A New Theory of Insider Trading Law

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- Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 **Cornell L. Rev.** 845 (2013).
- Sung Hui Kim, *Insider Trading as Private Corruption*, 61 **UCLA L. Rev**. 928 (2014).

Sung Hui Kim of the UCLA School of Law has developed a bold new theory of insider trading that is well worth reading. In *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, Kim lays the foundation of her new theory, which she expands in *Insider Trading as Private Corruption*.

In arguing that members of Congress are fiduciaries for purposes of insider trading law, Kim joins a number of others scholars who have argued for the imposition of fiduciary duties on government officials. *See, e.g.,* Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (2011); Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 Calif. L. Rev. (2013); D. Theodore Rave, *Politicians as Fiduciaries*, 126 Harv. L. Rev. 671 (2013); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 Tex. L. Rev. 441 (2010). I come to this literature as a skeptical reader. Having written extensively on fiduciary law, I am wary of scholarship that purports to extend fiduciary analysis into new domains, stretching the fiduciary concept beyond its analytical boundaries. In *Last Temptation*, therefore, I prepared myself for an arduous slog when I read that Professor Kim was arguing that the "majority view"—that "members of Congress are fiduciaries to no one" (P. 849)—was wrong (P. 852).

My concerns were heightened when I saw that Professor Kim proposed to begin her analysis through analogy to established fiduciary relationships. (P. 870.) Although Deborah DeMott, one of the leading scholars of fiduciary law, argues that this is the method employed by courts (and implies that the method would, therefore, be appropriate for commentators), analogical reasoning has limited value without an underlying theory of fiduciary relationships. I come from a group of scholars who contend that fiduciary duties arise from the structure of relationships, and this analysis does not depend heavily on analogical reasoning. *See* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399 (2002); Larry E. Ribstein, *Are Partners Fiduciaries*, 2005 U. Ill. L. Rev. 209. Thus, I found Professor Kim's analysis in Part II "unsatisfyingly thin," (P. 853) as she predicted.

Of course, Professor Kim was not convinced by her own metaphors. She recognized the limitations of analogical reasoning and used that section of her paper to set up a more persuasive analysis grounded in "the underlying policy or purpose that animates fiduciary law." (P. 893.) In the most important and original section of the paper, Professor Kim argues that "one core purpose of fiduciary law is anti-corruption." (P. 903.) Relying on the "rule against secret profits" (P. 904), she links corruption in the public sector to fiduciary principles for purposes of federal insider trading law. The analysis in this part of the paper is nuanced, original, and insightful. Impressive.

As much as I ended up liking *Last Temptation*, I was even more impressed with *Insider Trading as Private Corruption*. In this piece, Professor Kim builds on her incomplete theorization of corruption in *Last Temptation*, proposing a "new theory of insider trading law" based on anti-corruption. (P. 932.) This is an ambitious and exciting piece of scholarship, attempting to bring more conceptual coherence to a notoriously challenging area of law.

Professor Kim nicely reveals the shortcomings of existing theories and readily concedes some shortcomings in her own theory. (I chuckled a bit, but appreciated her confidence in suggesting that "the sites where corruption theory diverges from the received doctrine constitute areas ripe for doctrinal reform." (P. 935.).)

Her taxonomy of the costs of corruption is especially significant as a framework for analysis. (P. 961-967.) Professor Kim identifies three categories of costs from corruption. "Temptation Costs" arise when managers allow their decisions about the corporation to be influenced by self-interest, for example, by "push[ing] the firm into riskier projects or manipulat[ing] the timing and content of information release in a manner that will generate more price volatility than otherwise." (P. 962.) "Distraction Costs" consume managerial time and attention. (P. 964.) And "Legitimacy Costs" may affect securities markets if investors come to view those markets as a "rigged game." (P. 967.) On the whole, I was convinced by Professor Kim, that a "key benefit of seeing insider trading as private corruption is that it allows us to see the harms of insider trading more generally as the harms of corruption." (P. 961.)

Insider trading is a nice place to start the development of the corruption theory, but I hope Kim does not end her investigations there. This is a nice framework for thinking about extensions of fiduciary law into new fields.

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