to unanimously affirm defendant’s Title 18 mail and wire fraud convictions, which were brought in addition to Title 15 securities fraud charges). Notably, Congress modeled Section 1348, as well as the Title 18 bank and health fraud statutes, after the mail and wire fraud statutes. See Charles Doyle, Cong. Res. Serv., Mail and Wire Fraud: A Brief Overview of Federal Criminal Law 18 (2019) (discussing how mail and wire fraud statutes have been used as models for other criminal fraud statutes); Angela Burgess, Greg Andres, & Neil MacBride, Lower Bar for Criminal Insider Trading Charges, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 23, 2020), https://corpgov.law.harvard.edu/2020/01/23/lower-bar-for-criminal-insider-trading-charges/ [https://perma.cc/GLE7-YWA4] (stating Section 1348 was modeled after Title 18 mail and wire fraud statutes).

88. See 148 Cong. Rec. S7418–01 (daily ed. July 26, 2002) (statement of Sen. Leahy) (“[Section 1348 is] intended to provide a flexible tool to allow prosecutors to address the wide array of potential fraud and misconduct which can occur in companies that are publicly traded.”).

89. See, e.g., Burgess, Andres, & MacBride, supra note 87 (indicating that while criminal authorities may utilize Section 1348, Title 15, or both to prosecute insider trading, only Title 15 is available to the SEC to prosecute insider trading).


91. See § 1348 (failing to mention insider trading).
trading under Section 1348 remain undefined, and there are no standard jury instructions on which to rely.92

D. Intersection of Title 15 Securities Fraud Provisions and Section 1348

As the relevant Title 15 provisions and Section 1348 similarly prohibit securities fraud, intersection of the respective case law is inevitable.93 A crucial question is whether courts should consider Title 15 insider trading precedent to guide decisions in Section 1348 cases.94 Even if courts choose to view Section 1348 in a vacuum, the SEC may potentially invoke the collateral estoppel doctrine to leverage a criminal Section 1348 conviction to impute summary judgment in a later civil case.95


93. See Woody, supra note 17, at 623 (noting an “intersection between § 1348 and Rule 10b-5”). Some technical differences between the provisions do exist, but the provisions are so similar that the same insider trading conduct will typically give rise to both Title 15 and Section 1348 liability. See Peter J. Henning, A New Way to Charge Insider Trading, N.Y. TIMES (Aug. 24, 2015), https://www.nytimes.com/2015/08/25/business/dealbook/a-new-way-to-charge-insider-trading.html [https://perma.cc/TA69-W6XT] (“It is not clear how much [Section 1348] differs from [Title 15] because both require proof of some type of fraud.”). For example, the provisions have different scienter standards and maximum penalties. See § 1348; 15 U.S.C. § 78ff(a) (2018). Section 1348 requires a defendant to act “knowingly” and carries a 25-year maximum imprisonment, while Rule 10b-5 requires a defendant to act with “willfulness” and carries a 20-year maximum imprisonment. See Moser & Weitz, supra note 92, at 112, 121, 122 n.35 (first quoting § 1348; then quoting § 78ff(a); and then citing 18 U.S.C. §§ 1341, 1343 (2018)) (presenting some technical differences between the provisions). These distinctions may be crucial for criminal prosecutors trying to avoid potential “multiplicity of charges” issues when attempting to prosecute insider traders under both Section 1348 and Title 15 in the same case. Woody, supra note 17, at 625. Courts have rejected multiplicity defenses raised by defendants charged with criminal violations of both the Title 15 and Section 1348 securities fraud within the same case. See id. at 623–25. Multiplicity, which is the “charging [of] a defendant under different statutes for the exact same conduct, without an additional fact,” is outlawed by the Fifth Amendment. Id. at 623; see also Multiplicity, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Multiplicity violates the Fifth Amendment protection against double jeopardy.”).

94. See generally United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (determining whether longstanding personal benefit requirement for tipper-tippee insider trading cases brought under Title 15 applies to actions brought under Section 1348), vacated and remanded, No. 20-5649, 2021 WL 78043 (Jan. 11, 2021) (remanding back to Second Circuit in light of the Supreme Court’s decision in Kelly v. United States, a case inapplicable to the personal benefit requirement). This Note discusses this issue in Blaszczak infra Parts III and VI.

95. For a full discussion of the collateral estoppel issue, see infra notes 99–103 and accompanying text.
1. **Application of Title 15 Precedent to Section 1348 Insider Trading Decisions**

Criminal authorities have sometimes brought insider trading actions under Section 1348, but the case law in this area is extremely limited.\(^96\) Importantly, no clear consensus has been reached as to whether courts must interpret Section 1348 in a vacuum or whether they may rely on Title 15 securities fraud precedent to guide their interpretations.\(^97\) This issue is at the heart of *Blaszczak*.\(^98\)

2. **Criminal Conviction as a Basis for Civil Liability**

The doctrine of collateral estoppel prevents parties from “relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.”\(^99\) Thus, civil authorities may invoke collateral estoppel to use a defendant’s criminal conviction to attain summary judgment in a corresponding civil case.\(^100\) In *SEC v. Stein*,\(^101\) the Ninth Circuit granted summary judgment to the SEC in a civil Title 15 securities fraud case because the defendant’s prior criminal conviction under Section 1348 provided the court with enough evidence to prove Title 15 securities fraud.\(^102\) If other courts adopt the Ninth Circuit’s reasoning, the SEC may have the ability to circumvent Title 15 insider trading precedent—including the personal benefit requirement—by allowing the DOJ to garner an easier criminal conviction under Section 1348, and then using the conviction to prove Title 15 elements in civil proceedings.\(^103\)

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96. See, e.g., Hanusik, Ricigliano, & Aviad, *supra* note 19, at 54–55 (noting limited use of Section 1348 in insider trading cases prior to *Blaszczak*).


98. See *Blaszczak*, 947 F.3d at 36 (determining *Dirks* is not binding precedent for Section 1348 securities fraud).


100. See *Woody*, *supra* note 17, at 658–39.

101. 906 F.3d 823 (9th Cir. 2018).

102. See *id.* at 834. Notably, the court stated that Title 15 securities fraud charges “involve ‘the application of the same rule of law’ as that involved in the criminal case” under Section 1348. See *id.* at 830 (quoting *Restatement (Second) of Judgments* § 27 cmt. c. (AM. LAW INST. 1982)). Although *Stein* involved securities fraud, it was not an insider trading case. *Id.* at 827. The defendant in *Stein* was also convicted of Title 18 mail and wire fraud, as well as money laundering and conspiracy to obstruct justice, in the criminal case. See *id.* at 827–28.

103. See *Woody*, *supra* note 17, at 641.
E. Insider Trading Prohibition Act: Pending Legislation

In December 2019, a vast and bipartisan majority of the United States House of Representatives voted to pass the Insider Trading Prohibition Act (ITPA), which attempts to codify and clarify much of the judge-made insider trading case law.\textsuperscript{104} The ITPA includes the “direct or indirect personal benefit” requirement for tipper-tippee cases.\textsuperscript{105} The House added the personal benefit language to the bill not only to prevent judges from construing the personal benefit test more broadly than the Supreme Court has permitted, but also to “prevent[] activist judges and overzealous prosecutors from reading the test out of the law entirely.”\textsuperscript{106} While the ITPA represents an effort to codify current insider trading law, it does not include an exclusivity provision.\textsuperscript{107} This means that even if the ITPA is eventually enacted into law, criminal and civil authorities would still have the option to avoid the ITPA altogether by simply choosing to charge insider trading suspects under the existing securities fraud provisions rather than the ITPA.\textsuperscript{108} As of this writing, the ITPA is still awaiting review by the Senate, but commentators are pessimistic it will become law given the current political climate.\textsuperscript{109}


\textsuperscript{105} See H.R. 2534 (including examples of personal benefit such as “pecuniary gain, reputational benefit, or a gift of confidential information to a trading relative or friend”).

\textsuperscript{106} Press Release, The House Financial Services Committee, McHenry Amendment Accepted to Improve Insider Trading Bill, Protect Good-Faith Traders, (Dec. 5, 2019) (on file with author) (stating in part why personal benefit requirement is included in proposed ITPA). While the personal benefit requirement was absent from earlier drafts of the bill, Representative Patrick McHenry, the House Financial Services Committee’s highest-ranking Republican, proposed an amendment to add the personal benefit requirement to the bill just two days before the House vote brought it back to life. See id.; H.R. Rep. No. 116–320, at 2–3 (2019).

\textsuperscript{107} See Press Release, House Financial Services Committee, supra note 106 (“H.R. 2534 as amended does not include . . . an exclusivity provision to make [the ITPA] the exclusive insider trading law of the land”).


III. TIPPING THE SCALES: FACTS OF UNITED STATES V. BLASZCZAK

The principal insider trading issue before the Second Circuit in Blaszczak was whether the Dirks personal benefit test, which must be met for Title 15 securities fraud liability, also applies to Section 1348 claims.110 Defendant David Blaszczak was a “‘political intelligence’ consultant for hedge funds.”111 He was also a former employee of the Centers for Medicare & Medicaid Services (CMS), a federal government agency, and “enjoyed unique access to [CMS’s] predecisional information through his inside sources at [CMS],” including defendant Christopher Worrall.112

A. Deerfield and Visium Schemes

Defendants Theodore Huber and Robert Olan were employees of Deerfield Management Company, L.P. (Deerfield), a hedge fund focused on healthcare investments.113 They approached Blaszczak numerous times between 2009 and 2014, seeking tips on CMS’s confidential information to gain an “illegal market edge.”114 On several occasions, Blaszczak provided the Deerfield partners with MNPI regarding upcoming CMS rate changes, which would presumably affect the prices of certain healthcare stocks.115 Deerfield then executed short sales against companies that would be negatively affected by the rate changes.116

During roughly the same time period as the Deerfield scheme, Blaszczak tipped off a portfolio manager at another hedge fund, Visium Asset Management (Visium), about upcoming CMS rate changes.117 Visium executed transactions such as short sales and put-option purchases...
against companies that would be negatively affected by the rate changes.\footnote{118}

\section*{B. Procedural History of Blaszczak}

In March 2018, the federal government filed an indictment in the United States District Court for the Southern District of New York, alleging that the four defendants—Blaszczak, Huber, Olan, and Worrall—committed securities fraud under both Title 15 and Section 1348 in connection with the Deerfield and Visium schemes.\footnote{119}

In April 2018, the case proceeded to a jury trial.\footnote{120} The district court instructed the jury that under \textit{Dirks}, “in order to convict Worrall of Title 15 securities fraud, it needed to find that he tipped confidential CMS information in exchange for a ‘personal benefit.’”\footnote{121} Further, the district court instructed the jury that in order to convict Blaszczak, Huber, or Olan of Title 15 securities fraud, the jury “needed to find that [the respective defendants] knew that [Worrall or] a CMS insider had tipped the information in exchange for a personal benefit.”\footnote{122}

Conversely, the district court did \textit{not} provide similar personal benefit jury instructions for the Section 1348 allegations.\footnote{123} The district court did, however, instruct the jury that it could convict the defendants of Section 1348 securities fraud if the defendants engaged in a scheme to convert or embezzle CMS’s confidential information, and wrongfully used that information for their own use or shared it for someone else’s use.\footnote{124}

The jury returned a split verdict and acquitted all defendants on the Title 15 securities fraud charges but found all defendants besides Worrall guilty of Section 1348 violations.\footnote{125} The court sentenced all four defend-
All four defendants timely appealed the district court ruling, in part on the grounds that the district court should have instructed the jury that the personal benefit requirement applies to Section 1348 (in addition to the Title 15 securities fraud provisions). Upon review, a three-judge panel of the Second Circuit affirmed the district court’s decision and upheld the jury’s verdict on all counts. In April 2020, the Second Circuit denied the defendants’ petition for rehearing. In September 2020, Blaszczak, Olany, and Huber petitioned for Supreme Court review. In January 2021, the Supreme Court vacated the Blaszczak decision and remanded the case back to the Second Circuit for further consideration of the Supreme Court’s recent decision in *Kelly v. United States.*

**IV. SECOND CIRCUIT TIPS ITS HAND: NARRATIVE ANALYSIS OF BLASZCZAK**

In *Blaszczak,* the Second Circuit analyzed whether the *Dirks* personal benefit requirement for insider trading under the Title 15 securities fraud provisions also applies to Section 1348. The court focused on the differing legislative purposes served by the Title 15 provisions and Section conspiracy counts. See id. at 30. For a further discussion of the conversion charges and the property issue the court considered, see supra note 110. The Supreme Court vacated and remanded Blaszczak back to the Second Circuit so the Second Circuit can reconsider what constitutes “property” in light of *Kelly,* in which the Supreme Court narrowly construed the meaning of “property” under the Title 18 fraud statutes. See generally *Kelly v. United States,* 140 S. Ct. 1565, 1574 (2020); see also supra note 25 (discussing how property issue represents basis of Supreme Court’s decision to vacate and remand Blaszczak).

126. See Blaszczak, 947 F.3d at 30. Blaszczak was sentenced to twelve months and one day, Worrall to twenty months, and Huber and Olany each to thirty-six months imprisonment. See id. The court issued fines of $1,250,000 each to Huber and Olany, and also ordered Blaszczak to forfeit $727,500, Huber to forfeit $87,078, and Olany to forfeit $98,244. See id. The four defendants were also ordered to jointly and severally cover CMS’s costs for providing witnesses, which equaled $1,644,26 total. See id.

127. See id. at 30, 35. The defendants also argued that the personal benefit requirement should extend to the wire fraud statute. See id.

128. See id. at 25–26, 45. Circuit Judge Richard J. Sullivan delivered the majority opinion. See id. at 25. Senior Circuit Judge Amalya Lyle Karse dissented, but the dissent was unrelated to the personal benefit issue. Rather, Senior Circuit Judge Karse primarily argued that the MNPI was not government “property.” See id. at 45–49 (Karse, C.J., dissenting). For a discussion of the conversion charges and the property issue the court considered, see supra notes 110, 125.

129. See Order, Petition for Rehearing, Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811).

130. See Petition for Writ of Certiorari, supra note 25.

131. For a further discussion of the Supreme Court’s decision to vacate and remand Blaszczak, see supra note 25. For a discussion of *Kelly* and its relevance to the property issue in Blaszczak—which is unrelated to the personal benefit requirement in insider trading cases—see supra note 125.

132. See Blaszczak, 947 F.3d at 34–35. The court also considered whether the requirement extends to Title 18 wire fraud. See id.
1348 and ultimately concluded a personal benefit was not necessary within the misappropriation theory of insider trading liability.\textsuperscript{133} The court also declined to consider the policy concerns raised by the defendants.\textsuperscript{134} Ultimately, the Second Circuit held the personal benefit requirement does not apply to insider trading cases brought under Section 1348.\textsuperscript{135}

A. Statutory Interpretation and the Misappropriation Theory of Fraud

In \textit{Blaszczak}, the Second Circuit relied heavily on statutory interpretation to decide the personal benefit issue.\textsuperscript{136} First, the court compared the plain language of the Title 15 and Section 1348 securities fraud provisions and found none of the provisions explicitly declare a personal benefit requirement; rather, the provisions all similarly address “schemes to ‘defraud.’”\textsuperscript{137} Next, the court cited \textit{Dirks}, asserting “Congress enacted the Title 15 fraud provisions with the limited ‘purpose of . . . eliminat[ing] [the] use of inside information for \textit{personal advantage}.’”\textsuperscript{138} On these grounds, the Second Circuit determined the Title 15 personal benefit requirement is judicially crafted to reflect the overarching purpose of the Exchange Act.\textsuperscript{139}

The Second Circuit then differentiated the legislative intent behind Section 1348 from that of the Title 15 provisions.\textsuperscript{140} The court stated Congress enacted Section 1348 to allow criminal authorities to more broadly enforce securities fraud and to “overcome the ‘technical legal requirements’ of the Title 15 provisions.”\textsuperscript{141} The court also emphasized its belief that Congress sought to implement similar elements and intent requirements for Section 1348 as it did for other Title 18 fraud statutes.\textsuperscript{142}

Moreover, the Second Circuit distanced the personal benefit test from the misappropriation theory of fraud on which the court relied to uphold the convictions of the defendant tippees.\textsuperscript{143} Because a breach of

\textsuperscript{133.} See \textit{id.} at 35–37.

\textsuperscript{134.} See \textit{id.} at 37.

\textsuperscript{135.} See \textit{id.}

\textsuperscript{136.} See \textit{id.} at 35–37 (discussing primarily the text and purposes of the Exchange Act and Section 1348 in analyzing the personal benefit issue).

\textsuperscript{137.} See \textit{id.} at 35.

\textsuperscript{138.} \textit{Id.} (alterations in original) (quoting \textit{Dirks v. SEC}, 463 U.S. 646, 662 (1983)).

\textsuperscript{139.} See \textit{id.} at 35–36 (“While it is true that Section 1348 . . . concerns the general subject matter of securities law, Section 1348 and the Exchange Act do not share the same statutory purpose.”).

\textsuperscript{140.} See \textit{id.} at 36.

\textsuperscript{141.} \textit{Id.} (quoting \textit{S. REP. NO. 107-146}, at 6 (2002)).

\textsuperscript{142.} See \textit{id.} (citing \textit{S. REP. NO. 107-146}, at 14). The court specifically referenced the Title 18 bank and health care fraud statutes, which were modeled after the Title 18 mail and wire fraud statutes. For a further discussion of these criminal statutes, see \textit{supra} note 87.

\textsuperscript{143.} See \textit{Blaszczak}, 947 F.3d at 36 (“In the context of embezzlement, there is no additional requirement that an insider breach a duty to the owner of the [inside information], since ‘it is impossible for a person to embezzle the money of
duty is implied within the embezzlement context, criminal prosecutors did not need to prove exactly how that breach of duty occurred, thus, any evidence of a tipper receiving a personal benefit was superfluous to the Section 1348 charges.\textsuperscript{144} On these grounds, the Second Circuit declined to extend the personal benefit test to Section 1348 securities fraud.\textsuperscript{145}

\textbf{B. Policy Considerations Rejected}

In removing the personal benefit requirement for Section 1348 cases, the court refused to consider the merits of the defendants’ policy arguments in \textit{Blaszczak}.\textsuperscript{146} The defendants contended the decision would allow criminal prosecutors to circumvent the well-established personal benefit test required under Title 15 by instead charging tippers with Section 1348 violations for the same conduct.\textsuperscript{147} The court maintained that even if this criticism was true—though the court declined to explicitly agree or disagree—it would not consider the policy argument because it is Congress’s responsibility to do so.\textsuperscript{148}

\textbf{V. Foul Tip: Critical Analysis of \textit{Blaszczak}}

The Second Circuit’s decision in \textit{Blaszczak} to forgo the personal benefit requirement in Section 1348 cases appears reasonable given the legislative history of Section 1348.\textsuperscript{149} Nevertheless, a deeper dive into the context of the legislative history and a textual analysis of Section 1348 uncover an opposing and more persuasive interpretation.\textsuperscript{150} In addition, the rule of lenity—which requires a criminal court to resolve statutory ambiguity in favor of criminal defendants—should have served as a backstop that further deterred the court from its holding.\textsuperscript{151} Moreover, the Second Circuit should have more rigorously considered the significant policy implications before deciding \textit{Blaszczak}, especially given the lack of Section 1348 case law and lack of clear direction from Congress about Section 1348’s

\textsuperscript{144} See \textit{id.}.

\textsuperscript{145} See \textit{id.} 36–37 (using the same reasoning to decline to extend the personal benefit requirement to Title 18 wire fraud cases).

\textsuperscript{146} See \textit{id.} at 37.

\textsuperscript{147} See \textit{id.}; see also Brief and Special Appendix for Defendant-Appellant Robert Olan at 33, \textit{Blaszczak}, 947 F.3d 19 (No. 18-2811) (arguing prosecutors would never use Title 15 for criminal insider trading enforcement if Section 1348 allowed them to avoid the personal benefit requirement altogether).

\textsuperscript{148} See \textit{Blaszczak}, 947 F.3d at 37.

\textsuperscript{149} See infra text accompanying notes 157–58.

\textsuperscript{150} See \textit{id.}

\textsuperscript{151} See \textit{Whitman v. United States}, 574 U.S. 1003, 1003 (2014) (noting the rule of lenity is meant to provide fair notice of crime elements to potential violators and that lenity “vindicates the principle that only the \textit{legislature} may define crimes and fix punishment”); see also infra Section V.A.3.
treatment of Title 15 insider trading elements.\textsuperscript{152} Ultimately, the Second Circuit should have opted to uphold the personal benefit requirement in tipper-tippee insider trading cases brought under Section 1348.\textsuperscript{153} Nevertheless, congressional action or further judicial review can still cure the errors from the Blaszczak decision.

A. Statutory Interpretation

The context of the legislative history the Second Circuit cited in Blaszczak suggests Congress did not intend to abolish the personal benefit requirement in criminal cases.\textsuperscript{154} While the Second Circuit offered plausible arguments based on the legislative purpose of Section 1348, the similarities in the text of Section 1348 and the Title 15 provisions support the application of the personal benefit requirement.\textsuperscript{155} Additionally, given the multiple reasonable interpretations of Section 1348, the rule of lenity should have further discouraged the Second Circuit’s holding in Blaszczak.\textsuperscript{156}

1. Legislative Intent

From a legislative intent perspective, the Second Circuit had adequate grounds to find it was not bound by the Title 15 insider trading elements in Blaszczak.\textsuperscript{157} Congress partially enacted Section 1348 to avoid the “technical elements from the [Title 15] securities laws,” and it is conceivable that the personal benefit requirement was one of those technical elements.\textsuperscript{158}

But in discussing the burdens of Title 15’s “technical elements,” Congress provided specific examples of the technical elements it sought to avoid and did not reference the insider trading elements.\textsuperscript{159} Notably, Congress critiqued the Rule 10b-5 requirement that a fraud be “in connection with a purchase or sale of any security,” indicating that Section 1348

\textsuperscript{152}. See, e.g., Slamowitz, supra note 29, at 37.
\textsuperscript{153}. See infra Sections V.A & B.
\textsuperscript{154}. See infra Section V.A.1 (analyzing the legislative history and intent behind Section 1348).
\textsuperscript{155}. See infra Section V.A.2 (comparing text of Section 1348 and the Title 15 provisions).
\textsuperscript{156}. See infra Section V.A.3.
\textsuperscript{157}. See United States v. Blaszczak, 947 F.3d 19, 34–37 (2d Cir. 2019) (discussing and comparing the legislative history and intent behind Section 1348 to the relevant Title 15 provisions, and ultimately declining to extend the personal benefit requirement to Section 1348 prosecutions), vacated and remanded, No. 20-5649, 2021 WL 78043 (Jan. 11, 2021).
\textsuperscript{158}. S. Rep. No. 107-146, at 20 (2002) (“[Section 1348] should not be read to require proof of technical elements from the securities laws . . . .”).
\textsuperscript{159}. See id. (discussing desire to avoid Title 15 technicalities but never mentioning the personal benefit or other judge-made requirements); Brief of Amici Curiae Law Professors at 7-11, United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811) (arguing nothing in Section 1348’s language or legislative history suggests Section 1348 was meant to address insider trading elements).
would forgo the technical “purchase or sale” element to cover a wider range of fraud.160 This example suggests Congress was referring to “technical elements” in the text of the Title 15 provisions, not to judge-made elements such as a personal benefit.161 In addition, the Second Circuit may have overstated the dissimilarity of the purposes of Section 1348 and the Exchange Act.162 For example, the Second Circuit posited that eliminating the use of MNPI for a “personal advantage” was the “limited purpose” of the Exchange Act, but this was really only one of the several purposes of the Exchange Act.163

160. See 17 C.F.R. § 240.10b-5 (2020) (emphasis added); S. Rep. No. 107-146, at 6 n.9 (2002) (citing SEC v. Zandford, 238 F.3d 559 (4th Cir. 2001)) (asserting one of the technicalities Congress was looking to avoid was courts’ strict construction of Rule 10b-5’s “purchase or sale” verbiage in dismissing some criminal cases); Luke A. E. Pazicky, A New Arrow in the Quiver of Federal Securities Fraud Prosecutors: Section 807 of the Sarbanes–Oxley Act of 2002 (18 U.S.C. § 1348), 81 Wash. U. L.Q. 801, 821 (2003) (discussing Congress’s disapproval of strict constructions of Rule 10b-5’s “purchase or sale” technicality). Congress also indicated that Section 1348 was meant to cover a wider range of fraud than Title 15, and insider trading is clearly already outlawed by Title 15. Further, Congress emphasized the need for flexibility in addressing novel types of securities fraud that have yet to arise, which could not refer to the well-established Title 15 insider trading doctrine. See S. Rep. No. 107-146, at 20 (“By covering all ‘schemes and artifices to defraud’ . . . [Section] 1348 will be more accessible to [criminal] investigators and prosecutors and will provide needed enforcement flexibility and, in the context of publicly traded companies, protection against all the types schemes and frauds which inventive criminals may devise in the future.” (citation omitted)).


162. See Blaszczak, 947 F.3d at 34–35 (differentiating purposes of Section 1348 and the Exchange Act); Andrew N. Vollmer, The Second Circuit’s Blaszczak Decision: Dirks Besieged [Jan. 11, 2020], https://ssrn.com/abstract=3516082 [https://perma.cc/6DU9-58FU] (claiming that “almost nothing about” the Second Circuit’s explanation of the legislative intent behind the Title 15 provisions was correct).

163. See Blaszczak, 947 F.3d at 35 (quoting Dirks v. SEC, 463 U.S. 646, 662 (1983)). Essentially, the Second Circuit replaced the word “a” with the word “limited” from the Dirks assertion that “a purpose of the securities laws was to eliminate ‘use of inside information for personal advantage.’” Dirks, 463 U.S. at 662 (quoting Cady, Roberts & Co., 40 S.E.C. 907, 912 n.15, 1961 WL 60638 (Nov. 8, 1961)); see also Second Circuit Denies Rehearing in Key Insider Trading Case, PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP (Apr. 13, 2020), https://www.paulweiss.com/practices/litigation/litigation/publications/second-circuit-denies-rehearing-in-key-insider-trading-case;id=32632 [https://perma.cc/3MF6-TDFX] (“[T]here is a substantial difference between a ‘purpose’ . . . and ‘the limited purpose’ of [the Exchange Act] . . . . Dirks was simply noting that the personal benefit test is consistent with the Exchange Act’s origins, not suggesting that the requirement implements some purpose unique to the Exchange Act that does not apply to other fraud statutes.”). The Exchange Act was largely aimed at ensuring that only accurate information persisted in securities markets, and the personal benefit test was borne in part to draw a line between fraudulent and benign disclosures of MNPI. See Vollmer, supra note 162. This purpose is more in line with Section 1348.
2. **Textual Analysis**

Section 1348’s explicit text also supports upholding the personal benefit requirement in Section 1348 tipper-tippee cases.\(^\text{164}\) Conspicuously, Section 1348’s crucial language essentially mimics Rule 10b-5’s language.\(^\text{165}\) Yet, Congress chose not to clarify the limits of what constitutes a scheme to defraud or include any explicit reference to insider trading in the Section 1348 text.\(^\text{166}\) This implies elements of “fraud” under Title 15—including the personal benefit requirement—are the same under Section 1348.\(^\text{167}\)

Context matters, too. The Supreme Court has consistently construed Rule 10b-5 to require a personal benefit in both criminal and civil tipper-tippee cases.\(^\text{168}\) The requirement has stood for almost forty years, yet Congress has not expressly stricken it down.\(^\text{169}\) If Congress intended to drastically alter the scope of insider trading law by abolishing a key element such as a personal benefit, it is reasonable to conclude that Congress would have either: (1) more clearly articulated this goal in the language of Section 1348; or (2) made this abundantly clear in the legislative record instead of merely relying on the broad statement that Section 1348 would help avoid some “technical requirements.”

3. **The Rule of Lenity**

The Second Circuit’s broad interpretation of Section 1348 not requiring a personal benefit is even more questionable because of the rule of lenity. To provide criminal defendants with proper notice of what conduct constitutes a crime, the rule of lenity states courts must narrowly construe ambiguous statutes in favor of criminal defendants.\(^\text{170}\) Given the


\(^{165}\) Brief of Amici Curiae Law Professors at 13, United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811). Compare § 1348 (making it unlawful for any person to “knowingly execute[ ] or attempt[ ] to execute, a scheme or artifice . . . to defraud any person . . . in connection with . . . any security”), with 17 C.F.R. § 240.10b-5 (2020) (“It shall be unlawful for any person . . . [t]o employ any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security.”).

\(^{166}\) See § 1348 (providing very broad securities fraud prohibition).

\(^{167}\) Petition for Writ of Certiorari, supra note 25, at 24–25 (“What makes tipping or trading on tipped information ‘fraud’ under [both Title 15 and Section 1348] . . . are the same elements: a breach of duty of confidence by the tipper for a personal benefit and knowledge of that by the tippees.”).

\(^{168}\) See, e.g., Salman v. United States, 137 S. Ct. 420 (2016) (reinforcing personal benefit requirement in affirming criminal conviction on those grounds); Dirks v. SEC, 463 U.S. 646 (establishing personal benefit requirement in a civil case).

\(^{169}\) See, e.g., Vollmer, supra note 162 (noting Dirks remains valid Supreme Court precedent).

multiple plausible interpretations of Section 1348 regarding the personal benefit issue, the rule of lenity should have served as a final line of defense against the holding in *Blaszczak*.\(^{171}\) Interpreting Section 1348 in favor of the defendants would have surely compelled the court to require a personal benefit under Section 1348. Therefore, the rule of lenity should have signaled the Second Circuit to defer to the Supreme Court’s Title 15 case law—at least until Congress more explicitly asserted its intent to the contrary.\(^{172}\)

### B. Policy Implications of *Blaszczak*

Although policy determinations are best left to the legislature, courts may consider them when attempting to interpret an ambiguous statute.\(^{173}\) Therefore, the Second Circuit unnecessarily limited its analysis in *Blaszczak* by pronouncing “it is not the place of courts to check [Congress’s] decision on policy grounds.”\(^{174}\) If the court had considered the implications of its interpretation of Section 1348—as this Note argues it should have—the court would have likely upheld the personal benefit requirement in Section 1348 insider trading cases.

The policy concerns raised by the defendants in *Blaszczak* are persuasive.\(^{175}\) For starters, the holding may essentially extinguish the *Dirks* personal benefit requirement in criminal cases.\(^{176}\) In addition, criminal authorities’ relative advantage over the SEC in pursuing insider trading actions runs counter to the traditional relationship between criminal and

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171. Lenity is especially relevant in decisions such as *Blaszczak*, where the Second Circuit essentially created a new version of tipper-tippee liability without explicit instruction from Congress. See Brief of Amici Curiae Law Professors at 25, United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811) (first citing Skilling v. United States, 561 U.S. 358 (2010); then citing United States v. Bass, 404 U.S. 336 (1971)) (arguing rule of lenity should apply with “special force” in *Blaszczak* because the Second Circuit essentially developed its own common-law jurisprudence of tipping liability despite a lack of clear legislative intent).

172. See *Bass*, 404 U.S. at 348 (“[L]egislatures and not courts should define criminal activity.”); Woody, supra note 17, at 641–44 (discussing how the rule of lenity should have applied in *Blaszczak* given the severe penalties for Section 1348 violations and the absence of clear Section 1348 case law in insider trading contexts).

173. See Robert A. Katzmann, *Judging Statutes* 31–32 (2014) (“When the text [of a statute] is ambiguous, a court is to provide the meaning that the legislature intended. In that circumstance, the judge gleams the purpose and policy underlying the legislation and deduces the outcome most consistent with those purposes.”).


175. See id. For a further discussion of the defendants’ policy arguments, see supra notes 146–48 and accompanying text.

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This discrepancy creates a potential loophole for the SEC to bypass the personal benefit requirement on the heels of a Section 1348 criminal conviction.178

1. **Title 15 Insider Trading Precedent: A Dead Letter?**

As the defendants asserted, if Blaszczak’s personal benefit analysis stands, it has the potential to render decades of insider trading case law futile in criminal cases.179 Criminal authorities may now choose to sidestep longstanding insider trading Supreme Court precedent—including but potentially not limited to the personal benefit element from Dirks—by bringing only Section 1348 charges against suspected insider traders.180 A result this extreme should require more precise congressional instruction. The profound impact of this outcome is discussed further in Part VI.

Blaszczak opens the door for criminal prosecutors to pursue convictions against individuals to whom insider trading liability should not extend.181 Without the personal benefit requirement, employees who merely overshare MNPI in a careless way may be liable as tippers, and individuals who fall into MNPI may be liable as tippees despite being unaware of the information’s source.182 Imposing liability on these unaware or careless individuals would too severely discourage those in possession of MNPI from ever sharing it with anyone, including market analysts.183

2. **Criminal Liability Becomes Easier Than Civil Liability**

Blaszczak undoubtably makes criminal convictions easier to obtain than civil verdicts in insider trading cases.184 This effectively inverts the

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177. See infra Section V.B.2; see also Adam Pritchard, 2nd Circ. Ruling Makes Messy Insider Trading Law Worse, Law360 (Jan. 27, 2020, 4:10 PM), https://www.law360.com/articles/1237586/2nd-circ-ruling-makes-messy-insider-trading-law-worse [permalink unavailable] (maintaining Congress did not intend for Section 1348 to allow criminal prosecutors to prove less elements than the SEC in insider trading cases).

178. See infra Section V.B.2; see also Woody, supra note 17, at 641 (asserting the SEC could utilize a criminal insider trading conviction—achieved under the more lenient Section 1348 standards—to secure summary judgment in a later civil case).

179. See Blaszczak, 947 F.3d at 37 (arguing the court should consider policy implications); see also Joint Petition for Rehearing or Rehearing En Banc at 16, Blaszczak, 947 F.3d 19 (2d Cir. 2019) (No. 18-2811) (“If left undisturbed, the majority’s ruling would render those decisions a dead letter and create crippling uncertainty.”).

180. See, e.g., Burgess, Andres, & MacBride, supra note 87 (highlighting that criminal authorities may use both 1348 and Title 15 in insider trading actions while the SEC is limited to Title 15).

181. See Pritchard, supra note 177.

182. See id.

183. See Dirks v. SEC, 463 U.S 646, 658–59 (1983) (noting proper functioning of the stock market partially depends on market analysts’ access to important company information).

traditional legal principle that civil verdicts require a lower standard of proof than criminal convictions.\(^\text{185}\) Further, the resulting weakening of the SEC’s power to enforce insider trading violations compared to criminal authorities may clash with the Exchange Act, in which Congress empowered the SEC to lead the charge in safeguarding the securities markets.\(^\text{186}\)

On the other hand, and perhaps just as unsettling, Blaszczak may indirectly create an avenue for the SEC to circumvent the personal benefit requirement in Title 15 cases entirely.\(^\text{187}\) The SEC may do this under the collateral estoppel doctrine by simply waiting for criminal prosecutors to convict insider traders under Section 1348, then using the criminal conviction to garner summary judgment in a subsequent civil case—without addressing the personal benefit requirement or other traditional Title 15 securities fraud elements.\(^\text{188}\) While the collateral estoppel doctrine is well-established, courts should decline to impute civil liability in this particular context, as it sidesteps the Supreme Court’s explicit Title 15 securities fraud requirements.\(^\text{189}\) Both consequences of Blaszczak—criminal authorities...
ties’ relative advantage in pursuing insider trading actions and the SEC’s potential use of collateral estoppel to combat the competitive imbalance—are problematic.

C. Potential Silver Linings of Blaszczak

Although Blaszczak is a net negative for insider trading law in the short term due to the uncertainty it brings for securities traders and enforcement authorities, it might yield positive, long-term results if it provokes more legislative or judicial attention to the intersection of Title 15 and Section 1348. Even now, those who advocate for broader enforcement of the securities fraud provisions will likely view Blaszczak as a step in the right direction and a welcome indication that the personal benefit test could be obsolete.\footnote{See, e.g., John C. Coffee, Jr., The Blaszczak Bombshell: A Return to the “Parity of Information” Theory of Insider Trading?, COLUM. L. SCH. BLOG ON CORP. & CAP. MKT. (Feb. 26, 2020), https://clsbluesky.law.columbia.edu/2020/02/26/the-blaszczak-bombshell-are-we-returning-to-a-parity-of-information-theory-of-insider-trading/ [https://perma.cc/6FYN-TAAH] (agreeing with the Second Circuit’s step to effectively remove the personal benefit requirement from criminal insider trading cases but acknowledging the peculiarity of the context in which the removal occurred).}

The Supreme Court recently vacated and remanded Blaszczak to the Second Circuit due to an issue unrelated to the personal benefit requirement, but the remand does not prohibit the Second Circuit from reconsidering its interpretation of Section 1348.\footnote{Christian Garcia & John Murray, U.S. Supreme Court Vacates Second Circuit’s Expansion of Criminal Insider Trading Liability, JD SUPRA (Jan. 25, 2021), https://www.jdsupra.com/legalnews/u-s-supreme-court-vacates-second-8047640/ [https://perma.cc/6RJB-7YY6] (“It is . . . unclear whether the Second Circuit will revisit its holding that the Dirks personal benefit test does not apply to [Section 1348]. . . . [The remand] leav[es] the door open for the government to continue to argue that it need not establish a personal benefit in its insider trading prosecutions under [Section 1348].”). For a further discussion of the Supreme Court’s decision to vacate and remand Blaszczak, see supra note 25.} The Second Circuit should take advantage of this fortuitous opportunity to do so. But even if the Second Circuit keeps its original personal benefit analysis intact—which seems likely when considering the remand had nothing to do with the personal benefit requirement—the Supreme Court should provide a definitive position on whether courts should import Title 15 insider trading elements to Section 1348 cases, especially given the potentially radical repercussions for insider trading liability.\footnote{See, e.g., United States v. Blaszczak, 947 F.3d 19 (2d Cir. 2019), vacated and remanded, No. 20-5649, 2021 WL 78043 (Jan. 11, 2021); see also Joint Petition for Rehearing or Rehearing En Banc, supra note 179, at 12 (“If left in place, the [Blaszczak] decision will radically expand criminal liability by allowing prosecutors to evade the personal-benefit requirement and will throw insider-trading law—and those who rely on it to govern their conduct—into chaos.”); Ho & Fox, supra note 25 (discussing how Supreme Court’s decision to vacate and remand Blaszczak did.

Collateral Estoppel, BLACK’S LAW DICTIONARY (11th ed. 2019). For a further discussion of collateral estoppel, see supra notes 99–103 and accompanying text.
dorse the personal benefit requirement for all insider trading cases for the reasons stated throughout this Note. But even if not, any clarification of the relationship between Title 15 and Section 1348 in the insider trading context would help lower courts address the storm of uncertainty that Blaszczak epitomizes.

If the Supreme Court does not get the opportunity to adjudicate the personal benefit requirement in Blaszczak or another similar case, legislative intervention is a particularly attractive outcome that is already looming due to the House’s passage of the ITPA. Such legislative action has only become more critical in the wake of Blaszczak. While the ITPA is a good start, it must also add an exclusivity clause for sufficient effectiveness; otherwise, criminal authorities could simply choose to use Section 1348 instead of the ITPA in insider trading actions. Even without an exclusivity clause, a comprehensive insider trading law would serve as strong authority to guide courts in future cases.

VI. AT THE TIPPING POINT: IMPACT OF BLASZCZAK

If its personal benefit analysis remains undisturbed, Blaszczak carries the potential to fundamentally alter the way that both criminal and civil authorities approach insider trading cases. To avoid the burden of es-
establishing that a tipper received a personal benefit, which has long been a critical element of tipper-tippee liability, criminal prosecutors in the Second Circuit would have the option to forgo Title 15 charges altogether and instead pursue only Section 1348 charges.197 As the Blaszczak decision itself highlights, this option—which is not available to the SEC—gives criminal prosecutors a much easier road to insider trading convictions.198 Consequently, the DOJ would likely make Section 1348 the new default vehicle for criminal tipper-tippee cases.199 The resulting power shift may alter the SEC’s role in insider trading enforcement in a way that potentially runs counter to the legislative intent of the Exchange Act.200

Because the personal benefit requirement is already satisfied somewhat easily, the DOJ’s ability to evade the personal benefit requirement in Section 1348 criminal cases would, on its own, be unlikely to produce a dramatic increase in insider trading convictions.201 But the personal benefit requirement might just be the first domino to fall. Courts may rely on Blaszczak to allow the DOJ to bypass other longstanding Title 15 insider trading standards.202

Only time will tell exactly how pervasive Blaszczak’s impact on insider trading law will be; therein lies the problem. Even a subtle shift by the DOJ toward utilizing Section 1348 instead of Title 15 in criminal insider trading cases would further complicate insider trading law.203 Courts will...

197. See, e.g., Burgess, Andres, & MacBride, supra note 87 (explaining Blaszczak allows prosecutors to circumvent the longstanding personal-benefit requirement by utilizing Section 1348).
198. See Haray, supra note 176, at 16.
199. See Atanasio, Cahn, Mitchell, & Titolo, supra note 194 (positing that criminal prosecutors will rely more heavily on Section 1348 in insider trading cases in the wake of Blaszczak). Similar broad interpretations of Section 1348 may eventually inspire the DOJ to do the same for all criminal insider trading cases. See Coffee, Jr., supra note 190 (arguing the Blaszczak decision “may in time trump Rule 10b-5”).
200. See Woody, supra note 17, at 640 n.305.
201. See Second Circuit Denies Rehearing in Key Insider Trading Case, supra note 163 (commenting on the generally low bar for satisfying the personal benefit requirement and how criminal authorities have rarely struggled to establish this element).
202. See Stephen L. Ascher, Anthony S. Barkow, Anne Cortina Perry, & Charles D. Riely, Second Circuit Allows Insider Trading to Be Proven Without Personal Benefit, Am. B. Ass’n (Jan. 21, 2020), https://www.americanbar.org/groups/litigation/committees/securities/practice/2020/united-states-v-blaszczak/ [https://perma.cc/E8LA-368K] (indicating Blaszczak "could have the effect of subjecting defendants to possible criminal liability even in situations in which the government is unable to meet the elements of [Title 15] and the SEC is unable to bring a civil case"); Haray, supra note 176, at 16 (“We should expect prosecutors to look for opportunities to use [Blaszczak] to create other advantages for themselves in [Section 1348] securities fraud cases, and, where possible, avoid being bound by precedent applicable to [Title 15] claims.”).
203. See Second Circuit Denies Rehearing in Key Insider Trading Case, supra note 163 (asserting the Second Circuit’s inconsistent application of the personal benefit...
be forced to forge ahead with minimal precedent to rely on, and results in insider trading cases will likely become even more unpredictable than they currently are.\footnote{204} Although the updated \textit{Blaszczak} decision binds courts in only the Second Circuit, the Second Circuit serves as the main hub for insider trading cases and may persuade other courts to follow suit.\footnote{205} The robust unknowns make one thing clear: if neither the Supreme Court nor Congress intervenes to provide clear guidance on how to navigate the interplay between the Title 15 and Section 1348 securities fraud provisions, \textit{Blaszczak} and similar future cases will push insider trading law into an even deeper state of uncertainty.

\footnote{204. See Vollmer, supra note 162 ("Judges and juries in future cases will have less guidance about the conduct necessary for a conviction. . . . Participants in the securities markets will have less guidance about their legal obligations.").}

\footnote{205. See Slamowitz, supra note 29, at 37 n.31 ("While it also remains to be seen if the Second Circuit \textit{Blaszczak} decision will be adopted by other circuit courts, the Southern and Eastern Districts of New York are where most insider trading cases take place."). Notably, the Second Circuit includes New York City, the unofficial financial center of the United States. See, e.g., DUFF & PHILPS, GLOBAL REGULATORY OUTLOOK 2019 5 (2019) (deeming New York the financial hub of the entire world).}