

## The Philosophical Theories of Utilitarian Ethics and Deontology on the Regulation of Insider Dealing in The United Kingdom

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### Abstract

This paper applies the philosophical theories of Utilitarian Ethics and Deontology in seeking to better understand the regulation of insider dealing in the United Kingdom and if the approach to such regulation should be reconsidered. Though evolved over a long time, there is a striking difference in UK and USA insider regulations. The paper has presented a meticulous analysis and critique of the philosophical theories which can directly relate to insider dealing, understand its regulation and the positive and negative aspects of its practice from an ethical perspective.

**Keywords: Utilitarian Ethics, Insider Dealing, United Kingdom**

The insider dealing laws and regulatory measures have evolved over time across the world's markets. The United Kingdom (UK) has one of the world's biggest economies, with well-built and sophisticated insider dealing regulations. However, in comparison, the United States of America (US) had insider dealing regulations (insider trading in the US) much earlier than the UK. The US regulator's attitude to insider dealing is extreme and effective. Treadway (1991) quoted Richard Breeden of the Securities and Exchange Commission ('SEC'), who famously threatened: "...people who engage in insider trading should be left naked, homeless, and without wheels."

It is important to note that, when discussing the term "insider dealing", the average person instantly classifies it negatively, and those who engage it are immoral, unethical or common criminals. The purpose of this essay is to analyze and critique the philosophical theories which can directly relate to insider dealing, understand its regulation and the positive and negative aspects of its practice from an ethical perspective.

Barnes (2011) elucidated that insider dealing in UK has become a matter of public concern particularly since the 2007-9 financial crisis. Griffin (2006) asserts that insider dealing is "...the misuse of unpublished 'inside information' relating to a company for the purpose of gaining an unfair advantage in transactions involving company shares or other company securities." Holyoak (2009) described the information to be considered price-sensitive, because if it were made public, it would affect the stock price significantly. White (2008) highlighted that insider dealing has also been said to destroy public confidence over the fairness and effect the overall success of the Stock Exchange.

McGee (2008) postulated that previously, using such inside information known only to the company or its employees was considered legitimate. However, in the 1950's making a profit at the expense of society was deemed disreputable and unethical. From this point countries began looking at criminalizing the practice suggesting those engaging in insider dealing "...are totally devoid of ethical principles." According to Manne (1970) academics in law, philosophy and economics have proposed that not all insider dealing is unethical and some studies have concluded that certain aspects of insider dealing are actually beneficial to the Stock Exchange and investment community. While most argue insider dealing should be prohibited, Hetherington (1967) posits some questioned about the practice of insider dealing as to whether it should be punishable or otherwise.

Budney (1979) states that nonetheless, it has long been the view that insider dealing is something evil and most articles written about the practice argued that insider dealing is unequivocally immoral. Unfortunately, many of these articles fail to assess the ethical issues surrounding insider dealing, merely basing their beliefs on the foundation that using inside information is inherently unethical. It is important to note that what is unethical may not be illegal and visa-versa. The two concepts overlap, they are not identical.

Although seen as illegal and immoral, the use of inside information is not limited to insider dealing. Many profit from the use of inside information in everyday life. A solicitor who uses the non-public information they have acquired by years of practice and then charge a fee for this service is neither illegal nor immoral. Applying the utilitarian ethics perspective, a transaction is ethical provided the gains exceed the losses. Thus, as the solicitor and the client both benefit from the transaction, it is irrelevant whether inside non-public information is used, the transaction will be ethical.

Those who take a narrow view on insider dealing argue that 'inside information' is only available to those who, by virtue of their duties or employment, have access to. These persons are commonly referred to as primary insiders. Individuals such as family or friends who knowingly use inside information from a primary insider are known as secondary insiders.

Nevertheless, solicitors are able to use their non-public information to represent a client and potentially help their case. However, although such information and knowledge held by solicitors is supplemented through years of practice and the experience earned by these individuals, it is nonetheless part of the public knowledge and is available to anybody who wishes to spend the time and money to practice the profession and represent themselves. Arguably therefore, such knowledge and information cannot be equated to what is commonly understood as 'inside information.'

Bentham (2015) explained the assertion that may have some credibility. However, the most prominent issue is not whether it is ethical for individuals to benefit from using non-public inside information, but whether it is ethical to benefit from asymmetric information. There are two means to determine whether benefiting from this information is ethical. Firstly, the theory of utilitarian ethics looks at results and should the gains exceed the losses or if the result is one which provides the greatest possible happiness, then benefiting from using such information is ethical. Alternatively, the second approach is the concept of deontology which assesses the rightness or wrongness of actions themselves, as opposed to the rightness or wrongness of the consequences of those actions. The approach determines whether it fulfils an individual's moral duty, irrespective of whether it makes people happy. Deontologists hold that right actions are defined by duty and once it is understood what an individual is duty bound to do morally, then the 'natural' rights action can be carried out regardless of consequences. Therefore, individuals must do what is right, and what is right is that which conforms to moral law. Thus, if it is indeed immoral to use inside information, this will be deemed an unethical practice (Korsgaard & Kant, 2012).

The theory of utilitarian ethics is one of the best well known most influential moral theories. Often considered a 'consequentialist' philosophical perspective, its central idea is whether actions are morally right or wrong depending if their effects are good or bad. Utilitarians believe that pleasure and happiness must be pursued. Davies and Holdcroft (1991) has stated that hence, the goal of any action of an individual should seek the greatest happiness for the greatest number of people. According to Bentham (2015) moral decision depends on the outcome, if it delivers the greatest happiness to the majority, it will be the 'morally' right decision where the "...end justifies the means." It must be noted in the case of insider dealing, the breach of a fiduciary duty may be factored in when determining whether the action still results in the greatest good for the greatest number of people.

According to Smart & Williams (1973) the utilitarian theory rejects systems or moral codes that are based on taboos or commands that center on traditions, customs, or orders given by leaders. Harris (1997) emphasized on what makes a morality to be true or justifiable is its positive contribution to people. Utilitarianism is identified as the theory of utility and each action is justified by its usefulness in fetching about desired consequences. Arguably, the most important utilitarian theorists and social reformers are Jeremy Bentham and John Stuart Mill. Their theory of utilitarianism has had a major impact both on philosophical work in moral theory and on approaches to political, economic and social policy.

Utilitarianism is broken down into two types: act utilitarianism which Bentham founded his 'greatest happiness' hypotheses and focuses on the effects of individual actions, such as an individual insider using inside information to benefit themselves; and rule utilitarianism, which was developed by John Stuart Mill and focuses on the effects of types of actions, such as the effects insider dealing has as a whole (Finnis, 1975). Both act utilitarianism and rule utilitarianism agree that the overall aim in evaluating actions is to create the best results possible, but differ on how to do this.

Act utilitarianism is the belief that, when someone is deciding to do an action, the action taken must be one that creates the greatest utility. Act utilitarians argue that, the principle of utility in doing whatever will produce the best overall results should be applied to each individual set of

circumstances. The right action in any situation is the one that yields more utility and creates the most well-being over any other available action (Mill, 1879).

In contrast, Tebbit (2000) has stated that rule utilitarianism adopts a two-part view that stresses the significance of moral rules. A specific action is ethically justified if it conforms to a justified moral rule; and a moral rule is acceptable if its inclusion into moral code would generate more utility than other potential rules. Therefore, the morality of individual actions should be judged by reference to general moral rules, and particular moral rules should be judged by seeing whether their acceptance into society's moral code would produce more well-being than other prospective rules. Arguably, the main difference between act and rule utilitarianism is that act utilitarianism directly applies the utilitarian principle to the evaluation of individual actions, while rule utilitarianism directly applies the utilitarian principle to the evaluation of rules and then evaluates individual actions by seeing if they obey those rules.

Nonetheless, utilitarianism has attracted plenty of criticism for being unworkable and even absurd. Additionally, many have suggested that the utilitarian theory results are morally wrong and object to the reduction of the human experience to the pursuit of pleasure. Moreover, one of the biggest criticisms with the theory of utilitarianism is that happiness is an abstract concept and lies at the heart of the theory. Many have questioned how to measure happiness when it only exists in a person's mind and, if happiness cannot be measured, how can the effects an action has on the amount of happiness in society be assessed?

Bentham (2015) offered a mathematical formula to this problem and proposed a method of working out the sum total of pleasure and pain produced by an action, and thus the total value of its consequences; known as the 'felicific calculus'. Consequently, in order to determine what action is correct in a given situation, the pleasures and pains that result from it should be considered in respect of their certainty, duration and intensity. Further, the extent of the number of people affected, their propinquity, fecundity purity should also be assessed (Crimmins, 2017). Any alternative courses of action should also be considered to determine which act has the best tendency, and is therefore right. Bentham envisaged the calculus could be used for criminal law reform whereby, it would be possible to work out the minimum penalty necessary to prevent a crime of a certain kind.

Many including Smart & William (1973) have ridiculed the formula as absurd and suggested that utilitarians would be continuously required to perform calculations in order to determine every consequence of their actions, however minor. Additionally, the weighing of consequences is more a matter of vague intuition and cannot be done by scientific calculation.

The felicific calculus is also unable to interpret the different degrees of happiness nor that everyone is brought happiness differently, and to different degrees. It is also almost impossible to foresee an action's consequences and therefore, any effort to predict the effects on pleasure and happiness are similarly unfeasible. Conversely, Mill argued these calculations have already been calculated by past generations of humans and have now formed part of society's moral rules. Therefore, the outcome of every action does not need to be calculated before action is taken.

Intuitively speaking, the theory of utilitarianism appears to be *prima facie*, an extremely attractive philosophy, because it offers a simplicity that most other philosophical theories lack, as it cuts through the variety of miscellaneous moral rules favored by deontology. On the contrary, deontologists argue that the utilitarian theory allows individuals to justify heinous acts on the grounds that their outcomes are beneficial.

Deontology is an alternative ethical theory considered solely on duty and rights. This theory is dependent on the Scriptures which may refer to rules, moral laws, and intuition, and is based on the belief that everyone has a set moral obligation to abide by defined principles. Therefore, the ends of an action do not justify the means but instead it is the action itself that is intrinsically good or bad. Consequences of an action cannot be controlled in any case, as it is not guaranteed whether an intended result will occur from a particular action.

Derived from the Greek word 'deon', meaning "duty", this ethical theory considers morals to be unconditional, obligatory, and universal, and holds that an individual must do their moral duty irrespective of any negative consequences. Thus, while utilitarian ethics focuses on an action's outcome, deontology stresses that the means or actions themselves must be ethical. Deontologists also suggest that, there are transcendent moral rules and truths that are applicable to everyone (Ellis, 1992).

Immanuel Kant, a main advocate wanted deduce the rational way to live and envisioned a 'Kingdom of Ends' where rational beings could live in harmony by shared values and respect others (Korsgaard, 2012). Atwell (1986) narrated Kant to have said that when considering morality, "...there is only one good thing and that is a good will". A good will is the intention to act in accordance with the universally ethical laws that everyone automatically and freely give

themselves. Audi (2016) elucidated that moral laws require the individual to treat others as ends rather than as means to an end.

Kant proposed a 'categorical imperative' to always act morally. a command or recommendation of action that is completely absolute, for example, "one should never lie" or "one should always keep their promises." The categorical imperative helps people to behave a certain way out of duty, with no other external or ulterior factors in mind. This makes for a more reliable moral system, as it ensures that individuals do indeed always tell the truth or behave justly regardless.

The categorical imperative determines whether an act is morally permissible by ensuring that everyone "...act only according to that maxim by which they can, at the same time, will that it should become a universal law (Sullivan, 1989)." In other words, a 'maxim' translates to the rule or subjective principle that the will of an individual uses in making a decision and when following this maxim, would the individual want this rule to become universal law for everyone to follow. Thus, if the action the individual considers meets these requirements, a categorical imperative is devised and is a sound moral rule which must be followed absolutely. However, if not, the action is not moral and therefore not permissible. Arguably therefore, as the categorical imperative places an obligation on individuals to follow rules that they are wanting to become universal, this is a major strength of Kant's theory of deontology as it can remain consistent. This is because this theory is rules-based and absolute, and therefore requires individuals to be consistent in their morality. Rachels (2009) supports Kant's moral system as stable as it is rational.

It can also be argued that, the theory's ability to be absolute can also present a major weakness as it can lead to the possible conflict of rules. An example is seen in a scenario where an individual is forced to choose between two obligatory moral rules, "never tell a lie" and "if you can help it, never allow innocents to die." Using Kant's deontological theory, both these universal moral rules would be unconditional and must be followed. However, utilitarians would argue that, there are no 'universal moral rules' as such rules are difficult to ascertain and can lead to 'morally untenable outcomes (Icheku, 2011). Consequently, absolutism in such circumstances would be irrational and the advantages and disadvantages of an individual's actions can be calculated with ease. Therefore, instead of depending on nebulous moral rules to guide someone's actions, a more 'concrete' method of determining the ethics of a particular act must be used.

It is also suggested that Kant underrates the significance of taking consequences into account when considering an action. Although Kant believed that an actions consequence can never be certain, utilitarians argue that most circumstances have calculable consequences and these should always be considered when contemplating an action. Still, Kant advocates that, regardless of the actions' consequences, what is important is the individual's intention and adherence to an unconditional rule. However, as per the example above, utilitarians would argue that the outcome of someone being killed because the individual avoided lying, is much less desirable than if that someone could be saved from death through a lie. Thus, the ends of an action must be assessed rather than the means to determine whether an act is ethical or not.

On the other hand, deontologists have attempted to refute this and argue, the ends are illusory, and it is impossible to foresee the consequences of an individual's actions with absolute certainty. The only certainty is that the individual's actions are ethical based on the categorical imperative. Additionally, deontologists believe that people are only responsible for their own actions and no one else's. Therefore, in respect of the above example, following the categorical imperative, the individual is only responsible for their decision whether to lie or not; it is the person who makes the unethical decision to kill someone who holds the responsibility of that person's death. In theory, this argument has its merits, however, in practice, there is a strong assertion that an individual who allows someone to die to avoid lying will ultimately feel a sense of responsibility for that person's death.

In order to fully appreciate the utilitarian and deontological perspectives on the regulation of insider dealing, the regulations on the practice of insider dealing must first be identified and assessed. In the UK, Part V of the Criminal Justice Act 1993 regulates the criminal offences of insider dealing. Section 52 identifies the main offence of insider dealing that, '...an individual who has information as an insider is guilty of insider dealing if he deals in stocks and shares whose price will be affected by that information when it is publicly disclosed.' Although the CJA provides two other circumstances in which an individual's actions will amount to a criminal offence. These are beyond the scope of this paper.

To breach insider dealing offences, the 'insider' must be in possession of 'inside information'. The notion of 'inside information' is central to this legislation and recognized as particular securities or a particular issuer of securities; specific or precise; has not been made public; and if it were made public, it would likely have significantly affected the price of securities.

The addition of 'particular securities' in the definition has been criticized for being too broad, especially as it includes many types of securities, for example: stocks, shares and options. However, this section does specify that these securities must be 'price-affected securities', meaning that if the information was made public, it would be likely have a significant effect on the price of securities. Many have criticized the CJA 1993 for not defining 'significant effect' that the ambiguous nature of this term damages the efficiency of the CJA's ability to regulate insider dealing infringements. Additionally, the information must relate to the issuer, however the issuer need not be the source.

The CJA has included the terms 'specific' and 'precise' in the criteria to satisfy the 'inside information' requirement. In a parliamentary debate prior to the introduction of the CJA, precise information was described as "...narrow, exact and definitive." The term 'specific' derives from the previous legislation and is included because 'precise' information by itself, may not be covered. The reason for this was to avoid prosecution of those who use rumors and speculation, as it is considered vital to the Stock Exchange economic function. Alternatively, this provision was also established to speed up disclosures and catch those who have greater access to information of a specific nature, such as company directors. However, White argues 'specific' information places too much restriction on individuals and states that releasing some non-public information can contribute to market efficiency and provide a true market value of price-affected securities if inside information was publicly available.

In relation to non-public information, the Government provided clarity on the definition of 'made public' by dividing Section 58 of the CJA 1993 into two parts. The first part was to define information which is considered to have been made public, and the second is to define information which 'may be treated' as made public. Information is deemed to have been made public if it is in accordance with the rules of a regulated market, or it appears, by virtue of any enactment, in records open to inspection by the public regardless if the market has assimilated the information or not. Thus, individuals may deal with this information as soon as it appears in a public document or immediately after its public release. This has questioned the effectiveness of the CJA as this provides a loophole to insider dealers.

In regards to the second definition of made public, Section 58(3) has identified five circumstances in which information 'may be treated' as made public: diligence or expertise; communicated only to a section of the public; observation; payment of a fee, or only published outside the UK. Band has questioned the effectiveness of this provision as this list of circumstances is non-exhaustive and unhelpful. Hannigan suggests the law should place the burden on the insider to prove that the information was in fact available to the public. However, if the individual was unaware the information was not made public, they will be unaware they were committing an offence when dealing. Therefore, it could be argued that, this goes against the principle of non-retroactivity in criminal law and undermines the effectiveness of the CJA 1993.

In relation to the perpetrator, the CJA identifies that an individual will be guilty of insider dealing if they have information as an insider. Therefore, the Act provides that '...a person has information as an insider if and only if it is inside information and that it is from an inside source.' Furthermore, any person who uses such 'inside information' to gain an unfair advantage is recognized as an insider. This also includes 'tippees' or 'secondary insiders', acting on information received, directly or indirectly from an insider. Nevertheless, the most common example of an insider who, by virtue of their duties or employment, have access to a company's information are primary insiders (Lomnicka, 1994).

Previously, legislation required the primary insider and the inside information to have a 'connection' with the related company. However, Dine has argued the removal of the 'connection' requirement has made the offence too wide and states that this "...puts in doubt the philosophical basis of making this behavior a criminal offence." According to White, the removal of this requirement from the CJA is a "...significant extension..." of the legislation to prosecute those who are not 'connected' to the company, but have direct access to price sensitive information by virtue of their employment.

The CJA provides a secondary insider can be defined as an individual who has information as an insider if the information is, and they know it is, from an inside source. This can include family members and friends, deemed to have information if the direct or indirect source is a primary insider. The information need not be invited and there is no requirement for the tippee to know the insider's identity, provided they know that the information came from an insider. This is similar to the US position, whereby, a tippee cannot receive suspicious information and rely on his lack of enquiry to escape liability. Arguably, this demonstrates that lawmakers have attempted to widen the scope of this provision to avoid evasion of prosecution on technicalities. Hannigan suggests that it will still be difficult to prove that the source of the information was an insider.

Where there is circumstantial evidence such as family links or prior trading with the relevant company, it must be demonstrated that the information came from an inside source. Therefore, it will be near impossible to establish if both parties refute any involvement (Hannigan, 1994).

When looking at the regulation of insider dealing, Rider and Ashe (1993) argue that:

‘...the main convincing justification for controlling insider dealing is that it has a perceived, adverse impact on confidence...it will alienate investors and potential investors, with adverse consequences for society as a whole.’

It is argued that, an insider receiving criminal penalties are of little consolation to those dealing on the regulated market without the use of ‘inside information.’ Alcock argues that, “...the insiders gain is not really made at the expense of the party he trades with since this party has already come to the market as a willing buyer or seller at the prevailing market price (Alcock, 1993).”

The utilitarian approach to the regulation of insider dealing is to evaluate the positives and negatives of its practice with regards to the bearing it has on social utility. Utilitarians have determined that insider dealing often negatively impacts on social utility and has therefore maintained traditional arguments against its practice. In actuality, Utilitarians have long argued that, insider dealing harms market efficiency as it causes an incorrect price formation of securities and undermines the confidence in the capital market. Not only this, from a utilitarian perspective, insider dealing also harms those who are not privy to the inside information and can reduce part of a business’s earnings that would otherwise go to shareholders in dividends (Schotland, 1967).

For the first utilitarian argument, if the securities market has access to all the relevant information available, the security prices instantly and fully reflect this and the market will be informational efficient. It is at this moment that the prices of securities are reliable at a price which is ‘fair’. From a utilitarian perspective, this is attractive as it increases social utility (Snoeyenbos & Smith, 2000). Schotland (1967) argues insider dealing reduces market efficiency as it postpones the disclosure of information. Using a theoretical model, Leland (1992) demonstrated that when permitted, insider dealing allowed for share prices to reflect information quicker. The insider’s dealings enable the fundamental value of securities to be fully reflected by revealing the private information component to the market as the security prices will reflect the information available to the public and the non-public price sensitive information. It could be argued that permitting insider dealing increases security market efficiency (Meulbroeck, 1992).

Fischel (1984) stated that insider dealing can also create a method of communicating price sensitive information in cases where complex value-relevant information is difficult to disclose to the public. Therefore, insider dealing can increase information efficiency in financial markets by acting as an alternative for disclosing to non-public price sensitive information.

It has long been argued that insider dealing decreases investor confidence when dealing in the financial market. However, it could be argued that as there is a strong argument that insider dealing improves market efficiency, therefore investor confidence should increase rather than decrease. Additionally, as the market is information efficient, an investor can be confident about the accuracy of the market prices because the security prices fully reflect all relevant information. Bainbridge concludes that irrespective of whether an insider benefits from their use of the inside information, the investor has the autonomy to deal on the financial market and can buy or sell the security at its fundamental value and therefore, insider dealing does not significantly threaten investors’ confidence (Bainbridge, 2000).

Nevertheless, a prominent argument used against insider dealing is its ability to harm those investors who are not privy to the inside information. McGee argues that should any such group exist, clear unambiguous legislation should “...be passed to prevent fraud from being committed against these individuals, while allowing non-fraudulent transactions to be completed without fear of prosecution (McGee, 2008).” On the other hand, Haddock (1986) argues that, insiders do not harm their counterparts and their actions are essentially more likely to benefit from an insider use of inside information. From a utilitarian perspective, should it be determined that insider dealing does in fact supplement market efficiency, market investors are on average, more likely to gain from insiders’ actions than not.

It is a general assumption that prohibiting insider dealing enables investors to profit instead of corporate insiders. However, it could be argued that banning insider dealing merely moves the position of ‘winners’ and ‘losers’ and not solve the ‘unfair’ situation or the asymmetric information problem. Both Tighe (1994) and Haddock (1987) demonstrate that, prohibiting insider dealing enables market professionals such as analysts and investment bankers to make the largest gains as they can obtain the benefits of the prohibition and impose costs on investors for their services.

Insider dealing can also be used to compensate primary insiders through an equity linked compensation scheme. Conversely, the majority of these schemes prohibit insider dealing and only include bonuses, shares and stock options. Carlton questions why insider dealing should be treated adversely if bonuses, salaries, and other compensation schemes enable an insider to benefit at the shareholder's expense. Rather than not allowing insider dealing to compensate insiders, the practice could be used as a further governance mechanism and offer an additional method of resolving traditional compensation problems (Fischel & Carlton, 1982).

In balancing the positives and negatives of insider dealing from a utilitarian perspective, it could be argued that insider dealing causes little harm. It is imperative to outline the importance of social gains that derive from the market being informational efficient. The more information available enables prices to be reflected correctly and guides capital investment in the economy. Management is provided with an added method of communicating complex information in a way in which the public is more likely to understand. Investors' confidence is unlikely to decline and those who are not privy to the information are not harmed. The suggestion of an equity linked compensation scheme can reward the entrepreneurial and innovative contributions of primary insiders and provide another significant social benefit. Therefore, on utilitarian grounds, there is little ethical foundation to prohibit insider dealing.

From the deontological perspective, the view that makes an act morally justifiable is the respect it expresses for the autonomy, rights and dignity of those persons affected by it, and not merely the social welfare or the utility that the act produces. Under Kantian ethics, these moral rules require the individual to treat others as ends rather than as means to an end. Consequently, there are three traditional arguments against insider dealing: the fairness argument; a property rights argument and a market morality argument. Thus, it has often been argued that insider dealing is simply 'unfair' and completely unethical (Schotland, 1967). Werhane (1991) argues that insider dealing should be prohibited as there is a lack of a level playing field as "...it gives the outsider an unfair comparative disadvantage that skews competition..."

The fairness argument can be broken down into two versions: the absolute equality version and the equal access view. The absolute equality version pursues absolute equality between market participants by concentrating on the possession of information. Levmore supports this theory of full disclosure based on an overall moral responsibility to treat others the same as an insider would want to be treated (Levmore, 1982). Thus, insider dealing is unfair as an insider can use superior inside information not known to the other investors. Therefore, from a deontological perspective, this strict concept on fairness would mean that all transactions involving asymmetric information would be immoral and unethical. However, Moore argues that, it is considered standard professional behaviour for a journalist to discover news facts and not share this information with his competitors to 'scoop' the competition.

This scenario can also include money being made in respect of that non-public information. Therefore, in agreement with Machan (1996), why should insider dealing be treated any differently? Thus, in the absence of a substantive ethical theory that sufficiently identifies if and when it is acceptable to let the interest of one individual take precedence over another's interests, the absolute equality version of fairness fails to provide any direction when assessing insider dealing (Lawson, 1988). Further, some differences between the parties may be relevant to making fair informational advantages, for example, a solicitor profiting from a 'fair' informational advantage by providing a chargeable service. Debatably, it is informational advantages that are at the heart of the market economy.

The equal access view was mainly supported by Brudney (1979) and concentrates on the access to the inside information instead of its unequal possession. Brudney (1979) argues the access to inside information is an advantage which "...cannot be competed away since it depends upon a lawful privilege to which an outsider cannot acquire access..." Nonetheless, it is still unclear as to what the concept of equal access means. Moreover, the equal access view fails to provide a strong moral basis to prohibit insider dealing as it fails to explain the inequality in some methods of access to information and why it is morally more significant than others (Lawson, 1988).

Werhane (1991) suggests that insider dealing largely ignores the two necessary principles for fair competition, namely, an informational efficient market where all relevant information can be accessed by everyone and competitors having a "...equal comparative advantage..." It could be argued that Werhane fails to appreciate how, as the market is information efficient, a competitor can be confident about the accuracy of the market prices because the security prices fully reflects all relevant information, without the need to gather and process the information themselves. Therefore, equality between market participants is reached as the use of inside information promotes efficiency and offers a low-cost way for individuals to gain access to the dissemination and assembly of all relevant information to value securities.

Although there is a strong argument that insider dealing strengthens and promotes market efficiency, it is no adequate ethical basis to allow its practice. Rather than prohibiting insider dealing, the practice should be permissible as it provides a simple method for all investors to get access to non-public price sensitive information. Therefore, although prima facie the fairness argument is straight forward, it is largely problematic and struggles to hold up against scrutiny. The main reason as to why the argument fails is the belief that eliminating insider dealing will provide a level playing field. Unfortunately, this is not the case. Instead, much like the utilitarian perspective, the regulation of insider dealing simply transfers the information advantage from one group to another without creating a 'level playing field'. The idea of equal access and a level playing field is not absurd; however, regulating insider dealing does not provide the solution. Instead, the regulation of insider dealing essentially promotes an unfair capital market.

Kitch (1980) postulated that the deontologists' information is valuable because information can be seen as a valuable intangible property right in a corporate setting. The notion of intangible property rights has been long established, for example, copyright, information, patents, trademarks, and trade secrets, and therefore, it could be argued insider dealing is erroneous as the use of non-public price sensitive information involves violating the company's property rights and can be determined as theft, often referred to as the 'theft theory (Irvine, 1987). Macey (1988) established a two-stage test to determine whether a violation of property right has occurred. Firstly, it must be determined who indeed owns the rights to the non-public information. Secondly, the relationship between the person trading and the owner of the property must be identified. Thus, if the insider using the information also has property rights over the information, a 'theft' cannot have occurred. Alternatively, it must be determined if the owner has provided the individual with the authority to deal with it. Therefore, only in cases where the owner has not provided authority will there be an abuse of property rights.

Therefore, it becomes imperative to determine whose property the inside information is. It is argued that it is the property of the company and therefore, if the company prohibits the use of information, insider dealing is wrong (Moore, 1990). Furthermore, it could also be argued that, insider dealing is also wrong because it damages the fiduciary relationship between the insider and the company's shareholders. Allowing insider dealing as a form of compensation may improve the fiduciary relationship between the shareholder and the insider. Alternatively, it has been suggested that, allowing insider dealing as a compensation method can give insiders the opportunity to deal on negative inside information to benefit themselves and possibly fabricate information at the expense of shareholders in order to encourage stock price movements to capture profits based on inside information. Not only this, but the practice can also enable insiders to choose risky projects in the interests of increasing the volatility of stock prices in order to increase profits and overall reduce shareholder control on how much compensation they believe the insider is entitled to.

Clearly, these issues are significant and need to be avoided. However, it is important to note these problems can also occur in relation to other equity linked compensation schemes, yet these are still applied universally (Macey, 1999). Should shareholders wish to allow insider dealing as a form of compensation, a similar contract can be created to avoid the issues noted above. Macey argues that, it should be a matter of contract as to the distribution of gains from the use of inside information and therefore, companies can determine which insiders can deal using said information. Additionally, this form of compensation avoids the long and costly process of determining how much remuneration an individual is entitled to and allowing insiders to use their inside information to deal will reduce the cost of fixed wages of management. Therefore, provided similar benefits cannot be produced by another compensation scheme at a reduced cost, insider dealing should be considered as a valid form of remuneration (Fischel, 1982).

The final deontological argument against insider dealing is the effect it has on general market morality, which '...entails the notion of market culture, and so of institutional culture, and ultimately of personalized ethics, which entails certain moral principles (McClellan, 2015). The necessity for a market morality which is supported by a certain degree of fairness in competition and self-interest that is restrained by reason as a required condition for a free market. Therefore, the practice of insider dealing is connected to a culture of greed and therefore undermines the morality of the market. Evidently, it is difficult not to be sympathetic to this argument. If the use of insider dealing is dismissed because of this, it could be argued that alternative forms of equity linked compensation should also be dismissed on similar grounds. Therefore, should shareholders be given the freedom to regulate insider dealing contractually, the uses of the practice in respect of compensation are paramount and ought to have similar moral effects (Machan, 1996). Still, while other forms of equity linked compensation have been used, the prohibition of insider dealing continues to grow.



In the United Kingdom, insider dealing is illegal. From a utilitarian perspective, the main impact of a person engaging in insider dealing is that it inadvertently strengthens market efficiency. Because of the increase in informational market efficiency, the more information available enables prices to be reflected correctly and guides capital investment in the economy. It provides management with an additional method of communicating complex information, investors' confidence is unlikely to decline and those who are not privy to the information are not harmed. The suggestion of an equity linked compensation scheme has the ability to reward the entrepreneurial and innovative contributions of primary insiders and provide another significant social benefit. Therefore, on utilitarian grounds, there is little ethical foundation to prohibit insider dealing as the implied number of positive effects of market efficiency greatly outweigh the negative effects associated with the practice.

When analyzing the deontological fairness argument, it provides no comprehensive ethical basis for prohibiting insider dealing. From a deontological perspective insider dealing should be regulated based on the property rights argument. It is the shareholders of a company who has property rights to the inside information and therefore have the right to decide what this information can be used for and who has authority to use it. Final argument deontologists propose centers on market morality and a culture of greed. Debatably, this argument was abstract yet most convincing as a culture of greed would significantly affect a well-functioning market. Nevertheless, although difficult to oppose, banning insider dealing based on this argument alone causes controversy as to other compensation schemes companies are authorized to operate.

Since the property rights perspective is the only argument with any real significance, it should be left to companies to decide whether they allow information to be used. This issue can be largely solved by the introduction of a contract with their insiders. Given the nature of the contract, it will allow for maximum flexibility as to what conditions the insider must follow when dealing on company inside information. To avoid controversy and remain transparent to outside investors, it should be a requirement that companies disclose whether they authorize the use of inside information by their insiders and under what conditions.

The deontologist's property rights argument can directly relate to the compensation view whereby insiders can engage in insider dealing for reward. It also provides an additional governance instrument to shareholders. However, from a moral point of view, it remains difficult to understand why insider dealing should be banned, but not other forms of equity linked compensation, especially if the reason for the prohibition is to establish a level playing field. Instead, the prohibiting of insider dealing has meant that market professionals have been given the informational advantage and small investors remain adversely affected.

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