

# ARTICLE: "HUH?" INSIDER TRADING: THE CHRIS COLLINS STORY

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## Reporter

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## Highlight

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### ABSTRACT

*On June 22, 2017, Representative Christopher Collins called his son from the lawn of the White House to share confidential information about a public company. In tipping off his son, Collins acted despite significant legal risk and a limited payoff.*

*This article attempts to make sense of Collins' seemingly inexplicable behavior by turning to the work of criminologists to identify distinctive features of the crime of insider trading. First, James William Coleman's research on what motivates white-collar criminals suggests that the absence of readily identifiable victims may contribute to the incidence of insider trading. Second, the work of Lawrence Cohen and Marcus Felson on the opportunity structure of crime suggests how the ease with which those in possession of material non-public information can trade facilitates insider trading.*

## Text

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### [\*96] Introduction

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 problems? <sup>1</sup>A [\*97] socially learned antipathy toward legal rules?

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<sup>1</sup> See, e.g., Terrie Moffitt et al., Neuropsychological Tests Predicting Persistent Male Delinquency, 32 Criminology 277, 293 (1994).

<sup>2</sup>Or just the product of a cold-hearted weighing of costs and benefits? <sup>3</sup>In some circumstances, the reasons why someone commits a crime may be obvious. Other times, all we have is mystery. <sup>4</sup>

On October 1, 2019, Christopher ("Chris") Collins pled guilty to two criminal counts arising from the sale of stock in Innate Immunotherapeutics Limited ("Innate"), an Australian biotechnology company, by his son, Cameron, and Stephen Zarsky, the father of Cameron's fiancé. <sup>5</sup>Why did Collins commit these crimes? Based on any reasonable weighing of the costs and benefits, Collins' action is hard to fathom. The crime he committed was relatively easy to detect, <sup>6</sup>and the consequences, if **[\*98]** caught, were likely severe. <sup>7</sup>There was also relatively little to gain by tipping off others. The amount of money that Collin's son avoided losing thanks to the tip from his father was approximately \$ 570,900. <sup>8</sup>This may be a lot of money for many, but Collin's net worth at the time exceeded \$ 35 million not including the value of his stake in Innate. <sup>9</sup>

Nor can Collins' choice to tip off his son be explained as the result of a process of unexpectedly stumbling into a crime through a series of seemingly minor, but difficult to reverse, transgressions. <sup>10</sup>Here, there is a single phone call that triggered criminal liability. It is also difficult to interpret Collins' behavior as the product of a rash and unconsidered choice. <sup>11</sup>Collins had many hours to "cool off." Collins' son was not able to trade on the inside information his father provided until the following morning, and only when his **[\*99]** son sold his shares was the crime of insider trading consummated.

Collins, moreover, clearly knew that insider trading law prohibited him from sharing this information with his son. When Collins entered his guilty plea, he stated that "I knew [those things] were illegal and improper."

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<sup>2</sup> See, e.g., Robert K. Merton, *Social Theory and Social Structure* (1968).

<sup>3</sup> See, e.g., Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 207-08 (1968).

<sup>4</sup> The terminology is borrowed from Flannery O'Connor. FLANNERY O'CONNOR, MYSTERY AND MANNERS: OCCASIONAL PROSE 115 (1957) ("Freedom cannot be conceived simply. It is a mystery and one which a novel, even a comic novel, can only be asked to deepen.").

<sup>5</sup> The counts Collins pled guilty to were conspiring to commit securities fraud and making false statements. Sheila McClear, *Former Republican congressman Collins pleads guilty in insider-trading case*, WASH. POST (Oct. 1, 2019, 4:11 PM), [https://www.washingtonpost.com/powerpost/former-republican-congressman-collins-pleads-guilty-in-insider-trading-case/2019/10/01/1de62172-e484-11e9-b403-f738899982d2\\_story.html](https://www.washingtonpost.com/powerpost/former-republican-congressman-collins-pleads-guilty-in-insider-trading-case/2019/10/01/1de62172-e484-11e9-b403-f738899982d2_story.html). With respect to Zarsky, see Jerry Zremski, *Guilty pleas leave Cameron Collins, fiancée's father facing prison*, BUFFALO NEWS (Oct. 3, 2019), <https://buffalonews.com/2019/10/03/son-of-former-rep-chris-collins-pleads-guilty-in-insider-trading-case/>.

<sup>6</sup> Aberrant trading activity around the time Collins provided the tip to his son was noted by several market observers even without the application of sophisticated detection techniques. Jerry Zremski, *Collins loses millions as stock collapses -- but others may have gotten out early*, BUFFALO NEWS (June 28, 2017), <https://buffalonews.com/2017/06/27/collins-loses-millions-stock-collapses-others-may-gotten-early/>.

<sup>7</sup> In choosing to tip off his son, Collins ultimately lost his Congressional seat, was required to pay significant fines, and is likely to spend time in prison.

<sup>8</sup> *United States v. Christopher Collins, Cameron Collins, and Stephen Zarsky*, 18 Crim. 567, at 11 (S.D.N.Y.) [hereinafter, "*Indictment*"].

<sup>9</sup> See generally United States House of Representatives: 2017 Financial Disclosure Statement for Christopher Collins (filed Apr. 17, 2018) (documenting Collins' assets in 2017).

<sup>10</sup> See, e.g., Michael D. Guttentag, *Stumbling into Crime: Stochastic Process Models of Corporate Fraud*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 205 (Alon Harel & Keith N. Hylton, eds., 2012).

<sup>11</sup> When he pled guilty to the two criminal counts, Collins suggested this might explain his behavior. He stated: "I was in a very emotional state." Vivian Wang, *Ex-Rep. Chris Collins Pleads Guilty to Insider Trading Charges*, N.Y. TIMES (Oct. 1, 2019), <https://www.nytimes.com/2019/10/01/nyregion/chriscollins-guilty-congress.html>.

<sup>12</sup>Collins was already on notice that sharing material nonpublic information could violate House rules and federal law. In fact, on June 5, 2017, just a few weeks before providing the tip to his son, an investigator from the Office of Congressional Ethics ("OCE") interviewed Collins in depth to determine if Collins had previously selectively disclosed material nonpublic information to friends and colleagues. <sup>13</sup>In addition, Innate had a corporate policy that prohibited Directors from tipping or trading when in possession of material nonpublic information, a policy Collins was almost certainly aware of as a long-standing member of the Board of Directors. <sup>14</sup>

The risks of committing the crime very much outweighed the benefits, and other reasons typically offered to explain why someone commits a crime do not appear to apply here. Collins' behavior falls squarely into the "huh?" category of insider trading. <sup>15</sup>A case study of [\*100] one instance of this kind of "huh?" insider trading might appear unlikely to offer insight into insider trading violations generally. The opposite is true. Collins' choices highlight two distinctive aspects of the crime of insider trading that may increase the likelihood of this crime occurring. First, there is rarely a readily identifiable victim of insider trading. Second, once in possession of material non-public information there may be few "natural" guardians limiting the opportunity to engage in insider trading. <sup>16</sup>This is why Collins' actions also suggest how a trading halt at times of high information asymmetry might help to limit the amount of insider trading that occurs.

## I. The Chris Collins Story

The career of Chris Collins and the series of events that led Collins to plead guilty are largely a matter of public record.

### A. Before June 22, 2017

Chris Collins was born in upstate New York. His father held management positions at the General Electric Company throughout the country, so Collins grew up in different parts of the country. <sup>17</sup>In his youth, Collins was an Eagle Scout. <sup>18</sup>He graduated from college with an engineering degree in 1972 from North Carolina State University and went to work at Westinghouse, a large [\*101] public company. <sup>19</sup>Collins also received an MBA from the University of Alabama at Birmingham in 1975. <sup>20</sup>

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<sup>12</sup> McClear, *supra* note 5. However, a confidential source did tell a reporter that even after the guilty pleas, "[h]e still thinks he didn't do anything wrong." Jerry Zremski, *Blindsided by resignation, Collins loyalists say he pleaded guilty to shield his son*, BUFFALO NEWS (Oct. 1, 2019).

<sup>13</sup> See generally, Transcript of Interview of Representative Collins, Review No. 17-3509\_Exhibits-Final Redacted\_Part 1, (2017) [hereinafter, "Collins Transcript"]. The OCE is "an independent, non-partisan entity charged with reviewing allegations of misconduct against Members, officers, and staff of the U.S. House of Representatives and, when appropriate, referring matters to the House Committee on Ethics." OFFICE OF CONGRESSIONAL ETHICS, <https://oce.house.gov/>.

<sup>14</sup> *Indictment*, *supra* note 8, at 3-4.

<sup>15</sup> The Merriam Webster definition of "huh" is a word "used to express surprise, disbelief, or confusion, or as an inquiry inviting affirmative reply." *Huh*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/huh>.

<sup>16</sup> See *infra* notes 66 to 69 and accompanying text for a discussion of the meaning of "natural" in this context.

<sup>17</sup> *Christopher 'Chris' Collins: Associated Press Candidate Biographies* (June 27, 2014).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Chris Collins Biography*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=C001092>.

In 1983, after a decade working at Westinghouse, Collins seized on the new-at-the-time practice of executives buying underappreciated divisional operations from the company for which they worked.<sup>21</sup> Collins with a small group purchased Nuttall Gear, a division of Westinghouse that made industrial gears.<sup>22</sup> Nuttall Gear was subsequently sold by Collins and the other executives in 1997 for \$ 10 million. At that time, Collins reportedly owned 60 percent of the company.<sup>23</sup> After that sale, Collins dabbled in a variety of businesses and tried his hand at politics.<sup>24</sup> He lost in his bid for a Congressional seat in 1998, but was elected to the position of Erie County executive from 2007 through 2011.<sup>25</sup>

From January 21, 2013 until September 30, 2019, Collins represented the 27th Congressional District of New York.<sup>26</sup> The district is in Western New York and **[\*102]** includes suburbs surrounding Buffalo and Rochester.<sup>27</sup> Prior to his indictment on insider trading charges, Collins was noteworthy as a Congressman for two things. First, Collins was the first member of Congress to support Donald J. Trump's candidacy for the presidency of the United States.<sup>28</sup> Second, Collins was under investigation for possible ethical breaches related to his continuing role as a member of the Board of Directors of Innate. Complaints were filed with the OCE at the beginning of 2017 alleging that Collins had improperly introduced federal legislation specifically designed to benefit Innate and that Collins had violated insider trading law by tipping off friends and associates about Innate's forthcoming fund-raising activities.<sup>29</sup>

These complaints were investigated by the OCE, and the OCE approved a report on July 2, 2017 recommending that two of Collins' activities related to Innate be reviewed by the House Committee on Ethics.<sup>30</sup> First, the OCE found that there was "substantial reason to believe that Representative Collins took official actions or requested official actions that would assist a single entity in which he had a significant financial interest, in violation of House rules and standards of conduct."<sup>31</sup> Second, the OCE found that there was "substantial **[\*103]** reason to believe that Representative Collins shared material nonpublic information in the purchase of Innate stock, in violation of House rules, standards of conduct, and federal law."<sup>32</sup> The OCE report was not

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<sup>21</sup> Fred O. Williams, *Clarence, N.Y., Businessman's Investments in Shaky Manufacturing Firms Pay Off*, KNIGHT RIDDER TRIBUNE BUS. NEWS (March 31, 2004).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Chris Collins is a successful businessman with over 35 years' experience in both large and small organizations*, OUR CAMPAIGNS (Sept. 17, 2018, 12:17 PM), <https://www.ourcampaigns.com/CandidateDetail.html?CandidateID=16659>.

<sup>25</sup> *Christopher 'Chris' Collins: Associated Press Candidate Biographies* (June 27, 2014).

<sup>26</sup> He was elected to Congress in 2012 by a roughly 5,000 vote margin. In 2014, Collins was reelected by a margin of over 110,000 votes. In 2016, Collins was reelected by a margin of over 100,000 votes. In 2018, he won again, but only by about 1,000 votes, albeit three months after he was charged with insider trading. Election results reported at *Election Statistics, 1920 to Present*, UNITED STATES HOUSE OF REPRESENTATIVES HISTORY, ART & ARCHIVES, <https://history.house.gov/Institution/Election-Statistics/>.

<sup>27</sup> *New York's 27th Congressional District*, GOVTRACK <https://www.govtrack.us/congress/members/NY/27>.

<sup>28</sup> McClear, *supra* note 5 ("Collins, President Trump's first congressional supporter. . .").

<sup>29</sup> Jerry Zremski, *Those who complained about Chris Collins breathe sigh of relief*, BUFFALO NEWS (Oct. 3, 2019), <https://buffalonews.com/2019/10/03/relief-and-satisfaction--those-who-complained-about-collins-breathe-a-sigh-of-relief/>.

<sup>30</sup> OFFICE OF CONGRESSIONAL ETHICS, Review No. 17-3509, UNITED STATES HOUSE OF REPRESENTATIVES 1 (2017).

<sup>31</sup> *Id.* at 2.

made public until October 2017, several months after Collins tipped off his son from the White House lawn.<sup>33</sup> However, Collins was informed of the OCE investigation on March 10, 2017, and of the initiation of a second-phase review on April 10, 2017.<sup>34</sup> News reports about the investigation were published in May 2017, and Collins was interviewed by the OCE on June 5, 2017.<sup>35</sup>

## B. June 22, 2017 and After

Then came the events of Thursday, June 22, 2017. This was the day Innate received the results from the clinical trial of the drug MIS416.<sup>36</sup> MIS416 was a potential treatment for secondary progressive multiple sclerosis ("SPMS"), and the only significant drug that Innate was developing.<sup>37</sup> The results delivered to Innate on June 22, 2017 showed no clinical benefits from use of MIS416. Failure of the drug trial was certain to be financially ruinous for Innate.<sup>38</sup> News of the disappointing results from the drug trial was communicated to the Board of Directors of Innate in an email sent out at approximately 6:55 p.m. on June 22, **[\*104]** 2017.<sup>39</sup> As required by the Australian Stock Exchange, the company requested a halt in trading of its shares beginning on Friday, June 23, 2017.<sup>40</sup> The halt in trading was triggered by Innate's receipt of the results, but Innate did not disclose the outcome of the drug trial until Monday, June 26, 2017.<sup>41</sup> Nor did the trading halt prevent continued trading in Innate securities on the U.S. OTC market.<sup>42</sup>

About fifteen minutes after receiving the email sent to the Innate Directors with the news of the failed clinical trial, Collins emailed back: "Wow. Makes no sense. How are these results even possible???"<sup>43</sup> Almost immediately after sending that email, Collins began to try and get in touch with his son Cameron by phone. Even though Collins was at a Congressional picnic on the White House lawn, Collins and his son traded calls six times within the space of a few minutes. Collins and Cameron finally connected at 7:16 p.m. and spoke for about six minutes.<sup>44</sup> Starting early the next morning, Collins' son began to sell the Innate stock he owned. This selling occurred before news of the failed drug trial was made public.<sup>45</sup> When news of the failure of the drug trial was

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<sup>32</sup> *Id.* at 1.

<sup>33</sup> Deirdre Walsh, *House ethics committee investigating Reb. Chris Collins for insider trading allegations*, CNN POLITICS (Oct. 12, 2017), <https://www.cnn.com/2017/10/12/politics/chris-collins-investigation-house-ethics-committee/index.html>.

<sup>34</sup> OFFICE OF CONGRESSIONAL ETHICS, *supra* note 30, at 5.

<sup>35</sup> Jerry Zremski, *Business ties ultimately spell doom for Collins' congressional career*, BUFFALO NEWS (Oct. 1, 2019); Collins Transcript, *supra* note 13, at 1.

<sup>36</sup> *Indictment*, *supra* note 8, at 8.

<sup>37</sup> *Id.* at 1.

<sup>38</sup> *Id.* at 2.

<sup>39</sup> *Id.* at 8.

<sup>40</sup> *Id.* at 7.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 10-11.

publicly announced and trading resumed in Australia on Monday, June 26, 2017, Innate's stock dropped 92%.<sup>46</sup>

By selling shares before public release of the news about the failed clinical trial Cameron avoided approximately \$ 570,900 in losses.<sup>47</sup> When Cameron sold his Innate shares based on the material nonpublic [\*105] information he had received from his father, both Cameron and Collins violated insider trading law. Collins had tipped off a close family member, and therefore presumptively received a personal benefit from providing the tip.<sup>48</sup> Cameron, in turn, knew the impropriety of the source of the information, and that the information was material and nonpublic, and sold his shares of Innate anyway. As the Supreme Court said about similar facts in the recently decided *Salman* case, this violation was "in the heartland" of the insider trading prohibition.<sup>49</sup>

## II. Motivation and Opportunity In Inside Trading

Why do they do it? As noted in the Introduction, scholars have suggested various approaches to illuminate why people commit a crime.<sup>50</sup> Starting with the work of Edward Sutherland, a subfield has emerged to consider the question of motive in the context of white-collar crime.<sup>51</sup>

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 [\*106] categories: motivation and opportunity.<sup>52</sup> The discussion below follows Coleman's approach of looking separately at the details of motivation and opportunity to inspect the crime of insider trading.

### A. Motivation

Coleman identifies four factors that can help to explain what might motivate someone to commit a white-collar crime. These factors are: 1) an individual's personality, 2) cultural factors and motivation, 3) the neutralization of ethical constraints, and 4) organizational effects that shape behavior.<sup>53</sup> Each of these factors and how they may contribute to our understanding of the motivation of those who engage in insider trading is briefly reviewed below.

#### 1. Individual Personality

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<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.* at 11.

<sup>48</sup> The Supreme Court in *Dirks v. SEC* held that a selective disclosure by an insider will trigger insider trading liability if "the insider personally will benefit, directly or indirectly, from his disclosure." 463 U.S. 646, 662 (1983). The Court also held that the tipper receives a personal benefit when the gift of confidential information is made to "a trading relative." *Id.* at 664.

<sup>49</sup> *Salman v. United States*, No. 15-628, slip op. at 3 (U.S. Dec. 6, 2016).

<sup>50</sup> See *supra* notes **Error! Bookmark not defined.** -- 4 and accompanying text.

<sup>51</sup> See, e.g., Edward H. Sutherland, *White-Collar Criminality*, in *WHITE-COLLAR CRIME: CLASSIC AND CONTEMPORARY VIEWS* 29 (Gilbert Geis et al. eds., 3d ed. 1995).

<sup>52</sup> 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*] ("The theory presented here is based on the common sense notion that two basic factors - motivation and opportunity -- must come together for any crime to occur."). See also, James William Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93 *AMER. J. SOCIOLOGY* 406 (1987).

<sup>53</sup> Coleman, *Motivation and Opportunity*, *supra* note 52, at 360-72.

Coleman begins his discussion of the factors that contribute to the motivation to commit a white-collar crime with a discussion of an individual's personality. Over the years, scholars have identified various personality traits that appear to be associated with a higher propensity to commit white-collar crime. <sup>54</sup>There **[\*107]** may ultimately prove to be a relationship between certain personality types and the propensity to commit insider trading in particular. Currently, there is not strong evidence of such a relationship. <sup>55</sup>

## 2. Cultural Factors and Motivation

Cultural factors are the second element of motivation to commit a white-collar crime that Coleman identifies. In focusing on cultural factors, Coleman wants to highlight the degree to which an individuals' goals and motivations are shaped by the social milieu in which the individual is raised. Breaking with assumptions made by some legal scholars, Coleman's view is that even the desire to pursue one's own self-interest is a product of cultural factors rather than simply an innate feature of human nature. <sup>56</sup>Thus, Coleman is open to the possibility that a white-collar criminal could commit a crime for reasons other than self-enrichment. Coleman writes that: "financial self-interest, even in its most general sense, is only part of a larger motivational complex that is deeply ingrained in white-collar workers." <sup>57</sup>One example Coleman provides of this "larger motivational context" is concern about how a financial loss might affect one's status within the community more than concern about the direct effects of a loss of wealth on purchasing power. <sup>58</sup>Recognizing the socially constructed nature of motivation raises the possibility that someone engaging in insider trading, perhaps in providing a tip, might be motivated more by a desire to enhance one's reputation **[\*108]** and social standing than the hope of receiving a pecuniary gain from the tip.

## 3. Neutralization of Ethical Constraints

Coleman identifies the necessity of neutralizing ethical constraints as a third element of motivation for committing a white-collar crime. Neutralization of ethical concerns is important because white-collar criminals are likely to accept many aspects of the existing social order as valid. Thus, the typical white-collar criminal needs to find a way to distinguish their own wrongdoing from that of "ordinary" criminals. Coleman identifies three common neutralization techniques: 1) rationalizing that no one is harmed by the crime, 2) believing that ill-gotten gains are actually earned or deserved, and 3) arguing that 'everybody else is doing it.' <sup>59</sup>

Each of these three rationalizations, lack of harm, just dessert, and common practice, could play a role in the neutralization of ethical constraints among those who engage in insider trading. Most significantly, it may be

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<sup>54</sup> See, e.g., Paul M. Klenowski & Kimberly D. Dodson, *Who Commits White-Collar Crime, and What Do We Know About Them?*, in THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME (Shanna R. Van Slyke et al. eds., 2016).

<sup>55</sup> *But see*, Usman Ali & David Hirshleifer, *Opportunism as a Firm and Managerial Trait: Predicting Insider Trading and Misconduct*, 126 J. FIN. ECON. 490 (2017).

<sup>56</sup> Coleman, *Motivation and Opportunity*, *supra* note 52, at 363.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, at 368. The term rationalization is also prevalent in the fraud triangle scholarship. For a review and updating of the fraud triangle see generally Jack Dorminey, et al., *The Evolution of Fraud Theory*, 27 ISSUES IN ACCT. EDUC. 555 (2012).

particularly easy to accept the rationalization that no one is harmed, because one of the distinctive features of insider trading is the absence of an obvious victim.<sup>60</sup>

#### **[\*109]** 4. Organizational Effects Shaping Behavior

The fourth component of individual motivation that may help to explain why people commit white-collar crimes which Coleman identifies are organizational effects. Coleman explains that "[m]odern organizations are, in a sense, machines for controlling human behavior....And although organizations may well encounter special problems in persuading employees to engage in illegal activities, the mechanisms for achieving conformity to organizational expectations are much the same whatever the legal standing of the organization's demands."<sup>61</sup> The claim Coleman is making here is that in addition to the influence of the general social milieu on one's motivation, the guidance and values within a particular organization can also influence one's motivation to commit a white-collar crime.

There is evidence that organizational effects are relevant to the extent to which various types of white-collar crime, such as accounting fraud, occur within an organization.<sup>62</sup> There is more limited evidence that there **[\*110]** are corporate environments in which insider trading is more likely to flourish.<sup>63</sup>

In summary, Coleman separates the motivation to commit a white-collar crime into four constituent elements: 1) an individual's personality, 2) cultural factors and motivation, 3) the neutralization of ethical constraints, and 4) organizational effects that shape behavior.<sup>64</sup> Of these four elements, one seems especially relevant to understanding why someone might be motivated to engage in insider trading. The neutralization of ethical constraints is likely to be much easier when there are no readily discernible victims, as is often the case when engaging in insider trading.

#### **B. Opportunity**

As described above, Coleman separates the necessary prerequisites to white-collar crime into two broad categories: motivation and opportunity.<sup>65</sup> The four factors underlying the motivation to commit a white-collar crime identified by Coleman are quite helpful in framing a consideration of what might motivate someone to engage in insider trading. Coleman's discussion of different aspects of the opportunity to commit a white-collar crime is less helpful in exploring the details of "why they do it" in the context of insider trading.

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<sup>60</sup> For a similar observation, see Nicolas Bourdin, *The Psychology of White-Collar Crime, And Why It Matters*, 259 N.Y. L. J. 9 (Jan. 29, 2018) ("An investor trading on inside information or a salesman bribing a public official to win a contract may believe that no one is being harmed. . . . The human instinct that warns against causing the suffering of others never kicks in."). In fact, lack of an obvious victim led one of the leading proponents of legalizing insider trading, Henry Manne, to conclude that there was no victim of insider trading. HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* 61 (1966) ("The insider's gain is not made at the expense of anyone. The occasionally voiced objection to insider trading -- that someone must be losing the specific money the insider makes -- is not true in any relevant sense."). This claim was aggressively, and I believe successfully, challenged by, among others, William Wang. See, e.g., William Wang, *Trading on Material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?*, 54 S. CAL. L. REV. 1217 (1981).

<sup>61</sup> Coleman, *Motivation and Opportunity*, *supra* note 52, at 369.

<sup>62</sup> See, e.g., Lee Biggerstaff, David C. Cicero, & Andy Puckett, *Unethical Culture, Suspect CEOs and Corporate Misbehavior* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 19261, 2013).

<sup>63</sup> See, e.g., Ali & Hirshleifer, *supra* note 55.

<sup>64</sup> See *supra* notes 53 to 62 and accompanying text.

<sup>65</sup> See *supra* note 52 and accompanying text.

I, therefore, turn to other scholarship to organize the discussion of the opportunity structure of insider trading. Specifically, I start from the work of Lawrence Cohen and Marcus Felson and their seminal article, *Social Change and Crime Rates: A Routine Activities Approach*.<sup>66</sup> Cohen and Felson's framework focuses [\*111] attention on the availability of "suitable targets and the absence of capable guardians."<sup>67</sup>

Both in terms of the nature of suitable targets and in the absence of capable guardians, the opportunity structure of the crime of insider trading is unusual. The appearance of suitable targets for the commission of an insider trading crime can arise unexpectedly, because inside information is usually produced as a byproduct of other business activities, such as preparing to acquire another company or to report financial results. In this respect, material nonpublic information often comes to the recipient as something like manna from heaven. Of course, some people by dint of their position or relationships are much more likely than others to receive this particular form of mana.

Cohen and Felson introduce the concept of capable guardianship, the second aspect of the opportunity structure of crimes they describe, to refer to more than just the question of whether police are actively monitoring a particular location. They write that "[w]hile police action is analyzed widely, guardianship by ordinary citizens of one another and of property as they go about routine activities may be one of the most [\*112] neglected elements in sociological research on crime...."<sup>68</sup> The guardianship structure protecting against insider trading is distinctive in that in many situations there are virtually no "natural" guardians to committing this crime. Once in possession of material nonpublic information the crime of insider trading is unusually easy to carry out.<sup>69</sup> All that is required is an active trading market in the relevant firm's securities that can be accessed either directly or through friends, relatives, or acquaintances. In this respect insider trading is different from other white-collar crimes, such as accounting fraud, where misrepresented earnings ultimately will need to be reconciled with the firms' cash balances. Gains from insider trading can be camouflaged as fortuitous stock trades without the need for some future reconciliation.

In summary, as with other crimes, insider trading only occurs when someone motivated to commit a crime meets an opportunity to carry out that crime. Insider trading is unusual both with respect to the nature of the motivation involved and its opportunity structure. With respect to motivation, one of the distinctive aspects of insider trading is that there is rarely an identifiable victim whose presence might trigger ethical concerns. With respect to opportunity structure, once one has material nonpublic information, there are usually few natural barriers to using that information for profit.

### **[\*113] III. Explaining Why Collins Did It**

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<sup>66</sup> Lawrence Cohen & Marcus Felson, *Social Change and Crime Rates: A Routine Activities Approach*, 44 AMER. SOC. REV. 214 (1979). Cohen and Felson did not initially argue that their analysis was applicable to situations involving a wide variety of crimes. *Id.* at 589 ("Further, this analysis is confined to those predatory violations involving direct physical contact between at least one offender and at least one person or object which that offender attempts to take or damage."). Later research showed that the routine activities approach was useful in understanding a wide variety of crimes. See, e.g., Pamela Wilcox & Francis T. Cullen, *Situational Opportunity Theories of Crime*, 2018 ANN. REV. CRIMINOLOGY 123, 123 ("perspectives that address situational opportunity have gained tremendous traction in the field over the past several decades.").

<sup>67</sup> Cohen & Felson, *supra* note 66, at 589. Cohen and Felson also include likely offenders as part of their taxonomy, a topic that I have discussed above within the context of the rubric set out by Coleman. See *supra* note 53 and accompanying text.

<sup>68</sup> Cohen & Felson, *supra* note 66, at 590.

<sup>69</sup> This is related to the observation above that there is not an obvious victim of this harm. The closest there might be to such a victim would be the market maker who can either attempt to identify informed traders or shift the cost of trading with informed traders to others. See, e.g., Lawrence R. Glosten & Paul R. Milgrom, *Bid, Ask and Transaction Prices in a Specialist Market with Heterogeneously Informed Traders*, 14 J. FIN. ECON. 71 (1985) (modeling trading behavior under information asymmetries in securities markets).

The discussion above introduced a taxonomy that separates the causes of white-collar crime into two broad categories: motivation and opportunity. That discussion highlighted how the absence of readily identifiable victims may make it easier to neutralize concerns about the wrongfulness of engaging in insider trading. The discussion also noted that the opportunity to engage in insider trading often comes with few natural guardians.

This analytic work helps to make at least some sense of Collins' otherwise inexplicable choice to violate insider trading law despite significant risks and a limited payoff. In terms of motivation, there are several rationalizations that can be surmised from the record that Collins may have relied on to neutralize ethical concerns. First, as noted above, the lack of readily identifiable victims is a hallmark of insider trading and this may have made it easier to neutralize any potential ethical concerns when committing this crime.<sup>70</sup>Second, Collins viewed himself as something of a savior of Innate. At one point he stated that "[w]ithout me, [Innate] would have gone down."<sup>71</sup>Collins might have believed because of his central role in ensuring Innate could even run a clinical trial on a potential treatment for SPMS that he was entitled to a privileged position when the time came for sharing losses resulting from the failed clinical trial. Third, since Collins was the largest shareholder of Innate and unable to trade his own shares (they were housed in Australia where trading was halted) he was destined to lose a significant amount of money as a result of the failure of the MIS416 clinical trial.<sup>72</sup>His large personal [\*114] loss might have justified in his mind providing some protection to others in his entourage from smaller losses. Collins took much pride in his role of bringing wealth to his local community. There is evidence Collins attempted to shield not only his son but also other colleagues from the otherwise inevitable losses.<sup>73</sup>Finally, Collins may have viewed protecting others from loss as virtuous care-taking of those who had supported Innate in its praiseworthy efforts to find a cure for SPMS and thus an appropriate ethical counterbalance to the wrong of engaging in insider trading.<sup>74</sup>

The nature of the opportunity presented to Collins when he was faced with the choice of whether to engage in insider trading may also have contributed to Collins' behavior. As discussed above, there are very few "natural" barriers that prevent those in possession of material nonpublic information from profiting from that information.<sup>75</sup>All that one needs to do is make a phone call to someone who is able to trade, as evidenced by Collins' call to his son from the White House lawn.

There is an additional aspect of the opportunity presented to Collins when in possession of material nonpublic information worthy of note. Collins' opportunity to engage directly in insider trading was severely limited because his shares were housed in an account in Australia where a mandatory halt on trading was imposed between the time the company received the clinical trial results and when the information about the [\*115] failed drug trial was publicly disclosed.<sup>76</sup>If Collins' shares had been held in a United States account, he could have sold some or all his shares just as his son did. The Australian rule providing for a halt on trading illustrates how a simple securities market regulation can significantly reduce opportunities to engage in insider trading. The example of

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<sup>70</sup> See *supra* note 60 and accompanying text.

<sup>71</sup> Collins Transcript, *supra* note 13, at 16.

<sup>72</sup> Estimates of Collins' losses ranged from \$ 5 million to \$ 44 million. Jerry Zremski, *Collins Loses Millions as Stock Collapses -- But Others May Have Gotten Out Early*, BUFFALO NEWS (June 28, 2017).

<sup>73</sup> Jerry Zremski, *FBI agent: Other Collins Associates Dumped Innate Stock*, BUFFALO NEWS (June 28, 2019), <https://buffalonews.com/2019/06/27/fbi-agent-other-collins-associates-dumped-innate-stock/>.

<sup>74</sup> Collins might also have viewed himself as somewhat immunized from prosecution not only because he was a member of Congress, but also because he was an early and vocal supporter of President Trump.

<sup>75</sup> See *supra* note 69 and accompanying text.

<sup>76</sup> *Indictment*, *supra* note 8, at 7.

Collins' lack of personal trading suggests the Australian approach is worthy of further study as a tool to reduce insider trading.

### **Conclusion**

Studying Collins' seemingly inexplicable decision to engage in insider trading highlights two previously underappreciated aspects of the crime of insider trading. First, because the victims are not readily observable or even cognizant that they are being harmed the crime is easier than many other crimes both to rationalize and to carry out undetected. Second, there may be few natural guardians preventing people from engaging in insider trading in large, impersonal securities markets once they gain access to material non-public information. One policy suggested by this review worthy of further consideration is an Australian-style mandated halt on trading in anticipation of the release of significant material nonpublic information.

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