could not purchase shares in the target company prior to public disclosure (*SEC* v. *Shapiro*, *supra*). Moreover, the Securities and Exchange Commission had commenced judicial and administrative proceedings based on market information frauds and had filed complaints against printers under Section 10(b) and Rule 10b-5 when they traded on the basis of non-public tender offer news. See pages 59-61, *supra*. Thus, the agency charged with the interpretation and enforcement of the Act had expressed its view that petitioner's conduct could give rise to a violation (*SEC* v. *Sorg Printing Co.*, *supra*).[51]

The Securities Exchange Act of 1934 expressly authorizes criminal prosecutions for willful violations of its provisions and the rules promulgated thereunder. See 15 U.S.C. 78ff.[52] Before petitioner undertook his scheme to defraud, numerous criminal prosecutions had been commenced by the Department of

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[51] Of course, petitioner was also on warning that the statute and rule would receive a broad and flexible interpretation. See *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, *supra*, 404 U.S. at 12; 1 Bromberg, *supra*, at § 2.2(332).

[52] This case involves a prosecution under a statute defining a specific federal offense. Although, as the dissenting judge noted in the court below (Pet. App. A33), this Court's recent decisions have restricted the availability of "implied remedies," the Court has not hesitated to give full scope to criminal enforcement proceedings expressly authorized by Congress. *United States* v. *Naftalin*, *supra*. Limitation of implied private remedies, which serve as supplements to government enforcement proceedings, gives added importance to the efforts of the Department of Justice and the Securities and Exchange Commission to obtain compliance with the statute.

Justice under Section 10(b) and Rule 10b-5 where willful violations were found to exist, including, as noted on page 60, *supra*, a case involving a market information fraud.[53]

If petitioner or an attorney consulted by him had made even a minimal effort to ascertain the requirements of the law, they would have learned that petitioner's intended conduct entailed a substantial risk of criminal liability. "No honest and reasonable citizen could have difficulty in understanding" the illegality of that course of conduct. See *United States* v. *Persky*, 520 F.2d 283, 286-288 (2d Cir. 1975), rejecting a similar "fair notice" claim under Section 10(b) and Rule 10b-5. The argument that no "omens" or "portents" of liability were present (Br. 41) ignores the broad prohibitory language of the statute and rule and the line of authority that we have summarized above. Simply stated, a person of ordinary intelligence had fair notice that the decep-

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[53] See, *e.g.*, *United States* v. *Re*, 336 F.2d 306 (2d Cir.), cert. denied, 379 U.S. 904 (1964) (market manipulation); *United States* v. *D'Honau*, 459 F.2d 73 (9th Cir. 1972) (market manipulation); *United States* v. *Koss*, 506 F.2d 1103 (2d Cir. 1974) (failure to deposit proceeds of offering); *United States* v. *Persky*, 520 F.2d 283 (2d Cir. 1975) (false press releases); *United States* v. *Wolfson*, 289 F. Supp. 903 (S.D. N.Y. 1968) (fraudulent distribution of securities). Many other criminal indictments under Section 10(b) and Rule 10b-5 have resulted in convictions without published opinions. Some of those indictments are described in III Loss, *Securities Regulation*, *supra*, at 1449 n.15; VI Loss, *Securities Regulation*, *supra*, at 3559.

tive course of conduct alleged in the indictment was forbidden.[54]

2. This case, however, presents no abstract question about the adequacy of potential notice, derived from statute books or judicial opinions. Petitioner received explicit personal notice. As the court of appeals pointed out, "[f]ew malefactors receive such explicit warning of the consequences of their conduct" (Pet. App. A17). Warning posters appeared throughout petitioner's place of employment, stating in large, bold-face print: "You are forbidden to use any information learned from customer's copy * * *. [Y]ou are liable to criminal penalties of 5 years in jail and $10,000 fine for each offense." See pages 5-6, *supra*. Those warnings were communicated to all employees at Pandick Press through other forms of personal notification, as discussed above. *Ibid.*[55]

The district court charged the jury that it could not convict petitioner unless it believed that he acted willfully, deliberately, and intentionally, with aware-

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[54] As an example of the purported unforeseeability of the court of appeals' decision, petitioner points out that a "judge's clerk" would be prohibited by that decision from buying stock on the basis of material non-public information obtained from his or her position (Br. 43 n.19). For example, a clerk aware of a forthcoming antitrust ruling could profitably purchase securities or sell them short. That this conduct is prohibited by the statute, we submit, is not a surprising consequence. Cf. *United States* v. *Peltz*, 433 F.2d 48, 52 n.4 (2d Cir. 1970).

[55] Petitioner admitted on the witness stand that he knew that his conduct was wrongful and in violation of SEC requirements. See pages 10-11, *supra*.

ness that his conduct was wrongful.[56] See pages 11-13, *supra*. The court also instructed the jury that the central issue in the case was petitioner's "state of mind." It directed the jury to consider (Tr. 692):

> Had Mr. Chiarella not seen the notices posted next to his time clock and elsewhere for many months, as he testified? Or was he not telling the truth about these notices, as the government urges, in order not to reveal to you his awareness of possible criminal penalties attached to his conduct.

The jury's guilty verdict establishes that petitioner knew that his conduct was wrongful. The jury did not choose to believe that he had never read the signs warning of criminal liability. In the words of the district court at petitioner's sentencing hearing, petitioner's claim of ignorance of criminal penalties was "perjury beyond a reasonable doubt" (Pet. App. A17 n.18). In light of the jury's finding of willful and knowing misconduct, there is no question in this case of convicting a defendant for engaging in practices that he believed to be proper.[57]

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[56] Petitioner complains that not all of the legal analysis contained in the court of appeals' decision was included in the charge to the jury (Br. 46-47). But the jury was simply required to find the facts in the case: whether petitioner behaved as charged in the indictment, and whether his conduct was willful and knowing. Whether the conduct charged in the indictment and proven by the government at trial constitutes a violation of the statute and rule presented a legal question for the court.

[57] Petitioner argues that he believed that he was justified in behaving as he did because he observed tender offerors making open market purchases prior to announcement of

3. The decisions of this Court have consistently sustained prosecutions under criminal statutes containing general prohibitory language when the defendant's conduct is fairly encompassed by the statute and mens rea is proven by the government. This is true even when the precise coverage of the statute is subject to debate. For example, in *Nash* v. *United States*, 229 U.S. 373, 377 (1913), the Court sustained a criminal indictment charging a restraint of trade illegal under the Sherman Act's "rule of reason." [58] Similarly, in *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 31-36 (1963), the Court held that the defendants received fair notice in a prosecution for sale of goods at "unreasonably low prices." The court dismissed the argument that prosecution under this general statutory standard was unfair, noting that the defendants could not be convicted unless the government proved mens rea. See also *United States* v. *United States Gypsum Co.*, 438

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their offers (Br. 48 n.21). The short answer to that assertion is that petitioner argued this point to the jury, which refused to credit it. The jury determined (by its verdict) that petitioner realized that *his* conduct was wrongful, regardless of the propriety of the behavior of other persons.

[58] See also *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348 (1918) *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501-503 (1925); *Gorin* v. *United States*, 312 U.S. 19, 27-28 (1941); *United States* v. *Ragen*, 314 U.S. 513, 523-524 (1942); *United States* v. *Petrillo*, 332 U.S. 1, 5-8 (1947); *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340-342 (1952), all rejecting fair notice arguments under statutes containing prohibitions expressed in general terms, where the offense required proof of mens rea.

U.S. 422, 438-441 (1978), holding that the government may obtain a criminal conviction in a "rule of reason" antitrust case if it proves that the defendants acted with knowledge that their actions were likely *to* produce anticompetitive effects.[59]

Under these authorities, petitioner's "fair notice" claim is untenable. The government proved beyond a reasonable doubt that petitioner engaged in conduct that falls within the prohibition of Section 10(b). The government also proved that petitioner acted willfully and knowingly, with the realization that his behavior was wrongful. In these circumstances, even though petitioner's conduct may not have precisely duplicated that involved in prior cases, and even though the prohibitory language of Section 10(b) and Rule 10b-5 is general in scope, his conviction was properly sustained. See *United States* v. *Naftalin, supra*, slip op. 10. Petitioner was "given clear notice that a reasonably ascertainable standard of conduct is mandated; it [was] for him to insure that his actions [did] not fall outside the legal limits." *United States* v. *Powell*, 423 U.S. 87, 92 (1975).

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[59] *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), relied on by petitioner (Br. 44-45), has no pertinence here. In that civil rights demonstration case, involving First Amendment issues, the judicial decision under review contradicted the literal text of the criminal statute that was the basis for the prosecution. The Court held that the defendants could not have foreseen such a perverse construction. As we have noted, the prohibitory statute here in question embraces all fraudulent schemes, including the scheme practiced by petitioner. There is no repugnance between the decision below and the statute.

4. The government obtained an indictment in this case to vindicate the deterrent purposes of the Act. As the evidence in this case disclosed, petitioner made over $30,000 in illegal profits. He did so through methods that approximate theft—"conversion," in the words of the court of appeals, or "embezzlement" in the words of the district court. He did so in the face of explicit warnings that his conduct would result in criminal liability. An injunction or disgorgement order is generally not a sufficient sanction to deter and punish deliberate misconduct of this kind. Such sanctions merely return the wrongdoer to the position he would have occupied if he had not engaged in the scheme to defraud. Under all the circumstances, petitioner's 30-day prison sentence, accompanied by probation, certainly was not unwarranted in light of the severity of his offense. Any lesser sanction would invite others to repeat the highly profitable fraud in which he engaged.

III. THE DISTRICT COURT CORRECTLY CHARGED THE JURY ON THE STATE OF MIND ELEMENT OF PETITIONER'S OFFENSE

Petitioner contends that the district court erred by refusing to instruct the jury that the government must prove a specific intent to defraud or deceive (Br. 49-53). He does not dispute that the district court's charge complied with Section 32(a) of the Act, 15 U.S.C. 78ff(a), which provides that any person who "willfully violates any provision of this chapter, or any rule or regulation thereunder * * *"

is guilty of a criminal offense. Rather, he argues that the court was required to charge the jury "*both* that intent to defraud was required before a * * * violation could be found and that if found, such violation was a crime if determined to be a willful violation * * *" (Br. 52-53; emphasis in original). He asserts that this two part charge on mens rea is mandated by the Court's decision in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976).

As noted on pages 11-13 above, the district court instructed the jury that it could not convict petitioner unless it found that he engaged in the scheme to defraud alleged in the indictment and did so "wilfully and knowingly" (Tr. 682, 687, 688, 690). The court explained that the government must prove that petitioner acted "intentionally" and "deliberately," rather than through "negligence or inadvertence" (Tr. 688). The court emphasized to the jury that knowing and willful misconduct requires proof that petitioner acted with "a realization * * * that he was doing a wrongful act" and that "the knowingly wrongful act involved a significant risk of effecting the violation that occurred" (*ibid.*). The court declined to supplement these instructions on mens rea with petitioner's requested charge on specific intent to defraud (J.A. 831a): [60]

> Intent to defraud means the specific intent to deceive, cheat or trick someone. And, an intent

[60] "J.A." refers to the Joint Appendix filed in the court of appeals.

> to deceive, before being considered the specific intent which satisfies the statute, must be coupled with what may be best described as an evil ambition to injure someone and deprive him of something of value.

As we demonstrate below, the district court properly refused to give this additional charge. Neither Section 32(a) nor Section 10(b) of the Act requires the government to prove that the defendant entertained "an evil ambition to injure someone."

1. This Court's decision in *Ernst & Ernst* v. *Hochfelder*, *supra*, held that in a private damage action under Section 10(b) and Rule 10b-5 the plaintiff must plead and prove scienter and that proof of "negligence" would not suffice. The Court described scienter as a mental state "embracing intent to deceive, manipulate, or defraud." 425 U.S. at 194 n.12. Although scienter "embraces" intent to defraud, it also embraces knowing and willful misconduct;[61] moreover, as the Court pointed out, it may also embrace "reckless" conduct. *Ibid.*

An analysis of *Hochfelder* demonstrates that the Court held not that Section 10(b) requires specific intent to defraud, but rather that culpability greater than mere negligence must be shown. The plaintiffs in *Hochfelder* brought suit against the defendant auditors on the theory that they aided and abetted the fraud of the president of a brokerage house

[61] The Latin term "scienter" means "knowingly" or with "guilty knowledge." *Black's Law Dictionary* 1512 (Rev. 4th ed. 1968); *Bouvier's Law Dictionary* 3013 (3d rev. 1914).

through "negligent nonfeasance" (425 U.S. at 190). The question before the Court was "whether scienter is a necessary element of such a cause of action, or whether negligent conduct alone is sufficient" (*id.* at 197). In concluding that negligence alone would not suffice, the Court noted that the language of Section 10(b) was aimed at "knowing or intentional misconduct" (*ibid.*), a "type of conduct quite different from negligence" (*id.* at 199). The Court also pointed out that the language of the statute was inconsistent with imposition of liability "for wholly faultless conduct" (*id.* at 198) and that the legislative history demonstrates that Congress intended to prohibit conduct involving "some element of scienter" rather than "negligent conduct alone" (*id.* at 201). Congress intended Section 10(b) to apply in cases where the defendant "has not acted in good faith" (*id.* at 206). Due to the limited scope of its holding, the Court left open the question whether "reckless" conduct would suffice to maintain an action under Section 10(b) (*id.* at 194 n.12).[62]

Thus, the *Hochfelder* case lends no support to petitioner's claim that "specific intent to defraud" is required by the statute. To the contrary, the Court's repeated references to states of mind other than specific intent (including knowing and bad faith con-

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[62] The Court also left open the question whether scienter must be proven in an SEC civil enforcement proceeding. See 425 U.S. 194 n.12.

duct) support the traditional view that proof of guilty knowledge is sufficient.[63]

Significantly, the pre-*Hochfelder* decisions that the Court relied on (425 U.S. at 194 n.12) recognize that liability extends to "knowing, wilful and reckless conduct." See, *e.g.*, *Clegg* v. *Conk*, 507 F.2d 1351, 1361-1362 (10th Cir. 1974), cert. denied. 422 U.S. 1007 (1975); *Lanza* v. *Drexel & Co.*, 479 F.2d 1277, 1306 (2d Cir. 1973) (en banc); *SEC* v. *Texas Gulf Sulphur Co.*, *supra*, 401 F.2d at 868 (Friendly, J., concurring). Similarly, the common law definition of scienter extended to conduct that was knowing, willful or reckless.[64] Finally, the appellate court de-

[63] Indeed, even if petitioner might have been entitled to an additional instruction on intent, to clarify the issue for the jury, he was not entitled to the instruction he requested. "Specific intent" to defraud has never included a particular design to cause injury. "The fact that the defendant was disinterested, that he had the best of motives, and that he thought he was doing the [victim] a kindness, will not absolve him from liability, so long as he did in fact intend to mislead." Prosser, *supra*, § 107, at 700. The district court was not obliged to give the jury an instruction that misstated the law. See 2 C. Wright, *Federal Practice and Procedure* (Criminal) § 482 at 278-279 (1969 ed.) (collecting cases); see also *United States* v. *Lam Lek Chong*, 544 F.2d 58, 68 (2d Cir. 1976).

[64] See Bucklo, *The Supreme Court Attempts to Define Scienter under Rule 10b-5: Ernst & Ernst* v. *Hochfelder*, 29 Stan. L. Rev. 213, 229 (1977) (footnotes omitted) ("Even the English case generally credited with establishing the strict intent requirement at common law, *Derry* v. *Peek* [14 A.C. 337 (1889)] purported to allow liability when the representation is 'made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.'" Accord, W. Prosser, *Law of Torts*, § 107, at 699-701 (4th ed. 1971). 1 Harper & James, *supra*, § 7.3, at 533-535.

cisions since *Hochfelder* have uniformly held that a specific intent to defraud is not required.[65]

In sum, nothing in *Hochfelder* or the authorities that preceded or followed it supports petitioner's ar-

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[65] See *Coleco Industries, Inc.* v. *Berman*, 567 F.2d 569, 574 (3d Cir. 1977), cert. denied, No. 77-1725 (Oct. 2, 1978) ("plaintiff may recover under Rule 10b-5 for misrepresentations that are recklessly made as well as those made with conscious fraudulent intent"); *First Virginia Bankshares* v. *Benson*, 559 F.2d 1307, 1314 (5th Cir. 1977), cert. denied, 435 U.S. 952 (1978) ("[t]he defendant must know of the falsity of the information, or must act in reckless disregard of its falsity, or must intend to deceive"); *Sundstrand Corp.* v. *Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir.), cert. denied, 434 U.S. 875 (1977) ("recklessness should be viewed as the functional equivalent of intent"); *Sanders* v. *John Nuveen & Co.*, 554 F.2d 790, 792 (7th Cir. 1977) (" 'reckless behavior' can be sufficient to constitute scienter"); *Wright* v. *Heizer Corp.*, 560 F.2d 236, 251 (7th Cir. 1977) (cites with approval the recklessness standard in *Sundstrand Corp.* v. *Sun Chemical Corp.*, *supra*, and *Sanders* v. *John Nuveen & Co.*, *supra*); *Rolf* v. *Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 46 (2d Cir.), cert. denied, No. 78-560 (Dec. 4, 1978) ("*Hochfelder* left intact our rule that recklessness is a form of scienter in appropriate circumstances"); *Nelson* v. *Serwold*, 576 F.2d 1332, (9th Cir.), cert. denied, No. 78-182 (Nov. 13, 1978) ("Congress intended the ambit of § 10(b) to reach a broad category of behavior, including knowing or reckless conduct"); *Edward J. Mawod & Co.* v. *SEC*, 591 F.2d 588, 596 (10th Cir. 1979) ("*Hochfelder* does not require that there be premeditated malice. It recognized that the carrying on of manipulative or deceptive device or contrivance was itself evidence that knowledge existed."); *Mansbach* v. *Prescott, Ball & Turben*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,861, at 95,526 (6th Cir. 1979) ("recklessness constitutes sufficient scienter") *McLean* v. *Alexander*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,879, at 95,601, 95,605 (3d Cir. 1979) ("reckless conduct is actionable under Section 10(b)").

gument that the government must prove a specific intent to defraud some victim. See *United States* v. *Charnay*, 537 F.2d 341, 351, 357-359 (9th Cir.), cert. denied, 429 U.S. 1000 (1976), rejecting the assertion that *Hochfelder* changes the traditional "willfulness" standard required by Section 32(a) of the Securities Exchange Act.[66] As the courts below recognized, a charge to the jury that the government must prove that the defendant acted willfully and knowingly, with a realization that his conduct is wrongful and likely to produce the violation that results, fully comports with the requirements of *Hochfelder* and the criminal penalty section of the Act.

2. In addition to its lack of support in statutory or case authority, petitioner's proposed instruction that the government must prove "an evil ambition to injure someone" has no logical application in a case of this kind. Persons trading on the basis of material non-public information could not be proceeded against by the government in either criminal or civil enforcement actions if Section 10(b) required such proof. By hypothesis, traders in petitioner's position deal through their brokers on a securities exchange. They do not know who sells them securities or who buys securities from them. In these circumstances, persons trading on non-public information would almost never entertain "an evil ambition to injure

[66] The "willfulness" standard prescribed by Congress is described in *United States* v. *Peltz*, 433 F.2d 48, 54-55 (2d Cir. 1970), cert. denied, 401 U.S. 955 (1971), and *United States* v. *Dixon*, 536 F.2d 1388, 1395-1397 (2d Cir. 1976).

someone." Their sole objective would be to make a quick profit, and not to get caught. If the rule against trading on material non-public information is to be enforced at all, it must embrace situations in which the defendant acts deliberately and intentionally in making a secret profit, with knowledge that the information that he uses is non-public and with the realization that he is acting wrongfully.

In the present case, petitioner stipulated that he did not disclose the material information that he used. He admitted that he learned the information by decoding confidential documents. He told his broker that he wanted to make a quick profit, and the evidence showed that his quick profit was substantial. He admitted on the witness stand that he knew that his conduct was wrongful. See pages 9-10, *supra*. In sum, the government proved culpable action and a culpable state of mind. Nothing more could realistically be shown in a case of this kind.

These considerations were recently addressed by the Court in *United States* v. *United States Gypsum Co.*, *supra*. In that case, the Court held that criminal prosecutions under the antitrust laws required proof of *mens rea*, but it rejected the defendants' assertion that a specific intent to inflict injury or to violate the law was also required. The Court noted that when the government proves that the defendants were "consciously behaving in a way the law prohibits," such conduct "is a fitting object of criminal punishment." 438 U.S. at 445. The Court pointed out that "[a] requirement of proof not only of * * *

knowledge of likely [anticompetitive] effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome." *Id.* at 446. The Court's analysis of specific intent in *United States Gypsum Co.* is equally applicable here and underscores the correctness of the decision of the court below.

IV. THE DISTRICT COURT CORRECTLY RECEIVED IN EVIDENCE AN ADMISSION MADE BY PETITIONER TO THE NEW YORK DEPARTMENT OF LABOR

Petitioner finally contends (Br. 53-69) that the district court committed reversible error by admitting into evidence a report prepared by an employee of the New York Department of Labor, which summarized petitioner's remarks during an interview concerning unemployment compensation. That summary (Gov. Ex. 12) stated the following:

> I was discharged for violating Company rule re disclosure of client information. The allegation is true. It was a matter of a printing of stock tender offers & I utilized the information for myself. This happened last year & through investigation by S.E.C., the matter came to light & I was discharged.

Petitioner argues (Br. 54) that "[b]oth federal and state interests strongly favor preserving the confidentiality of the statement." As we demonstrate below, neither state nor federal interests support exclusion of this relevant piece of evidence in a federal criminal prosecution.

1. The principal basis for petitioner's argument in favor of exclusion is his assertion (Br. 54) that the law of New York "mandates, in no uncertain terms, confidentiality of information provided in connection with a claim for unemployment insurance." However, the New York statute (N.Y. Lab. Law § 537) (McKinney 1977) prescribes no such absolute privilege. The statute provides in pertinent part (emphasis supplied):

> Information acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein *unless the commissioner is a party to such action or proceeding* * * *. Such information insofar as it is material to the making and determination of a claim for benefits shall be available to the parties affected *and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement.*

Thus, the statute itself recognizes that countervailing public need can justify disclosure. If the Commissioner of Labor is a party plaintiff or defendant in a court proceeding, or intervenes therein, the statute authorizes disclosure. And, in the Commissioner's discretion, confidential information may be revealed to third parties in the course of placing unemployed workers.

Significantly, the New York Department of Labor interprets the statute to permit disclosure of confidential files to the Federal Bureau of Investigation. As the witness from the Department of Labor testified, the FBI is given access to "all the records in the office" (Tr. 278-279). Moreover, the report in question was released for use at trial with approval of New York's Commissioner of Labor (J.A. 67a-68a). In light of the practice of the New York authorities to disclose their reports to the agency of the federal government responsible for the investigation of federal crimes, and in view of the fact that the Commissioner of Labor himself authorized release of petitioner's report, the argument that use of the report at trial "frustrates" the policies of the State of New York is wholly untenable.

2. Fed. R. Evid. 402 succinctly states the federal policy in this area. Unless explicitly barred by the Constitution, federal statute, or federal rule, "[a]ll relevant evidence is admissible." Fed. R. Evid. 501 defines the exceptional circumstances in which relevant evidence may be excluded on grounds of privilege:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in the rules prescribed by the Supreme Court * * * the privilege of a witness * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience.

As the court of appeals recognized (Pet. App. A23), New York's statutory privilege was unknown at

common law.[67] Moreover, although petitioner argues that federal constitutional and statutory "policies" support his claim of privilege, he points to no provision of the Constitution or any federal statute or rule that prohibits use of the report.[68]

Because no federal statute, constitutional provision, or common law principle requires exclusion of this relevant evidence, the courts below correctly declined to erect a new federal privilege. As this Court noted in *United States* v. *Nixon*, 418 U.S. 683, 709 (1974): "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." The Court added that "[w]hen the ground for asserting privilege * * * in a criminal trial is based only on generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." *Id.* at 713. See also *Herbert* v. *Lando*, No. 77-1105 (Apr. 18, 1979), slip op. 20-21 ("[e]videntiary privileges in litigation are not favored");

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[67] See *Coyne* v. *O'Connor*, 121 N.Y.S. 2d 100, 101 (Sup. Ct. 1953), describing the privilege as a "statutory privilege," rather than "the common-law variety of absolute privilege."

[68] We address petitioner's policy arguments on pages 92-95, *infra*.

United States v. *Nobles*, 422 U.S. 225, 230-231 (1975); *Branzburg* v. *Hayes*, 408 U.S. 665, 690 & n.29 (1972); *United States* v. *Bryan*, 339 U.S. 323, 331-332 (1950); 8 J. Wigmore, *Evidence* §§ 2192, 2193 (McNaughton rev. 1961).[69] The state civil cases relied on by petitioner (Br. 56) do not announce a rule of law that controls the receipt of evidence in this federal criminal prosecution. See *Wolfle* v. *United States*, 291 U.S. 7, 12-13 (1934); *Funk* v. *United States*, 290 U.S. 371, 381-387 (1933).

3. a. Petitioner's contention (Br. 64-65) that the New York privilege has been transmuted into a federal privilege by the Federal Unemployment Tax Act, 26 U.S.C. 3304(a)(16), (17), is insubstantial. As the court below correctly pointed out, petitioner did not raise this claim in the district court as a ground for exclusion of his statement (Pet. App. A22 n.22). For this reason, petitioner waived the claim. See Fed. R. Evid. 103(a)(1). In any event, petitioner's reliance on the statute is misplaced. The Federal Unemployment Tax Act merely specifies conditions

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[69] Consistent with these authorities, the lower federal courts have shown great reluctance to adopt state privileges in federal criminal proceedings, where those privileges lack clear support in federal common law. See, *e.g.*, *In re Special April 1977 Grand Jury*, 581 F.2d 589, 592-593 (7th Cir. 1978), cert. denied, No. 78-403 (Dec. 11, 1978); *In re Grand Jury Impaneled January 21, 1975*, 541 F.2d 373, 378-383 (3d Cir. 1976); *United States* v. *Cortese*, 540 F.2d 640, 642-643 (3d Cir. 1976); *United States* v. *Craig*, 528 F.2d 773, 781-784 (7th Cir.) (Tone, J., concurring), adopted en banc, 537 F.2d 957, cert. denied, 425 U.S. 973 (1976). This Court will address a related question this Term in *United States* v. *Gillock*, No. 78-1455.

for federal approval of state unemployment compensation statutes and provides that the states must offer safeguards to prevent misuse of information obtained by state agencies. It nowhere indicates that information obtained by state agencies administering unemployment compensation statutes must be suppressed in federal criminal trials.[70]

b. Petitioner also argues (Br. 59, 65-66) that proposed Fed. R. Evid. 502 (56 F.R.D. 183, 234-235 (1973)) would have recognized a privilege in favor of persons making reports "required by law to be made" if the relevant state statute so provided. Proposed Rule 502 is irrelevant here for three reasons. First, New York's statute does not withhold information from the federal government in criminal cases, as previously noted. Second, the report in question was not "required by law to be made." Rather, it was the product of petitioner's voluntary application for benefits. Finally, and most fundamentally, the proposed rule of evidence relied on by petitioner was never adopted by Congress. During hearings on the proposed rule, witnesses expressed disapproval of the recognition of state privileges in federal criminal proceedings (see *Rules of Evidence (Supplement)*:

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[70] As the court of appeals observed (Pet. App. A22 n.22), state unemployment compensation statutes providing for disclosure of information to prosecuting authorities have been approved under the Federal Unemployment Tax Act. See Mass. Ann. Laws ch. 151A, § 46 (Michie/Law. Co-op. 1976); Wash. Rev. Code § 50.13.060, 50.13.070 (Supp. 1978). See also 43 Fed. Reg. 51473 (1978), noting the Secretary of Labor's approval of these statutes.

Hearings on the Proposed Federal Rules of Evidence Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 47, 49-50 (1973) (views of Senator McClellan)). Congress abandoned the proposed rule in favor of the current version of Rule 501, which provides that privileges in federal criminal cases are defined by the federal common law. See S. Rep. No. 93-1277, 93d Cong., 2d Sess. 6 (1974); H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8 (1973); H.R. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 7-8 (1974). See also *In re Grand Jury Impaneled January 21, 1975*, *supra*, 541 F.2d at 378-383.

c. Petitioner further argues (Br. 66-67) that the policies of the Fifth Amendment bar use of his admission. That contention was not raised in the court below and should not be reviewed here. See *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's argument is insubstantial.

Petitioner did not refuse to provide information to the New York Department of Labor on Fifth Amendment grounds or otherwise assert a Fifth Amendment privilege. Under these circumstances, he may not contend that use of his statement infringed the Fifth Amendment. See *Garner* v. *United States*, 424 U.S. 648, 655 (1976) ("[o]nly the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege. If, instead, he discloses the information sought, any incriminations properly are viewed as not com-

pelled."). See also *United States* v. *Kordel*, 397 U.S. 1, 7-13 (1970) (persons providing answers to interrogatories may not later assert "self incrimination" when those answers are used in a criminal prosecution); *California* v. *Byers*, 402 U.S. 424, 427-431 (1971) (statute requiring disclosure of information for general regulatory purposes does not result in "self incrimination").

Moreover, petitioner was not "compelled" to make any statement. Nor was he ever promised that his statement would be kept confidential—much less offered "immunity" from use of his statements in a criminal prosecution. Compare *New Jersey* v. *Portash*, No. 77-1489 (Mar. 20, 1979), slip op. 9.[71] Unlike taxpayers who are required to file tax returns (*Garner* v. *United States*, *supra*) or motorists who are required to furnish information about traffic accidents (*California* v. *Byers*, *supra*), petitioner was not subject to any legal obligation to make a statement. He therefore may not assert that he was forced to incriminate himself. *Garner* v. *United States*, *supra*, 424 U.S. at 654-656.

4. Finally, petitioner argues that his admission had "the dramatic impact of a written confession"

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[71] Although petitioner took the witness stand and testified at trial, he did not assert that he received any promise of confidentiality or immunity. The employee from the New York Department of Labor who communicated with petitioner and transcribed his statement testified that if petitioner had inquired about the use to which his statement could be put, he would have been informed that it could be turned over to the FBI (Tr. 278-279).

(Br. 68). He makes that assertion despite his recognition that the statement "did not significantly add to the government's evidence" (*ibid.*). We note that petitioner's "confession" consisted simply of a statement that he was fired for violating company rules and an admission that the charge of violating those rules was "true." The government clearly established these undisputed facts by independent proof (see pages 5-11, *supra*). Thus, although relevant and admissible, petitioner's statement was merely cumulative evidence.

Significantly, petitioner's admission said nothing whatsoever about the central issue in the case—the existence of *mens rea*. As petitioner notes (Br. 49), his "sole defense on the merits was that he denied having an intent to defraud." His prior admission was entirely consistent with his position at trial that, although he knew of his company's rules, he did not act with a state of mind sufficiently culpable to give rise to criminal liability. Since the admission had no bearing on petitioner's "sole defense," it is difficult to credit his assertion that it prejudiced him or that it forced him to take the witness stand (Br. 69).[72]

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[72] If, indeed, petitioner had been forced to take the witness stand to rebut the admission, one would expect that he would have presented contradictory evidence. To the contrary, however, he repeatedly admitted both on direct and cross examination that he used confidential client information for trading in the stock market, realizing that this constituted a violation of his company's rules and could lead to discharge (Tr. 475-521).

In sum, receiving petitioner's admission resulted only in duplication of undisputed evidence. The admission did not have any bearing on what petitioner designates as his "sole defense" on the merits. Under these circumstances, even if the district court committed error in receiving the admission, that error could not have affected the outcome of the trial. See *Kotteakos* v. *United States*, 328 U.S. 750, 757-765 (1946).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

(Gov. Ex. 18)

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