III

In this case, the petitioner was convicted of violating § 10 (b) although he was not a corporate insider and he received no confidential information from the target company. Moreover, the "market information" upon which he relied did not concern the earning power or operations of the target company, but only the plans of the acquiring company.[13] Petitioner's use of that information was not a fraud under § 10 (b) unless he was subject to an affirmative duty to disclose it before trading. In this case, the jury instructions failed to specify any such duty. In effect, the trial court instructed the jury that petitioner owed a duty to everyone; to all sellers, indeed, to the market as a whole. The jury simply was told to decide whether petitioner used material, nonpublic information at a time when "he knew other people trading in the securities market did not have access to the same information." Record, at 677.

The Court of Appeals affirmed the conviction by holding that "[*a*]*nyone*—corporate insider or not—who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose." 588 F. 2d 1358, 1365 (CA2 1978) (emphasis in original). Although the court said that its test would include only persons who regularly receive material nonpublic information, *id.*, at 1366, its rationale for that limitation is unre-

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that they know is confidential and know or should know came from a corporate insider, *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith*, 495 F. 2d 228, 237–238 (CA2 1974). The tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty. Subcommittees of American Bar Association Section of Corporation, Banking, and Business Law, Comment Letter on Material, Non-Public Information (Oct. 15, 1973) reprinted in BNA, Securities Regulation & Law Report No. 233, at D–1, D–2 (Jan. 2, 1974).

[13] See Fleischer, Mundheim & Murphy, An Initial Inquiry into the Responsibility to Disclose Market Information, 121 U. Pa. L. Rev. 798, 799 (1973).

lated to the existence of a duty to disclose.[14] The Court of Appeals, like the trial court, failed to identify a relationship between petitioner and the sellers that could give rise to a duty. Its decision thus rested solely upon its belief that the federal securities laws have "created a system providing equal access to information necessary for reasoned and intelligent investment decisions." 588 F. 2d, at 1362. The use by anyone of material information not generally available is fraudulent, this theory suggests, because such information gives certain buyers or sellers an unfair advantage over less informed buyers and sellers.

This reasoning suffers from two defects. First, not every instance of financial unfairness constitutes fraudulent activity under § 10 (b). See *Santa Fe Industries Inc.* v. *Green*, 430 U. S. 462, 474–477 (1977). Second, the element required to make silence fraudulent—a duty to disclose—is absent in this

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[14] The Court of Appeals said that its "regular access to market information" test would create a workable rule embracing "those who occupy . . . strategic places in the market mechanism." *United States* v. *Chiarella*, 588 F. 2d 1358, 1365 (CA2 1978). These considerations are insufficient to support a duty to disclose. A duty arises from the relationship between parties, see nn. 9 and 10, *supra*, and accompanying text, and not merely from one's ability to acquire information because of his position in the market.

The Court of Appeals also suggested that the acquiring corporation itself would not be a "market insider" because a tender offeror creates, rather than receives, information and takes a substantial economic risk that its offer will be unsuccessful. *Id.*, at 1366–1367. Again, the Court of Appeals departed from the analysis appropriate to recognition of a duty. The Court of Appeals for the Second Circuit previously held, in a manner consistent with our analysis here, that a tender offeror does not violate § 10 (b) when it makes preannouncement purchases precisely because there is no relationship between the offeror and the seller:

"We know of no rule of law . . . that a purchaser of stock, who was not an 'insider' and had no fiduciary relation to a prospective seller, had any obligation to reveal circumstances that might raise a seller's demands and thus abort the sale." *General Time Corp.* v. *Talley Industries*, 403 F. 2d 159, 164 (CA2 1968), cert. denied, 393 U. S. 1026 (1969).

case. No duty could arise from petitioner's relationship with the sellers of the target company's securities, for petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions.

We cannot affirm petitioner's conviction without recognizing a general duty between all participants in market transactions to forgo actions based on material, nonpublic information. Formulation of such a broad duty, which departs radically from the established doctrine that duty arises from a specific relationship between two parties, see n. 9, *supra*, should not be undertaken absent some explicit evidence of congressional intent.

As we have seen, no such evidence emerges from the language or legislative history of § 10 (b). Moreover, neither the Congress nor the Commission ever has adopted a parity-of-information rule. Instead the problems caused by misuse of market information have been addressed by detailed and sophisticated regulation that recognizes when use of market information may not harm operation of the securities markets. For example, the Williams Act[15] limits but does not completely prohibit a tender offeror's purchases of target corporation stock before public announcement of the offer. Congress' careful action in this and other areas[16] contrasts, and

[15] 15 U. S. C. § 78m (d)(1) permits a tender offeror to purchase 5% of the target company's stock prior to disclosure of its plans for acquisition.

[16] Section 11 of the 1934 Act generally forbids a member of a national securities exchange from effecting any transaction on the exchange for its own account. 15 U. S. C. A. § 78k (a)(1) (1972–1978 Supp.). But Congress has specifically exempted specialists from this prohibition—broker-dealers who execute orders for customers trading in a specific corporation's stock, while at the same time buying and selling that corporation's stock on their own behalf. § 11 (a)(1)(A), 15 U. S. C. A. § 78k (a)(1)(A) (1972–1978 Supp.); see S. Rep. No. 94–75, 94th Cong., 1st Sess., 99

is in some tension, with the broad rule of liability we are asked to adopt in this case.

Indeed, the theory upon which the petitioner was convicted is at odds with the Commission's view of § 10 (b) as applied to activity that has the same effect on sellers as the petitioner's purchases. "Warehousing" takes place when a corporation gives advance notice of its intention to launch a tender offer to institutional investors who then are able to puchase stock in the target company before the tender offer is made public and the price of shares rises.[17] In this case, as in warehousing, a buyer of securities purchases stock in a target corporation on the basis of market information which is unknown to the seller. In both of these situations, the seller's behavior presumably would be altered if he had the nonpublic information. Significantly, however, the Commission has acted to bar warehousing under its authority to regulate tender offers[18] after recognizing that action under § 10 (b) would rest on a "somewhat different theory" than that previously used to regulate insider trading as fraudulent activity.[19]

(1975); 2 Securities and Exchange Commission, Report of the Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st. Sess., 57–58, 76 (1963). See generally S. Robbins, The Securities Markets 191–193 (1966). The exception is based upon Congress' recognition that specialists contribute to a fair and orderly marketplace at the same time they exploit the informational advantage that comes from their possession of buy and sell orders. 2 Securities and Exchange Commission, Report of the Special Study of Securities Markets, H. R. Doc. No. 95, 88th Cong., 1st Sess., at 78–80. Similar concerns with the functioning of the market prompted Congress to exempt market makers, block positioners, registered odd-lot dealers, bona fide arbitrageurs, and risk arbitrageurs from § 11's general prohibition on member trading. 15 U. S. C. A. § 78k (a)(1)(A)–(D) (1972–1978 Supp.); see S. Rep. No. 94–75, at 99. See also Securities Exchange Act Release No. 34–9950, 38 Fed. Reg. 3902, 3918 (1973).

[17] Fleischer, Mundheim & Murphy, *supra* n. 16, at 811–812.

[18] SEC Proposed Rule § 240.14e–2, 44 Fed. Reg. 9987–9988 (1979).

[19] 1 SEC Institutional Investor Study Report, H. R. Doc. No. 92–64, 92d Cong., 1st Sess., xxxii (1971).

We see no basis for applying such a new and different theory of liability in this case. As we have emphasized before, the 1934 Act cannot be read " 'more broadly than its language and the statutory scheme reasonably permit.' " *Touche Ross & Co.* v. *Redington,* 47 U. S. L. W. 4732, 4735 (June 18, 1979), quoting *SEC* v. *Sloan,* 436 U. S. 103, 116 (1978). Section 10 (b) is aptly described as a catch-all provision, but what it catches must be fraud. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak. We hold that a duty to disclose under § 10 (b) does not arise from the mere possession of nonpublic market information. The contrary result is without support in the legislative history of § 10 (b) and would be inconsistent with the careful plan that Congress has enacted for regulation of the securities markets. Cf. *Santa Fe Industries Inc.* v. *Green,* 430 U. S., at 479.[20]

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[20] MR. JUSTICE BLACKMUN's dissent would establish the following standard for imposing criminal and civil liberty under § 10 (b) and Rule 10b–5:

"[P]ersons having access to confidential material information that is not legally available to others generally are prohibited from engaging in schemes to exploit their structural information advantage through trading in affected securities." *Post,* at 7.

This view is not substantially different from the Court of Appeals theory that anyone "who regularly receives material nonpublic information may not use that information to trade in securities without incurring an affirmative duty to disclose," *supra,* at 8, quoting 588 F. 2d, at 1365, and must be rejected for the reasons stated in Part III. Additionally, a judicial holding that certain undefined activities "generally are prohibited" by § 10 (b) would raise questions whether either criminal or civil defendants would be given fair notice that they have engaged in illegal activity. Cf. *Grayned* v. *City of Rockford,* 408 U. S. 104, 108–109 (1972).

It is worth noting that this is apparently the first case in which criminal liability has been imposed upon a purchaser for § 10 (b) nondisclosure. Petitioner was sentenced to a year in prison, suspended except for one month, and a five-year term of probation. *Id.,* at 1373, 1378 (Meskill, J., dissenting).

IV

In its brief to this Court, the United States offers an alternative theory to support petitioner's conviction. It argues that petitioner breached a duty to the acquiring corporation when he acted upon information that he obtained by virtue of his position as an employee of a printer employed by the corporation. The breach of this duty is said to support a conviction under § 10 (b) for fraud perpetrated upon both the acquiring corporation and the sellers.

We need not decide whether this theory has merit for it was not submitted to the jury. The jury was told, in the language of Rule 10b–5, that it could convict the petitioner if it concluded that he either (i) employed a device, scheme or artifice to defraud or (ii) engaged in an act, practice, or course of business which operated or would operate as a fraud or deceit upon any person. Record, at 681. The trial judge stated that a "scheme to defraud" is a plan to obtain money by trick or deceit and that "a failure by Chiarella to disclose material, non-public information in connection with his purchase of stock would constitute deceit." *Id.*, at 683. Accordingly, the jury was instructed that the petitioner employed a scheme to defraud if he "did not disclose . . . material non-public information in connection with the purchases of the stock." *Id.*, at 685–686.

Alternatively, the jury was instructed that it could convict if "Chiarella's alleged conduct of having purchased securities without disclosing material, non-public information would have or did have the effect of operating as a fraud upon a seller." *Id.*, at 686. The judge earlier had stated that fraud "embraces all the means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false misrepresentation, suggestions or by suppression of the truth." *Id.*, at 683.

The jury instructions demonstrate that petitioner was convicted merely because of his failure to disclose material, non-

public information to sellers from whom he bought the stock of target corporations. The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers. Because we cannot affirm a criminal conviction on the basis of a theory not presented to the jury, *Rewis* v. *United States,* 401 U. S. 808, 814 (1971), see *Dunn* v. *United States,* 47 USLW 4607, 4609 (June 4, 1979), we will not speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of § 10 (b).[21]

The judgment of the Court of Appeals is

Reversed.

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[21] The dissent of THE CHIEF JUSTICE relies upon a single phrase from the jury instructions, which states that the petitioner held a "confidential position" at Pandick Press, to argue that the jury was properly instructed on the theory "that a person who has misappropriated material non-public information has an absolute duty to disclose that information or refrain from trading." *Post,* at 2. The few words upon which this thesis is based do not explain to the jury the nature and scope of the petitioner's duty to his employer, the nature and scope of petitioner's duty, if any, to the acquiring corporation, or the elements of the tort of misappropriation. Nor do the jury instructions suggest that a "confidential position" is a necessary element of the offense for which petitioner was charged. Thus, we do not believe that a "misappropriation" theory was included in the jury instructions.

The conviction would have to be reversed even if the jury had been instructed that it could convict the petitioner either (1) because of his failure to disclose material, nonpublic information to sellers or (2) because of a breach of a duty to the acquiring corporation. We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct. *United States* v. *Gallagher,* 576 F. 2d 1028, 1046 (CA2 1978); see *Leary* v. *New York,* 395 U. S. 6, 31–32 (1969); *Stromberg* v. *California,* 283 U. S. 359, 369–370 (1931).

SUPREME COURT OF THE UNITED STATES

No. 78-1202

Vincent F. Chiarella, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 18, 1980]

MR. JUSTICE STEVENS, concurring.

Before liability, civil or criminal, may be imposed for a Rule 10b-5 violation, it is necessary to identify the duty that the defendant has breached. Arguably, when petitioner bought securities in the open market, he violated (a) a duty to disclose owed to the sellers from whom he purchased target company stock and (b) a duty of silence owed to the acquiring companies. I agree with the Court's determination that petitioner owed no duty of disclosure to the sellers, that his conviction rested on the erroneous premise that he did owe them such a duty, and that the judgment of the Court of Appeals must therefore be reversed.

The Court correctly does not address the second question: whether the petitioner's breach of his duty of silence—a duty he unquestionably owed to his employer and to his employer's customers—could give rise to criminal liability under Rule 10b-5. Respectable arguments could be made in support of either position. On the one hand, if we assume that petitioner breached a duty to the acquiring companies that had entrusted confidential information to his employers, a legitimate argument could be made that his actions constituted "a fraud or a deceit" upon those companies "in connection with the purchase or sale of any security."* On the other hand,

*See *Eason* v. *General Motors Acceptance Corp.*, 490 F. 2d 654 (CA7 1973), cert. denied, 416 U. S. 960. The specific holding in *Eason* was

inasmuch as those companies would not be able to recover damages from petitioner for violating Rule 10b–5 because they were neither purchasers nor sellers of target company securities, see *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, it could also be argued that no actionable violation of Rule 10b–5 had occurred. I think the Court wisely leaves the resolution of this issue for another day.

I write simply to emphasize the fact that we have not necessarily placed any stamp of approval on what this petitioner did, nor have we held that similar actions must be considered lawful in the future. Rather, we have merely held that petitioner's criminal conviction cannot rest on the theory that he breached a duty he did not owe.

I join the Court's opinion.

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rejected in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723. However, the limitation on the right to recover pecuniary damages in a private action identified in *Blue Chip* is not necessarily coextensive with the limits of the rule itself. Cf. *Piper* v. *Chris-Craft Industries, Inc.,* 430 U. S. 1, 42, n. 28, 43, n 30, 47, n. 33.