2013

A Portrait of the Insider Trader as a Woman

Joan MacLeod Heminway

11. A portrait of the insider trader as a woman

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The stock image of the perp walk for an insider trader is that of a besuited male—not too old, not too young—being led away by law enforcement officials (similarly clothed and also male). The suit and the age may be of marginal significance in this stereotypical profile. Yet the sex and gender[1] of the standard, run-of-the-mill insider trader is certainly male. This is, perhaps, unremarkable. Men have historically been the predominant trading participants in the securities markets. And so they must also be the predominant violators of trading rules, insider trading included.

Yet, since 2000, women have more frequently served as poster children for transgressions of US prohibitions on insider trading under § 10(b) of the Securities Exchange Act of 1934, as amended, and Rule 10b-5 as adopted under § 10(b) by the US Securities and Exchange Commission (SEC), either as defendants or as unwitting participants. Martha Stewart is undoubtedly the most visible example of a female image in an insider trading story. But other examples, not household names in other respects, also form part of a more visible presence of women in insider trading cases and controversies. These women include Carolyn Balkenhol, Danielle Chiesi, Randi Collotta, Nina Devlin, Kathryn Gannon (a/k/a Marilyn Star), Christie Heffner, Winnifred Jiau, Charlotte Ka On Wong Leung, Serenella Lina, Annabel McClellan, Donna Murdoch, Monie Rahman and Patricia Rocklage, to name a few.

Although it may be interesting and seemingly unusual to see more women as the veritable face of insider trading in the USA, one must wonder whether this change has any substantive significance. What, if anything, does sex or gender have to do with US insider trading regulation? This chapter first addresses that question and then explores (anecdotally and through extensions of existing sex and gender studies outside the insider trading realm) the potential roles and significance of sex and gender in insider trading in the USA. In particular, omnipresent public reports of insider trading cases in which material nonpublic information is shared between romantic partners (so-called "pillow talk" cases[2]) allow us to see women in a multiplicity of roles in insider trading schemes. The lack of empirical studies illuminating potential sexed or gendered information asymmetries,

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1 For a helpful and lucid discussion of sex and gender and its value in research and analysis (albeit in a different context), see Joan W. Scott, Gender: A Useful Category of Historical Analysis, 91 Am. Historical Rev. 1053 (1986). This chapter focuses on gender more than sex, while acknowledging that "the close association of gender and sex and the normative demands of conforming to the sex–gender stereotype for social recognition means that both the female sex and feminine gender are likely to be treated as equivalents." Alan Gregory et al., Does the Stock Market Gender Stereotype Corporate Boards? Evidence from the Market's Reaction to Directors' Trades, British J. of Mgmt. (forthcoming 2012) (early view at 2), available at http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8551.2011.00795.x/abstract (last visited Nov. 20, 2012) (subscription required).

2 See, e.g., Ellen Rosen, Rise in Insider-Trading Cases Shows the Perils of Pillow Talk, N.Y. Times, Aug. 24, 2007, at C6.

conceptions of duty and (more particularly) trust, risk preferences and senses of entitlement to insider trading proceeds also is a matter of concern. Although we can understand a few things about women as insider traders from existing theoretical, empirical, anecdotal and analytical information, many questions remain. Our understanding of the role that sex or gender may play in the construction and operation of insider trading prohibitions and enforcement efforts and the resulting overall picture of women as insider traders are both, as yet, incomplete.

I. SEX OR GENDER AS A VALID LENS FOR INSIDER TRADING INQUIRY AND ANALYSIS

Insider trading law may interrelate with gender in a number of legally significant ways. For example, at a general level, the law of insider trading in the USA may be an expression of gendered principles. US insider trading law may be shaped by different conceptions of men and women and their roles in the economy and society. In addition (or instead), the operation of the rules governing insider trading in the USA may interact with gender in distinct ways: US insider trading regulation may engage men and women differently or it may have disparate impacts on market participants based on gender. Scholars have begun to explore these possibilities using theory and empirical data gathered in the lab and in the field. Insights from this work allow for a richer understanding and critique of the law governing insider trading regulation in the USA.

A. Insider Trading as an Expression of Gendered Principles

Although its potential origins in gendered economic and societal conceptions may be non-obvious, the law of insider trading may be gender-constructed—at least in part. In 1998, Professor Judith Greenberg assessed the possible gendered nature of US insider trading regulation in a notable law review article.[3] In that work, she contended that insider trading law was shaped by the federal courts' perceptions of gendered roles in the economy and society—specifically, gendered roles that operate in markets and in families.

> [I]deas about gender, through their connection to the concepts of market and family, play a part in forming insider trading law. Insider trading law is understood to be law of and for the market, but not the family. Thus, concepts of "family" work to determine the limits of insider trading law.[4]

Specifically, Professor Greenberg concludes that "[i]nsider trading law today is premised on retaining the difference between markets and families, men and women."[5] She supports her argument by establishing the organizational utility of markets and family as a descrip-

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[3] Judith G. Greenberg, Insider Trading and Family Values, 4 Wm. & Mary J. of Women & L. 303 (1998).
[4] Id. at 308.
[5] Id. at 372.

tive dichotomy and illustrates the application of her thesis primarily through the analysis of an infamous insider trading case, *US v. Chestman*.[6]

The *Chestman* case is an early and interesting example of a pillow talk case—a special type of insider trading case, as earlier noted, typically based on the conveyance of material nonpublic information from one member of a romantically linked couple to the other.[7] In the *Chestman* case, a case involving material nonpublic information passed by a wife to her husband, the court found that kinship and marriage did not, alone, give rise to the requisite duty of trust and confidence on which insider status and insider trading liability are based.[8] Professor Greenberg notes that the result in *Chestman* reifies male/female distinctions rooted in the economic and social divide between the market and the family.[9] Specifically, Professor Greenberg notes that the *Chestman* court characterized the sharing of information and breach of trust between the wife and the husband in that case as ordinary marital relations and obligations that are not fiduciary in nature; they are matters of family and not of the market and therefore are not the basis of insider trading liability.[10] Professor Greenberg critiques this characterization and the resulting legal analysis in the case.[11]

At the same time, Professor Greenberg also notes that the court's view of the facts in *Chestman* paradoxically counters the traditional gendered roles of men and women in marriages.[12] In *Chestman*, the wife in the couple revealed material nonpublic information to her husband, who passed that information on to his broker. Would the result in *Chestman* have been different, we might ask, if the husband had revealed information to the wife and she had tipped or traded on it?

In 2000, nine years after the *Chestman* decision, the SEC adopted a rule to clarify the status of marital and other family relationships in misappropriation cases. Under Rule 10b5-2, the requisite duty of trust and confidence exists in a misappropriation case:

> Whenever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling; provided, however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information.[13]

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[6] 947 F.2d 551 (2d Cir. 1991).

[7] See supra note 2 and accompanying text; see also Chapter 1 in this volume; infra section III.

[8] *Chestman*, 947 F.2d at 570–71.

[9] Greenberg, supra note 3, at 331. ("An analysis of *Chestman* shows the importance of courts maintaining a clear line between market and family. Were this line to disappear, the distinction between family and market might be blurred, upsetting our notions of how to act in each realm and, thus, of male and female identity.")

[10] Id. at 332–33.

[11] Id. at 333–35.

[12] Id. at 333. ("[T]he court viewed Keith and Susan Loeb's marriage as being a marriage of autonomous, self-sufficient individuals – a truly modern marriage.")

[13] 17 C.F.R. § 240.10b5-2(b)(2) (2012); see also Chapter 1 in this volume.

Rule 10b5-2 appears gender-neutral on its face. But the presumption of a duty based on the spousal relationship leaves open the possibility that a court may continue to explicitly or implicitly construct the law of insider trading based on gender through the ability of a recipient of material nonpublic information to rebut the presumed duty of trust and confidence by establishing the necessary facts, as expressly provided in the rule.

Professor Greenberg also invokes in her analysis another infamous insider trading case based on marital relations, *SEC v. Switzer*.[14] In the *Switzer* case, the husband in a married couple shared material nonpublic information with his wife for the purpose of coordinating their family activities and obligations. An acquaintance overheard the information, traded on it and tipped others. The court found no breach of duty in the husband's disclosure of the material nonpublic information to his wife under the circumstances.[15]

In describing and analyzing the *Switzer* case, Professor Greenberg notes the court's engagement with the gendered roles of the husband and wife in applying insider trading law to the facts of the case.

> [T]he court describes the conversation between husband and wife as one in which she is performing as a good wife, solicitous of his mental health . . . [S]he is described as the caring wife of separate spheres ideology. It is her job to provide solace and comfort to her husband as he deals with the troubles of the world.[16]

The stereotypical husband/wife relationship in the *Switzer* case provides a plausible explanation for the court's failure to find a breach of duty. The court may have been acting to preserve that traditional relationship and its role in the nuclear family.

Having established this gender-role premise, Professor Greenberg notes that several other, similar cases not involving heterosexual marital couples yield different results.[17] She finds the heterosexual marriage component to be compelling, if not dispositive, and ties the roles in this relationship back to her central theme: the market/family duality.

> According to the separate spheres ideology, the market is a male venue. Thus, the cases that involve the transfer of business information between men are more easily seen as involving market relations than those that involve the transfer of information among members of a heterosexual couple. Or, to phrase the point differently, relations between men and women are understood as predicated on an underlying sexual attraction and emotional attachment. These are characteristics associated with the family.[18]

In the aggregate, Professor Greenberg's analyses provide a reasonable basis for concluding that gender may have had a role in constructing US insider trading law.

The SEC's insider trading enforcement action against Martha Stewart also reveals potential gender-based roots for US insider trading regulation—or at least for the exercise of administrative enforcement discretion in insider trading cases. As a famous

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[14] 590 F. Supp. 756 (W.D. Okla. 1984).
[15] Id. at 766.
[16] Greenberg, supra note 3, at 341–42.
[17] Id. at 342–44.
[18] Id. at 344.

television, radio and print publication personality, Martha Stewart represented a highly visible female example of insider trading to be held up for public pillory and contempt.[19] Although the SEC's case against Stewart (which involved a relatively small sum of money and was questionable on the merits for a number of reasons[20]) eventually was settled before trial, the public widely believes that Stewart was jailed for violating US insider trading prohibitions.[21] The SEC's enforcement activity more than served its purpose in personifying the modern insider trader as a woman.

The SEC's enforcement actions against Stewart can be seen as part of a larger strategy on the part of the agency to preserve and exercise its enforcement discretion with the aim of enhancing its own perceived value and serving related political aims.[22] In particular, during a time of deregulation and underfunding, it may be in the SEC's best interest to engage in high-profile enforcement activity.[23] By pursuing visible insider trading cases, the SEC may be able to improve its political leverage with the legislature, enabling it to garner additional funds and other support for its operations—while at the same time achieving specific and general deterrence aims.[24] Admittedly, visible enforcement activity was not necessarily a winning strategy for the SEC in the years immediately following the 2008 financial crisis (although the SEC's enforcement activity during that time may have prevented a more significant deterioration of its relationship with the US Congress). However, at the time the *Stewart* case was ripe for enforcement action, this strategy may have been employed with greater success.

Specifically, in early 2002 (when the SEC exercised its discretion to pursue Stewart for alleged insider trading violations), Stewart was highly visible as a public figure in a growing media/entertainment/publishing firm. Stewart's name was the business's headline, and she was a visible part of the entertainment piece of her business. Her image was recognizable to many in the United States and was associated with her name and her business. At a time when few women were recognizable as directors and officers of public companies, she was recognizable as a woman who started her own business and took it public. And, as one of few women having both the power and duties of an insider and the wealth to engage in relatively significant personal trading transactions in the market,

[19] See generally Joan MacLeod Heminway, Was Martha Stewart Targeted?, in Martha Stewart's Legal Troubles 3–42 (Joan MacLeod Heminway ed., 2007) [hereinafter *Targeted*]; Joan MacLeod Heminway, Save Martha Stewart? Observations About Equal Justice in US Insider Trading Regulation, 12 Tex. J. Women & L. 247 (2003) [hereinafter *Equal Justice*].

[20] Ray J. Grzebielski, Why Martha Stewart Did Not Violate Rule 10b-5: On Tipping, Piggybacking, Front-Running and the Fiduciary Duties of Securities Brokers, 40 Akron L. Rev. 55 (2007); Joan MacLeod Heminway, Martha Stewart: Insider Trader?, in Insider Trading: Global Developments and Analysis (Paul Ali & Greg N. Gregoriou eds., 2008).

[21] Even reputable news outlets get this wrong. See, e.g., Congress Insiders: Above the Law?, 60 Minutes, CBSnews.com (November 11, 2011), available at http://www.cbsnews.com/8301-18560_162-57323221/congress-insiders-above-the-law/ (last visited Nov. 20, 2012).

[22] See generally Harvey L. Pitt & Karen L. Shapiro, Securities Regulation By Enforcement: A Look Ahead At the Next Decade, 7 Yale J. on Reg. 149 (1990) (describing the interactions between SEC enforcement activity and the political realm, among other things).

[23] See Stephen M. Bainbridge, Securities Law: Insider Trading 149 (2d ed. 2007); see also Pitt & Shapiro, supra note 22, at 184–89 (describing the importance of visibility to an effective, efficient enforcement program).

[24] Bainbridge, supra note 23, at 149.

Stewart was a highly visible and desirable enforcement target for SEC enforcement action in part because she is a woman.

The Martha Stewart insider trading enforcement saga also exemplifies more generally a feminist construction of insider trading regulation (or, again, at least a feminist construction of enforcement discretion in the application of that body of regulation)—a construction that relies on unequal distributions of privilege and power as its core premises.[25] "Surely, there is a feminist tale to be told here—including that of male-dominated rule-makers and enforcement agents causing the fall of women who threaten their male power base and the resulting gender-infused *schadenfreude*—the joy experienced from another's misfortune."[26] In fact, it is possible that SEC enforcement discretion was exercised against Stewart at least in part because she is a woman.

> [T]he Martha Stewart investigation represents a highly publicized attempt to enforce US insider trading regulation against a woman. Accordingly, the SEC may be pursuing its insider trading enforcement action against Martha Stewart to hold her out as an example to other women (presumably as a deterrent) that alleged violations of US insider trading regulation committed by women will be vigorously pursued. . . . [S]trategic enforcement action is common and is an accepted part of overall enforcement discretion.[27]

The vagaries of insider trading regulation under § 10(b) and Rule 10b-5 create opportunities for enforcement of the law of insider trading in gender-specific ways that may reshape the contours of that law.[28]

Professor Theresa Gabaldon uses feminist analysis to examine US insider trading regulation in a 2002 article—together with Professor Greenberg's article, one of few full-length works in the area of feminism and securities regulation.[29] Like Professor Greenberg, Professor Gabaldon focuses on the nature of relationships in the context of insider trading's duty of trust and confidence in the USA. Specifically, she analyzes federal securities regulation rules (including those in US insider trading law) from the standpoint of trust-oriented relationships—noting both in-group and out-group manifestations and elements. She concludes, in relevant part, that:

> The predominant imagery of the federal securities laws is sketched by their recognized goals and enhanced by their detailed operative provisions. The central portrayals are of cold, hard, economically rational man. The usual offeror of securities is a predator, eager to sell nothing for something. His foil is a socially isolated widow or orphan who, if given enough (truthful) information will be made capable of rational, self-protective decision-making.[30]

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25 Theresa A. Gabaldon, Feminism, Fairness, and Fiduciary Duty in Corporate and Securities Law, 5 Tex. J. Women & L. 1, 7 (1995) (referring to feminism's "insistent reliance on the springboard proposition that women occupy an unequal position in society").

26 Joan MacLeod Heminway, Martha Stewart and the Forbidden Fruit: A New Story of Eve, 2009 Mich. St. L. Rev. 1017, 1021 n.10.

27 Heminway, *Targeted*, supra note 19; Heminway, *Equal Justice*, supra note 19 (footnotes omitted).

28 Id.

29 Theresa A. Gabaldon, Assumptions about Relationships Reflected in the Federal Securities Laws, 17 Wis. Women's L. J. 215 (2002).

30 Id. at 247.

Insider trading law under § 10(b) and Rule 10b-5 can be viewed through this construct. The federal judiciary, as the key rule maker in US insider trading regulation, has largely been charged with identifying the predators whose activity needs to be channeled appropriately and the widows and orphans whose interests need to be protected. As such, Professor Gabaldon's portrayal of insider trading law in the USA also indicates that US insider trading regulation may be at least partially founded in gendered norms.

B. The Interaction of Sex and Gender with the Operation of US Insider Trading Rules

Regardless of whether US insider trading regulation is constructed along gendered lines, its application and effects may differ based on categories of difference, including sex and gender. Increased knowledge of the biological and behavioral attributes of men and women gained from empirical studies has afforded researchers additional knowledge about innate and socialized differences in the sexes. This greater knowledge, when combined with theoretical frameworks and analysis, has enabled a richer study of the interrelation of insider trading with sex and gender.

Gender has become a more prevalent lens for inquiry and analysis as women have been moving in greater numbers into more diverse roles in the national economy and in society more generally. Women have increased their economic and financial market participation and visibility in varying sectors in the 20th and 21st centuries. Especially relevant to the subject of this chapter, women are more involved in buying and selling securities. Through empirical work on gender and securities trading, we have learned that women's behavior and outcomes in securities trading (as in other realms) are not always the same as those of men.[31] These differences in behavior and outcome may emanate from, or signal the need for changes in, the US securities regulation.

> [T]here is emerging evidence that women may behave and fare differently from men when they engage in securities trading transactions. These differences in behavior and outcome are increasingly important; around the world, growing numbers of women are investing in publicly traded securities and, as the publication of numerous female-targeted popular press books demonstrates, being encouraged to invest in the securities markets (and elsewhere) in greater amounts and with greater frequency. The increased participation of women in the securities markets may be or become market significant or legally significant.[32]

If these differences exist generally in securities trading transactions, they may also exist in trading contexts involving actual or potential contraventions of insider trading prohibitions. The identification of any salient differences in male and female insider trading may provide academics, policy makers and other interested parties with a new window on the efficacy of US insider trading regulation—a window that substantiates earlier analyses or illuminates new areas for consideration, study and potential action.

A number of important questions can be—and are beginning to be—asked about

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[31] Joan MacLeod Heminway, Female Investors and Securities Fraud: Is The Reasonable Investor A Woman?, 15 Wm. & Mary J. of Women & L. 291, 309–19 (2009).

[32] Id. at 294–95.

gender differences in insider trading behavior and outcomes. Paramount among them: whether female insiders have access to the same kind and amount of undisclosed market-relevant (from a legal standpoint: material nonpublic) information as male insiders; whether female insiders trade while in possession of material nonpublic information as frequently as, and in volumes similar to, men; and whether women's trades while in possession of material nonpublic information are otherwise qualitatively different (made at different times, for different reasons and under other different circumstances). Empirical work has begun to answer these questions.

For example, a recent study finds that women may be less likely to benefit from insider trading because they are less likely to be in possession of material nonpublic information. In a study of insider trading behavior of senior corporate executives and directors in the USA between 1975 and 2008, researchers found that both male and female executives, board members and senior officers earned significant average positive excess returns from their securities purchases.[33] However, men earned greater excess returns on insider purchases on average than women in the same insider position, and men traded more frequently than women in the same insider position.

The coauthors tested four hypotheses as possible explanations for these results:

- an information access hypothesis, positing that men in the executive ranks have better access to beneficial information than women in the same positions;
- an overconfidence hypothesis, positing that men in the executive ranks are more overconfident than women in the same positions;
- a risk-aversion hypothesis, positing that men in the executive ranks are less (or no more) risk-averse than women in the same positions; and
- a use propensity hypothesis, positing that women in the executive ranks are less willing to use insider information than men in the same positions.[34]

The only hypothesis of the four that was supported by the tests performed in the study was the information access hypothesis. Although female executives do trade as much as (if not more than) male executives before significant events, male executives trade more overall and earn greater excess returns.[35] The researchers conclude that the sum total of the results of their study "suggest[s] that female executives may have limited access to inside information in comparison to their male counterparts."[36] Research conducted by graduate students in Sweden on trading in the securities of Stockholm Stock Exchange issuers also finds that male insiders earn higher abnormal returns than female insiders and attributes that difference to gender-related information asymmetries.[37]

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33 See Sreedhar T. Bharath et al., Are Women Executives Disadvantaged? (June 24, 2009), http://ssrn.com/abstract=1276064 (last visited Nov. 20, 2012).
34 Id. at 3–4.
35 Id. at 4–5.
36 Id. at 5.
37 See Sverker Nordlander & Oscar Rheborg, An Insider Trading Cocktail—A Study on Gender Differences and the Implications of the Capital Insurance (Fall 2010), http://arc.hhs.se/download.aspx?MediumId=1086 (last visited Nov. 20, 2012).

A subsequent event study of director trades in the UK verifies the overall results of the US and Swedish studies: while all directors earned abnormal returns, men earned greater abnormal returns than women.[38] However, after measuring returns using a longer-term window, the UK study results changed dramatically. Over the longer term, women earned higher abnormal returns than men.[39] As a result, the study co-authors hypothesize that "the announcement period market reaction does not reflect the actual information-gathering capabilities of female directors, but reveals only the market's perception of such capabilities, which may have less to do with their actual capabilities and more to do with gender stereotyping."[40]

Finally, in an earlier UK study conducted by three of the same researchers, the co-authors found that abnormal returns for male and female directors of UK companies were similar after controlling for the category of director (executive versus non-executive).[41] The motivation for and findings of this study are founded in part in board demographics. Specifically, the researchers noted in describing the sample of firms being studied, that:

> [T]here are an average of 11.3 and 8.4 directors per company, respectively, but . . . females are underrepresented. Even more dramatically, females are more underrepresented with respect to executive directorships over non-executive directorships. The ratio of male non-execs to execs is 1.77, but the ratio of female non-execs to execs is 4.8. Hence any gender differences in directors' trading, since females are over-represented as non-executive directors relative to executive positions, may contaminate the information hierarchy effect measured only with respect to the category of the director.[42]

The results of the study expressly address the disentanglement of gender from director status in the United Kingdom and indicate that "the market reaction to a director's trade is not influenced by the gender of the director but is affected by the category of the director trading."[43]

Studies like these are beginning to reveal gender-based insider trading differences and to dispel certain commonly held beliefs about differences in male and female insider trading behaviors and outcomes. Data collected and analyzed in these studies should help theoreticians, researchers, policy makers and enforcement agents identify and better understand the legal significance of any identified differences in men's and women's behaviors and outcomes in insider trading contexts. For example, if US insider trading law protects or motivates men and women differently and that difference in protection or motivation is neither intended nor desirable, then changes in the law or in the enforcement of the law may be warranted.

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38 Gregory et al., supra note 1.
39 Id. at 11.
40 Id. at 12–13.
41 Alan Gregory et al., Stock Market Patterns around Directors' Trades: Effects of Director Category and Gender on Market Timing (July 2009), https://business-school.exeter.ac.uk/documents/papers/finance/2009/0902.pdf (last visited Nov. 20, 2012).
42 Id. at 4.
43 Id. at 5.

II. THE PERSISTENCE OF PILLOW TALK CASES AS AN EXPRESSION OF THE GENDER-CONSTRUCTION NORM

The theoretical and empirical background described in section I of this chapter offers a number of preliminary insights into the construction of US insider trading law and the difference in behavior and outcomes of female and male insider trading in the USA. These insights are important descriptors of insider trading realities as they relate to men and women. Some of these realities are more compelling than others.

Of particular note are the pillow talk cases,[44] which (as noted in section I) have received some theoretical, doctrinal and policy-oriented attention. A pillow talk case may involve either a heterosexual or homosexual relationship. In either case, much can be learned about the interaction of sex or gender and insider trading. Men and women may behave differently in mixed-sex (or mixed-gender) and same-sex (or same-gender) groups.[45]

A. Legal and Empirical Observations about Pillow Talk Cases

The sharing of information between members of a couple in a pillow talk case is legally cognizable as a classic tipping case (if a corporate insider in the relationship inappropriately discloses material nonpublic information to the other individual in the relationship); a misappropriation case (if the individual in the relationship receiving the information breaches a duty of trust and confidence to the other individual in the relationship); or a misappropriation tipping case (if one individual in the relationship violates a duty of trust and confidence to someone outside the relationship by sharing material nonpublic information with the other individual in the relationship).[46] In each of these cases, the member of the couple receiving the information within the relationship may either trade on that information or tip it to someone outside the relationship. Thus, in the first form of pillow talk case, styled as a classic tipping case, an insider passes material nonpublic information to his or her romantic partner who either trades in securities of the issuer affiliated with the insider or re-tips the information to others who similarly trade. In the second form of pillow talk case, cognizable under Rule 10b5-2, a recipient romantic partner trades in securities or tips material nonpublic information in violation of his or her spousal (or other) duty of trust or confidence to the conveying romantic partner. In the third type of pillow talk case, a direct or indirect recipient of material nonpublic information violates a duty to the source of that information by tipping the information to his or her romantic partner who, in turn, either trades in securities of the issuer affiliated with the insider or re-tips to others who trade. Any of these forms of pillow talk case may involve one or more chains of tippees (i.e., more than just one or two tippees): the tippee or tippees of

44 See supra notes 2 & 7 and accompanying text.

45 See, e.g., Sander Hoogendoorn et al., The Impact of Gender Diversity on the Performance of Business Teams: Evidence from a Field Experiment 4 (Tinbergen Inst. Discussion Paper, Paper No 2011-074/3, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1826024 (last visited Nov. 20, 2012); Radosveta Ivanova-Stenzel & Dorothea Kübler, Gender Differences in Team Work and Team Competition 21–22 (July 9, 2009), available at http://www2.wiwi.hu-berlin.de/wt1/research/2007/IK090702.pdf (last visited Nov. 20, 2012).

46 See Chapter 1 in this volume.

an insider (or misappropriator) may re-tip some or all of the information to one or more secondary tippees, who may then further re-tip some or all of the information to one or more tertiary tippees, *ad infinitum*. Expert network insider trading cases, a significant target of the enforcement efforts of the SEC in the new millennium, fit this description and may involve pillow talk.[47]

Tipping and misappropriation cases have not been examined empirically in published studies. Because the existence and identity of a tippee or misappropriator typically is not known unless and until an inquiry and investigation by the SEC or another law enforcement authority is concluded and publicized, event studies, the *sine qua non* of empirical research in finance,[48] are not useful as a means of empirical study of tippee and misappropriator behavior. Said differently, one cannot measure the abnormal returns of a class of traders around a particular market-affecting event without knowing who comprises that class of traders, specifically or generally. Accordingly, event studies do not provide information about pillow talk cases.

One could gather and analyze, on the basis of gender, basic data on the pillow talk cases that have become public. While the data collection would be difficult and the sample size would be small, meaningful quantitative and qualitative empirical research using these data may help illuminate important aspects of this common form of insider trading. Qualitative research on pillow talk cases may be particularly instructive and may take many forms, including:

> [T]he analysis of information obtained through interviews, questionnaires or surveys, focus groups, reviews of historical documents (including correspondence and other communications), and direct participant observation captured in journal entries (or diaries). Study designs . . . [may] range from ethnographies (cultural examinations), to phenomenological research (experiential assessments), to approaches rooted in grounded theory (methods centered on theory formation and confirmation).[49]

Research of this kind may enable a better understanding of, for example, the types of relationship or the behavioral attributes of the individuals in a relationship that most commonly result in tipping, re-tipping or misappropriating information or in tippee or misappropriator trading. Studies of this kind may lead to new information about the relationship between gender and insider trading and the nature of women as insider traders.

B. Anecdotal Observations about Pillow Talk Cases

In the absence of current empirical data and analysis on pillow talk cases, however, the anecdotal information that has surfaced in the news media provides snapshots of several variants of this form of insider trading case and the varied roles of women in these cases. Public reports indicate that pillow talk is a relatively common way of disseminating

47 See Ben Protess, Chiesi Sentenced to 30 Months in Galleon Case, DealBook, NYTimes.com (July 20, 2011), available at http://dealbook.nytimes.com/2011/07/20/chiesi-sentenced-in-galleon-insider-trading-case/ (last visited Nov. 20, 2012).

48 See Joan MacLeod Heminway, Theoretical and Methodological Perspectives, in The Sage Handbook of Corporate Governance 102–07 (Thomas Clarke & Douglas Branson eds., 2012).

49 Id. at 107.

material nonpublic information as part of alleged or actual insider trading violations. News stories published by *The New York Times* and reported on Fox News and other national media outlets in late 2007 noted that the SEC had brought seven pillow talk cases to that point in the year (after having brought only one case in all of 2006).[50] The *ABA Journal* noted a continued enforcement focus on pillow talk cases in 2008.[51] The pillow talk cases featured in these news stories comprise both simple tipping and misappropriation cases, in which the tipper and tippee are the only people engaged in the scheme, and more complex insider trading cases involving chains or networks of tippers and tippees. These cases often involve salacious facts and engage prurient interest.

In a case with facts close to those in *Chestman*, for example, Matthew Devlin, the husband of a public relations executive with advance knowledge of corporate transactions, acquired material nonpublic information from his wife (Nina Devlin, known as the "golden goose") and passed it on to others.[52] Similarly, William Marovitz, the husband of former Playboy Enterprises, Inc. chairman and chief executive officer Christie Hefner (daughter of Playboy founder Hugh Hefner), settled an SEC enforcement action alleging that he traded in Playboy stock while in possession of material nonpublic information about Playboy, despite significant compliance efforts over many years to prevent him from doing so.[53] In these cases, according to the publicized facts, men are using information extracted from seemingly unsuspecting women to trade or tip.

Turnabout is (as they say) fair play, however. Women also use material nonpublic information gleaned from their romantic relationships with men to trade or tip. Annabel McClellan, a San Francisco wife and mother, entered into a consent decree with the SEC to settle an insider trading case against her for tipping relatives about material nonpublic information on upcoming business transactions gained from her unwitting husband, a tax advisor who worked on mergers and acquisitions for Deloitte Tax L.L.P.[54] Adding

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[50] See Rosen, supra note 2; Lis Wiehl, Insider Trading: Pillow Talk Reveals Couples' Dirty Little Secrets, FoxNews.com (Oct. 30, 2007), available at http://www.foxnews.com/story/0,2933,305978,00.html (last visited Nov. 20, 2012).

[51] See Martha Neil, NYSE Insider Trading Cases at Record High in 2008 as 'Pillow Talk' Increases, ABAJournal.com (Feb. 9, 2009), available at http://www.abajournal.com/news/article/08_insider_trading_hits_record_high_pillow_talk_a_growing_problem/ (last visited Nov. 20, 2012).

[52] See Patricia Hurtado, Ex-Lehman Broker Devlin Sentenced to Three Years' Probation, Bloomberg.com (March 23, 2012), available at http://www.bloomberg.com/news/2012-03-23/ex-lehman-broker-devlin-sentenced-to-three-years-probation-1-.html (last visited Nov. 20, 2012); Holly M. Sanders, Flack Suspended in Pillow-Talking Case, N.Y. Post, Dec. 23, 2008, at 33.

[53] See David S. Hilzenrath, SEC Charges William Marovitz, Spouse of Playboy's Christie Hefner, with Insider Trading, washingtonpost.com (Aug. 3, 2011), available at http://www.washingtonpost.com/business/economy/sec-charges-william-marovitz-spouse-of-playboys-christie-hefner-with-insider-trading/2011/08/03/gIQATSSqsI_story.html (last visited Nov. 20, 2012); Peter Lattman, Christie Hefner's Husband Is Accused of Insider Trading, DealBook, NYTimes.com (Aug. 3, 2011), available at http://dealbook.nytimes.com/2011/08/03/husband-of-playboy-executive-accused-of-insider-trading/ (last visited Nov. 20, 2012).

[54] See Karen Gullo & Joshua Gallu, Ex-Deloitte Partner's Wife Settles SEC Case for $1 Million, Bloomberg.com (Oct. 17, 2011), available at http://www.bloomberg.com/news/2011-10-17/ex-deloitte-partner-s-wife-settles-sec-case-for-1-million-1-.html (last visited Nov. 20, 2012); Elizabeth Lesly Stevens, Lives With Polished Veneer Are Snared in S.E.C. Inquiry, NYTimes.com (Dec.

to the human interest of this story was the widely reported fact that McClellan also was co-developing "My Nookie," an adult-themed Web site and mobile app, during the time she was being investigated.[55]

In addition to the cases in which one romantic partner dupes another, there are cases in which husbands and wives or romantic partners collaborate to pass information to others in the market who trade or re-tip. A notable 2007 case of this kind involved an information technology specialist at MDS, Inc. who learned about a potential future tender offer by MDS for shares of Molecular Devices Corp. (and related merger negotiations), tipped his female romantic partner about the transaction and, together with the romantic partner, traded in Molecular Devices stock and call options.[56] In another, similar case involving a married couple (both lawyers), the wife both directly tipped a broker about material nonpublic information she acquired through her job at Morgan Stanley and tipped her husband on material nonpublic information, knowing he would share it with the broker.[57]

Perhaps most infamously, the highly publicized Galleon Group network insider trading cases include pillow talk components involving material nonpublic information gained in one romantic relationship as part of a collaborative network involving another romantic relationship. Danielle Chiesi, one of Raj Rajaratnam's informants, used a romantic relationship with an IBM executive to acquire material nonpublic information.[58] Chiesi also enjoyed a long-term romantic relationship with another participant in the insider trading network. In addition, her overall feminine wiles and flirtatious nature became gendered components of the case against her.[59] Wiretapped recordings of conversations between Chiesi and Rajaratnam reveal that Chiesi called Rajaratnam "honey" and "babe," and that, following Chiesi's successful solicitation of information from one male contact, Chiesi stated she had played the source of the information "like a finely tuned piano."[60] Chiesi's breach of trust and confidence was publicly revealed to be both personal and professional.

Romantic partners also may be involved in other ways in insider trading schemes. While not strictly pillow talk cases, they emanate from similar facts. In one recent case, for example, a former Goldman Sachs associate who obtained material nonpublic information from various sources (including confidential grand jury proceedings) made illegal trades through his girlfriend's account (as well as his aunt's account).[61] In a May 2012 complaint, the SEC alleged that a young woman used her boyfriend's account to make illegal trades based on material nonpublic information about the terms and timing

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11, 2010), available at http://www.nytimes.com/2010/12/12/us/12bcmcclellan.html?pagewanted=all (last visited Nov. 20, 2012).

55 See Stevens, supra note 54.

56 See Rosen, supra note 2.

57 See id.; Larry Neumeister, Couple Pleads Guilty to Insider Trading, USATODAY.com (May 10, 2007), available at http://www.usatoday.com/money/economy/2007-05-10-1028951420_x.htm (last visited Nov. 20, 2012).

58 See Protess, supra note 47.

59 See id.

60 Id.

61 Michael J. de la Merced, Former Associate at Goldman Pleads Guilty, NYTimes.com (Aug. 29, 2007), available at http://www.nytimes.com/2007/08/29/business/29insider.html?ex=1346040000&en=daded0d369d41725&ei=5090&partner=rssuserland&emc=rss (last visited Nov. 20, 2012).

of a forthcoming acquisition of the company at which she worked as a legal assistant.[62] She also tipped her father.[63] Many insider trading cases, including pillow talk cases, also engage family members other than spouses.[64]

The pillow talk cases described here are a small sampling; nevertheless, they represent a diverse lot. The roles of women are varied. The analogy of some of these insider trading cases to prostitution is inescapable: man meets woman, gains her trust and confidence, and uses her in a scheme to make profits from an illegal enterprise. Yet, in other cases, the power dynamic of the roles, on its face, is reversed or more equal. It is hard to discern from these cases whether women engage with the law of insider trading on the same bases and under the same circumstances as men or whether they represent a distinct population from a regulatory standpoint. What we know from these public accounts is relatively superficial. With additional empirical research, however, these types of cases may offer new gender-based insights on US insider trading regulation.

III. THE OVERALL NEED FOR ADDITIONAL EMPIRICAL WORK TO FURTHER ENRICH UNDERSTANDING

Pillow talk cases are not the only type of insider trading case about which we lack empirical research on the basis of gender. As a whole, the gendered aspects of insider trading in the USA are understudied. As a result, our understanding of the role of sex and gender in insider trading is imperfect. There are many unsettled questions. We do not yet know whether women behave or fare differently from men in most aspects of insider trading. For example, women may or may not have the same capacity or desire to acquire material nonpublic information that men have. The studies cited in section I.B do not definitively answer that question.[65] Accordingly, while a woman may be in a role that puts her in the position of having a duty of trust and confidence (making her an insider for purposes of insider trading law under § 10(b) and Rule 10b-5), she may not have an inside line to the same quantity or quality of material nonpublic information to which a man in the same or a similar position has preferential access. A traditional feminist account of this type of information asymmetry and its relationship to the historical male orientation of enforcement and violations of US insider trading law might note that insider trading is a matter of privilege, and the male-dominance of illegal insider trading is yet another manifestation and extension of male privilege.

Researchers find that demographic majorities may use their in-group status to highlight and preserve the out-group status of demographic minorities in organizational management in a number of ways—although various factors may decrease the salience of the

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62 See Sec's & Exch. Comm'n v. Milliard, CV12-73-M-DLC (D. Mont. filed May 7, 2012), available at http://www.sec.gov/litigation/complaints/2012/comp-pr2012-84.pdf (last visited Nov. 20, 2012).

63 Id.

64 See, e.g., Bruce Carton, New Form of Family Betrayal: Siblings, ComplianceWeek.com (Sept. 1, 2009), available at http://www.complianceweek.com/new-form-of-familial-betrayal-siblings/article/188095/ (last visited Nov. 20, 2012).

65 See supra notes 33–43 and accompanying text.

demographic differences.[66] From a structural perspective, board activity and decision-making may incorporate female directors in ways that handicap their ability to access material information. For example, evidence exists that female board members in the US historically served on less significant, less tactical board committees.[67] A marginalization of female corporate directors in board processes may reduce the quantity or quality of information available to those female directors. However, recent research reports indicate that, in particular in the years since the passage of the Sarbanes–Oxley Act in 2002,[68] women are beginning to assume more leadership roles on US corporate boards.[69] This trend may offset any perceived or actual informational imbalances between female and male directors. In addition, although the findings may be *sui generis* to Norway (which has a 40 percent gender quota rule for boards of public limited liability companies), female directors in Norway reported in a recent study that they are able to access important corporate information as board members.[70]

The mere fact that an information asymmetry may exist between men and women is not, in and of itself, legally significant. However, since US insider trading law is designed to address, among other things, certain kinds of information asymmetries, the existence of an information asymmetry challenges the notion that the same insider trading regulation for both men and women is needed to protect investors and markets. In US insider trading regulation, one size may not fit all.

The existence and nature of possible informational imbalances between male and female directors are not the only unresolved research questions relevant to gender and insider trading, however. Women may, for instance, have different conceptions of duty generally and different conceptions of a duty of trust and confidence, a core component of insider trading regulation in the USA. Different perceptions of duty may result in different types of breaches of duty. For example, there is evidence in the empirical literature that women and men trust differently, and those differences may have an impact on their behavior in relationships of trust.[71] Women may choose to breach duties in different circumstances than men breach those same duties because of their different understandings of the requisite duty. If women behave differently in relationships of trust and confidence based on a different notion of trust, then we may be over-regulating or under-regulating

66 See James D. Westphal & Laurie P. Milton, How Experience and Network Ties Affect the Influence of Demographic Minorities on Corporate Boards, 45 Admin. Science Q. 366 (2000).

67 See Diana Bilimoria & Sandy Kristin Piderit, Board Committee Membership: Effects of Sex-Based Bias, 37 Academy of Mgt. 1453 (1994).

68 Pub. L. No 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 & 29 U.S.C.).

69 See Dan R. Dalton & Catherine M. Dalton, Women and Corporate Boards of Directors: The Promise of Increased, and Substantive, Participation in the Post Sarbanes-Oxley Era, 53 Bus. Horizons 257, 261 (2010).

70 See Beate Elstad & Gro Ladegard, Women on Corporate Boards: Key Influencers or Tokens?, J. Mgmt Gov. (Online First™), Nov. 23, 2010, available at http://ssrn.com/abstract=1582368 (last visited Nov. 20, 2012).

71 See generally Rachel Croson & Uri Gneezy, Gender Difference in Preferences, 47 J. Econ. Lit. 448, 458–61 (2009); Joan MacLeod Heminway, Sex, Trust, and Corporate Boards, 18 Hastings Women's L. J. 173, 196 n. 117 (2007) (describing sex-based differences in trusting behavior and trustworthiness and relating them to the corporate governance context).

their conduct as compared with men. Which understanding of trust should govern and guide policy makers and regulators if two or more different types of trust are operative?

Women also may breach duties at different times and in different circumstances because of differences in their risk preferences. Some studies indicate that women may be more risk-averse than men in certain situations.[72] Moreover, a recent study of male traders in the City of London provides evidence that elevated steroid levels may change risk preferences, indicating a possible biological link between gender and risk-taking.[73] Women's distinct understandings of their duties in various insider trading contexts and the risks of proceeding in disregard of them may drive women to different patterns of compliance and non-compliance with US insider trading prohibitions.

Women also may have a different sense of entitlement to the profits that may be extracted from insider trading. Research indicates that women may be more other-regarding and less driven toward competitive behaviors than men, at least in certain contexts.[74] These attributes may lead women to make different decisions about taking insider trading proceeds for themselves (especially if they believe, however mistakenly, that others are harmed in the process) than men would make under similar circumstances. If insider trading is viewed as a tournament with winners and losers, women may just not want to play the game with the same frequency that men do. If that were to be proven true, it might impact the way in which, for example, scarce enforcement resources are allocated.

The hypotheses and observations made in the preceding paragraphs highlight a number of unanswered questions about sex or gender and insider trading founded in existing behavioral literature outside the insider trading context. These (and other) unanswered questions represent ready areas for empirical study that may help us to better understand and describe certain insider trading phenomena and give us information important to assessing the efficacy of existing insider trading rules and enforcement efforts. More—and more detailed—empirical analysis will help us complete our picture of female insider traders and better understand how they may differ from male insider traders. With this knowledge, we may be able to reform insider trading regulation and tailor insider trading enforcement to better protect investors and better assure honest, fair trading markets.

IV. AN INCOMPLETE PORTRAIT OF THE INSIDER TRADER AS A WOMAN

Public reports indicate that women have growing and varied roles in insider trading violations in the USA. These new, diverse roles for women may be distinct or have distinctive characteristics—different from the roles historically and currently occupied by male insider traders. Scholarship in law and behavioral psychology and economics (among other areas of academic inquiry) has begun to identify and describe sex or gender differences in various contexts, but researchers have done little to study sexed or gendered

[72] See, e.g., Croson & Gneezy, supra note 71, at 449–54.

[73] John M. Coates & Joe Herbert, Endogenous Steroids and Financial Risk Taking on a London Trading Floor, 105 PNAS 6167 (Apr. 21, 2008).

[74] See id. at 454–67.

aspects of insider trading doctrine or enforcement. Theoretical, doctrinal and empirical research and analysis can help fill this void and construct a more complete picture of the gendered construction and operation of US insider trading rules and the place of women in the overall insider trading puzzle.

Given that insider trading regulation in the USA is based on relationships (those founded on a duty of trust and confidence as well as, in tipping cases, the receipt of a personal benefit by a tipper),[75] the identification of sex and gender interactions with insider trading should help reveal more about the nature of relationships that commonly lead to insider trading liability. The *Dirks* case[76] and Rule 10b5-2[77] exemplify ways in which the federal courts and the SEC have struggled with the types of relationship that should be protected (e.g., under *Dirks*, the relationship between a truth-seeking broker-dealer/analyst and his information sources and clients) and those that may create liability (e.g., under Rule 10b5-2, the three identified relationships giving rise to a duty of trust and confidence in misappropriation cases) through the application of insider trading doctrine and the enforcement of its principles. Empirical research that illuminates the relationships that underlie violations of US insider trading law may help guide further rule-making initiatives or the exercise of insider trading enforcement discretion under § 10(b) and Rule 10b-5.

Although women have become more visible as participants in the securities markets and as alleged and actual transgressors of insider trading rules, the role of women in insider trading is still ill understood, except anecdotally. The portrait of the insider trader as a woman is a work in process. It is important that those of us who are engaged with the project keep the brush and palette in hand and continue painting until the full image is revealed in relevant detail. The resulting finished portrait of the insider trader as a woman may afford us important information not only about female insider traders, but also about insider traders and insider trading more generally.

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75 See Chapter 1 in this volume.

76 Dirks v. SEC, 463 U.S. 646 (1983).

77 17 C.F.R. § 240.10b5-2 (2012).