“[I]nterstitial judicial lawmaking is at least tolerated and perhaps affirmatively authorized. More to the point, it is inevitable. Any resolution of statutory ambiguity involves judicial choice. The resulting ‘gloss’ on the legislative text is both politically legitimate and institutionally unavoidable.”¹

Over the course of my career as a litigator, teacher, and writer in the field of white collar crime, I have long lamented the courts’ unwillingness to reign in legislative and prosecutorial overreaching. Like many other observers, I have thought that courts should apply more aggressively the Due Process Clause’s fair notice requirement and simply strike down overly broad and vague statutes as unconstitutional rather than filling in the blanks in poorly written statutes.

But now I am coming to believe that I may have been mistaken about my view of the respective roles of Congress and the courts. In a number of areas, courts have interpreted – some would say have effectively written – laws in ways that have actually dramatically improved upon their original versions. If we conclude that this is a desirable state of affairs, then we need to rethink the traditional view that courts interpret laws but do not – or should not – write them. And white collar statutes, which create crimes that by their very nature are difficult to define clearly, provide a fertile ground for examining the role of courts and Congress in law making.

This project will examine the role of courts in effectively rewriting criminal laws. To test the proposition that courts can and should act as a super-legislature, I will survey federal

decisions handed down the explosion of white collar prosecutions in the early 1980s. The project will focus on some of the broadest and most controversial federal statutes used to prosecute white collar crimes, including insider trading, obstruction of justice, mail and wire fraud, and RICO. The paper will also examine the courts’ responses to Congressionally enacted sanctions schemes, include sentencing and forfeitures.

Consider federal sentencing. Under the pre-Booker regime, Guidelines white collar sentencing was often arbitrary and draconian, with courts often imposing prison terms – based largely on the amounts of loss – that seemed wildly disproportionate to the crimes. Now, in the aftermath of Booker and the post-Booker series of United States Supreme Court sentencing cases, the system seems to many to be more flexible and just; one commentator referred to the new, court-modified sentencing scheme as “nearly perfect.”2 Tellingly, Congress has not chosen to return to the pre-Booker regime.

In Yates, the infamous undersized grouper case, the Court interpreted the federal obstruction of justice statute known as the “anti-shredding” law to exclude destruction of tangible objects. In her plurality opinion, Justice Ginsburg wrote, “‘Tangible object’ in § 1519, we conclude, is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.” The Court reached this result even though, as Justice Kagan noted quite correctly in her dissent, destruction of tangible objects seems plainly to fall within the statute’s literal language. In the plurality and concurring decisions, five members of the Court instead focused on the practical aspects of the law and the context in which it was enacted. The Court rewrote the statute to render it more rational.

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For another example, consider the notoriously vague and ill-defined offense of “honest services” fraud. In *Skilling*, the Court limited such prosecutions to cases involving bribes and kickbacks. This was a very result-oriented decision that sought to place some limits on a law that was ill defined at best. In his concurring opinion, Justice Scalia clearly framed the debate over the courts’ role:

In my view, the specification in 18 U.S.C. § 1346 that ‘scheme or artifice to defraud’ in the mail-fraud and wire-fraud statutes includes ‘a scheme or artifice to deprive another of the intangible right of honest services,’ is vague, and therefore violates the Due Process Clause of the Fifth Amendment. The Court strikes a pose of judicial humility in proclaiming that our task is ‘not to destroy the Act ... but to construe it.’ But in transforming the prohibition of ‘honest-services fraud’ into a prohibition of ‘bribery and kick-backs’ it is wielding a power we long ago abjured: the power to define new federal crimes.

Is Justice Scalia correct? I had long thought so. Now I have my doubts. Congress has time and again, no matter which way the political winds are blowing, failed to draft coherent, rational, effective white collar criminal statutes and sanctions schemes. Perhaps now we should acknowledge that the courts do act as a sort of super-legislature, and that this state of affairs is preferable to a regime that strikes down laws only to have Congress enact equally flawed laws.

[At this point in the paper I will discuss Congress’s failed attempts to draft a new, broader honest services statute in response to *Skilling*.]

Here it is helpful to focus on a white collar crime that has perhaps proven to be more difficult to define than any other – insider trading. The Second Circuit’s decision in *United States v. Newman* is the best recent example of a court undertaking to define a crime clearly when Congress has failed to do so. Before delving into the *Newman* case, consider the evolution of the courts’ approach to insider trading. [At this point in the paper I will discuss the Court’s process of defining insider trading in *Chiarella, Dirks,* and *O’Hagan*.]
The principal holding in *Newman*, that a tippee must know of the tipper’s breach of duty in order to be criminally liable, should not be considered remarkable. As I have argued elsewhere, the essence of insider trading is the fraud upon the owner of the stolen information. If the tippee does not know that the information was effectively stolen, then the tippee lacks the intent to defraud. Not remarkable. But what is remarkable is prosecutors’ insistence that tippees could be criminally liable even in the absence of such proof. It took the Second Circuit’s decision to rein in expansive assertions of tippee liability. And this aspect of the *Newman* decision is likely to stand; the government did not seek to appeal this holding to the Supreme Court.³ [At this point I will discuss Congress’s failed attempts (so far) to define insider trading in response to *Newman*.]

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This is not the optimal process through which to create a scheme of white collar criminalization. It can take years, even decades, for constitutional challenges to work their way through the courts. It is of little comfort to those charged in what I have elsewhere termed “gray area” prosecutions to know that perhaps, one day – even long after those defendants were convicted and served their sentences – courts will reign in the application of these statutes. Still, unless and until we establish a federal commission to draft complex criminal statutes, judicial lawmaking in the white collar context is likely to continue and even to expand. Congress is just not up to the task.

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³ The aspect of the case now before the Supreme Court in *United States v. Salman* involves a narrower and, in my view, much less significant aspect of the *Dirks* holding as interpreted in *Newman* – the definition of the “personal benefit” that the tipper must intend to receive.