

CRIMINAL INSIDER TRADING IN PERSONAL NETWORKS

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Frequently, we associate white-collar crime with business, power, status, money, and greed.² Standard definitions of white-collar crime are consistent with this common understanding, although definitions have shifted over time.³ Over 70 years ago, sociologist Edwin Sutherland defined white-collar crime as “crime committed by a person of respectability and high social status in the course of his occupation.”⁴ According to the U.S. Federal Bureau of Investigation, “white-collar crime is now synonymous with the full range of frauds committed by business and government professionals. . . . The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage.”⁵ Other widely

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2. See, e.g., JOHN P. ANDERSON, INSIDER TRADING: LAW, ETHICS, AND REFORM 222 (2018) (identifying and providing examples of common perceptions of insider trading as a crime involving privilege and greed).

3. See, e.g., Lucian E. Dervan & Ellen S. Podgor, “White-Collar Crime”: Still Hazy After All These Years, 50 GA. L. REV. 709 (2016) (assessing historical and contextual definitions of white-collar crime); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1 (2004) (identifying and interrogating the many definitions of white-collar crime).

4. Edwin H. Sutherland, *White Collar Crime*, 59 YALE L. J. 581, 581 (1949).

5. White-Collar Crime, FBI,

<https://web.archive.org/web/20220302190107/https://www.fbi.gov/investigate/white-collar-crime> (last visited Oct. 10, 2022).

available definitions, including the definition of white-collar crime offered on the Corporate Finance Institute's website, also focus on the position of the actor and the financial nature of the activity.⁶

Yet, there is a more personal side of white-collar crime. This aspect of white-collar crime becomes apparent through an analysis of a little-studied, yet significant, subset of insider trading cases—those involving the tipping of material nonpublic information between or among friends and family, or the misappropriation of material nonpublic information from a friend or family member.⁷ One might wonder why a person would put a friendship or family relationship at risk—put others in that type of relationship at risk—by engaging in that kind of conduct. It may all be about business, power, status, money, and greed. Perhaps, however, something more is involved.

With those issues in mind, this Article describes and comments on criminal insider trading prosecutions brought over an eleven-year period. The core common element among these cases is that they all involve alleged tipper/tippee insider trading or misappropriation insider trading implicating information transfers between or among friends or family members (rather than merely business connections). The ultimate objectives of the Article are to explain and comment on the nature of the criminal friends-and-family insider trading cases that are prosecuted and to posit reasons why friends and family become involved in criminal tipping and misappropriation.

6. What is a White-Collar Crime?, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/knowledge/finance/white-collar-crime/> (last visited Sept. 17, 2022) (“White-collar crime is a non-violent crime where the primary motive is typically financial in nature. White-collar criminals usually occupy a professional position of power and/or prestige, and one that commands well above average compensation.”).

7. Two recently published large-sample studies of insider trading enforcement actions validate the importance of studying insider trading involving personal relationships in both the civil and criminal enforcement contexts. See Kenneth R. Ahern, *Information Networks: Evidence from Illegal Insider Trading Tips*, 125 J. FIN. ECON. 26, 28 (2017); Michael A. Perino, *Real Insider Trading*, 77 WASH. & LEE L. REV. 1647 (2020). Professor Ahern's study of public insider trading tipping cases filed between 2009 and 2013 reveals that “[o]f the 461 pairs of tippers and tippees in the sample, 23% are family members, 35% are friends, and 35% are business associates, including pairs that have both family and business links.” Ahern, *supra*, at 28. In Professor Perino's study of 465 insider trading enforcement actions brought in SEC fiscal years 2011 to 2015, friends and family constitute the largest single group of defendants in his sample—44.6%—and constitute over 28% of the criminal defendants included in the sample. See Perino, *supra*, at 1683.

To achieve these objectives, the Article proceeds in three additional substantive parts. First, the Article undertakes a brief review of U.S. insider trading regulation in the tipper/tippee and misappropriation contexts. Then, the Article describes a group of thirty-six friends-and-family tipper/tippee and misappropriation cases prosecuted by the U.S. Department of Justice between 2008 and 2018, noting general comments and questions about the conduct underlying the alleged criminal friends-and-family insider trading represented by those cases. Finally, before concluding, the Article offers observations about the possible motivations for that conduct based on a variety of literatures analyzing human behavior, especially in circumstances involving criminal activity.

I. U.S. INSIDER TRADING REGULATION IN THE TIPPER/TIPPEE AND MISAPPROPRIATION CONTEXTS

The federal regulation of insider trading in the United States has roots in congressional action, regulatory rules and pronouncements, and criminal and civil decisional law. The foundational statutory and regulatory rules that govern insider trading in the United States are the general antifraud provisions relating to purchases and sales of securities codified in Section 10(b) of Rule 10b-5 under the Securities Exchange Act of 1934, as amended.⁸ The U.S. Securities and Exchange Commission has promulgated two additional rules governing insider trading more specifically: Rules 10b5-1 and 10b5-2.⁹ Criminal enforcement of Section 10(b) may be sought for willful violations.¹⁰

Unlawful insider trading under Section 10(b) and Rule 10b-5 is frequently classified into one of three categories: classical, tipper/tippee, and misappropriation.¹¹ This Article focuses

8. 15 U.S.C. § 78j(b) (2018); 17 C.F.R. § 240.10b-5 (2022).

9. 17 C.F.R. §§ 240.10b5-1 & 240.10b5-2.

10. See 15 U.S.C. § 78ff(a) (2018) (providing for criminal enforcement against “[a]ny person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter. . .”).

11. See, e.g., Joan Macleod Heminway, *Save Martha Stewart? Observations About Equal Justice in U.S. Insider Trading Regulation*, 12 TEX. J. WOMEN & L. 247, 257 (2003) [hereinafter *Save Martha*] (“A number of key legal rules have emerged, resulting in three basic types of insider trading which may be actionable under Rule 10b-5: “classic,” tipper/tippee, and misappropriation.”); Zachary T. Knepper, *Examining the Merits of Dual Regulation for Single-Stock Futures: How the Divergent Insider Trading Regimes for Federal Futures and Securities Markets Demonstrate the Necessity for (and Virtual Inevitability of) Dual CFTC-SEC Regulation For Single-Stock Futures*, 3 PIERCE L.

attention on the latter two types of insider trading, tipper/tippee and misappropriation. Both types of insider trading involve the transmission of material nonpublic information from one person to another.¹²

In tipper/tippee settings, the transmission of material nonpublic information is intentional (and perhaps even purposeful). Archetypal tipper/tippee liability is based on a securities trade made by the tippee. Specifically, if a person who owes a duty of trust and confidence to a business firm (or other information source) transmits material nonpublic information improperly (i.e., in violation of that duty) to another person and the person to whom the information is conveyed then engages in a related securities transaction, we classify the resulting unlawful insider trading as a tipper/tippee violation.¹³ Improper transmission of the information occurs “when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should now that there has been a breach.”¹⁴ The tipper may be liable for the tip (if they acted with the requisite state of mind), and the tippee may be

REV. 33, 42 (2004) (noting that “insider trading cases can be categorized into at least three groups” and describing each); Menesh S. Patel, *Does Insider Trading Law Change Behavior? An Empirical Analysis*, 53 U.C. DAVIS L. REV. 447, 454–55 (2019) (describing classical, misappropriation and tipping liability under U.S. securities law); 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, 5–6 (2019) (stating that “[t]he Supreme Court has adopted three theories of insider trading” and describing each).

12. Nonpublic information is material if it is (1) substantially likely to be important to the reasonable investor or (2) substantially likely to significantly affect the total mix of available information, as seen through the eyes of the reasonable investor. *See* Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (adopting for use under Section 10(b) and Rule 10b-5 the two alternative standards earlier approved by the Court for assessing materiality in the proxy fraud context in *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438, 448–49 (1976)).

13. *See* *Dirks v. S.E.C.*, 463 U.S. 646, 659–64 (1983).

14. *Id.* at 660.

liable for the trade (if they knew of the tipper's breach of duty).¹⁵ Tipplers and their tippees may be friends or family members.¹⁶

In misappropriation cases, the transmission of material nonpublic information may occur inadvertently (even involuntarily) or in a confidential personal context (for example, between friends, spouses, or other family members in the coordination or organization of their personal activities or affairs). In general, misappropriation liability under U.S. insider trading law may lie when an individual who possesses material nonpublic information engages in a securities trading transaction in breach of a duty of trust and confidence owed to the source of that material nonpublic information.¹⁷

Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information. In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information.¹⁸

15. *See id.*; *see also* *Salman v. United States*, 137 S. Ct. 420, 427–28 (2016). The *Dirks* Court succinctly described U.S. insider trading proscriptions on tipplers: “insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage . . . may not give such information to an outsider for the . . . improper purpose of exploiting the information for their personal gain.” *Dirks*, 463 U.S. at 659 (citation omitted). The *Dirks* Court also described the rationale for the insider trading liability of tippees under U.S. law, stating that “the transactions of those who knowingly participate with the fiduciary in such a breach are ‘as forbidden’ as transactions ‘on behalf of the trustee himself.’” *Id.* (citations omitted).

16. *See, e.g., Salman*, 137 S. Ct. at 421 (“Petitioner *Salman* was indicted for federal securities-fraud crimes for trading on inside information he received from a friend and relative-by-marriage, Michael Kara, who, in turn, received the information from his brother, Maher Kara, a former investment banker at Citigroup.”); *Dirks*, 463 U.S. at 664 (noting that “[t]he elements of fiduciary duty and exploitation of nonpublic information . . . exist when an insider makes a gift of confidential information to a trading relative or friend.”).

17. *See United States v. O'Hagan*, 521 U.S. 642, 653 (1997). Liability also may result if the individual possessing the material nonpublic information transmits it to another person who engages in a securities trade. *See* Merritt B. Fox & George N. Tepe, *Personal Benefit Has No Place in Misappropriation Tipping Cases*, 71 SMU L. REV. 767, 770 (2018) (summarizing the law in this area).

18. *O'Hagan*, 521 U.S. at 652.

Thus, archetypal misappropriation liability is founded on a securities trade made by the information expropriator. The fiduciary or fiduciary-like duty of trust and confidence that underlies misappropriation claims may exist in friendships and family relationships.¹⁹

The legal doctrine applicable to tipper/tippee and misappropriation liability under U.S. insider trading law can be exceedingly complex in certain factual contexts. This Article is not designed to take on the task of ferreting out those details. That task has been and continues to be undertaken in other writings.²⁰ Rather, the fundamental legal doctrine is explained in brief in this Part I to give the reader an appreciation of the selection criteria for the friends-and-family insider trading prosecutions described *infra* Part II.

II. PROSECUTED INSTANCES OF CRIMINAL FRIENDS-AND-FAMILY INSIDER TRADING, 2008-18

The 2008–18 criminal friends-and-family insider trading enforcement actions selected for analysis are part of a proprietary data set generated in connection with a larger study of friends-and-family insider trading that has not yet been published. The criminal enforcement actions were initially identified by performing a search for cases included in the Bloomberg Law database. The initial search was purposefully broad—“insider trading’ AND ‘criminal’”—and was executed using the date range 01/01/2008 through 08/01/2018. This search yielded 458 results, which were downloaded into a comma-separated values (.csv) file with the related docket numbers. The results were then filtered by removing actions with a docket number that included a “civ” or “cv”

19. See, e.g., 17 C.F.R. § 240.10b5-2(b) (2022); S.E.C. v. Yun, 327 F.3d 1263, 1274 (11th Cir. 2003); United States v. Chestman, 947 F.2d 551, 568 (2d Cir. 1991); United States v. Corbin, 729 F. Supp. 2d 607, 616-17 (S.D.N.Y. 2010); S.E.C. v. Goodson, No. 99CV2133, 2001 WL 819431 (N.D. Ga. Mar. 6, 2001).

20. Indeed, a number of my own publications address doctrinal issues under U.S. insider trading law. See, e.g., Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017 (2009); Joan MacLeod Heminway, *Martha Stewart Saved! Insider Violations of Rule 10b-5 for Misrepresented or Undisclosed Personal Facts*, 65 MD. L. REV. 380 (2006); Joan MacLeod Heminway, *Save Martha*, *supra* note 11; Joan MacLeod Heminway, *Tipper/Tippee Insider Trading As Unlawful Deceptive Conduct: Insider Gifts of Material Nonpublic Information to Strangers*, 56 WASH. U. J.L. & POL’Y 65 (2018); Joan MacLeod Heminway, *Women Should Not Need to Watch Their Husbands Like (a) Hawk: Misappropriation Insider Trading in Spousal Relationships*, 15 TENN. J.L. & POL’Y 162 (2020).

and actions that were filed *solely* against entities. This reduced the number of enforcement proceedings to 216. Basic information available on Bloomberg Law about each of these cases was then reviewed to determine whether the case involved tipping or misappropriation between or among friends or family.²¹ Cases not meeting these criteria were removed from the data set.

Once these relevant cases were identified, the docket and the underlying case filings (including, where available, the initial indictment, any superseding indictments, and other collateral documents filed with the court, as well as court opinions) for each case were reviewed to isolate core information about each case. For each criminal enforcement action, the data set includes the following information, as available:

- The year in which the action was brought and the filing date;
- The case caption information;
- The initial litigation release number, as applicable;
- The source of initial information obtained about the action, together with a link to Bloomberg Law or a url, as available;
- The court in which the action was filed;
- The type of insider trading alleged (tipper-tippee or misappropriation);
- The names of each alleged tipper and tippee (in tipper-tippee cases)²² and the claimed source of information and alleged misappropriator (in misappropriation cases);

21. Two of the friends-and-family cases in the data set, *United States v. Rajaratnam et al.* and *United States v. Gupta*, involve the transmission of information between family members and friends, respectively, but are also components of a larger expert network insider trading scheme conducted for the purpose of engaging in profitable trades as a business objective. *See, e.g.*, *United States v. Rajaratnam*, 802 F. Supp. 2d 491, 500 (S.D.N.Y. 2011) (“[T]he government . . . sought to prove that Rajaratnam conspired to trade on the basis of inside information he received from Rajat Gupta, a member of the board of directors of Goldman Sachs. Specifically, the government sought to prove that Gupta tipped Rajaratnam . . .”).

22. In legal actions involving multiple downstream “tips” or “tippees,” each downstream tip is catalogued as a separate indictment or reportable event. However, all related tips and actions are organized in the data set under the same litigation release, file, or docket number. If a party is named in multiple enforcement actions based on the same related facts, that individual has multiple dockets listed in the data set.

- The relationship of the alleged tippee to the alleged tipper (in tipper-tippee cases) and of the alleged misappropriator to the claimed source of information (in misappropriation cases);
- The sex of the alleged tipper and tippee (in tipper-tippee cases) and the claimed source of information and alleged misappropriator (in misappropriation cases);
- The resolution of the action, if any, including the date of that resolution;²³ and
- The source of resolution information relating to the action.

The data set also includes a brief statement of the key facts, as alleged. As warranted, reviews of companion civil enforcement actions (where available) and Google searches were initiated to obtain missing information from a reputable source. Information yielded from these searches was then added to the data set. Certain information remained unavailable after completion of these searches.

A. Key Datapoints

Appendix I includes a summary of selected data related to the criminal enforcement actions identified using this process. In total, 36 distinct case-captioned prosecutions are represented, several of which include more than one defendant.²⁴ The years in which the most indictments for friends-and-family insider trading were filed were:

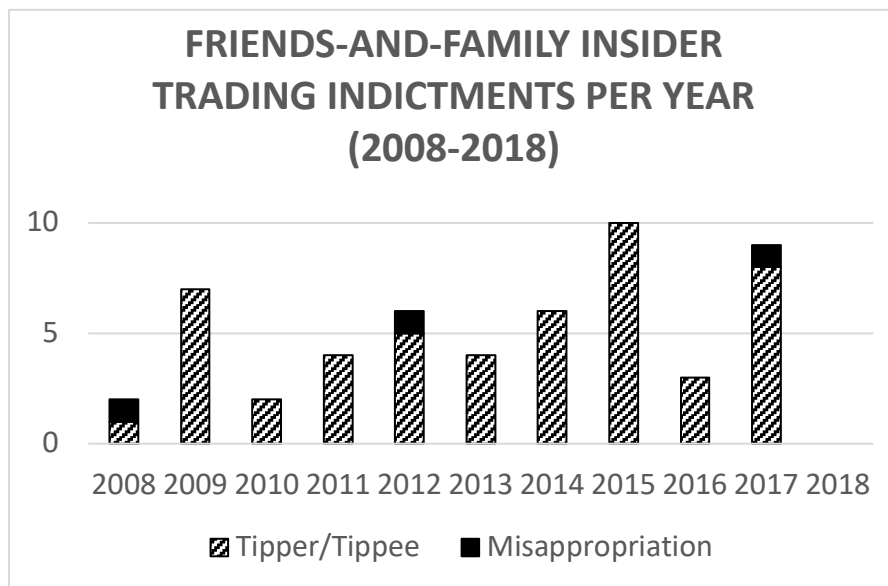
- 2015 (5 cases involving 10 indictments)
- 2017 (5 cases involving 9 indictments)
- 2012 (5 cases involving 6 indictments)
- 2009 (4 cases involving 7 indictments)

23. Cases against individual defendants in the same enforcement action may be resolved with those individual defendants at different times. The resolution date, if any, of legal actions related to each individual defendant has been separately recorded in the data set.

24. Several of the cases involve multiple consolidated indictments. In most cases, the indictments for all included defendants occurred at or about the same time (typically, within a few months of each other). In the case captioned *United States v. Conradt et al.*, however, two significantly later indictments (filed late in 2014) were consolidated with two earlier indictments (filed late in 2012) and are counted as a single case.

- 2013 (4 cases involving 4 indictments)
- 2011 (4 cases involving 4 indictments)

Three cases (involving an aggregate of four indictments) were filed in 2014,²⁵ three cases (each involving one indictment) were filed in 2016, two cases (each involving one indictment) were filed in each of 2008 and 2010, and no criminal friends-and-family insider trading enforcement actions were filed in 2018. A graphic summary of the distributions of indictments is included below.



In total, these 36 cases include 53 matched tipper/tippee and source/misappropriator relationship pairs in which material nonpublic information was allegedly shared.²⁶ An inspection of these cases and matched pairs yields several noteworthy findings.

25. In addition to these three new cases, two additional indictments were filed in *United States v. Conrady et al.* in 2014. See *supra* note 24.

26. The case captioned *United States v. Gupta* includes two separate indictments—the first of which (filed in 2011) was initially sealed. The second indictment (filed in 2012) includes additional facts and appears to supersede the first indictment. As a result, the earlier (2011) indictment has been removed from the data set.

- **The overwhelming majority of criminal friends-and-family insider trading prosecutions are tipper/tippee cases.**

Of the 36 cases, only three are misappropriation cases, each involving an indictment against a single defendant.²⁷

- **Spousal relationships are over-represented in the misappropriation prosecutions.**

Two of the three misappropriation prosecutions involve a husband taking and using information from his wife, and they are the only proceedings in the data set involving a married couple.²⁸ The third misappropriation prosecution involves the receipt of information from a friend.²⁹

- **Most criminal indictments for friends-and-family insider trading relate to information transmitted between friends.**

Of the 53 matched pairs represented in the data set, 39 involve friends (38 in tipper/tippee relationships). Tippees also include a mistress and a girlfriend's father (each of which may be classifiable as a friend relationship).³⁰ The most prevalent family relationships represented in the data set include five brother-in-law tippees, three brother tippees, and two husband misappropriators.³¹ Other family tippees

27. See, e.g., Complaint, United States v. Devlin, No. 08 Civ. 11001 (S.D.N.Y. Dec. 18, 2008) [hereinafter *Devlin*, Complaint]; United States v. McGee, 763 F.3d 304 (3d Cir. 2014); Complaint, United States v. Yan, No. 17 MAG 5156 (S.D.N.Y. July 11, 2017) [hereinafter *Yan*, Complaint].

28. See, e.g., *Devlin*, Complaint *supra* note 27; *Yan*, Complaint, *supra* note 27.

29. See, e.g., *McGee*, 763 F.3d at 304.

30. See, e.g., United States v. Gansman, 657 F.3d 85 (2d Cir. 2011); Complaint, United States v. Moodhe, No. 17 Cr 491 (S.D.N.Y. 2017).

31. See, e.g., *Devlin*, Complaint, *supra* note 27; United States v. Rajaratnam, 802 F. Supp. 2d 491, 500 (S.D.N.Y. 2011); Complaint, United States v. Kara, No. CV 09 1880 (N.D. Cal. Apr. 30, 2009); United States v. Salman, 792 F.3d 1087, 1089 (9th Cir. 2015); Complaint, United States v. Nguyen, No. 12 Civ. 5009 (S.D.N.Y. June 26, 2012) [hereinafter *Nguyen*, Complaint]; Complaint, United States v. Bayyouk, No. CV 09 1880 (N.D. Cal. Apr. 30, 2009); United States v. Fishoff, 949 F.3d 157 (3d Cir. 2020); Complaint, United States v. Wiegand, No. 15CV1276MMADHB (S.D. Cal. June 9, 2015); Complaint, United States v. Fefferman, No. 15CV1276MMADHB (S.D. Cal. June 9, 2015); *Yan*, Complaint, *supra* note 27.

represented in the data set include a nephew and a father.³²

- **The actors represented in these criminal proceedings are overwhelmingly male.**

Only five of the 106 tippers, tippees, information sources, and misappropriators represented in the data set are women; 101 are men.³³

- **All but one of the actors who allegedly acquired and used material information obtained through a tip or misappropriation (i.e., tippees and misappropriators) is male.**

Two of the five women represented in the data set are sources of information in misappropriation cases, two are tippers, and one is a tippee.³⁴

The predominance of tipper/tippee prosecutions, prevalence of male actors, and dominance of friendship relationships in the represented prosecutions are especially striking.

B. Limitations of Data Set and Related Observations

It is important to issue a note of caution to those who may desire to make generalizable observations about friends-and-family insider trading based on the information included in and derived from the hand-collected data set presented and analyzed in this Article. The data collection methods used in assembling the data set have certain inherent limitations. Accordingly, the information obtained through those data collection methods may have innate, unquantifiable flaws. The shortcomings of the data collection methods include the narrowly tailored criteria for the identification and selection of the included cases and the nature of the data sources.

The data set includes only criminal enforcement actions. As a result, it does not allow for conclusive observations about the

32. See, e.g., *United States v. Talbot*, 530 F.3d 1085 (9th Cir. 2008); *United States v. Stewart*, 907 F.3d 677 (2^d Cir. 2018).

33. See, e.g., *Gansman*, 657 F.3d at 85; *Devlin*, Complaint, *supra* note 27; Complaint, *United States v. Hansen*, No. 10 CV 105050 (E.D. Pa. Sept. 27, 2010) [hereinafter *Hansen*, Complaint]; *Nguyen*, Complaint, *supra* note 31; *Yan*, Complaint, *supra* note 27.

34. See, e.g., *Gansman*, 657 F.3d at 85; *Devlin*, Complaint, *supra* note 27; *Hansen*, Complaint, *supra* note 33; *Nguyen*, Complaint, *supra* note 31; *Yan*, Complaint, *supra* note 27.

overall prevalence of actionable, unlawful information sharing between or among friends or family members. For example, there are certainly instances in which tipping or misappropriation in personal networks is the subject of civil (rather than criminal) enforcement.³⁵ These civil enforcement actions can be identified and examined. Also, some unlawful insider trading in personal networks undoubtedly goes undetected by enforcement agents or, if detected, never becomes the subject of public or private enforcement for various reasons. The number of undetected tipper/tippee or misappropriation violations (including those involving information shared in friendships and family relationships) will never be known, and the extent to which enforcement agents fail to adjudicate and punish known or suspected violative conduct is unlikely to be revealed with any precision.

Moreover, the criminal enforcement actions included in the data set were identified and data from them was collected initially and primarily from a commercial legal database, Bloomberg Law. Commercial decisional law databases are easily searchable (making their use in data collection desirable), but they may be incomplete. “Concerns over coverage of federal court decisions on commercial databases are not new—and there is a rich literature on these issues, especially at the federal district-court level.”³⁶ Notably, a recently published study of cases filed in the U.S. Court of Appeals for the First Circuit identified a significant number of missing criminal decisions.³⁷ As a result, the data set may not include all friends-and-family insider trading enforcement actions prosecuted by the U.S. Department of Justice between 2008 and 2018.

Notwithstanding these limitations, the collected data offer information about a meaningful subset of friends-and-family insider trading enforcement actions. This information lays a foundation for broader and deeper studies of friends-and-family

35. Walter Pavlo, *Insider Trading: Civil or Criminal Crime?*, FORBES (Oct. 24, 2013, 8:15 AM), <https://www.forbes.com/sites/walterpavlo/2013/10/24/insider-trading-civil-or-criminal/?sh=39ba03c76564>.

36. Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1104 (2021) (footnote omitted). Professor McAlister describes and cites to works from that rich literature. *See id.* at nn.14-18 and accompanying text.

37. *Id.* at 1144 (“It was more than twice as likely that a missing judgment involved a criminal appeal (67.1%) than was true for all merits terminations in the First Circuit during the same time period (31.6% of merits terminations were criminal).”).

insider trading that may provide insights relevant to the enforcement of existing insider trading prohibitions or the reform of U.S. insider trading regulation. Among other things, by segregating friends-and-family insider trading cases from the larger body of insider trading enforcement actions, distinct trends or issues may become apparent. Certainly, the facts of these cases have the propensity to raise unique questions (involving, as they do, public financial investment activity that leverages relationships generally considered to be private and personal).

C. General Factual Settings

Indeed, even as a limited sampling of cases over an eleven-year period, deeper dives into the facts of the enforcement actions represented in the data set offer additional food for thought. As a threshold matter, it is significant to note that the willfulness requirement for criminal insider trading enforcement³⁸ sets these cases off from their civil enforcement counterparts. As a general matter, criminal enforcement represents a powerful corrective force intended (at least in part) to rectify a societal wrong.³⁹ Potential judicial remedies for criminal violations—e.g., financial penalties, public reprobation, and imprisonment—reflect that sober undertaking. Consequently, the alleged activities of the defendants in criminal friends-and-family insider trading actions consciously draw friends and family members into unlawful conduct that puts their financial well-being, professional development, and personal liberty in jeopardy.

For example, a review of the tipper/tippee prosecutions in the data set reveals that the prototypical case involves allegations of intentional schemes to profit from material nonpublic information by sharing it for the purpose of trading for profit. Much of the information shared through the personal connections evidenced in these cases related to pending corporate transactions, especially

38. See *supra* note 10 and accompanying text.

39. See, e.g., Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*, 27 HARV. ENVTL. L. REV. 105, 108 (2003) (“Although the primary goal of civil enforcement is to secure compliance, criminal sanctions function on a broader plane; society can use criminal sanctions to change beliefs, attitudes, values, and goals, and to effectuate policies by influencing what individuals think they ought or want to do in a particular situation.”); Mary Graw Leary, *Third Dimension of Victimization*, 13 OHIO ST. J. CRIM. L. 139, 142 (2015) (“[O]ne primary goal of the criminal law is to reflect a moral code of acceptable and unacceptable behavior within the community.” (footnote omitted)).

business combinations.⁴⁰ In each case, securities trades allegedly were made with awareness of the nonpublic and confidential nature of the information and the unlawful nature of the conduct.⁴¹

As for the misappropriation cases, one of the spousal misappropriation prosecutions arose from a husband's alleged unauthorized use of material nonpublic information about a pending business combination obtained from his wife, who was working on the transaction as a law firm associate.⁴² The other spousal misappropriation action involved a stock broker's alleged unauthorized use of material nonpublic information about multiple corporate transactions obtained from his wife, a partner in a public relations firm.⁴³ The misappropriation action involving the sharing of information between friends is a case arising out of the unauthorized use of material nonpublic information shared by a corporate executive with an investment adviser who was an Alcoholics Anonymous ("AA") co-participant and informal mentor of the executive after an AA meeting.⁴⁴ Both husbands and the AA mentor traded in related securities while in possession of the misappropriated material nonpublic information. Alleged conduct and factual backgrounds in the cases—including the financial or investment knowledge or experience of the tippee or

40. *See, e.g.*, *United States v. Klein*, 913 F.3d 73, 75–77 (2d Cir. 2019) (Schulman, a law firm partner, shared nonpublic news of a forthcoming acquisition with his investment adviser, Klein, who traded while in possession of that information and tipped his childhood best friend, who was a financial advisor); *United States v. Metro*, 882 F.3d 431, 433 (3d Cir. 2018) (Metro, a managing clerk at a law firm, transmitted material nonpublic information about thirteen future corporate transactions to his friend Tamayo between February 2009 and January 2013. Tomayo traded in related securities through a broker who also traded on his own behalf and for other clients.); *United States v. Gansman*, 657 F.3d at 90 (Gansman, an attorney in the Transactional Advisory Services Department of Ernst & Young, LLP "repeatedly disclosed material nonpublic information to Donna Murdoch, a woman with whom he was having an affair. . . . Murdoch, in turn, traded on this information before the deals became public, profiting from the increase in stock price that occurred when the deals were later announced.").

41. *See, e.g.*, sources cited *supra* note 40.

42. *See Yan*, Complaint, *supra* note 27; *see also* Jonathan Stempel & Brendan Pierson, *MIT Scientist Gets 15 Months Prison for Insider Trading*, REUTERS (Mar. 30, 2018, 4:12 PM), <https://www.reuters.com/article/us-usa-insidertrading/mit-scientist-gets-15-months-prison-for-insider-trading-idUSKBN1H61PL>.

43. *See Cooperation Nets Probation for Ex-Broker With Role in Wall Street Insider Scheme*, BLOOMBERG L. (Mar. 27, 2012), https://www.bloomberglaw.com/bloomberglawnews/white-collar-and-criminal-law/XDPR7G1O000000?bna_news_filter=white-collar-and-criminal-law#jcite; *see also* Grant McCool, *Broker Who Stole Business Secrets from Wife Avoids Prison*, REUTERS (Mar. 23, 2012, 6:17 PM), <https://www.reuters.com/article/insidertrading-devlin/broker-who-stole-business-secrets-from-wife-avoids-prison-idINDEE82M00X20120323>.

44. *United States v. McGee*, 763 F.3d 304, 308–09 (3d Cir. 2014).

misappropriator, attempts to disguise the relevant trades, internet searches relating to liability avoidance, and (in the misappropriation actions) the secretive way in which the information was obtained from the source—indicated willful violative conduct.⁴⁵

Many questions spring to mind. Why would friends and family members knowingly implicate each other in criminal activity that could result in significant financial penalties, loss of employment, and imprisonment? Why would a husband voluntarily risk his marriage and cause damage to his and his wife's careers and reputations by illegally using information obtained through interactions taking place in daily marital life? Why would a trusted mentor in an alcoholism recovery group turn traitor on a fellow alcoholic with whom he has spent personal time and confidentially "shared intimate details" about his life? Can these and other like circumstances involved in criminal friends-and-family insider trading actions be fully explained by abuses of power or position or a quest for financial gain?

III. POSSIBLE RATIONALES AND MOTIVATIONS FOR CRIMINAL FRIENDS-AND-FAMILY INSIDER TRADING

Questions about the origins of and motivations for unlawful friends-and-family insider trading inspire this Article and my related work on friends-and-family insider trading cases more broadly. Ultimately, the answers lie in identifying and assessing possible conscious and unconscious catalysts for human behavior in insider trading settings. This Part III samples ideas from a variety of academic disciplines that may offer clues to the factors influencing the behaviors of the central actors involved in criminal conduct employing or founded in the transmission of material nonpublic information through friendships and family relationships—specifically, conduct that violates U.S. insider trading prohibitions. The academic disciplines represented and ideas presented do not by any means constitute an exhaustive list; they merely exemplify ideas that have some salience in explaining the behavior of friends and family acting as tippers, tippees, or misappropriators in criminal insider trading enforcement actions.

45. See sources cited *supra* notes 42–44.

A. Economics Perspective: Rational Choice

The work of University of Chicago (and Nobel Laureate) economist Gary S. Becker in modeling criminal behavior and enforcement as a function of the cost of crime has been hugely influential in and outside economic research on crime. In his seminal 1968 article, *Crime and Punishment: An Economic Approach*,⁴⁶ Professor Becker illustrated a rational choice theory of crime and punishment through which the costs and benefits of crime commission and criminal enforcement may be evaluated. Where the costs of a crime (including the nature and severity of the penalty and the probability of enforcement) outweigh the benefits, a rational economic actor should be deterred from committing the crime.⁴⁷ “The method used formulates a measure of the social loss from offenses and finds those expenditures of resources and punishments that minimizes this loss.”⁴⁸

Certainly, a faulty cost-benefit assessment (including one in which the individualized costs and probability of enforcement are underestimated or incorrectly weighted) may result in poor behavioral decision making. Yet, the extent to which friends-and-family tippers, tippees, and misappropriators engage in rational cost-benefit analyses in determining to commit criminal violations of U.S. insider trading law remains to be seen. Qualitative empirical work done in this regard tends to focus on corporate executives trading for their own account (or that of family members) or those involved in expert network insider trading—insider trading occurring as part of a course of business rather than in personal networks.⁴⁹

46. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

47. *Id.* at 169–70.

48. *Id.* at 170; see also Michael B. Dorff & Kimberly Kessler Ferzan, *The Perils of Forgetting Fairness*, 59 CASE W. RES. L. REV. 597, 616–17 (2009) (“Economists’ answers focus on deterrence. The law induces obedience by establishing appropriate incentives. We obey the law because the law ensures that it is in our interests to do so. The law can set up these incentives either by promising rewards for compliance or by threatening punishment for disobedience.” (footnotes omitted)).

49. See, e.g., *infra* notes 50–58 and accompanying text (describing one such project focusing on corporate executive insider trading); *infra* notes 63–67 and accompanying text (describing a study focusing on the relationship between management compensation and insider trading violations).

B. Business Management Perspective: Failure to Perceive Harm

In his 2016 book *Why They Do It*,⁵⁰ Harvard Business School Professor Eugene Soltes examined why corporate executives would risk all that they had built and acquired by participating in white-collar crime. Ultimately, he finds that these executives do not engage in any easily discernible version of the expected cost-benefit analysis.⁵¹ Rather, their conduct reflects their failure to see or internalize the harms generated by their conduct⁵²—“a broader lack of recognition of the consequences of their actions”⁵³ or what Professor Soltes describes generally as “poor managerial intuitions.”⁵⁴ The overall vagueness of U.S. insider trading regulations also likely plays a role in the puzzle.⁵⁵ Professor Soltes specifically notes, in a chapter focusing on insider trading, that “criteria imposed on what constitutes illicit insider trading in the United States don’t always comport with the public’s—or even prosecutors’—perceptions of what trading ought to be prohibited.”⁵⁶ Moreover, identifying the victims of criminal insider trading—those who are harmed by the conduct—can be challenging.⁵⁷

The information shared and analyzed in *Why They Do It* was extracted from interviews conducted by Professor Soltes with convicted former executives.⁵⁸ His findings and related reflections certainly are intriguing—perhaps even resonant with some readers and commentators. However, one may wonder whether non-executives engaging in criminal friends-and-family insider trading also fail to apprehend the harms caused by their conduct. There may be differences in the perceptions or intuitions of corporate executives and nonexecutives who trade in the

50. EUGENE SOLTES, *WHY THEY DO IT* (2016).

51. *Id.* at 327–30.

52. *Id.* at 226 (“[I]nsider traders themselves have trouble intuitively sensing and relating to the harm they cause.”).

53. *Id.* at 6.

54. *See id.* at 8.

55. *See id.* at 224–25; *see also* ANDERSON, *supra* note 2, at 59–87.

56. *Id.* at 224.

57. *See id.* at 211–25; *see also id.* at 206 (“The harm tends to be psychologically distant, perhaps more so than with any other white-collar crime.”).

58. *See id.* at 4 (explaining that Professor Soltes eventually corresponded with and visited “more than four dozen of the most senior executives who oversaw some of the most significant corporate failures in history.”).

corporation's securities while in possession of material nonpublic information.

Undoubtedly, hindsight reveals itself to be 20-20 vision as to the harms caused by criminal friends-and-family insider trading. The chapter in Professor Soltes's book on insider trading closes with the related reflections of Sam Waksal, former CEO of ImClone Systems Incorporated, whom Professor Soltes interviewed for that chapter.⁵⁹ Waksal and his family were caught up in an insider trading scandal in the early years of the 21st century that also ensnared domestic diva and media icon Martha Stewart in regulatory enforcement proceedings for insider trading and other alleged violations of federal and state law.⁶⁰ Professor Soltes writes:

With the powerful tools at the disposal of regulators to monitor trades, it's difficult to imagine that people like Waksal couldn't appreciate that trades by family members were being carefully watched. Yet, Waksal never really felt he was causing harm to anyone in particular. He never had that gut feeling telling him to stop.

"They wrote about me as if there was some giant byzantine idea that I was trying to perpetuate when in the end it was a phone call to my daughter that was an error in judgment," Waksal explained. "I don't know what I was thinking. . . . I wasn't, sadly."⁶¹

Although publicly available facts about the criminal enforcement actions included in the data set assembled for description and review in this Article do not give us complete information about the *ex-post* reflections of the defendants in those cases, some of the sentencing hearings and press reports on those proceedings offer

59. *Id.* at 226.

60. See Michael L. Siegel & Christopher Slobogin, *Federal Prosecutorial Power and the Need For Law of Courts*, in *MARTHA STEWART'S LEGAL TROUBLES* 55, 57–59 (Joan MacLeod Heminway ed., 2006) (collecting academic essays written by corporate, securities, and criminal law scholars on these enforcement efforts against Stewart).

61. SOLTES, *supra* note 50, at 226.

insights about harm recognition that are consistent with Waksal's observations.⁶²

C. Corporate Finance Perspective: Questioning Rational Choice

An insider trading study published in the *Journal of Corporate Finance* a decade ago casts some doubt on the full explanatory value of the rational choice theory developed by Professor Becker and others.⁶³ The study, coauthored by Professors Utpal Bhattacharya and Cassandra Marshall, was designed to determine whether the compensation of a senior corporate manager impacts the likelihood that the manager will be indicted for criminal insider trading.⁶⁴ The coauthors posited, assuming rational choice theory has fundamental explanatory power, that the data would show an inverse correlation between executive compensation and insider trading indictments (since lesser compensated managers would have less to lose).⁶⁵

Yet, the data indicated the opposite: "that compensation of top management positively affects the probability of being indicted as an insider trader, after we control for year, industry, size, growth opportunities, and executive age."⁶⁶ They conclude as follows:

62. See, e.g., McCool, *supra* note 43 ("Devlin, in tears, told the judge at the sentencing proceeding that his conduct was 'reckless, selfish and inexcusable' and that he had spent the last 3-1/2 years trying to repair the damage."); Nate Raymond, *Ex-research Firm Executive Sentenced for Insider Trading*, REUTERS (Mar. 14, 2013, 6:17 PM), <https://www.reuters.com/article/us-insidertrading-nguyen/ex-research-firm-executive-sentenced-for-insider-trading-idUSBRE92D1BE20130314> (reporting that the defendant avowed that "[n]o apology will be enough for what I did," and, in reference to his tippees, that "I made them more important than the people I loved."). It is important to recognize that these admissions, especially those made in connection with sentencing, enjoy the benefits of hindsight and may be self-serving.

63. Utpal Bhattacharya & Cassandra D. Marshall, *Do They Do It for the Money?*, 18 J. CORP. FIN. 92 (2012).

64. *Id.* at 93 ("The main result of our paper is based on a probit test as well as a rare event logit test, which tries to find out whether compensation of the top management affects the probability of being indicted as an illegal insider trader.").

65. See *id.* ("[W]here the potential offender considers the costs and the benefits before committing the crime, the testable implication is that we should see 'poorer' top management committing more white-collar crime. Why? . . . The primary reason is that the 'poor' have less to lose (present value of foregone future compensation if caught is lower for them)."; see also *id.* at 104 ("[W]here the potential offender computes the costs and the benefits before committing the crime, we should see 'poorer' top management committing the most insider trading crimes. . . . [A]ssuming risk neutrality, the benefits of 'poorer' top management are the same but their costs . . . are lower than 'richer' top management. . . .").

66. *Id.* at 93.

So, do they do it for the money? They may, but it does not seem to be the primary motive. Then why do they do it? Psychological motives (like hubris) or sociological motives (like company culture, or because others do it . . .) may lie behind the white-collar crime of insider trading.⁶⁷

The mentioned psychological and sociological motives hold some promise for further study. However, the results obtained by Professors Bhattacharya and Marshall also may be explained by reference to more classic, common explanations for white-collar crime generally (and insider trading more specifically), including abuses of power or status and greed.⁶⁸

Ultimately, Professors Bhattacharya and Marshall do not offer a specific theory explaining why people violate U.S. insider trading prohibitions. They “leave that for future research.”⁶⁹ Rather, their study rejects “the null hypothesis” that “the economic motive for a white-collar crime like insider trading [is] strong.”⁷⁰ Thus, their work sheds little light on the precise nature of the specific motivations for criminal friends-and-family insider trading, except to the extent that the results they obtained may, as they observe, tend to diminish prospects that economic rationality fully explains criminal insider trading behaviors.⁷¹

D. Philosophical/Psychological Perspective—Possible Effects of Norms

The norms scholarship of Professor Cristina Bicchieri⁷² also may have application in efforts to divine the thought processes and

67. *Id.* at 104.

68. See ANDERSON, *supra* note 2 and accompanying text.

69. Bhattacharya & Marshall, *supra* note 63, at 94.

70. *Id.*

71. It bears noting that the data set used by Professors Bhattacharya and Marshall in their study, like the data set examined in this Article, includes only conduct that became the subject of a criminal indictment. See *supra* Part II.B. Further, the study published by Professors Bhattacharya and Marshall, like Professor Soltes’s work, described *supra* Part III.B, focuses on alleged insider trading by corporate management (as opposed to others—who are the prototypical defendants in friends-and-family insider trading prosecutions). As a result, only limited inferences can be drawn from the study results, although they offer valuable food for thought.

72. *E.g.*, CRISTINA BICCHIERI, NORMS IN THE WILD: HOW TO DIAGNOSE, MEASURE, AND CHANGE SOCIAL NORMS (2017) [hereinafter NORMS IN THE WILD]; see also Cristina

motives of criminal friends-and-family insider traders. Professor Bicchieri's work in this area is deep and rich—too deep and rich to describe and apply here in full. Suffice it to say, norms may explain criminal conduct, including criminal insider trading involving the sharing of information in personal networks.⁷³

Norms, described by Professor Bicchieri as a type of interdependent collective behavior (conduct that reflects the actor's understanding of what others expect),⁷⁴ may motivate behavior. She describes two different types of norms: descriptive norms and social norms.⁷⁵ “A descriptive norm is a pattern of behavior such that individuals prefer to conform to it on condition that they believe that most people in their reference network conform to it (empirical expectation).”⁷⁶ A social norm is based on both an empirical expectation (a factual belief of the actor) and a normative expectation (the actor's assessment of the way things should be).⁷⁷

A social norm is a rule of behavior such that individuals prefer to conform to it on condition that they believe that (a) most people in their reference network conform to it (empirical expectation), and (b) that most people in their reference network believe they ought to conform to it (normative expectation).⁷⁸

Human behavior may conform to or transgress social norms in specific contexts. Conformity to norms may be automatic or involve consideration and deliberation.⁷⁹

Professor Bicchieri's work raises questions about whether certain norms or other collective behaviors may operate in some or all of the criminal friends-and-family insider trading situations represented in the data set. Insider trading involving information shared in friendships and family relationships may be seen as a

Bicchieri, *THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS* (2006) [hereinafter *GRAMMAR*].

73. *Cf. id.* at 1 (questioning why “social practices that cause societal damage, violate human rights, or are plainly inefficient can survive” and linking the answer to norms and other collective behaviors).

74. *NORMS IN THE WILD*, *supra* note 72, at 1–4.

75. *See id.* at 18–41.

76. *Id.* at 19.

77. *Id.* at 28–41.

78. *Id.* at 35.

79. *See BICCHIERI, GRAMMAR*, *supra* note 72, at 3–4.

triumph of self-interest over pro-social behavior. As such, the existence of friends-and-family insider trading may indicate the absence of social norms, a transgression of social norms, or the existence and operation of social norms that are contrary to the policies underlying U.S. insider trading regulation.

As a small subset of both the general body of criminal insider trading actions and the vast aggregation of insider trading enforcement actions overall, the collection of 36 friends-and-family cases described in this Article may allow for a more nuanced quest for and assessment of any operative norms. Different descriptive or social norms may exist in specific circumstances or subpopulations—even subpopulations of the limited sampling of criminal enforcement proceedings presented in this Article, for example—depending on the nature of the case (tipper/tippee or misappropriation), the nature of the relationship (friend or family, and type of friend or family relationship), the gender or role of the insider trader, or other attributes (e.g., age, ethnicity, educational background).⁸⁰ Separating and analyzing the facts of each case more deeply may provide additional insights into these and other questions about the potential role that norms may play in insider trading.

E. Sociological Perspective—Multifactor Analysis

I offer one last academic perspective for consideration before closing—although there are no doubt many more that could be identified and briefly addressed. This last perspective comes from the work of James William Coleman. I credit my friend and colleague Michael Guttentag for bringing Professor Coleman’s scholarship to my attention through his own research and

80. See *id.* at 148 (“Social norms can be thought of as default rules that are activated in the right circumstances.”); *id.* at 173 (“[T]here are cases in which group identification and social norms are inextricably connected. Often groups develop their own special norms . . .”). For example, one of the enforcement proceedings in the data set presented in this Article, *United States v. Lee*, involves information tipped by an investment banker to a college friend. See Press Release, U.S. Dep’t of Justice, Former Investment Banker and His Associate Sentenced for Insider Trading Scheme (July 24, 2013), <https://www.justice.gov/opa/pr/former-investment-banker-and-his-associate-sentenced-insider-trading-scheme>. Both were still in their 20s at the time of sentencing. *Id.* Their common background (at a formative life stage) and age group may condition them to behave similarly in similar situations based on shared beliefs. One can imagine that families also may develop their own norms. In fact, federal securities regulation assumes normative duties of trust and confidence in certain family relationships (specifically, in spousal, parent/child, and sibling relationships). See 17 C.F.R. § 240.10b5-2(b)(3).

writing.⁸¹ Professor Coleman's work offers a synthesis that, in some ways, draws together several approaches to understanding why individuals may commit insider trading involving friends or family members.

Specifically, in the book chapter described by Professor Guttentag, Professor Coleman articulates four motivational factors that, together with opportunity, contribute to the commission of white-collar crime: the personality of the actor; cultural considerations; the neutralization of ethical checks on conduct; and the effects of organizational structures and values.⁸² Each may have salience in evaluating the possible motivations of an individual's engagement in criminal friends-and-family insider trading. Any impact of personality traits requires individualized assessment, and Professor Coleman has indicated that this factor may carry limited weight in explaining the motives underlying criminal friends-and-family insider trading.⁸³ However, some commonalities associated with friends-and-family insider trading allow for relevant observations about the application of Professor Coleman's framework.

The cultural and organizational contexts in which friends-and-family insider trading takes place (two factors identified by Professor Coleman) may offer some clues as to why criminal conduct occurs in certain settings and not others. For example, in a 1987 article, Professor Coleman describes a "culture of competition" in which society values an individual's quest for personal gain (financial or reputational).⁸⁴ He notes that an individual's insecurity, for example, may motivate gain-seeking

81. See Michael D. Guttentag, "Huh?" *Insider Trading: The Chris Collins Story*, 15 TENN. J.L. & POL'Y 95, 105–06 (2020) ("One elegant approach to identifying the causes of white-collar crime, developed by sociologist James William Coleman, separates elements that lead to the commission of a white-collar crime into two broad categories: motivation and opportunity." (citing James William Coleman, *Motivation and Opportunity: Understanding the Causes of White-Collar Crime*, in WHITE-COLLAR CRIME: CLASSIC AND CONTEMPORARY VIEWS 360, 361 (Gilbert Geis et al. eds., 3d ed. 1995) [hereinafter Coleman, *Motivation and Opportunity*])).

82. See Coleman, *Motivation and Opportunity*, *supra* note 82, at 360–72; see also James William Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93 AM. J. SOCIOLOGY 406, 408 (1987) [hereinafter, Coleman, *Integrated Theory*] ("The theory of white-collar crime presented here is based on the hypothesis that criminal behavior results from a coincidence of appropriate motivation and opportunity." (citations omitted)).

83. See Coleman, *Integrated Theory*, *supra* note 83, at 409–10 ("[T]here is far too little consistency in their findings to conclude that such personality theories have much explanatory value.").

84. See *id.* at 414–20.

behavior, especially in the economic sphere.⁸⁵ He also notes that “Some crimes result from the effort to live up to the expectations of friends and associates in the offender’s occupational world or from an unreflective acceptance of a set of definitions that make certain criminal activities seem to be a normal part of the occupational routine.”⁸⁶ These reflections about cultural expectations and individual responses to them resonate with some of Professor Bicchieri’s observations about descriptive and social norms.⁸⁷

Professor Coleman calls out friendships and family membership in his 1987 article in a way that caught my attention—a way that implicates the study of insider trading crimes committed in friend and family networks. Specifically, he notes that “reciprocal exchange is still common among relatives and friends in even the most capitalistic industrial societies, but it is market exchange that predominates.”⁸⁸ This thought requires careful inspection in analyzing what motivates criminal friends-and-family insider trading, which involves the sharing of information—often seen as part of a reciprocal exchange (as the law of tipper/tippee cases expressly recognizes⁸⁹)—as well as a market exchange (including the existence or promise of securities trading), all taking place in a larger culture that values the quest for wealth or status.

The facts adduced in *United States v. Salman*—which ultimately became the most recent insider trading case decided by the U.S. Supreme Court⁹⁰—immediately come to mind. The *Salman* case is represented in the data set described and evaluated *supra* Part II.⁹¹ *Salman* involves a stock tip made by a financial industry professional (Maher Kara) to his brother (Mounir

85. *See id.* at 417 (“[F]ear of failure is the inevitable correlate of the demand for success, and together they provide a set of powerful symbolic structures that are central to the motivation of economic behavior.”).

86. *Id.*

87. *See supra* note 81 and accompanying text.

88. Coleman, *Motivation and Opportunity*, *supra* note 82, at 419–20.

89. *See Dirks v. S.E.C.*, 463 U.S. 646, 664 (1983) (“[T]here may be 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. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.”); *see also Salman v. United States*, 137 S. Ct. 420, 427–28 (2016) (affirming *Dirks* on this point).

90. *Salman*, 137 S. Ct. at 420.

91. *See infra* Appendix I.

“Michael” Kara), who in turn passed the information to Maher’s brother-in-law (Bassam Salman).⁹² Bassam Salman then traded on the information through the brokerage account of a family member.⁹³ The Court affirmed Bassam Salman’s guilt based on the impropriety of the reciprocal exchange between Maher Kara and his brother, Michael, which represented a breach of Maher’s duty of trust and confidence—a breach of which both Michael and Bassam Salman were aware.⁹⁴

Bassam Salman’s arguments in the *Salman* case also may be interpreted as an example of neutralized ethical constraints (another of Professor Coleman’s motivational factors). Bassam Salman did not argue that no one was harmed by his insider trading, or that the money he made in his trades (over \$1.5 million) was earned or deserved, or that everybody else also is engaging in trading on material nonpublic information (three classical manifestations of neutralized ethical constraints).⁹⁵ However, he did argue that the lack of a financial benefit to Kara Maher rendered his insider trades lawful.⁹⁶ In making this argument, Bassam Salman justifies or rationalizes his conduct, arguably neutralizing its ethical content (as well as its legal significance)—at least after the fact.⁹⁷

IV. CONCLUSION

I am certainly not the first to express concerns that insider trading—and white-collar crime as a whole—may not be entirely

92. *Salman*, 137 S. Ct. at 423–24.

93. *Id.* at 424 (“By the time the authorities caught on, Salman had made over \$1.5 million in profits that he split with another relative who executed trades via a brokerage account on Salman’s behalf.”); *see also* United States v. *Salman*, 792 F.3d 1087, 1089 (9th Cir. 2015), *aff’d*, 137 S. Ct. 420 (2016) (“Salman arranged to deposit money, via a series of transfers through other accounts, into a brokerage account held jointly in the name of his wife’s sister and her husband, Karim Bayyouk. Salman then shared the inside information with Bayyouk and the two split the profits from Bayyouk’s trading.”).

94. *Salman*, 137 S. Ct. at 428 (“[B]y disclosing confidential information as a gift to his brother with the expectation that he would trade on it, Maher breached his duty of trust and confidence to Citigroup and its clients—a duty Salman acquired, and breached himself, by trading on the information with full knowledge that it had been improperly disclosed.”).

95. *See* Coleman, *Motivation and Opportunity*, *supra* note 82, at 368; *see also* Coleman, *Integrated Theory*, *supra* note 83, at 410–14.

96. *Salman*, 137 S. Ct. at 424 (“He argues that he cannot be held liable as a tippee because the tipper (his brother-in-law) did not personally receive money or property in exchange for the tips and thus did not personally benefit from them.”).

97. *See* Coleman, *Integrated Theory*, *supra* note 83, at 410.

founded in business, power, status, money, and greed. Others before me, including academic researchers whose work is featured *supra* Part III,⁹⁸ have puzzled over why individuals engage in criminal insider trading, white-collar crime, and even criminal activity more generally.

Why do they do it? This is one of the fundamental questions in criminology. Is the choice to commit a crime evidence of underlying psychological difficulties? A socially learned antipathy toward legal rules? Or just the product of a cold-hearted weighing of costs and benefits? In some circumstances, the reasons why someone commits a crime may be obvious. “Other times, all we have is mystery.”⁹⁹

Criminal activity rooted or occurring in friendships and families is particularly mysterious, given the essential abuse, misuse, or betrayal of trust typically involved. The relationships themselves may be irrevocably impacted by the criminal conduct, and associated damage to related individuals may result. Cost-benefit analyses seem to be especially challenging when friendships and family relationships weigh in the balance. One may sense that rational decision making of that kind may be a less significant explanator of criminal conduct emanating from and involving personal relationships—especially close ones.

As a step in solving the mystery in a limited sphere of white-collar criminal activity, this Article describes and offers commentary on 36 criminal insider trading prosecutions brought between 2008 and 2018. The cases involved allegations of tipper/tippee insider trading or misappropriation insider trading involving information shared with or learned from friends or family members. The nature of these cases and the fact patterns represented in them raise certain key questions about the thought processes and motives of the subject tippers, tippees, and misappropriators. The Article raises those questions and offers a selected literature review that identifies and briefly comments on possible reasons for criminal friends-and-family tipping and misappropriation.

98. See, e.g., SOLTES, *supra* note 50, at 4 (explaining how questions of motive emerged for the author); Bhattacharya & Marshall, *supra* note 63, at 92–93, 104 (expressly raising questions about the economic rationale for insider trading); Guttentag, *supra* note 82, at 96–97, 105 (asking why criminals do what they do).

99. Guttentag, *supra* note 82, at 97 (footnotes omitted).

Additional research is needed to evaluate the explanatory power of these (and other) potential explanations for criminal friends-and-family insider trading. Data and analyses using the publicly available facts from prosecuted cases can only offer limited information about the factors that predict (or commonly precipitate) friends-and-family insider trading violations. However, qualitative empirical studies could be designed to adduce more facts about the factors that predict (or commonly precipitate) friends-and-family insider trading cases and generate a richer set of standardized comparative information about this type of criminal conduct. Indeed, studying both criminal and civil friends-and-family insider trading in this way may provide additional (similar or distinctive) insights.

Apart from general curiosity about the criminal mind and the contexts in which criminal behavior occurs, why might it be important to understand why criminal friends-and-family insider traders do what they do? Without concrete knowledge about why individuals engage in unlawful tipping, misappropriating, and trading, the efficacious regulation of insider trading is unlikely to occur. The appropriate, effective calibration of regulation requires knowledge of the motivations of those who engage or would engage in the regulated conduct. We may observe identical behaviors, but the reasons behind them may significantly vary. “Indeed, the same actions may be independent or interdependent, and interventions aimed at successfully changing behavior must first understand the nature of the collective behavior in question.”¹⁰⁰

More specifically, in her work on applied descriptive and social norms, Professor Bicchieri offers the prospect that harmful norms may be changed through, among other things, legal means.¹⁰¹ While regulation alone cannot deter all undesired conduct (or guarantee consistent, comprehensive engagement in desired conduct), it can, together with other tactical responses, limit unwanted behaviors and incentivize constructive behaviors. However, to optimize the positive effects of U.S. insider trading regulation, we first must learn more about those who transgress its current contours. This Article provides a foundation for that work and will have been successful if it prompts additional research toward that end.

100. BICCHIERI, NORMS IN THE WILD, *supra* note 74, at ix.

101. *See id.* at 143–47.

APPENDIX I

Year	Case Caption	Type of Insider Trading ¹⁰²	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2008	Gansman et al.	T/T	Male	Female	Mistress
2008	Devlin	M	Female	Male	Husband
2009	Rajaratnam et al.	T/T	Male	Male	Brother
2009	Holzer	T/T	Male	Male	Friend
2009	Bouchareb et al.	T/T	Male	Male	Friend
2009	Bouchareb et al.	T/T	Male	Male	Friend
2009	Kara et al.	T/T	Male	Male	Brother
2009	Kara et al.	T/T	Male	Male	Friend
2009	Kara et al.	T/T	Male	Male	Friend
2010	Talbot et al.	T/T	Male	Male	Nephew
2010	Hansen	T/T	Female	Male	Friend

102. Tipper/Tippee (T/T) or Misappropriation (M)

Year	Case Caption	Type of Insider Trading ¹⁰²	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2011	Gupta	T/T	Male	Male	Friend
2011	Skowron, III	T/T	Male	Male	Friend
2011	Holley et al.	T/T	Male	Male	Friend
2011	Salman	T/T	Male	Male	Brother-in-Law
2012	Conradt et al.	T/T	Male	Male	Friend
2012	Conradt et al.	T/T	Male	Male	Friend
2012	McGee	M	Male	Male	Friend
2012	Nguyen	T/T	Female	Male	Brother
2012	Gupta	T/T	Male	Male	Friend
2012	Bayyouk	T/T	Male	Male	Brother-in-Law
2013	Riley et al.	T/T	Male	Male	Friend
2013	Lee et al.	T/T	Male	Male	Friend

Year	Case Caption	Type of Insider Trading ¹⁰²	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2013	Dowd	T/T	Male	Male	Friend
2013	Megalli	T/T	Male	Male	Friend
2014	Melvin et al.	T/T	Male	Male	Friend
2014	Conradt et al.	T/T	Male	Male	Friend
2014	Conradt et al.	T/T	Male	Male	Friend
2014	Post et al.	T/T	Male	Male	Friend
2014	Metro et al.	T/T	Male	Male	Friend
2014	Metro et al.	T/T	Male	Male	Friend
2015	Fishoff	T/T	Male	Male	Friend
2015	Fishoff	T/T	Male	Male	Brother-in-Law
2015	Fishoff	T/T	Male	Male	Friend
2015	Fishoff	T/T	Male	Male	Friend

Year	Case Caption	Type of Insider Trading ¹⁰²	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2015	Cunniffe et al.	T/T	Male	Male	Father
2015	Cunniffe et al.	T/T	Male	Male	Friend
2015	Adcox	T/T	Male	Male	Friend
2015	Wiegand et al.	T/T	Male	Male	Brother-in-Law
2015	Wiegand et al.	T/T	Male	Male	Friend
2015	Fefferman	T/T	Male	Male	Brother-in-Law
2016	Davis	T/T	Male	Male	Friend
2016	Fung	T/T	Male	Male	Friend
2016	Klein et al.	T/T	Male	Male	Friend
2017	Siva et al.	T/T	Male	Male	Friend
2017	Siva et al.	T/T	Male	Male	Friend
2017	Siva et al.	T/T	Male	Male	Friend

Year	Case Caption	Type of Insider Trading ¹⁰²	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2017	Siva et al.	T/T	Male	Male	Friend
2017	Siva et al.	T/T	Male	Male	Friend
2017	Moodhe	T/T	Male	Male	Girlfriend's Father
2017	Blaszczak et al.	T/T	Male	Male	Friend
2017	Brown et al.	T/T	Male	Male	Friend
2017	Yan	M	Female	Male	Husband