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Insider Trading: The Misappropriation Theory Ignored: Ginsburg's *O'Hagan*

DAVID COWAN BAYNE, S.J.*

> [The Ginsburg Majority] engages in the "imaginative" exercise of constructing *its own misappropriation theory from whole cloth. . . .* **[This] new theory . . . suffers from a . . . dispositive flaw**: It is not the theory offered by the Commission. Indeed, . . . *this . . . completely novel . . . theory has never been proposed by the Commission, much less adopted by rule or otherwise.*
>
> —Thomas, J., Dissenting in O'Hagan.[1]

Unfortunately—or perhaps to some, fortunately—the Supreme Court has yet to address the Misappropriation Theory. The conflicting Circuits, three to two,[2] remain in the same darkness that enveloped them before *United States v. O'Hagan*[3] came up on certiorari. Justice Ginsburg, who wrote the Supreme Court *O'Hagan*, completely bypassed the *Theory* considered by the five battling Circuits, then concocted her own *New Theory* in revealing detail, and accordingly concluded that James Herman O'Hagan was indeed in violation of this *New Theory.*

In short, the thesis of this Article is narrow and precise: The law of

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1. United States v. O'Hagan, 117 S. Ct. 2199, 2224, 2226 (1997) (Thomas, J., concurring in part and dissenting in part) (emphasis added).

2. The Second Circuit, progenitor of the Misappropriation Theory in *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992), had been joined by the Seventh Circuit in SEC v. Cherif, 933 F.2d 403 (7th Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992) and the Ninth Circuit in SEC v. Clark, 915 F.2d 439 (9th Cir. 1990). In 1995, the Fourth Circuit broke ranks in United States v. Bryan, 58 F.3d 933 (4th Cir. 1995), which was followed by the Eighth Circuit in United States v. O'Hagan, 92 F.3d 612 (8th Cir. 1996), *rev'd and remanded*, 117 S. Ct. 2199 (1997).

3. 92 F.3d 612 (8th Cir. 1996), *rev'd and remanded*, 117 S. Ct. 2199 (1997), *on remand*, 139 F.3d 641 (8th Cir. 1998).

Insider Trading is exactly where it was on the day the Eighth Circuit handed down *O'Hagan*. The Ginsburg Opinion never directly faced the concise question posed by the five Circuits: *Does the Misappropriation Theory conform to Section 10(b)?*

Because Justice Ginsburg avoided this question *judicially*, and founded her holding on a *New Theory* not before the Court, all else about the Misappropriation Theory itself is *obiter*. Thus, the lone purpose is to show that the *O'Hagan* majority spoke *adjudicatively* only about the Ginsburg *New Theory* and only *obiter* about the Misappropriation Theory.

The Consequences of This Narrow Objective

Thus sharply circumscribed, this Article will not move afield to a discussion of the ramified subjects raised by Ginsburg's *collateral* remarks about the Misappropriation Theory still awaiting a Supreme Court ruling.

These incidental reflections are meant to be a temptation—even a mandatory invitation—to later articles addressing the flaws long clouding the law of Insider Trading.

In direct response to this mandatory invitation, a second Article will join this present endeavor to complete a two-part Study of *O'Hagan*. "Insider Trading: Ginsburg's *O'Hagan:* Insider Trading Ignored"[4] will be forthcoming.

Consider the present Article as the opening salvo. A clearing-the-battlefield study toward other assaults on the remaining errors afflicting the law. Subsequent critiques of *O'Hagan*—bolstered by this two-part Study—are expected to facilitate a return to the rational days of the SEC's *Cady, Roberts*[5] and its progeny.

A Necessary Prelection

To set the scene, five rudimentary questions must be answered: (1) What, in intelligible layman language, is an Insider Trade? (2) How has the law traditionally treated this tort? (3) What is the Misappropriation Theory, in its original form as presented to the *O'Hagan* Court? (4) What are the unencumbered facts in *O'Hagan*? (5) How did the three Courts—District, Circuit, and Supreme—rule on these facts?

With these queries answered, the way will then lie open to show that the Ginsburg Majority did not, in fact, address the question before

4. David Cowan Bayne, S.J., *Insider Trading: Ginsburg's O'Hagan: Insider Trading Ignored* (forthcoming).

5. *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

it, but rather *constructed its own misappropriation theory from whole cloth,*[6] and thus conveniently reversed the Eighth Circuit. But, effectively finessing the Original Theory actually before it.

(1) *The Insider Trade in Primitive Simplicity*

Probably the root cause for the chaos in the law of Insider Trading and the muddled thinking of so many absurd holdings is ignorance of a basic truth: *The Insider Trade is a rudimentary scam.* It is not a complex concept. The essence of the trade is indistinguishable from the sale of an infertile bull, a house with an inoperable furnace, a car with a cracked engine-block.

Five pat *Fables* will penetrate the confusion in Ginsburg's *O'Hagan*. Keep these ABCs in mind:

The Case of the Nuclear Dump: The young couple, just now wed, trusted the long-time, esteemed land-developer and paid $150,000 for the new home. Only to join fifty other similarly-duped buyers who find that their homes lay atop acres of nuclear waste, long known to the builder. The postdiscovery value: $50,000.

The Dividend-less Widow: Emily Hotchkiss of Burr Oak, on the Kansas plains, having decided to unload her shares in Elmhurst Investment, approached that nice CEO toward a sale, and prudently asked if a dividend was in the offing on her common. The reply: "I won't know till the Board votes in New York. But meanwhile I will be happy to buy your shares at market."

The upshot: The following day the Widdie Hotchkiss sold to the CEO at $1.25. Three days later a $1.00 dividend was declared. The truth: The deceitful CEO had known full well that the dividend was already certain, and that the trusting Widow would get $1.25 for a share worth $2.25.[7]

The Stock Worth a Goldmine: In the prototypal *Texas Gulf Sulphur,*[8] the swindled seller sat on an "exploratory drill hole" of silver, zinc, and copper so remarkable that five TGS expert witnesses had never seen or heard of a comparable find.[9]

Yet, before the public announcement, the Insiders, with full knowl-

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6. Having rejected the [SEC's] description of its [misappropriation] theory, the majority then engages in the "imaginative" exercise of *constructing its own misappropriation theory from whole cloth.*

O'Hagan, 117 S. Ct. at 2224 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

7. *See* Hotchkiss v. Fischer, 16 P.2d 531 (Kan. 1932).

8. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969).

9. *See id.* at 843.

edge of the "goldmine," rushed to telephones, bought from thousands of unknowing shareholders, pocketed millions of dollars. Before the press release, TGS common had closed at 18. Two weeks later, it inevitably reached the rewarding level of 58-3/8.[10]

Vinnie the Markup Man: In the most celebrated Insider Trading case to date—and a chief contributor to the current quagmire—Vinnie Chiarella, working at Pandick Press, learned definitely and indisputably all the details of several impending takeovers. Thus armed, Vinnie bought low before, sold high after and "netted $30,000 from the innocent victims when the price jumped after the tender."[11]

James Herman O'Hagan, Con Man: The Dorsey law firm, largest in Minnesota, represented the Brit multinational Grand Met toward the takeover of the Pillsbury Doughboy. O'Hagan, Dorsey's top securities man, learned at the watercooler of the buyout by Grand Met, bought Pillsbury common from in-the-dark sellers, and sold after the news hit the press. Innocent Pillsbury shareholders lost $4 million to James Herman.[12]

(2) *The Legal Essentials of the Tort*

The crime of Insider Trading is none other than the common-law *tort* of *Deceit* codified into Section 10(b) of the 1934 Act,[13] and then criminalized by the addition of appropriate special penalties. The four *Essentials* of the basic tort, therefore, become by that very fact the intrinsic constituents of the *crime* of Insider Trading. This was the crime that sent, or should have sent, the five miscreants to jail in the real-life *Fables* highlighting the stripped-down essentials of the Insider Trade.

Hark back to its common-law genesis in 1909[14] and realize that the tort of Insider Trading must meet the five requisites of every tort: (1) Duty, (2) Breach, (3) Proximate Cause, (4) Damages, (5) Absence of Defenses.[15] Then adapt these to the "deceit" specifics: *A misstatement of a material fact, made knowingly, scienter, to induce reliance, with consequent reliance, and damages.*[16]

---

10. *See* SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 268 (S.D.N.Y. 1966).

11. David Cowan Bayne, S.J., *The Insider's Natural Law Duty:* Chestman *and the 'Misappropriation Theory,'* 43 U. KAN. L. REV. 79, 120 (1994).

12. The facts in these cases were adapted somewhat to conform to a "fable" format.

13. Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j (1988).

14. *See* Strong v. Repide, 213 U.S. 419 (1909).

15. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984).

16. *See* RESTATEMENT (SECOND) OF TORTS § 525 (1976). *See also* David Cowan Bayne, S.J., *Insider Trading: The Essence of the Insider's Duty*, 41 U. KAN. L. REV. 315, 321 (1992).

THE FEDERAL ADAPTION: SECTION 10(b)

In 1934, the Congress embodied these "deceit" basics in the securities laws, specifically in Section 10(b) of the Securities Exchange Act, which was in turn implemented by the Commission in Rule 10b-5.[17] *O'Hagan* centered on this Rule:

> Pursuant to its § 10(b) rulemaking authority, the Commission has adopted Rule 10b-5, which, as relevant here, provides:
>
> "It shall be unlawful . . .
>
> "(a) To employ any device, scheme, or artifice to defraud, [or]
>
> . . .
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,' "in connection with the purchase or sale of any security."[18]

In these words, for over sixty years, courts have found all the longtime requisites of common-law *deceit,* and later the specific tort of Insider Trading as first enunciated by the Supreme Court in *Strong v. Repide*[19] in 1909.

In the present context, these *Essentials* can be distilled into *four,* which thus facilitates an analysis of the five *Fables.* And in turn will shed light on *O'Hagan:* (a) *The Gravamen: Nondisclosure to the Investor*; (b) *A Simple Duty: To Disclose to the Investor*; (c) *The Victim: The Deceived Investor*; (d) *In Connection With a Deceitful Trade.*

Consider the five *Fables* in light of these four *Essentials* of Insider Trading:

(a) *The Gravamen: Nondisclosure to the Investor*

In each story the wrong, the Breach, was *Deception.* The deceitful land-developer hid the truth about the contaminated waste dump. The Kansas widow was not told the true value of her stock. The TGS Insiders failed to disclose the 'goldmine' beneath the public's stock. Vinnie lied to his sellers. James Herman conveniently forgot that the Investors' stock was undervalued by $4 million.

In every case, the essence of the Wrong was *a misstatement of a material fact, made knowingly,* with reliance and consequent damages. The *Breach* was *Deception.* Except for the home-buying couple—who were victims of a nonstock common-law land scam—each was an innocent Investor facing an Insider who traded on the basis of *undisclosed confidential information.*

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17. 17 C.F.R. § 240.10b-5 (1996).

18. *O'Hagan,* 117 S. Ct. at 2207 (quoting 17 C.F.R. § 240.10b-5 (1996)).

19. 213 U.S. 419 (1909).

(b) *A Simple Duty: To Disclose to the Investor*

Every malefactor of the Fables knew he had a *Duty to Disclose* any hidden defects in the product traded. He knew innately that his only legitimate advantage could come from *business acumen, honest research, market savoir,* and not from *contrivance* or *no-risk knowledge of a sure thing.* The nuclear waste, the declared-but-undisclosed dividend, the ready-to-be-mined ore, and the surefire price rises for Vinnie and James Herman were all facts that each withheld illegally.

Note especially that these illicit dollars were not earned through *astute analysis, sophisticated trading expertise, canny speculative impulse,* or even *the smile of Lady Luck.* Rather, the scam depended on *no-risk, reliable-not-conjectural, nonpublic information, relevant and material to an informed trade, which the duped had a right to know.* In short, the deck was stacked.

All five sharpsters subconsciously knew that they owed this Duty to Disclose to the innocent Investor with whom they dealt. While they may not have verbalized the ultimate moral foundation of this Duty, each felt in his heart that he should *protect a fellow human* from a disaster he could easily avert by the truth.[20] That he should not be *dishonest.* That he should not *lie.* These obligations are innate, common to all men, known by all.[21] Each knew he was *taking unfair advantage* of an innocent.

(c) *The Victim: The Deceived Investor*

No dispute could possibly arise as to the identity of the Victim defrauded. In every Fable, the Innocent faced a deliberate lie from the other side of the trade. This was the central point of each story, and clear beyond doubt. But a corollary factor was also of special note.

The noteworthy factor: None of the Victims cared a whit about *how* or *where* the Insider learned of the undisclosed Information—*how* or *where* the land-developer originally discovered the nuclear hazard, or the CEO was told of the dividend declaration, or the TGS experts became privy to the ore bonanza, or Vinnie figured out the names of the takeover targets, or James Herman got the word of the secret takeover. The key consideration was the lone fact: The Insider *did actually have* secret information, and *acted on it* to deceive his fellow trader, and gain illicit dollars.

20. *See* Bayne, *supra* note 16, at 340, 341.

21. *See* David C. Bayne, S.J., *The Natural Law for Lawyers—A Primer,* 5 DEPAUL L. REV. 159, 171-85 (1956) (*especially* at 181-85). *See also* DAVID COWAN BAYNE, S.J., CONSCIENCE, OBLIGATION, AND THE LAW 93-110 (2d ed. 1986).

(d) *In Connection With a Deceitful Trade*

Obviously the Deception of all the Victims occurred *during, as integral to, through,* the business transaction. The *Fraud was consummated* in the trade. The *Deceit* did not antedate the transaction, but was practiced on the Victim during the trade.

The first *Fable,* it should be noted, purposely carried a special message. In it, the *Deceit* was practiced, not in a securities sale on an Investor, but on home buyers in a real-estate sale. *The Case of the Nuclear Dump* was a fictional concoction—all the others were based on actual court cases—to illustrate two important relevancies:

> (1) That the *essential* fraud in the Insider Trade is *substantively indistinguishable* from common-law *Deceit,* which covers all manner of transaction-related duplicity, as in the sale of a horse, a car. Or a house.
>
> (2) That the *Deception* in a Section-10(b) stock fraud acquires its *accidental differentiation* from its common-law, nonstock, counterpart solely by the addition of the statutory requisite that the *Deception* must be perpetrated *"in connection with"* a securities transaction.

(3) *The Original Misappropriation Theory*

Conveniently, the essential elements of the Misappropriation Theory were fully formulated at an early date in its brief history—in spite of a "somewhat harrowing evolution"[22]—and were authoritatively stated in a consensus definition by the Ninth Circuit's *Clark,* and repeated by the Fourth:

> Those courts that have adopted the misappropriation theory with which we are concerned in this case have read section 10(b) and Rule 10b-5 to authorize the criminal conviction of a person who *(1) misappropriates material nonpublic information (2) by breaching a duty arising out of a relationship of trust and confidence and (3) uses that information in a securities transaction, (4) regardless of whether he owed any duties to the shareholders of the traded stock.*[23]

This consensus definition will later be analyzed under its four Essentials: A. *The Gravamen: Theft of Information.* B. *A Fiduciary Duty: Not To Steal.* C. *The Victim: The Owner of Information.* D. *With No Connection With a Deceitful Trade.*

22. *United States v. Bryan,* 58 F.3d 933, 953 (4th Cir. 1995).

23. *Id.* at 944 (quoting SEC v. Clark, 915 F.2d 439, 443 (9th Cir. 1990)) (emphasis added).

This was the Theory before all five Circuits, as well as the *O'Hagan* District Court that relied on it to convict Mr. O'Hagan. This, moreover, is the Original Theory—here presented in its most succinct form, without commentary or analysis—that will be the focus of this study of Ginsburg's *O'Hagan.*

(4) *The Plight of James O'Hagan*

Sadly, James Herman O'Hagan had a checkered past. As a senior partner in Minnesota's most prestigious law firm, Dorsey and Whitney, O'Hagan, at 56, had already been convicted of theft from a Dorsey client-trust-fund and sentenced to eight concurrent prison terms. Next, he was found guilty of $750,000 in tax delinquencies,[24] was the subject of a lengthy SEC investigation in the late eighties, and was then disbarred. Now he faces criminal charges for blatant Insider Trading, which had yielded him an undeserved $4 million.[25]

In the process of gaining $4 million and evoking criminal charges, Mr. O'Hagan gave the legal world the fifth *Fable*, the story of an elemental—even naive, for a securities lawyer—Insider Trade, that will rank with Mr. Chiarella's of *Chiarella*[26] infamy. The O'Hagan story was simplicity itself.

> In approximately July of 1988, Grand Met . . ., a large diversified company based in London, England, retained Dorsey & Whitney as local counsel because Grand Met was interested in acquiring the Pillsbury Company . . ., a Minneapolis, Minnesota, company.[27]

With incontrovertible information in hand, Mr. O'Hagan secretly over a two-month period, systematically amassed a sizable amount of Pillsbury common stock. "On October 4, 1988, Grand Met publicly announced its tender offer for Pillsbury stock."[28]

With that, the inevitable happened.[29] "Pillsbury stock immediately

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24. *See* O'Hagan v. United States, 86 F.3d 776 (8th Cir. 1996).

25. *See* Kevin G. Salwen, *SEC Files Charges of Insider Trading in Pillsbury Offer*, WALL ST. J., Jan. 11, 1990, at A6. *See also Ex-Attorney Convicted in Inside-Trading Case Tied to Pillsbury Deal*, WALL ST. J., Feb. 11, 1994; *Former Lawyer Told to Pay $7.7 Million for Insider Trading*, WALL ST. J., Aug. 11, 1995.

26. Chiarella v. United States, 445 U.S. 222 (1980).

27. United States v. O'Hagan, 92 F.3d 612, 614 (8th Cir. 1996). Paul J. Deveney, *World Watch*, WALL ST. J., Dec. 16, 1997 at A12. In more recent developments, Grand Met has now become, with Guinness, Diageo.

28. *O'Hagan*, 92 F.3d at 614.

29. "'When a tender offer is announced, usually the price of the target company rises and the price of the offeror falls or remains the same.'" *O'Hagan*, 92 F.3d at 614 n.3 (quoting SEC v. Maio, 51 F.3d 623, 628 n.3 (7th Cir. 1995))."

rose from $39 per share to almost $60 per share."[30] The result: Mr. O'Hagan "realized a profit of over $4,000,000"[31] at the expense of innocent, unknowing Investors who had originally sold to O'Hagan without the knowledge of the forthcoming takeover and the true value of its stock. O'Hagan's Inside Information was

> **reliable, not conjectural, nonpublic, relevant and material to an informed trade . . . which . . . the Shareholder has a right to know**[32]

as the *Compendium*[33]—a detailed, studied, exact delineation of all the elements of the Insider's Duty—succinctly laid out in the "Formal Statement of Insider Duty" in *Essence* in 1992.[34]

(5) *The Judicial Process Takes Over*

The SEC soon began the judicial process against O'Hagan, a successful attorney for 26 years, "highly respected by clients and fellow attorneys[,] . . . specializing in . . . securities cases."[35] Shortly, the SEC secured a fifty-seven count indictment in the District Court in Minnesota on the grounds of mail fraud, securities fraud, and money laundering.

> The case proceeded to trial, and a jury convicted O'Hagan on all 57 counts. The district court sentenced O'Hagan to 41 months of imprisonment. O'Hagan appeals.[36]

This conviction was founded solely on the Misappropriation Theory, with no alternative reliance.

On appeal, the Eighth Circuit vacated—remarkably to O'Hagan—all of O'Hagan's convictions. But the core of the reversal was *the invalidation of the insider-trading count.* Since the mail fraud and money laundering depended on the Section-10(b) violation, both fell when Judge Hansen, writing for a 2-to-1 majority, found: *The Misappropriation Theory does not conform to Section-10(b) requisites, and hence will not support a conviction of James O'Hagan.*[37]

This was a narrow holding, and sent the Circuits into a 3-to-2 conflict.

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30. *O'Hagan*, 92 F.3d at 614.
31. *Id.*
32. Bayne, *supra* note 16, at 353.
33. *Id.* at 352-53.
34. *Id.*
35. State v. O'Hagan, 474 N.W.2d 613, 615 (Minn. 1991).
36. *O'Hagan*, 92 F.3d at 614.
37. *Id.* at 613-14. *See also* David Cowan Bayne, S.J., *Insider Trading: The Demise of the Misappropriation Theory—And Thereafter*, 41 ST. LOUIS U. L.J. 625, 629 (1997).

To the Ginsburg Court

In 1997 the Supreme Court at last decided to face the chaos of the conflict, or so the Bench, Bar, and investing public had hoped. The Circuits were now in a black-and-white split. The Second led the charge, and was in fact the creator of and principal protagonist for the Misappropriation Theory, albeit weakly, with an inconclusive 6-to-5 en banc bench.[38] Aligned with the Second were single, and half-hearted, opinions by the Seventh and Ninth.[39]

The *Bryan*[40] opinion, by the brilliant Judge J. Michael Luttig, was the first to break sharply with the Theory. Judge Hansen and the Eighth in *O'Hagan* retraced *Bryan*. This set the stage for certiorari and reversal by Ginsburg's *O'Hagan*, 6 to 3. Justice Clarence Thomas wrote a dissent, joined by Justice Scalia and Chief Justice Rehnquist. Justices Breyer, Kennedy, O'Connor, Souter, and Stevens joined the Majority, but in silence.

The Court also addressed a tender-offer question involving fraudulent practices under Section 14(e) of the 1934 Act[41] and Rule 14e-3(a).[42] It affirmed the Eighth Circuit and ruled that the Commission did not exceed its rulemaking authority in enacting Rule 14e-3(a).[43] This ruling does not sufficiently concern the Misappropriation Theory to warrant specific comment. So too with the mail and wire fraud.[44]

Michael R. Dreeben, Deputy Solicitor General of the United States, argued for the Government and John D. French, of Fagre & Benson of Minneapolis, argued for Mr. O'Hagan.

On remand, a hapless District Judge in Minnesota will face a bewildered Mr. O'Hagan still awaiting his fate.

The Task at Hand

The burden resting on this Article is to lay out successively: I. THE ORIGINAL MISAPPROPRIATION THEORY SPLITTING THE CIRCUITS, II. THE NEW THEORY OF GINSBURG, and III. THE TWO 'THEORIES' IN JUXTAPOSITION.

38. United States v. Chestman, 947 F.2d 551 (2d Cir. 1991), *cert. denied*, 503 U.S. 1004 (1992).

39. *See* SEC v. Cherif, 933 F.2d 403 (7th Cir. 1991), *cert. denied*, 502 U.S. 1071 (1992) *and* SEC v. Clark, 915 F.2d 439 (9th Cir. 1990) respectfully.

40. United States v. Bryan, 58 F.3d 933 (4th Cir. 1995).

41. Securities and Exchange Act of 1934, § 14(e), 15 U.S.C. § 78n(e) (1988).

42. 17 C.F.R. § 240.14e-3(a) (1996).

43. *See generally O'Hagan*, 117 S. Ct. at 2214-17 (considering the grant on which the appellate court reversed O'Hagan's convictions for fraudulent trading with a tender offer).

44. *See id.* at 2219-20.

I. The Original Misappropriation Theory Splitting the Circuits

The short life of the Misappropriation Theory was detailed over many pages in "*Chestman* and the Misappropriation Theory"[45] in 1994. Furthermore, all three pro-Theory Circuits—the Second, the primary proponent with *Chestman*,[46] the Ninth in *Clark*,[47] and the Seventh with *Cherif*[48]—were unanimous in their definition of the *Theory.* Its essentials were clear to all, especially Mr. O'Hagan.

Moreover, this unqualified definition was followed in both dissenting Circuits—Judge Luttig's superb *Bryan*[49] opinion in the Fourth and Judge Hansen in the recently ill-treated, or more accurately untreated *O'Hagan*[50] in the Eighth.

The beauty of the present endeavor lies in the unsullied and unqualified definition of the *Theory* now to be laid out. This is the Theory that the five Circuits presented to Ginsburg but she conveniently ignored.

The Unchallenged Theory

In the fourteen years of its "somewhat harrowing evolution,"[51] the Misappropriation Theory reached its crystallized form early in life.

Judge Luttig, speaking for the Fourth Circuit in *Bryan*, defined the "particular theory of misappropriation adopted by our sister circuits,"[52] the Second, Seventh and Ninth. In doing so, he used the Ninth's *SEC v. Clark*:

> Those courts that have adopted the misappropriation theory with which we are concerned in this case have read section 10(b) and Rule 10b-5 to authorize the criminal conviction of a person who *(1) misappropriates material nonpublic information (2) by breaching a duty arising out of a relationship of trust and confidence and (3) uses that information in a securities transaction, (4) regardless of whether he owed any duties to the shareholders of the traded stock.*[53]

45. Bayne, *supra* note 11, passim.
46. United States v. Chestman, 947 F.2d 551 (2d Cir. 1991), *cert. denied,* 503 U.S. 1004 (1992).
47. SEC v. Clark, 915 F.2d 439 (9th Cir. 1990).
48. SEC v. Cherif, 933 F.2d 403 (7th Cir. 1991).
49. United States v. Bryan, 58 F.3d 933 (4th Cir. 1995).
50. United States v. O'Hagan, 92 F.3d 612 (8th Cir. 1996), *rev'd and remanded,* 117 S. Ct. 2199 (1997).
51. *Bryan*, 58 F.3d at 953.
52. *Id.* at 944.
53. *Id.* (quoting *Clark*, 915 F.2d at 443) (emphasis added).

Most important, this definition—consistently unqualified by all five Circuits that have treated it—was also followed in the District Court's *O'Hagan*.[54] In short, James Herman O'Hagan was subjected to this meaning of the Theory. This was the Theory that sent him to jail.

This was the same *Theory*, moreover, that both the dissenting Circuits found foreign to Section 10(b) of the 1934 Act.[55]

The Four Essentials of the *Original Theory*

As deducible from the definition, four major Essentials demand analysis: A. *The Gravamen: Theft of Information.* B. *A Fiduciary Duty: Not To Steal.* C. *The Victim: The Owner of Information.* D. *With No Connection With a Deceitful Trade.*

A. *The Gravamen: Theft of Information*

The unanimity of the three Theory Circuits makes this breakdown effortless. The Second Circuit, however, was far-and-away the chief protagonist, and its en banc *Chestman* was the Second's definitive pronouncement on the Theory. But, as a caveat for future courts, recall this evaluation, written in 1994, of the validity of the Second's *Chestman*:

> *Chestman*, moreover, was itself the epitome of dissonance. The eleven Judges were divided in a six-five split. The majority Opinion by Meskill, reversing the District Court, was a mishmash. The dissent by Judge Winter was divisively compelling. Two Judges added to the confusion with third and fourth opinions. Note too that the six-five split was a reversal of an earlier three-Judge Second Circuit panel, which itself had three separate opinions. (In this disarray, it approaches an affront to the Second Circuit to attribute the holding to the entire bench. Instead of the *Chestman* Court, perhaps better, the Meskill Majority. And the Winter Five.)[56]

To *Chestman*'s dissonance, add the flaccid support for the Theory by the Seventh's *Cherif* and the Ninth's *Clark* by Judge Cynthia Holcomb Hall.

As an equal voice in the *Chestman* 6-5 Opinion, Judge Winter of the Winter Five summed up the Theory position on the core concept:

> *[T]heft* rather than fraud or deceit, seems the *gravamen* of the [misappropriation] prohibition.[57]

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54. SEC v. O'Hagan, 901 F. Supp. 1461, 1463-64 (D. Minn. 1995).

55. 15 U.S.C. § 78j(b) (1995).

56. Bayne, *supra* note 11, at 83.

57. *Chestman*, 947 F.2d at 578 (Winter, J., concurring in part and dissenting in part) (emphasis added).

This broad-brush characterization is confirmed by the Meskill Majority in *Chestman*:

> Under this misappropriation theory, the "fraud" requirement of Rule 10b-5 is deemed to be satisfied when a person "*misappropriates* material nonpublic information in breach of a fiduciary duty or similar relationship of trust and confidence."[58]

The first glimmering of the Theory in *Newman*[59] went further and adduced *mere* Theft as an essential element of the Theory.

> Because the [*Newman*] court held that Rule 10b-5's predicate *fraud* requirement was established through the *mere theft* of the confidential information, it undertook no inquiry into whether there was the statutorily required deception.[60]

The Seventh Circuit's *Cherif* in 1991 was the most emphatic in citing *Theft* as the gravamen of the Theory. *Cherif* had openly opined that the Theory would apply "*even to 'mere' thieves*,"[61] without any breach of a fiduciary duty. The other two Circuits, somewhat inexplicably, always required that the "thief" also be a "fiduciary." Only thieving trustees or thieving agents or thieving friends were liable under the Theory.

The Fourth Circuit's *Bryan* opinion aptly summed up this integral role of *Theft* in the Theory and supplied the perfect segue to the second element, a "fiduciary duty":

> Moreover, while the courts adopting the misappropriation theory incant that the breach of a fiduciary relationship is a necessary element of the offense, in principle, if not in reality, these courts would be obliged to find liability in the case of *simple theft* by an employee, *even where no fiduciary duty has been breached*, for the *raison d'etre* of the misappropriation theory in fact is concern over "the unfairness inherent in trading *on [stolen] information*."[62]

B. *A Fiduciary Duty: Not to Steal*

This second Essential of the Theory is a perplexing concoction. Not only is it two-part, but it is a disturbing blend of two ill-fitting parts. The first part, *The Simple Duty Not To Steal,* has been joined with the far narrower obligation, *The Fiduciary Duty Binding the Thief.*

58. *Bryan*, 58 F.3d at 944 (quoting *Chestman*, 947 F.2d at 566) (emphasis added).

59. United States v. Newman, 664 F.2d 12 (2d Cir. 1981), *cert. denied,* 464 U.S. 863 (1983).

60. *Bryan*, 58 F.3d at 954 (emphasis added).

61. *Cherif,* 933 F.2d at 412 n.6 (emphasis added).

62. *Bryan*, 58 F.3d at 951 (quoting *Chiarella*, 445 U.S. at 241 (Burger, C.J., dissenting)) (emphasis added).

The analysis of this strange junction of two disparate, almost foreign, duties requires separate treatment.

(1) *Unadorned Misappropriation*

The first half of this unusual two-pronged obligation, *The Simple Duty Not To Steal,* flows directly as an immediate corollary from the first of the Theory Essentials, *Theft.*

Since *Misappropriation—stealing* to be blunt (in a paraphrase of Chief Justice Burger[63])—is the *Wrong* condemned by the Theory, the *Duty* which was violated in order to commit the *Wrong,* must perforce be: *Do Not Steal.*

The reasoning is ready: Move from the *Violation* of the law to the *Duty* that the violation violated. If the offense is Misappropriation, *Theft,* the *Duty* necessarily must be: *Not To Steal.* From the malefaction *Theft,* the illation to the *Simple Duty Not To Steal* can easily be made.

(2) *The Limitation to Fiduciary Thieves*

But "*misappropriation,*" without more, says nothing about stealing by *a trusted fiduciary.* Mere misappropriation is mere theft. *Webster's* is just that succinct:

> **mis•ap•pro•pri•ate** . . . *vt* (1857) : to appropriate wrongly (as by theft or embezzlement) . . . .[64]

That is the whole of *Webster's* definition. No mention of "theft by a trustee, or a fiduciary, or a lawyer or priest or trusted friend."

In short, the first Essential, *Theft,* stopped with Item (1) of the *Chestman* consensus:

> (1) misappropriates material nonpublic information . . . .[65]

and said nothing about limiting the crime of Insider Trading to trustees or fiduciaries, nor did it talk about absolving *all those insider traders who are* nonfiduciary, "*mere thieves.*"

The Genesis of the Fiduciary Thief

The Misappropriation Theorists inherited the "*fiducial*" element—albeit not the "*theft*" requisite—from *Chiarella*[66] a year before the 1981

63. *See* Chiarella, 445 U.S. at 245 (Burger, C.J., dissenting).

64. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1247 (1988).

65. *See Bryan,* 58 F.3d at 944 (citing *Clark,* 915 F.2d at 433).

66. 445 U.S. 222 (1980).

> In the late 70's . . . [New York attorney Stanley S.] Arkin took the case of Vincent Chiarella, a financial printer who had traded on information he came across in his work. Arkin fought all the way to the Supreme Court, and there he had

decision in *Newman*.[67] The result was this remarkable anomaly: The limited few liable under the Theory for Insider Trading must possess *two* distinct qualities: *First,* they had to be thieves. But then, *second,* they also had to be trusted confidants of the Victim of the Theft. Mere thieves were seemingly guiltless.

And *Chiarella* was not a Theory case at all, but simply an inexplicable aberration from the mainstream common-law Deceit of the SEC's prototypal *Cady, Roberts*.[68] *Chiarella* got its "fiduciary" accretion because the Timorous Powell did not want to hold "*any person,*"[69] every person, to honesty in a security trade. He felt only a trusted friend was bound to own up to the true value of a stock. Everyone else had no obligation to tell the truth.[70] Think that over. *The only persons liable for Insider Trading are Thieving Fiduciaries.*

And so, Powell's irrational "*fiduciary*" accretion in *Chiarella* was picked up unthinkingly by *Newman,* and mouthed ever after, finally to end up as Item (2) in the *Chestman* consensus:

> (2) by breaching a duty arising out of a relationship of trust and confidence. . . .[71]

This appendage was described at length in "The Awakening"[72] in these somewhat dramatic, but accurate, terms:

> The Deus ex Machina: Fiduciary Duty
>
> The Theorists then proceeded to roil the waters further by intruding the equally foreign concept of '*fiduciary duty*' into that of 'theft.' It was not enough that 'theft' sup-

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> Chiarella's conviction overturned by securing a narrower definition of insider trading.

Peter Truell, *Combative Lawyer for Aggressive Brokers Is in Demand,* N.Y. TIMES, Feb. 18, 1998, at D2. Truell did not emphasize that Mr. Arkin overcame the two-court rule and could thereby be called the sire of *Chiarella.* He certainly gave Justice Powell some needed moral support.

67. United States v. Newman, 664 F.2d 12 (2d Cir. 1981).

68. *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961). *See* David Cowan Bayne, S.J., *The Insider's Natural-Law Duty:* Chiarella *and the 'Fiduciary' Fallacy,* 19 J. CORP. L. 681 (1994).

69. Section 10(b) states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (1988) (emphasis added).

70. *See generally* Bayne, *supra* note 68, at 714-20 (discussing the five Chiarella relationships).

71. *Bryan,* 58 F.3d at 944 (quoting *Clark,* 915 F.2d at 443).

72. David Cowan Bayne, S.J., *Insider Trading and the Misappropriation Theory: The Awakening, 1995,* 30 LOY. L.A. L. REV. 487 (1997).

> planted 'deception.' Now the 'theft' had to be perpetrated by a trusted fiduciary! Eventually the canonized definition of the Theory joined the '*theft*'—seemingly inextricably, certainly inexplicably—with a '*breach of fiduciary duty.*' Liability then resulted only when a person
> 1) *misappropriates* material nonpublic *information* (2) by *breaching a duty* . . . of *trust*. . . .[73]

All five Circuits faced this accretion that was present in the consensus definition of the Misappropriation Theory. Two of the five accepted it without comment.[74] The Seventh in *Cherif*, however, had its doubts, wondering if it should be present at all. The Seventh feared that "*mere thieves*," without any fiducial bond to the Victim, would also be liable under the Theory.

However, the Fourth, in *Bryan*, and the Eighth, in *O'Hagan*, rejected the "*fiduciary*" requisite out of hand.

C. *The Victim: The Owner of Information*

The same indisputable logic that drove the Theory from (1) the *offense* of *Theft* to (2) the *Duty Not To Steal*, moved the Theory to the conclusion that (3) the only possible *Victim* of a *Theft*—he who was harmed by the breach of the *Duty Not To Steal*—had to be he from whom the information was stolen. The causal impact of the wrong, *Theft*, inexorably ran from malefaction to Victim.

In *Chestman*, the Victim of the Theft of the Information was the wife, Susan Loeb—the female ingénue in the Supermarket Soap[75]—who "owned" some secret information.

In *Cherif*, the poor Victim was First Chicago, the bank whose security system Danny Cherif penetrated to get confidential information on merger targets, which defrauded innocent—and never requited—sellers.[76]

In *Clark*, a British firm was damaged—although it lost not a farthing—because Clark, an employee, secretly learned of one of its forthcoming acquisitions and later cheated an unknowing public.[77]

In *Bryan*, the Victim was the state lottery.[78] In *O'Hagan*, Grand Met and the Dorsey law firm. But never the deceived Investors.[79]

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73. *Id.* at 504-04 (*quoting Bryan*, 58 F.3d at 944 (diting *Clark*, 915 F.2d at 433) (emphasis added)).
74. SEC v. Cherif, 933 F.2d 403 (7th Cir. 1991).
75. Bayne, *supra* note 11, at 84-86.
76. 933 F.2d at 403.
77. 915 F.2d at 439.
78. 58 F.3d at 933.
79. 117 S. Ct. at 2199.

Of course, in *O'Hagan* James Herman O'Hagan fleeced his sellers of over $4 million. And in all the Theory cases, the public traders lost substantial sums in similar securities sales. But under the Theory the public Investor was not the Victim. The *source of the information* was the aggrieved one, the only object of the Theory's solicitude.

The first Theory case, *Newman*, was responsible for putting this third Theory Essential on the books:

> "The Court [in *Newman*] was . . . influenced by *the damage inflicted on* the insider trader's *employer by a conniving employee*."[80]

Each succeeding Theory case endorsed this tenet, and it became engrafted on the Theory ever after.

D. *With No Connection With a Deceitful Trade*

This last and fourth Essential of the Theory has both *negative* and *positive* aspects—the obverse and reverse of the same coin—that demand individual treatment. In order to understand this fourth Essential well, both aspects will be studied in order, the negative first and then the positive: (1) *No Relation to a Securities Trade* and (2) *In a Theft of Information.*

Note that the formal description of the fourth Essential—and the heading of this subsection—is couched in negative terms, for good reason. The Original Misappropriation Theory—here now delineated—is later to be juxtaposed with Justice Ginsburg's New Theory, and for such a comparison the *negative* aspect of the fourth Essential is most appropriate.

(1) *No Relation to a Securities Trade*

This fourth Essential of the Theory owes its existence to the statutory requirement of the 1934 Act: That the *Deception* occur *"in connection with the purchase or sale of any security."*[81] This phrase concluded Rule 10b-5.

The Origin of the Phrase

When the tort of common-law Deceit was codified into the Securities Exchange Act of 1934 as Section 10(b),[82] *"in connection with"* was tacked on almost as an afterthought. Arguably, an astute tort practitioner would find it an unnecessary appendage, assuming that the *deceit* would necessarily be practiced *on a trader during the transaction.*

80. *Bryan*, 58 F.3d at 955 (quoting *Cherif*, 933 F.2d at 409) (emphasis added).

81. 17 C.F.R. § 240.10b-5 (emphasis added).

82. 15 U.S.C. § 78j(b) (1995).

The rationale for the SEC's addition of the phrase, however, was clear. Common-law *"deceit"*—an ancient tort—covered the *deception of any trader in any of a multitude of trades*, involving every conceivable kind of transaction, from the sale of a horse to the sale of a house.

The SEC wanted to be indubitably specific by adding an explicit condemnation of *Investor Deception in connection with* a particular class of transactions, *the purchase or sale of securities*. This phrase was designed to guarantee to the Investor his right to know the true value of the stock he was trading.

The Legislative History in a Nutshell

In one arresting account of the exact meaning of *"in connection with"* from the pen of an original draftsman of the statute, all questions about *Theft from the Source* evanesce.

Read the words of Milton Freeman, the "Father of the Proxy Rules," and try to discern even the semblance of the Misappropriation Theory:

> It was one day in the year 1943, I believe. I was sitting in my office in the S.E.C. building in Philadelphia and I received a call from Jim Treanor who was then the Director of the Trading and Exchange Division. He said, "I have just been on the telephone with Paul Rowen," who was then the S.E.C. Regional Administrator in Boston, "and he has told me about the president of some company in Boston who is going around buying up the stock of his company from his own shareholders at $4.00 a share, and he has been telling them that the company is doing very badly, whereas, in fact, the earnings are going to be quadrupled and will be $2.00 a share for this coming year. Is there anything we can do about it?" So he came upstairs and I called in my secretary and I looked at Section 10(b) and I looked at Section 17, and I put them together, and the only discussion we had there was where "in connection with the purchase or sale" should be, and we decided it should be at the end.
>
> We called the Commission and we got on the calendar, and I don't remember whether we got there that morning or after lunch. We passed a piece of paper around to all the commissioners. All the commissioners read the rule [Rule 10b-5] and they tossed it on the table, indicating approval. Nobody said anything except Sumner Pike who said, "Well," he said, *"we are against fraud, aren't we?"* That is how it happened.[83]

83. Milton Freeman, *Conference on Codification of the Federal Securities Laws: Administrative Procedures*, 22 Bus. Law. 793, 891, 922 (1967), *quoted in* Lanza v. Drexel & Co., 479 F.2d 1277, 1290 n.32 (2d Cir. 1973) (emphasis added).

That should suffice for the intent of the Commission and the meaning of codified common-law Deceit in Section 10(b) and Rule 10b-5.

The Theorists and *"In Connection With"*

The Theorists seemed to be moving along quite well with the first three Essentials of their consensus definition of the Theory. They reached three clear-cut elements:

> (1) *The Gravamen: Theft of Information,* (2) *A Fiduciary Duty: Not To Steal* and (3) *The Victim: Owner of Information.*

These three all flowed with irrefutable logic from the clear wording of the consensus definition:

> (1) misappropriates material nonpublic information (2) by breaching a duty arising out of a relationship of trust and confidence.[84]

But at this point in their reasoning, the Theorists were brought up short: How could the (1) *Theft of Information* (2) By a *Trusted Thief* (3) From the *Owner of Information* possibly be *"in connection with"* a stock sale? No such sale was present. At each level, the Theorists faced a brick wall: How connect the *Theft of Information* to a securities sale? Clearly, no connection actually existed. But the Code provision was mandatory: A connection must exist, or no Section 10(b).

The Theorists' Threefold Dilemma

Consider each of the first three Essentials in turn: (1) The *Gravamen* of the Wrong according to the Theory was indisputably *Theft of Information.* Stealing was the heart of the tort of Theft. But obviously, the *Theft of Information* from an employer had no relation whatever to a *purchase or sale of a security.* Therein lay the dilemma.

Next, (2) *A Fiduciary Duty Not To Steal* was clearly the obligation burdening the *Trusted Thief.* But once again, such a strange duty says nil about a securities trade. The Theory's quandary deepened.

As to (3) *The Victim: Owner of Information,* the Theorists were completely stymied. The "owner"— whether an employer or Susan of the Supermarket, First Chicago or the unscathed Brits—knew absolutely nothing about any stock trade, had no involvement whatsoever with any defrauded Investors. The Victim *presumably* was only unhappy about having his privacy invaded. The Theorists called it *"stealing."* An actionable wrong, no doubt, but with *No Relation to a Securities Trade.*

So, at every turn, the Theorists were unable to find a *"connection with a purchase or sale of any security."* A dilemma indeed.

84. *Clark,* 915 F.2d at 443 (emphasis added).

The Genesis of the Dilemma

The question naturally arises as to just how the Theorists ever wandered into this cul-de-sac. The answer is recent history, and is traceable—as with so many insider-trading ills—once again to that recent deviant, *Chiarella.*[85]

As before, the deviation is referable to the Timorous Powell, who could not bring himself to find Vincent Chiarella guilty of cheating his sellers out of $30,000 by lying about the value of their stock. Why he pitied the crooked Vinnie, and not the pitiable Innocents, remains perplexing.

Justice Powell knew well that Vinnie was guilty. Both lower courts had so found him. But the Supreme Court, by Mr. Justice Powell, nevertheless said he committed no wrong, His conviction was reversed.[86] Why?

The Court's answer had to be, and was: Vinnie had no Duty to tell the Truth to his sellers, the public Investors.[87] So, with no *Duty,* a *Breach* was impossible. Hence, no *Liability.* That holding has bedevilled the courts and the Commission ever since.

> The disputes among the Justices in *Chiarella* lead us to doubt that it will be the Supreme Court's last word on Rule 10b-5.[88]
>
> —Judge J. Skelly Wright, D.C. Circuit.
>
> The *Chiarella* opinion is . . . an enigma.[89]
>
> —Judge R.K. Winter, Second Circuit.

The Commission, the Bench, and the Bar have been at wit's end for the last eighteen years trying to circumvent *Chiarella.* But with no success.

With *Chiarella* vividly in mind, the Theorists knew that all latter-day Vinnies would henceforward *not* be liable for Insider Trading under Powell's contortion of traditional Section-10(b) reasoning. On the other hand, the Theorists also knew, viscerally, that these deceiving Vinnies *should* be liable, and were, in truth, guilty.

The Theorists knew, for example, that James Herman O'Hagan was guilty as sin when he lied to his sellers about the value of their stock, but under *Chiarella,* O'Hagan owed them no Duty to disclose the truth and was thus not liable. Therefore, the Theorists reasoned—instead of attacking *Chiarella* head-on in a return to the SEC's *Cady, Roberts*—that the route to circumventing *Chiarella* must be in some other gambit.

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85. *See* Bayne, *supra* note 68. *See also* Bayne, *supra* note 11, at 95-105.
86. *See Chiarella* 445 U.S. at 222.
87. *See* Bayne, *supra* note 68.
88. Dirks v. SEC, 681 F.2d 824, 837 (D.C. Cir. 1982) *rev'd,* 463 U.S. 646 (1983).
89. *Chestman,* 947 F.2d at 551, 575 (Winter, J., concurring in part and dissenting in part).

Perhaps, they must have conjectured, liability could be cooked up somewhere else in the facts. Somewhere where the right-less Investor is not involved at all, but where O'Hagan can be found guilty of something else. Something else like the Theft of Information. Then, O'Hagan would be liable and the Theory could *call* it Insider Trading.

Behold. *Chiarella* will be finessed and O'Hagan will be liable.

Thus the Dilemma arose. Now, what to do? How implement the Theorists' reasoning? How could the deceiving traders of the future be found guilty *in spite of* the *Chiarella* aberration? How bypass *Chiarella*?

The Delicacy of the Dilemma

Undeniable logic left no room in the Theory, as it had thus developed, for a *Wrong to the Investor during a Securities Transaction.* The only Wrong according to the Theory was Theft from an Owner of Information. Yet, the Wrong still had to be a Wrong, but how could it be: *In connection with a Deceitful Trade*?

The dilemma was ticklish. On the one hand, Section 10(b) was bald: *"In connection with"* a securities trade. This statement was decades old, enforced without dissent.

But, the Theory was equally bald: *The Gravamen* was *Theft of Information* from the *Victim*, the *"Owner" of Information.* The channel between these rocks was treacherous.

The Dilemma Solved

The Theorists were ingenious and up to the task. To implement their conjectural reasoning, they devised a devious solution: Twist the Theory in such a way that the latter-day Vinnies (1) *Would be declared liable for "Insider Trading"*—thereby escaping the effect of *Chiarella*'s guiltless Vinnie and the right-less Investor—*but (2) Without any requirement of Deception of an innocent Investor,* thereby respecting *Chiarella.* Which is to say: *"With No Connection with a Deceitful Trade."*

But this meant: (1) Ditch the *"in connection with," in fact and practice*, and (2) Do it *surreptitiously*, subtly. In other words, *appear to keep the phrase*, but so word the language so that only jesuitical insight would discern the ditching.

The Theorists accordingly approached their solution in two steps: (a) *The In-Fact Ditching of "In Connection With"* and (b) *The Meaningless Restoration of "In Connection With."*

(a) *The In-Fact Ditching of "In Connection With"*

The result of the Theorists' duplicity—and the first of the two steps in the solution of the dilemma—appeared in the Theory's last segment, Item (4) of the consensus definition:

> [T]he misappropriation theory . . . authorize[s] the criminal conviction of a person . . . *(4) "regardless of whether he owed any duties to the shareholders of the traded stock."*[90]

What is the full implication of this last tenet of the Theory? How does it help to solve the Dilemma? What is the true meaning of this Item (4) of the Theory?

The Translation of Item (4) into English

At first reading, a layman would find the last clause either totally incomprehensible or in need of a word-for-word parsing. The obvious present course is to parse Item (4). With that, a sensible analysis of its meaning will be possible.

The original phrase reads: *The "Insider" is liable,*

> *(4) "regardless of whether he owed any duties to the shareholders of the traded stock."*[91]

In this analysis, take each segment of the phrase in reverse order: (i) *"The Shareholders of the Traded Stock;"* (ii) *"He owed any duties;"* and (iii) *"Regardless of whether"*.

(i) *"The Shareholders of the Traded Stock"*

Why, or how—purposeful obfuscation?—the Theorists ever came up with their wording of Item (4) is difficult to fathom. The Chiarellas, Boeskys, O'Hagans, and other Insider Traders of the world, all traded in a two-party securities transaction. The only party on the other side of the deal was either *the owner of the stock traded* or the about-to-be *owner of the stock traded.* That was the whole of it. So, why call the *'Investor'* "the shareholders of the traded stock"? Who other than an *'Investor'* could he be?

If the Theorists were referring to the *nontrading* "shareholders of the traded stock," it was an irrelevant concern since they were not parties to the Insider Trade and were totally out of the picture.

The meaning was obvious: Trading opposite O'Hagan was: *The owner of the traded stock.* He was a current *Investor* or an about-to-be *Investor.* In any event, *"The Shareholders of the Traded Stock"* were none other than the public *Investors*, long protected by the Securities

90. *Bryan*, 58 F.3d at 944 (quoting *Clark*, 915 F.2d at 443) (emphasis added).
91. *Id.*

Acts. The *Investor* was the primary object of the solicitude of Section 10(b).

Item (4) would necessarily now read: *The 'Insider' is liable,*

(4) regardless of whether he owed any duties to **the public Investor**.

(ii) *"He Owed Any Duties"*

This clause is relatively straightforward. Nevertheless, the Theory might better have said *"The Insider,"* instead of *"he,"* since Insider Trading is the tort involved. In an *Insider Trade,* only an *Insider,* perforce, could be the one who *"owed any duties."* Thus, much clearer to say *"the Insider."*

The plural, *"duties,"* moreover, is superfluous, inasmuch as the only *duty* under any theory of Insider Trading law is a lone *Duty of Disclosure.*

A logical expatiation of *"any duty"* must be inserted at this juncture. Implicit in the concept of *"duty"* is the first-semester-Torts principle that a putative tortfeasor can never be held liable for a *Breach* if there is no *Duty* he could breach.

Consequently, if he cannot be guilty of a *Breach* of a *Duty to Disclose,* he cannot be guilty of *Deception.*

And finally, if *Deception* is absent, no *Harm* can possibly follow.

Therefore, if no *Duty,* no *Breach.* If no *Breach,* no *Deception.* If no *Deception,* no *Harm.*

These changes, captious as they might appear, would make for easier reading, especially for longtime securities-law observers. Item (4) thus becomes: *The 'Insider' is liable,*

(4) regardless of whether **the Insider owed any duty to disclose, deceived or harmed** the public Investor.

(iii) *"Regardless of Whether"*

But here are the key words of Item (4). In this lone preposition, *"regardless of whether,"* the entire meaning of the phrase—even the entire meaning of the Original Theory—becomes startlingly clear. In it lies a total *negation* of all that precedes it. In fact, the translation, or understanding, of that prepositional phrase becomes a real revelation, even to one adept in securities law.

The surest approach toward testing the phrase is the ultimate American authority, *Webster's Unabridged. Webster's* achieves this understanding in two steps.

First, with the definition of the *adverbial* constitutent:

[2]**regardless** . . . *adv* : without regard to impeding elements (as of

> prudence, expense, or effort) . . . .[92]

Webster's in its abridged form adds an emphasizing note:

> [2]**regardless** *adv* (1872) : despite everything <went ahead with their plans [regardless]>[93]

This adverb is the substantive element of the phrase and aptly expresses the thrust and meaning of Item (4). The definition provided by *Webster's* could well adapt to the Theory and loosely paraphrase Item (4) in these words:

> The misappropriation theory authorizes the criminal conviction of a person *(4) despite everything else, irrespective of impeding elements, such as the absence of any duty to disclose to, deception of, and harm to, the Investor.*

Next, *Webster's* attaches the adverb to the preposition used by the Theory, and thereby yields a fuller appreciation of the strong impact of the phrase on the exact meaning of Item (4). The newer abridged *Webster's* reiterates the *Unabridged* and adds one pertinent example:

> **regardless of** *prep* (1784) : without taking into account <accepts all *regardless of* age>; *also* : in spite of <*regardless of* our mistakes>[94]

Both meanings ascribed to *"regardless of"* by *Webster's* are apropos to the Theory's definition, and both come to the same result: James Herman O'Hagan is liable for Insider Trading *in any case*, even if he owed no duty to his trading partner, did not deceive him and did not harm him. *O'Hagan is liable, no matter what!*

O'Hagan's guilt is present *"in spite of"* the presence or absence of an obligation to the public Investor with whom he traded. Put yet another way: The Thief's liability for Insider Trading is fully established *"without taking into account"* any *duty* to the Investor. Or *deception.* Or *harm.*

Whether or Not

When joined with the preposition *"regardless* of," the conjunction *"whether"* is an intensifier. As *Webster's* explains:

> [2]**whether** *conj* (bef. 12c)—used as a function word usu. with correlative *or* or with *or whether* to indicate . . . (3) alternative conditions or possibilities <see me no more, [whether] he be dead or no —Shak.> . . .—**whether or no** *or* **whether or not**: in any case[95]

Tack *"whether or not"* onto the end of the translation of *"regard-*

92. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1911 (Philip Babcock Gove, ed. 1986).
93. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 984 (10th ed. 1997).
94. *Id.*
95. *Id.* at 1346.

less of" and the intensity of *"in spite of"* or *"without taking into account"* becomes even more emphatic. The full impact of the consensus definition now becomes clearer. A further paraphrase of the Theory is now be warranted:

> The misappropriation theory authorizes the criminal conviction of a person (4) *without taking into account whether or not the Insider owed any duty to disclose to the Investor, deceived the Investor, or harmed the Investor with whom he traded the stock. Liability is present in any case.*

Viewed from the aspect of the *right* flowing from the *duty*, the Theory finds it irrelevant whether an Investor in a securities transaction has any *right* to *the truth about the value of the stock* he trades. *The liability is present "regardless of whether"* the trading partner possessed any rights or suffered great damages.

With that, the Theorists had solved the first half of their dilemma: The *"in connection with"* had been effectively emasculated. The phrase has eliminated all of the constituents of the *"securities transaction"*—namely, duty to disclose to, deception of and harm to an Investor—and hence thereby eliminated the *"securities transaction"* itself.

Therefore, *the phrase was rendered, in practical effect, operatively inapplicable: The Insider is liable, even with no connection with a securities transaction involving duty, deception and harm.*

The Emasculation Analyzed

Of all the five Circuit opinions, Judge Luttig's was the most perceptive and reasoned. *Bryan* displayed historical depth, and a rare insight into the meaning and purpose of Section 10(b), as well as the law of Insider Trading.

For these reasons, Judge Luttig's understanding of the Theory's scuttling of *"in connection with"* deserves some special attention. His analysis, although pursuing a different tack, adds a further dimension to the reasoning elaborated thus far.

The Untenable Dichotomy

Bryan—which was followed virtually verbatim by *O'Hagan* in its analysis of the elimination of *"in connection with"*—highlights the *Theory*'s mistreatment of the phrase by exposing a dichotomy made by the Theory, when the Code permits no such dichotomy at all.[96]

> In essence, the misappropriation theory . . . artificially *divides* into two *discrete* requirements—[1] **a fiduciary breach** and [2] **a**

96. *See* Bayne, *The Awakening, supra* note 72.

> **purchase or sale of securities**—the single *indivisible* requirement of *deception upon the purchaser or seller of securities* . . . .[97]

In this paragraph, the two Circuits, the Fourth and Eighth, made the controlling point: The Theory *separated the inseparable* in the Code into two disparate parts. *First*, the Theory posited a Breach of some kind of Fiduciary Duty.

Then, *second*, the Thief at some later time and place engaged *in some kind of a securities transaction* that was *without deceit on a buyer or seller*, was honest, *did not at all involve Insider Trading, was totally distinct from the Theft by the 'disloyal' Thief, and did not wrong an Investor.*

The two Circuits explain this fallacious dichotomy:

> In [the false dichotomy], the theory effectively eliminates the requirement *that a person in some way connected to a securities transaction be deceived*, allowing conviction not only where the "defrauded" person has *no connection with a securities transaction*, but where *no investor or market participant has been deceived.*[98]

Chestman, by the Meskill Majority, had earlier been explicit in stressing this dichotomy. Meskill cited in support the Second Circuit's first Theory opinion, *Newman:*

> In contrast to *Chiarella* and *Dirks*, *the misappropriation theory does* **not** require that the buyer or seller of securities be defrauded.[99]

Emphasizing the point, *Chestman* continued, this time relying on the Supreme Court:

> [W]e have held that the predicate act of fraud may be perpetrated on the source of the nonpublic information, *even though the source may be unaffiliated with the buyer or seller of securities.*[100]

Bryan had earlier stressed the total lack of connection between the earlier Theft and the later unrelated securities transaction:

> Even though ["Butch" Bryan] *owes no duty of disclosure* to the purchaser or seller of the securities, *the completed fraud* (*i.e.*, the misappropriation) is deemed to be "in connection with the purchase or sale of [a] security," because the misappropriated information is **thereafter used** in a securities transaction.[101]

The Fourth Circuit *Bryan* removes any doubts by reiterating the Theory's rejection of the connection between the breach of loyalty and the securities trade:

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97. *Bryan*, 58 F.3d at 950 (emphasis added).
98. *Id.* (emphasis added).
99. *Chestman*, 947 F.2d at 566 (emphasis added). *Newman* so states, twice. 664 F.2d at 617.
100. *Chestman*, 947 F.2d at 566 (emphasis added).
101. *Bryan*, 58 F.3d at 944-45 (emphasis added).

> The source of the nonpublic information [the Victim of the Theft] need not . . . be in any way connected to or even interested in the purchase or sale of securities.[102]

One now is forced to ask why, in light of Item (4), the Theory bothered to insert Item (3) at all? The answer of course is patent. Not because of logic, but because of Section 10(b).

Judge Luttig, therefore, in the end reached the same conclusion: In actuality these words scuttled the phrase. In effect, the Theory ignored, bypassed, finessed—advertently emasculated—the statutory *"in connection with a purchase or sale of any security."*

Now, the Theorists must take their *second* duplicitous step towards solution of the dilemma.

(b) *The Meaningless Restoration of "In Connection With"*

Granted, by the difficult-to-discern—but nonetheless very effective—elimination of *"in connection with"* in Item (4) of the Theory, the Theorists had seemingly solved their dilemma, at least partially, But they still faced a mountainous obstacle: *Section 10(b)* and its mandate *"in connection with."*

This last anomaly of the Original Theory would never have arisen had not the Theorists been driven to do something to give at least lip service to that imperative proviso of Section 10(b): *The deception* must be *"in connection with"* a securities transaction. So, what was the lip service?

To give apparent adherence to this proviso, the Theorists decided to insert a hoped-for route around their last obstacle. The route they chose was a naive addition to their definition of the Theory. This disarming insertion:

> "(3) *uses that information in a securities transaction"*

certainly should satisfy the *"in connection with"* of Section 10(b). Item (3) could scarce be more explicit.

More to the point, the phrase was harmless enough. Indeed, in fact it was totally innocuous, since Item (4) immediately rendered it *meaningless.* As *meaningless,* insertion of Item (3) would not detract from the real heart of the Theory expressed in the first three Essentials:

> (1) *The Gravamen: Theft of Information,* (2) *A Fiduciary Duty: Not To Steal,* and (3) *The Victim: Owner of Information.*

And the obvious advantage of this seemingly explicit statement—meaningless as in truth it was—was its firm inclusion of the Code-man-

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102. *Chestman,* 947 F.2d at 567.

dated *"in a securities transaction."* This "forthright" phrase would certainly fool the SEC, the Bench, the Bar, and, needless to say, Academe.

The only effect of Item (3): The Insider did have to go out, sometime or other, and engage in a meaningless purchase or sale of stock and somehow or other use the information. How the information would be of use—since it in no way harmed the Investor—is not explained. Perhaps it attracted him to the stock or called his attention to it.

With that, the lip service was performed, the Theorists' duty done. Which concludes the exposition of the *negative* aspect of the Theory's successful circumvention of the Code proviso *"in connection with"* a securities trade.

But a short reflection of later relevance is in order:

The Consummation of the Fraud

In its elaborate rationalization of Section 10(b), what was the Theory's core concept? What lay at the Theory's heart?

Here is the Theory's ruling precept: That *the consummation of the Deception,* the *Fraud,* of *Insider Trading* is ***not*** to be found, under the Theory, *in the securities transaction.* The Wrong lies not in the stock sale.

But that only tells what the Wrong was *not* in connection with, where the Fraud was *not* consummated. The first subsection—(1) No Relation to a Securities Trade—therefore has been concluded. But that was the *negative* aspect.

Briefly now, *positively,* what was the *Wrong* really *in connection with?* Where was the Fraud really *consummated*?

(2) *In a Theft of Information*

This leads to a further revealing ratiocination, and to the exact locus—viewed *positively*—of the *consummation of the fraud* as specified by the Theory.

The reasoning begins with a basic question: If the Violation according to the Theory is *not* in a Wrong to the Investor, where does the Violation lie? A simple syllogism provides the answer.

According to the Theory, the Fraud is the Misappropriation of Information, *but* the Thief stole Information from the Owner. *Therefore,* the Fraud is *"in connection with"* the Theft of Information.

The Theorists' reasoning is now complete. Since the Investor was *not* injured by the Thief and since the Owner *was* injured by the Thief, *the consummation of the Fraud* must be in the *Theft* from the Owner. And not in the *Deceit* of the Investor.

Since the Theft was perpetrated *With No Connection With a Deceitful Trade*, the consummation of the Fraud was perforce *"in connection with the Theft of Information."*

These *four Essentials* of the Misappropriation Theory as adjudicated by the Five battling Circuits—the Theory that sent James Herman O'Hagan to jail, and came up on certiorari—could be assembled in a visual display for later use in the forthcoming juxtaposition with Justice Ginsburg's *New Theory*.

II. THE *NEW THEORY* OF GINSBURG

The Misappropriation Theory that sent James Herman O'Hagan to jail has now been definitively defined. This was the Original Theory that three Circuits half-heartedly rubber-stamped. And that two Circuits cogently ruled was inconsistent with Section 10(b) and the long-established law of Insider Trading.

Now the task is the synthesis of Justice Ginsburg's "*'imaginative'* exercise of constructing [her] own misappropriation theory *from whole cloth*."[103]

Justice Ginsburg did not openly avow her intent to abandon the Original Theory that came up on certiorari. That would have been instantaneously condemned. Rather, subtlety was the route to take, a more "imaginative" solution: Simply eating away at the Original Theory and inserting the components of the New Theory unobtrusively into a mass of meandering. In the end, the New Theory would be, in fact, woven *"from whole cloth"*. But only meditative scrutiny would easily detect the fact.

Such scrutiny is now in order. Aided by the impugning insights of Justice Thomas and the support of Justice Scalia and the Chief Justice, the New Theory can be successfully constructed, and later laid alongside the Original Theory.

Analysis will reveal that the two "theories" are poles apart and that Justice Thomas will be proven correct: The New Theory does indeed have *"a dispositive flaw."* Justice Thomas was unequivocal:

> *Whether the . . . new theory has merit, we cannot possibly tell* on the record before us . . . because, until today, ***the theory has never existed***. In short, the . . . *new theory* is simply not presented by this case, *and cannot form the basis for upholding [James Herman O'Hagan's] convictions.*[104]

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103. United States v. O'Hagan, 117 S. Ct. 2199, 2224 (Thomas, J., concurring in part and dissenting in part).

104. *Id.* at 2224-25 (emphasis added).

The Original Theory Essentials

The Gravamen:
Theft of Information

A *Fiduciary* Duty:
Not To Steal

The Victim:
The Owner of Information

With No Connection To
a *Deceitful Trade*

The difference between the 'theories' is black and white.

"The New and Improved Misappropriation Theory"[105]

The approach to the synthesis will be twofold. *First,* the *New The-*

105. *Id.* at 2225 (emphasis added).

ory will be presented in an *Amalgam,* in Ginsburg's exact words, collated from her Opinion. The New Theory will then stand out in stark simplicity.

Second, the distinct elements of Ginsburg's *"novel"* Theory will aptly serve as topic headings for supporting commentary. Under each topic heading, moreover, will be grouped further direct quotations from the majority opinion, with occasional references by Justice Ginsburg to the Government Brief and to the Oral Argument.

This corroborating annotation will confirm each sentence of the *Amalgam* and remove any doubt as to the legitimacy of the succinct synthesis and the authenticity of this *"'imaginative' exercise"* that created a *New Theory "from whole cloth."* What has been hidden in a mishmash of ramblings in the opinion itself will stand forth, concise, in full sunlight.

The Synthesized Amalgam

Unencumbered by commentary and supporting Ginsburg quotations, the essentials of the *New Theory*—next to be set off against the *Original Misappropriation Theory* of the Circuits—constitute an intelligible and surprisingly reasonable *definition of Insider Trading.* These are Ginsburg's own words:

The Amalgam

The Ginsburg *New Theory* outlaws:

> **(1) Trading on the basis of nonpublic, confidential information, (2) By an outsider to a corporation**
> **(3) To gain no-risk profits—that is, (4) the Investor's disadvantage stems from contrivance, not luck and cannot be overcome with research or skill—**
> **(5) Which is a self-serving abuse that will affect the corporation's security price when revealed to Investors,**
> **(6) With resultant harm to Investors.**
> **(7) Finally, the fraud is consummated only when he uses the information through securities transactions.**[106]

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106. The citations that follow document the individual components of this Ginsburg Amalgam as they appear verbatim in her *O'Hagan* opinion. To correlate the context and content of these phrases is the remaining task of this Article. At this point in the argument, the reader will only be diverted by an attempt to understand the entire correlation on the basis of these citations alone. The individual components of Ginsburg's Amalgam are repeated below in boldface, followed by the citation and quotation from the opinion.

> **(1) Trading on the basis of nonpublic, confidential information, (2) By an outsider to a corporation**

See O'Hagan, 117 S. Ct. at 2207 ("[T]he misappropriation theory outlaws *trading on the basis of nonpublic information by a corporate 'outsider'* . . . who [has] *confidential* information . . . .").

> **(3) To gain no-risk profits —**

The supporting excerpts from the opinion and the explanatory commentary will treat the four Essentials: A. *The Gravamen: Nondisclosure to the Investor.* B. *A Simple Duty: To Disclose to the Investor.* C. *The Victim: The Deceived Investor.* D. *In Connection With a Deceitful Trade.*

Throughout the ensuing analysis, all the words of the *Amalgam* will be highlighted by bold typeset to indicate the source of the *Amalgam*'s words, and to give the context in which Justice Ginsburg spoke.

A. *The Gravamen: Nondisclosure to the Investor*

The gravamen of Insider Trading in the view of all securities analysts is *Deception,* either practiced on (1) the so-called "*Owner*" of the Information, according to the Original Theory, or (2) on the *Investor*, as the Traditionalists and general public have always held. Therefore, the question is now: Where does the New Theory locate this gravamen? The Ginsburg *Amalgam* speaks directly to this question.

As the word "*gravamen*" suggests, the answer will reveal the most significant tenet of the New Theory, the linchpin holding the whole together, the starting point, necessarily, in assembling the other three Essentials.

The importance of this question is heightened by the antipolar views as to the locus of the *Deception*, the heart of Insider Trading. Is the *Deceit* on the person who "*owns*" the purloined Information? Or is the *Investor*, who trades with the O'Hagan, the TGS Insider, the

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Id. at 2209 ("*[T]o gain no-risk profits* through the purchase or sale of securities").

that is (4) the Investor's disadvantage stems from contrivance, not luck and cannot be overcome with research or skill —

Id. at 2210 ("An *investor's* informational *disadvantage . . . stems from contrivance, not luck;* it is *a disadvantage that cannot be overcome with research or skill.*")

(5) Which is a self-serving

Id. at 2207 ("Under this theory, a fiduciary's undisclosed, *self-serving* use of a principal's information").

abuse that will affect the corporation's security price when revealed to Investors,

Id. ("The misappropriation theory is thus designed to 'protect . . . against *abuses . . . that will affect th[e] corporation's security price when revealed*'") (quoting Brief for United States at 14).

(6) With resultant harm to Investors

Id. at 2209 ((" 'deceit can be practiced . . . *with resultant harm to* another person or group of persons' "). . . . A misappropriator . . . simultaneously harms members of *the investing public.*") (quoting Aldave, 13 Hofstra L. Rev. at 120).

(7) Finally, the fraud is consummated only when he uses the information through securities transactions.

Id. ("[T]he fiduciary's *fraud is consummated . . . when . . . he uses the information* to purchase or sell securities"); *id.* ("The theory . . . catches fraudulent means of capitalizing on such *information through securities transactions.*)

Chiarella, the *deceived* one? The answer is the most basic, in the present context, in the law of Insider Trading.

Justice Ginsburg began her answer at the earliest point in her opinion. She laid the foundation stone—the opening words of the *Amalgam*—with a definition of Insider Trading that would have been acceptable to all Traditionalists, in every case on the subject from the Supreme Court's *Strong v. Repide*[107] in 1909 through the latest *Cady, Roberts* progeny in the 1980s.[108]

In this very beginning in defining her New Theory, Justice Ginsburg aptly expresses its nucleus:

> [T]he misappropriation theory outlaws trading on the basis of nonpublic information by a corporate "outsider" . . . .[109]

In these words, the Justice has embodied two important constituents of the tort of Insider Trading: (1) ***Trading*** by the Insider with an Investor, (2) ***On the basis of*** *undisclosed*—***nonpublic***, not ***revealed*** to the public—***information***.

Thus far the Justice has only stated the prohibited act. She has not commented on its intrinsic evil.

Following this introduction, the Justice explains her theory in greater detail, building on the foundation:

> The misappropriation theory is thus designed to "protec[t] the integrity of the securities markets against **abuses by 'outsiders' to a corporation** who have access to **confidential information that will affect th[e] corporation's security price when revealed** . . . .[110]

These words advance her definition considerably. With them, Justice Ginsburg begins to analyze the inherent iniquity in the bald act of an O'Hagan merely "***trading***" with the public innocents "***on the basis of nonpublic information***."

In this explanatory sentence, the Justice compressed two additional and salient elements of the tort: (1) Insider Trading is an "***abuse***"; and (2) The undisclosed—"***confidential***," not "***revealed***"—price paid by the Insider has been *unstated*, therefore *materially misstated*, and hence did not reflect the true value of the security traded.

107. 213 U.S. 419 (1909).

108. *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961). The progeny: Dirks v. SEC, 681 F.2d 824 (D.C. Cir. 1982), *rev'd*, 463 U.S. 646 (1983); Zweig v. Hearst Corp., 594 F.2d 1261 (9th Cir. 1979); United States v. Chiarella, 588 F.2d 1358 (2d Cir. 1978), *rev'd*, 445 U.S. 222 (1980); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974); and SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). *See generally* Bayne, *supra* note 11, at 93-135.

109. *O'Hagan*, 117 S. Ct. at 2207.

110. *Id.* (emphasis added, to indicate phrases from the *Amalgam*).

A Corrupt Practice

Justice Ginsburg's use of the word "**abuse**" was peculiarly apt. Consider *Webster's*:

> **abuse** . . . *n* . . . : **1:** a corrupt practice or custom **2:** improper use or treatment: **misuse** . . . **3** *obs*: a deceitful act : **deception** . . . .[111]

The Justice's choice of the word "***abuse***" was superb, and totally appropriate in expressing the core element of the tort, *Deception*, while also describing it as a *"corrupt practice,"* and an *"improper use"* of information to which the Investor had a right.

Material to an Informed Trade

Justice Ginsburg buries in this pregnant statement a prominent requisite of the *"deceit"* tort: *Materiality. Disclosure* of the stock's true value *"**will affect the corporation's security price**."* Undisclosed, material deception results.

The *Compendium*[112]—first propounded seven years ago—anticipated the Justice in the definition of the essential *Information* in an honest disclosure:

> **Information of any kind, reliable not conjectural, nonpublic, relevant and material to an informed trade, from any source and not necessarily misappropriated . . . .**[113]

In an expatiation on her position, the Justice virtually paraphrased the *Compendium*, and further rounded out her *Amalgam:*

> An **investor's** informational **disadvantage . . . stems from contrivance, not luck;** it is a **disadvantage** that **cannot be overcome with research or skill . . . .**[114]

Emphasizing Ginsburg's obvious point: The *Materiality* to an informed trade by an *Investor* could be of no concern whatsoever to the *Source* of that information.

Justice Ginsburg makes it clear that the undisclosed value of the security was *materially misstated* and would affect the market accordingly. She thus, she explains why O'Hagan nets $4 million *"**when**"* the *"**confidential information**"* is *"**revealed**"*— that is, when the true value is actually disclosed. Furthermore, she consciously makes no reference to the so-called source of the Information in her explanation of the nature of the *"**abuse**."*

Note that a major segment of the *Amalgam* has come from these

111. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 47 (1988).
112. Bayne, *supra* note 16, at 352-53.
113. *Id.* at 353.
114. *O'Hagan*, 117 S. Ct. at 2210 (emphasis added).

Ginsburg statements. In fact, these alone could suffice to define the New Theory. But Justice Ginsburg buttressed her basic enunciation throughout her Opinion.

The "Nondisclosure to Whom?" Emphasized

In a matter absolutely integral to the question of *"Deceit of Whom?,"* the Justice makes clear that her New Theory centers on (1) *Nondisclosure to an Investor*, (2) *In a Stock Sale*, (3) *With an Investor.* She explains:

> Under this theory, a fiduciary's undisclosed, **self-serving use of** a principal's **information** to purchase or sell **securities** [is **outlawed** by Section 10(b)].[115]

Passim throughout her Opinion, Justice Ginsburg uses words such as ***"when revealed"*** and *"undisclosed"* to fortify the *"nondisclosure"* element of the *New Theory.* The constant use of ***"nonpublic"*** and ***"confidential"*** are, of themselves, ample evidence of a clear intent to incorporate *nondisclosure* into the essence of the New Theory.

To the Investor

But the more serious element of the *"Nondisclosure to the Investor,"* is her *nexus* of the Deceit *to* the *Investor.* After all, the presence of *Deception* is postulated by the Original Theory. Her *connection* of the Deception to the Investor, therefore, is crucial. Latent in this clipt remark is that very *nexus:*

> A fiduciary . . . *"secretly* convert[s] the . . . information *for personal gain."*[116]

Very little reasoning is necessary to penetrate the Ginsburg meaning in *"Secret use of information for personal gain." First,* of course, *"secret"* is just another bolster word to express the *"misstatement"* aspect of Insider Trading. If the *"statement"* were known to the trading partner—if it were not *"secret"*—it could scarce deceive him, and hence be a *"misstatement."*

But, *second,* is the key phrase *"for personal gain."* Certainly, the Insider Trader is not going to get any "personal gain" in a stock trade *without deceiving the Investor* with whom he trades. Clearly, the Owner has no connection with a stock trade that would yield dollars from the Owner to the Insider. The Owner lost no dollars that would give personal gain to the Insider.

Justice Ginsburg, of course, does persist in her lip service to the

115. *Id.* at 2207 (emphasis added, as above).
116. *Id.* at 2208 (quoting Brief for the United States at 17) (emphasis added).

Original Theory. She would be relegated to oblivion if she did not. However, continued scrutiny uncovers her *operative* concept of the law of Insider Trading, in contradistinction to her *"speculative"* or *"theoretical"* obeisance to the Original Theory.

Justice Ginsburg's clear junction of the *Deceit* with the *Investor* appears early in her Opinion. She refers to her New Theory as

> addressing efforts to *capitalize* on ***nonpublic information through*** *the purchase or sale of* ***securities***.[117]

This brief excerpt elicits four pertinent reflections, all establishing her *nexus* between *Deception* and *Investor*:

(1) Only two parties participate in a *"purchase or sale of securities,"* the Trader—a Chiarella, Milken, Boesky, or O'Hagan—and the *Investor* with whom he trades.

(2) The only way a Vinnie Chiarella or a James Herman O'Hagan could *"capitalize on* ***nonpublic information****"* would be to lie to his buyer or seller—the *Investor* on the other side of the deal—by *not disclosing* the true value of the traded stock and thus cheating him, for example, to the tune of $4 million.

(3) Were the information ***public***, that is, *known to all* and not *secret*, Vinnie or James Herman could not *capitalize* on it, because everyone would be equal. With a level playing field, only *"**skill**,"* market acumen, savoir, would be rewarded. The *"**investor's advantage**"* would not accordingly *"**stem[ ] from contrivance**,"* and hence offer no opportunity on which to *"capitalize."*

(4) The most important indicium of the *nexus* between the *Deceit* and the *Investor* is the phrase: *"**through** the purchase or sale of **securities**."* The word *"**through**"* in this context, denotes *"by means of," "during,"* or, as Justice Scalia appositely puts it:

> [T]he manipulation or *deception of a party to a* ***securities transaction***.[118]

Or, in Justice Ginsburg's words: "[T]he . . . *deception* of a[n *Investor* ***through***] ***a securities transaction***."

Justice Thomas to the Ramparts

Justice Thomas, in his sustained exposé of the Ginsburg New Theory, makes this same point:

> [T]he Commission and the majority . . . require *a more integral connection between the fraud and the securities transaction* [i.e., *the Investor*]. The majority states, for example, that the misappropriation

117. *Id.* at 2207 (emphasis added).
118. *Id.* at 2220 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

> theory applies *to undisclosed misappropriation of confidential information* "for securities trading purposes," . . . thus seeming to require *a particular intent* by the misappropriator [to join the *"fraud"* with the *Investor*].[119]

The Commission, on whom Justice Ginsburg occasionally relies in building her *"novel Theory,"* was equally prepared to require *Deceit on the Investor*—undoubtedly an atavistic return to its heyday of *Cady, Roberts* rationality—and did so state that position, as Justice Thomas points out:

> The Commission . . . argues that the misappropriation theory . . . "depends on *an inherent connection between the deceptive conduct and the purchase and sale of a security" [with an Investor].*[120]

Justice Thomas builds on his contention with further support. He quotes the Government replying to Justice Scalia during Oral Argument:

> [Mr. Dreeben:] "[T]he *only value* of this information *for personal profit for [James Herman O'Hagan]* was to take it and *profit in the securities market by trading on it.*"[121]

Finish that sentence: "by failing to *disclose* to the *Investor* the true value of his stock, that is, to lie, and net $4 million." That is what *"trading on it"* means. Patently, absent the deception of the Investor as to the true value of his stock, the Insider could not be guaranteed "personal profit." In short, here was the classic Insider Trading of history, dating back to 1909 and *Strong v. Repide.* Here was the Deceit action enshrined in Section 10(b) in 1934, and crystallized by the SEC "case of first impression,"[122] *Cady, Roberts.*

Justice Thomas realized that the Government was admitting—and Justice Ginsburg was endorsing the admission and incorporating it into her New Theory—that *the consummation of the Deception* lay in the *Nondisclosure to the Investor.* Armed with that realization, Justice Thomas hammered the point—and hammered as well the poor Deputy Solicitor General, Michael Dreeben, on whom had been foisted the thankless chore of defending the undefendable—time after time.

Justice Thomas quotes Mr. Dreeben to stress his point:

> [Mr. Dreeben]: [I]t is the use of the information that *enables the profits, pure and simple.* There would be *no opportunity to engage in profit* . . . .[123]

119. *Id.* at 2221 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

120. *Id.* (quoting Brief for United States at 21) (emphasis added).

121. *Id.* at 2222 (emphasis added).

122. *In re* Cady, Roberts & Co., 40 S.E.C. 907 (1961).

123. *O'Hagan,* 117 S. Ct. at 2222 (quoting from the Oral Argument) (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

Justice Thomas would translate that to read: "Enables the fleecing in the amount of $4 million." Only in the New Theory would *illicit loot of $4 million* be called *"profits."*

Note too that the Government stressed that the *Deception* was perpetrated *on* the *Investor, "pure and simple."* But even more telling was Dreeben's use of the word *'**only**.'* Justice Thomas beats that drum through several pages.

What Justice Ginsburg means when she relies on the use of *"**only**"*—and which in turn the Government means and which Justice Thomas repeatedly emphasizes that the New Theory means—is that the Insider Trader would have *"no opportunity to engage in profit"* by cheating the 'Owner' of the Information. Obviously, *"profits"* have never been conceived to flow from the Owner to the Insider.

The *"only value" for personal profit,* the only *"opportunity to engage in profit,"*—that is, *"to engage in looting the innocent Investor"* would be *"in a securities transaction"* by, in Justice Scalia's words, *"deception of a party **to*** a securities transaction."[124]

Thus does Justice Ginsburg explicitly *exclude* the only other *"opportunity to engage in profit"* conceivable in the present context, namely in the *Deception of the Owner.*

Justice Thomas is unremitting. This time, he hammers the Government's Brief on the same point:

> [T]he "misappropriated information had personal value to [Mr. O'Hagan] *only* because of its *utility in securities trading*."[125]

These euphemisms are exquisite. Secret, confidential information, known only to O'Hagan, undisclosed to his trading partner, has *"utility."* As a gun has 'utility' in a murder? Again, notice the stress on *"**only**."* Its *"**only**"* "utility" is in *Deceit* of the *Investor.* No "personal profits" were "enabled" in a deal with the source of the Information. Rather, *"**only**"* in a deal with the Investor.

Note also that this line of reasoning successfully removes "profits" from the act of *Theft from the Source* to the *Deceit of the Investor.* This is a focus of the entire analysis and of great import to the later juxtaposition of the two theories.

At this juncture in the Oral Argument, Justice Souter climbs on the bandwagon (prompting queries as to why he disappeared when the Court voted 6 to 3) and Justice Thomas welcomes him by quoting his question to the Government:

124. *Id.* at 2220 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

125. *Id.* at 2221 (quoting Brief for United States at 21) (Thomas, J., concurring in part and dissenting in part) (emphasis added).

> "[Justice Souter]: So what you're saying is, . . . in this case *the misappropriation can only be of relevance,* or is of substantial relevance, . . . with reference to the purchase of securities.
> "[Mr. Dreeben]: Exactly."[126]

Again, the removal of the gravamen from *Theft* to *Investor Deception.*

Although Justice Thomas continued to pursue the point, for present purposes, the conclusion is manifest:

> *The New Theory outlaws trading on nonpublic, confidential information, undisclosed to the Investor.*

The Thomas Summation

Toward the end of his cogent dissent, Justice Thomas attempts to encapsulate this first New Theory *Essential: The Gravamen: Nondisclosure to the Investor.* Unfortunately, he does not quite round out his thought. However, that omission can be filled in for him.

> The majority's approach is misleading in this case because it glosses over the fact that the supposed *threat to* fair and honest markets, *investor confidence,* and *market integrity* comes *not* from the supposed *fraud in this case* [i.e., *Theft from the Source, the Owner*], but from the mere fact *that the information used by O'Hagan was nonpublic.*[127]

Had Justice Thomas concluded, his sentence would have read like this: *"That is, that the information was not disclosed to the Investor by O'Hagan, and was the cause of $4 million in illegal losses to the Investor,"* and *"personal profit for"*[128] *O'Hagan.*

Justice Thomas could have expatiated: This *Nondisclosure to the Investor,* the Deceit, induced the Investor to sell at an unfair and dishonest price, thereby losing $4 million. Certainly that would also cause the Investor to lose his *"confidence"* in *"market integrity,"* in *"fair and honest markets."*

Thomas explains further:

> Even if it is true that trading on nonpublic information hurts the public, it is true *whether or not there is any deception of the source of the information.*[129]

Where or how O'Hagan got his secret information matters nil to the lied-

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126. *Id.* at 2222 (quoting the Oral Argument) (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

127. *Id.* at 2225 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

128. *Id.* at 2222 (Thomas, J., concurring in the judgment inpart and dissenting in part) (emphasis added).

129. *Id.* at 2225-26 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

to Investor. The Investor's only concern is that the Deceit cost him $4 million. Once again, Ginsburg moves the *Deception* from the *Theft* to the *Investor.*

B. *A Simple Duty: To Disclose to the Investor*

The Amalgam

The Ginsburg *New Theory* outlaws:

> **(1) Trading on the basis of nonpublic, confidential information, (2) By an outsider to a corporation**
> **(3) To gain no-risk profits—that is, (4) the Investor's disadvantage stems from contrivance, not luck and cannot be overcome with research or skill—**
> **(5) Which is a self-serving abuse that will affect the corporation's security price when revealed to Investors,**
> **(6) With resultant harm to Investors.**
> **(7) Finally, the fraud is consummated only when he uses the information through securities transactions.**[130]

As every student of Torts learns early in the course, the point of logical embarkation is invariably *Duty*. Then Breach. Thence on to *Proximate Cause, Damages*, and finally *Defenses.*

This approach is invariable, because it is dictated by the intrinsic nature of a tort. Thus, the *Breach* necessarily flows from and is logically dependent on the *Duty*. In fact, the nature of the *Breach* is so completely determined by the *Duty* breached, as to possess no characteristics not formed by the Duty itself.[131]

Why then, the question arises, did this scholarly inquisition into the *Duty* and *Breach* of the New Theory give the *Violation* of Section 10(b) precedence over the *Duty* as specified in the Code? Why not follow first-semester Torts and begin with *Duty*?

The answer is referable to the practicalities of Insider Trading and the Victim's preoccupation with the $4 million in losses caused by the immediate Breach—the lie about the stock's value—rather than with the more remote Duty forbidding it: *Not Deceive* a fellow trader. The innocent Investors thought first of the *Breach* that damaged them. The *Duty* behind the breach was of no pressing concern.

Accordingly, the New Theory thought first of the *Breach* and laid out its principal elements in detail, as the *Amalgam* illustrates.

Because of this intrinsic interdependence of *Duty* and *Breach*, the present task is already ninety percent complete. The nature of the

130. *See supra* note 105.

131. *See* Bayne, *Primer, supra* note 21, at 204-05. *See also* DAVID COWAN BAYNE, S.J., CONSCIENCE, OBLIGATION, AND THE LAW 133-34 (1966).

Breach is completely reflective—necessarily and essentially—of the nature of the consequent *Duty*. Due to this essential interdependence—the *Breach* is a mirror reflection of the *Duty* breached—this analysis of the *Duty* requires only a glance at the mirror.

In that mirror, the face of the *Breach* can be seen in full detail in the gravamen of the Wrong, the first of the Essentials: The *Breach* of the *Duty to Disclose to the Investor.*

Elementary logic moves the reasoning inexorably from the *Violation* of Section 10(b) to the *Duty* that the *Violation* violated. Since the gravamen of the Wrong is *Nondisclosure to the Investor,* the *Duty* perforce is *to Disclose to the Investor*, to tell him the truth about the value of the stock traded. From the malefaction *Nondisclosure*, the illation to the *Duty of Disclosure* can readily be made.

The Twin Alterations in Ginsburg's 'Duty'

"[I]n the 'imaginative' exercise of constructing [her] own misappropriation theory from whole cloth," Justice Ginsburg selectively alters both the *thrust* and the *nature* of the *Duty to Disclose* as defined by the Original Theory.[132] These two alterations accordingly form logical categories for commentary on this second Essential of the New Theory: *The Duty to Disclose to the Investor.*

As to the *thrust* of her New Theory, Justice Ginsburg no longer concentrates on the obligation to the *"Owner" of the Information.* The thrust now is toward the *Duty to the Investor.*

At the same time, the New Theory ignores completely, even directly disavows, a mainstay of the Original Theory, the *Fiduciary Duty*. Gone is all talk of a *"trusted"* agent, attorney, or confidant who succumbs to snooping, or as the Theorists call it, "thievery." The very *nature* of the Duty has been changed.

Justice Ginsburg, breaking with the Original Theory, presents (1) *The Duty of Disclosure to the Investor,* (2) *Unencumbered by a Fiducial Accretion.*

(1) *The Duty of Disclosure to the Investor*

The element of *"deception"* has been so integral to Section 10(b) and its antecedent tort, common-law *"deceit,"* that no theory interpreting Section 10(b) would dare deny its presence. *"Deception"* had to be kept at the center of any theory.

The Original Theory, therefore, kept *"deception,"* but remarkably shifted it from the deceit of the Victim of an O'Hagan lie to the corpora-

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132. *See* O'Hagan, 117 S. Ct. at 2224.

tion O'Hagan worked for. According to the Original Theory, the Victim deceived was Grand Met whom O'Hagan failed to inform that he had learned of the forthcoming takeover and intended to trade on that information.

Justice Ginsburg, however, sensed that a duty to Grand Met had little relevance to the Investors' loss of $4 million. So, she surreptitiously shifted the Duty from Grand Met to the cheated public Investors.

The Disclosure Element of the Duty

No pressing need prompted Ginsburg to dilate on the elemental requisite of "*disclosure*" itself. As a result, she simply

> **outlaws trading on the basis of nonpublic, confidential information.**

The word "***outlaws***" compresses the declaration: "*The law imposes a duty not to. . . .*' Without more, "***outlaws***" carries the burden of a prohibition, a negative command: To forgo. In the specific case at hand, the law forbids "***trad[ing] on the basis of nonpublic*** [that is, *undisclosed*] ***information***."[133] Here is the Ginsburg *Duty of Disclosure.*

Elsewhere in her Opinion, she inveighs against "*secret [undisclosed] profits*" reaped by the "*fiduciary-turned-trader.*"[134] She condemns the Insider who "*secretly,*" that is, without disclosure, *uses "information for personal gain"*[135] by lying about the stock's true value.

Although it received no particular emphasis in the Ginsburg New Theory, the requirement of "*deception*" is manifest throughout. The stress rather was on: *Who was deceived?*

The Object of the Deception: The Investor

Justice Ginsburg had concluded, at least subliminally, that deception of Grand Met or of the Dorsey law firm somehow was unrelated to the crime that produced the $4 million in losses to public Investors. And that, to the contrary, the public Investor would never have lost $4 million if he had known the true value of the traded stock. Briefly, the Investor, undeceived, would simply never have sold.

So, Justice Ginsburg altered her Amalgam to fit the crime, and thus permit her to convict James Herman O'Hagan, which she could never conscientiously do if it were Grand Met or Dorsey who had been wronged. Wronged, that is, according to her New Theory.

She might even have extrapolated the *civil* applicability of such a

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133. *See id.* at 2217.
134. *O'Hagan,* 117 S. Ct. at 2207.
135. *Id.* at 2208 (quoting Brief for the United States at 17) (emphasis added).

holding and realized that Grand Met and Dorsey were highly improbable plaintiffs in a civil action to recover $4 million in losses suffered by unrelated third parties, the public Investors. Especially inasmuch as Grand Met and Dorsey—at least Grand Met, since Dorsey's reputation did suffer from a totally collateral wrong—showed no signs of Insider Trading losses.

Reasoning in such a manner, Justice Ginsburg accordingly made no mention whatsoever in her Amalgam definition of the *"owner"* whence the information, but spoke throughout of the Investor as the beneficiary of the Duty to Disclose.

A single, synoptic reading of the Amalgam will establish Ginsburg's understanding as to the proper thrust of her New Theory:

The Ginsburg *New Theory* outlaws:

> **Trading to gain no-risk profits — that is, the Investor's disadvantage stems from contrivance —a self-serving abuse that will affect the security price when revealed to Investors, with resultant harm to the Investors.**
> **The fraud is consummated only through securities transactions.**

In this one synoptic reading Justice Ginsburg directs sole attention to the Investor. She adverts explicitly to the fact that the information is ***"nonpublic,"*** *i.e., undisclosed.* That it has *not been* ***"revealed to Investors."*** That this *nondisclosure* will bring ***"harm to the Investor."***[136]

Later in the Amalgam, the Justice again concentrates on the Investor when she explains how the nondisclosure of secret information redounds to ***"the Investor's disadvantage"*** by deliberate ***"contrivance, not luck,"*** in that Chiarella or O'Hagan took *"undue advantage"*—in the words of the SEC's classic expression of the basic evil of Insider Trading, *Cady, Roberts*[137]—of his trading partner, the innocent Investor.

The concluding words of the Amalgam—***"uses the information through securities transactions"***—seems to be (1) an advertent exclusion of the 'Owner' of the Information and (2) a conscious reference to the Investor. Quite clearly, the only parties to the ***"securities transactions"*** are the O'Hagans and Chiarellas on the one hand, and the trading partners, ***"the Investors,"*** on the other.

(2) *Unencumbered by a Fiducial Accretion*

The absence of any *fiducial* element in the Amalgam could suffice, at least *negatively,* for the *unqualified* nature of the New Theory's Duty.

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136. *Id.* at 2207.
137. *In re* Cady, Roberts & Co., 40 S.E.C. 907, 911, 912 (1961).

In a matter of such controversy besetting the Original Theory, Justice Ginsburg could surely be expected to specify explicitly her *Duty* as Fiduciary if she had determined to perpetuate the *Fiduciary Fallacy*[138] foisted on the law of Insider Trading by *Chiarella* in 1980.

However, considering the overall disorganization and rambling of the Opinion, it would be attributing too much securities-law expertise to Justice Ginsburg to conclude, in her break with the Original Theory, that she now engaged *explicitly* in the salutary cleansing of the law of Insider Trading by removing that untenable *Fiduciary* encumbrance of *Chiarella* and *Dirks.*

Nonetheless, the conclusion is justified that Justice Ginsburg had in fact removed the *fiduciary* element from her *Duty to Disclose to the Investor.* The failure even to use the word "fiduciary" in connection with Duty is too notable in light of the controversy surrounding the subject.

C. *The Victim: The Deceived Investor*

The Amalgam

The Ginsburg *New Theory* outlaws:

> **(1) Trading on the basis of nonpublic, confidential information, (2) By an outsider to a corporation**
> **(3) To gain no-risk profits — that is, (4) the Investor's disadvantage stems from contrivance, not luck and cannot be overcome with research or skill —**
> **(5) Which is a self-serving abuse that will affect the corporation's security price when revealed to Investors,**
> **(6) With resultant harm to Investors.**
> **(7) Finally, the fraud is consummated only when he uses the information through securities transactions.**[139]

A most perplexing insight into the mind of Justice Ginsburg emerges from the tortured reasoning surrounding this question, so fundamental to the law of Insider Trading: *Who really is injured by the Insider's use of nonpublic information in a securities transaction?*

When James Herman O'Hagan lied to his sellers about the true value of their stock, did his lie injure the Investors who lost $4 million? Or did the deceit harm Grand Met who was soon to announce an above-market offer for Pillsbury stock? Or the Dorsey law firm whence James Herman learned of the pending offer?

The primitive simplicity of the choice leaped at Justice Ginsburg

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138. *See* Bayne, *supra* note 68.
139. *See supra* text accompanying note 105.

from the pages of the *O'Hagan* record. Except to one enmeshed in the web of legalisms and arcane theorizing entangling the recent Theory opinions, this stark confrontation between the respective potential Victims of the Insider Trade would be faced without hesitancy. Obviously, the Investor was the only Victim. But, to the New Theory, the choice of the Victim would be deeply discomfiting and would require remarkably agile footwork to resolve.

The Earlier Victims

Moreover, the confrontation between competing Victims was intensified by the other four Theory cases—*Bryan*,[140] *Cherif*,[141] *Clark*,[142] and *Chestman*[143] in addition to *O'Hagan*.

In each of these cases the injury suffered by the antagonistic Victims because of the Insider's ***"trading on the basis of nonpublic, confidential information"***[144] was uniformly marked by glaring disparity.

In all the cases, the trading Victim, on the other side of the trade from the Insider, suffered substantial dollar injury. The $4-million Investor losses in *O'Hagan* were the greatest by far of the five cases. These, of course, would be most vivid to Justice Ginsburg.

But, Danny Cherif netted $247,000 in a mere nine months[145] from his unknowing Victims. John Naylor Clark and his tippee Van Moppes swindled the public Investor out of $55,000.[146] Keith Loeb, in the Supermarket Soap, "disgorged $22,000 profit and paid a $22,000 fine."[147] "Butch" Bryan and friends purchased over 6,000 public shares from unknowing shareholders on the basis of confidential, inside information.[148] The lost dollars were painfully palpable to the deceived traders.

The Victims of the Theft of Information on the other side of the confrontation suffered a far more intangible injury, if any at all. Any

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140. *See generally Bryan*, 58 F.3d at 933 (involving mail fraud).

141. *See generally Cherif*, 933 F.2d at 403 (forgery document authorizing continued access to bank after termination).

142. *See generally Clark*, 915 F.2d at 439 (knowing misappropriation and use of employer's material nonpublic information).

143. *See generally Chestman*, 947 F.2d at 551 (concerning disclosure of business secrets between family members).

144. O'Hagan, 117 S. Ct. at 2219.

145. *Cherif*, 933 F.2d at 406-07.

146. Bayne, *supra* note 11, at 138 & nn. 395-97. *See also Clark*, 915 F.2d at 442.

147. Bayne, *supra* note 11, at 85 & n.50.

148. Bryan, the West Virginia Lottery Director, purchased, on the basis of inside information, market shares of public companies doing business with the Lottery and also passed the information on to the Lottery's counsel, who also bought and tipped two friends. *See* United States v. Bryan, 58 F.3d 933, 939 (4th Cir. 1995); United States v. ReBrook, 58 F.3d 961, 963-64 (4th Cir. 1995).

loss, moreover, took on a totally different tortious nature. Danny Cherif's Victim, according to Theory proponents, was First Chicago, the bank from which Danny learned of an impending deal. The litigable harm inflicted on First Chicago smacked more of invasion of privacy, breaking and entering, or various business-type torts. But certainly nothing suffered by First Chicago suggested Insider Trading.[149]

The same could be said of Smith & Nephew, "the British multinational which lost not a farthing,"[150] in *Clark*. And of Supermarket Susan, from whom Keith Loeb learned his secret[151] (the *Chestman* court felt Keith had no confidential relation with his wife![152]). And of the West Virginia Lottery in *Bryan*.

The Ginsburg Fancy Footwork

This collective scenario led to the perplexing insight into the mind of Justice Ginsburg. The deft manner in which she maneuvered between these two classes of Victims explains her choice of the Investor as *her* Victim in her New Theory. Excisions from the Amalgam, apropos, summarize her selection:

The Ginsburg *New Theory* outlaws:

> **Trading to gain no-risk profits — that is, the Investor's disadvantage stems from contrivance—a self-serving abuse that will affect the security price when revealed to Investors, with resultant harm to the Investors.**
> **The fraud is consummated only through securities transactions.**[153]

The Ginsburg selection of the *Investor* would seem easy in light of the evidence before her. However, do not forget that Ginsburg was enmeshed in the web of legalisms entangling the Original Theory.

149.

> Danny Cherif, former employee of First Chicago, was able by stealth to purloin from the Bank's loan department material secret information about impending mergers. By buying low before and selling high after the public announcements, Danny netted $247,000 in a mere nine months.

Bayne, *supra* note 11, at 141.

150. *Id.* at 140.

151. *Chestman*, 947 F.2d at 555-56. The facts are summarized as "The Supermarket Soap" in Bayne, *supra* note 11, at 84-85.

152.

> Keith's status as Susan's husband could not itself establish fiduciary status. . . . [B]ecause Keith owed neither Susan [his wife] nor the Waldbaum family [his in-laws] a fiduciary duty or its functional equivalent, he did not defraud them by disclosing [inside information] to Chestman [his broker].

Chestman, 947 F.2d at 571.

153. *See supra* note 105.

Moreover, this is the *O'Hagan* case, and James Herman O'Hagan was convicted under the Original Theory. The Original Theory repeatedly held, by Ginsburg's admission, that the person or entity *defrauded is not the other party to the trade, but is, instead, the source of the nonpublic information.*[154]

Pretty difficult for Ginsburg to fly full in the face of her own bald statement. What could she say?

This categorical identification of the "Source"—First Chicago, the Brit multinational, Susan, the Lottery, Grand Met—as the Victim of the Deception of the Insider Trade intensified the need for agility to justify her categorical statement in the Amalgam that the real Victim was the defrauded Investor.

Ruth Bader Ginsburg began her way out of the quandary by resorting to Academe in the person of a Barbara Bader Aldave. Barbara Bader's quotation went to the core of the perplexity generated by the Justice's reasoning:

> [A] fraud or deceit can be practiced *on one person [Grand Met], with resultant harm to another person* or group of persons [*the $4-million Investors*].[155]

Lest one doubt that Justice Ginsburg could really be subscribing to such a causal impossibility, she advanced her own version of the nonsequitur but with a slight shading that masked, somewhat, the glaring illogic. However, the mask was unavailing, what with Aldave's bluntness. Justice Ginsburg explains:

> A misappropriator who ***trades on the basis*** *of* material, ***nonpublic information***, in short, gains his advantageous market position through deception; *he deceives the source of the information and simultaneously harms members of the investing public.*[156]

The gnawing thought arises: How could the "misappropriator" "*harm a member of the investing public*," if, as Item (4) of the Original Theory proclaims, "*the Insider does not owe any duty to the public investor*"? No duty. No harm.

Justice Thomas could not abide such fallacious rationalization:

> The majority's statement that a "misappropriator . . . *deceives the source of the information and simultaneously harms members of the investing public*," . . . focuses on the wrong point. Even if it is true that trading on nonpublic information hurts the public, *it is true*

154. *O'Hagan*, 117 S. Ct. at 2209 (emphasis added).

155. Barbara Bader Aldave, *Misappropriation: A General Theory of Liability for Trading on Nonpublic Information*, 13 HOFSTRA L. REV. 101, 120 (1984) (emphasis added).

156. *O'Hagan*, 117 S. Ct. at 2209 (citing Aldave, 13 HOFSTRA L. REV. at 120-21 & n.107) (emphasis added).

> *whether or not there is any deception of the source of the information.*[157]

Justice Thomas was likewise perplexed by Justice Ginsburg's "fancy footwork," and showed his perplexity in a lengthy exposé. He laid bare her fallacy:

> The majority's statement, by arguing that *market advantage* is gained "through" deception, unfortunately seems to embrace an error in logic: *Conflating causation and correlation.* That the misappropriator may both *deceive the source* and "simultaneously" *hurt the public* no more shows a causal "connection" between the two than the fact that the sun both gives some people a tan and "simultaneously" nourishes plants demonstrates that melanin production in humans causes plants to grow. In this case, the only element common to the deception and the harm is that both are the result of the same antecedent cause — namely, using non-public information.[158]

That riposte should conclude the point. One wonders why Justice Ginsburg was not fully true to her own New Theory, did not abandon the Original Theory overtly rather than covertly, join the dissenting Justices, and even win over a majority.

D. *In Connection With a Deceitful Trade*

The Amalgam

The Ginsburg *New Theory* outlaws:

> **(1) Trading on the basis of nonpublic, confidential information, (2) By an outsider to a corporation**
> **(3) To gain no-risk profits — that is, (4) the Investor's disadvantage stems from contrivance, not luck and cannot be overcome with research or skill —**
> **(5) Which is a self-serving abuse that will affect the corporation's security price when revealed to Investors,**
> **(6) With resultant harm to Investors.**
> **(7) Finally, the fraud is consummated only when he uses the information through securities transactions.**

When the tort of *Deceit* was codified into Section 10(b), the Congress appended certain federal requirements to the substantive elements taken directly from the common law.[159] Among the federal additions, and the one pertinent to this discussion, was the proviso that *Deception,*

157. *Id.* at 2225 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

158. *Id.* at 2226 n.7 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

159. *See* LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 768-80 (3d ed. 1995).

the basic tort, be committed *"in connection with the purchase or sale of any security."*[160]

The purpose of this provision was merely to limit the all-inclusive concept of *Deceit* to a narrower class of scams, the stock fraud. Congress did not want to load up this *securities* statute with alien deceptive practices already subject to their own appropriate statutory or common-law prohibitions.[161]

Recall the pertinent remarks of Milton Freeman summing up the legislative history in one anecdote, which concluded with Commissioner Sumner Pike's lone comment: "Well, we are against fraud, aren't we?"[162]

The limitation to *security* fraud was, therefore, in effect, a *nonsubstantive* provision that did not go to the essence of the tort, but was of a procedural or jurisdictional nature. The *"in connection with"* merely said that if the *Deception* involves an (1) *Investor* (2) *Deceived* (3) *Through a Securities Transaction,* the malefactor is liable under Section 10(b). If not, the action lies elsewhere. Perhaps simple Theft, Embezzlement, or the Taking of Money under False Pretenses. Wisely, the Congress did not wish to convert the myriad variations of Deceit common in human conduct into federal offenses. Even the government has finite resources.

Theft vis-à-vis Stock Scam

This fourth Essential of the New Theory, therefore, is totally dependent on the content of the first three. The intrinsic nature of the *securities* tort of Insider Trading is not indistinguishable from the intrinsic nature of the multitude of other, garden-variety deceptive practices. To the contrary, the *accidental* quality that distinguishes the *securities* fraud from its other deceptive cousins is the *"in connection with"* proviso. Thus, *"in connection with"* is merely the accidental, distinguishing element that sets off, gives special individuality to, the Insider Trade of Section 10(b).

"In connection with" has no independent *substantive* content of its own. Its sole objective is to determine if the three essential elements of the tort proper, *Deceit,* were all committed as part of, during, in connection with, ***through a securities transaction*** and not as part of, during, in

160. 17 C.F.R. § 240.10b-5.

161. Louis Loss agrees with the Supreme Court in *Ernst & Ernst v. Hochfelder* that Section 10(b) is a "'catch all,'" and that "[t]he Commission got [in Section 10(b) and Rule 10b-5] what it wanted—a handle for investigating and obtaing injunctive relief against insiders who were buying their companies' stock." LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 778, 779 (3d ed. 1995).

162. *See supra* note 83 and accompanying text.

connection with, a pigeon drop, a bunco game, or any other variant of nonstock frauds by which the unwary are relieved of their money.

If all the substantive elements of the tort add up to a *Theft*, the tort is necessarily *in connection with* a Theft. To the contrary, if each intrinsic essential of Insider Trading involves (1) *The Breach of a* (2) *Duty to Disclose* (3) *To an Investor during a stock sale*, the malefaction was committed *"in connection with the purchase or sale of any security."*

Moreover, to clinch the matter and facilitate the present analysis, all substantive essentials of the common-law *Deceit*—the non-federal-accretion elements—were purposefully incorporated in the Amalgam of the Ginsburg New Theory.

The Ginsburg Fourth Essential

This study of Justice Ginsburg's *"imaginative construction"* of her own *"in connection with"*—to complete her "novel theory"—is, therefore, wholly anticlimactic. She has already laid out all the essentials of the tort and has located them, again, willy-nilly, *inside, during, integral to,* ***through*** a securities transaction.

To gain the Ginsburg answer to *"in connection with" what?*, therefore, simply study in turn her treatment of the connection between the securities transaction, *"the purchase or sale of any security,"* and successively: (1) *The Breach: The Gravamen: Nondisclosure to the Investor,* (2) *A Simple Duty: To Disclose to the Investor,* (3) *The Victim: The Deceived Investor.* In these three are contained all the essentials of Insider Trading. If all three constituent essentials of the tort are *in connection with* a trade, the total tort is necessarily *in connection with* the securities trade.

How, therefore, does the New Theory *connect each with* a security transaction?

(1) *The Breach: The Gravamen: Nondisclosure to the Investor*

The Ginsburg Opinion is shot through with statements placing the Breach, the *Deception* itself, squarely inside the stock trade. At an early point, Justice Ginsburg states:

> The misappropriation theory *targets* information of a sort that misappropriators *ordinarily capitalize upon* ***to gain no-risk profits through*** *the purchase or sale of* ***securities***.[163]

Thus, the New Theory does *not "target"*— that is, ***outlaw—information*** that *"**gains no-risk profits**" from the Source of the Information.* Rather, the *target* is the well-known Inside Information which the O'Hagans,

163. *O'Hagan*, 117 S. Ct. at 2209 (emphasis added).

Chiarellas and Boeskys have long used to deceive the unknowing public Investor.

However, the most unhesitating connection of the *Deception* with the *Insider Trade* itself comes when Justice Ginsburg wishes to satisfy doubters about her firm adherence to the *"in connection with"* requisite of Section 10(b). In the process, she even directly disavows any connection with the Theft:

> We turn next to the § 10(b) requirement that the misappropriator's *deceptive use of information* be "in connection with the purchase or sale of [a] security." This element is satisfied because *the fiduciary's **fraud is consummated***, not when the fiduciary gains the confidential information [the so-called Theft], but *when, without disclosure to his principal, he **uses the information** to purchase or sell **securities**.*[164]

Those words, without more, establish a causal nexus between the *deception* and the harm to the *Investor.*

The Consummation of the Fraud

The implications of the word *'**consummated**'* are conclusive in this matter. It is a strong and definitive word. *Webster's* defines its adjectival form:

> **con•sum•mate** . . . *adj* . . . **1** : complete in every detail: perfect . . . .[165]

The Theory may dilate unreservedly on all the antecedent details of whatever transpired when the Insider *obtained* the Information—whether by happenstance, innocent eavesdropping, or chicanery—but all are, nonetheless, intrinsically irrelevant to what he later did with the information. Had the Insider stopped with the obtainment only, no evil consequences of a securities trade would have occurred.

The *essential element* of an Insider Trade is the actual, subsequent *"**use**" of "**the information** to purchase or sell **securities**."* Only in the trading is the ***fraud "consummated,"*** *"complete in every detail: perfect."* The Government Brief put it this way:

> Here, the misappropriated information had personal value to [James Herman O'Hagan] only because of its utility in securities trading; indeed, *his misappropriation was not complete until he traded on the information.* [O'Hagan's] fraud consisted of *the deceptive use of the information* about Grand Met's plans *for the purpose of [his] trading; the trading was an essential element of [O'Hagan's] "deceptive device."* The misappropriation theory thus depends on *an inherent*

164. *Id.* (emphasis added).

165. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 282 (1988).

> *connection between the deceptive conduct and the purchase or sale of a security.*[166]

The meaning of those words is indisputable. Note particularly that *"the deceptive use of the information"* is *not* in connection with the *Theft* but *"for the purpose of [his] trading"* with the Investor.

When pressed by Justice Souter during Oral Argument, Deputy Solicitor General Dreeben put in the last nail:

> [Justice Souter]: So what you're saying . . . is in this case the misappropriation can *only be of relevance*, or is of substantial relevance, . . . *with reference to the purchase of securities.*
>
> "[Mr. Dreeben]: *Exactly.*
>
> "[Justice Souter]: When you take money out of the accounts [that is, steal dollars rather than learn information] you can go to the racetrack, or whatever.
>
> "[Mr. Dreeben]: That's exactly right, and because of that difference, [there] can be no doubt that this kind of misappropriation of property [that is, inside information] is in connection with the purchase or sale of securities.
>
> "Other kinds of misappropriation of property may or may not, *but this is a unique form of fraud, unique to the securities markets*, in fact, because *the **only** way in which [James Herman O'Hagan] could have profited* through this information *is by either trading on it* [that is, with an Investor] *or by tipping somebody else to enable their trades.*"[167]

Justice Thomas was so impressed by that exchange that he quoted it in full.

Justice Thomas correctly interpreted that statement:

> The touchstone required for an embezzlement to be "use[d] or employ[ed], in connection with" a securities transaction is not merely that it "coincide" with, or be consummated by, the transaction, *but that it is necessarily and only consummated by the transaction.*[168]

In other words: "The Fraud is *not* consummated in the *Theft* from the *Source* but in the *Deceit* of the *Investor*."

The thrust of the New Theory is completely away from the *Theft from the Owner* to the *Deceit of the Investor*, the party to the securities transaction. The Government reiterated:

> "[T]he requisite connection between the fraud and the securities trading [is] because it is *only* in the trading that the fraud is

166. Brief for Petitioner at 19, United States v. O'Hagan, 117 S. Ct. 2199 (1997) (No. 96-842) (emphasis added).

167. *O'Hagan*, 117 S. Ct. at 2222-23 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting Brief for Petitioner at 19) (emphasis added).

168. *Id.* at 2222 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

consummated."[169]

Justice Thomas continued to explain his meaning by pointing out:

> [I]f the fiduciary discloses *to the source* that he plans to trade on the confidential information, there is no "deceptive device" . . . . Yet . . . the hypothesized "inhibiting impact on market participation" would [still be present]. . . . *"Outsiders" would still be trading based on nonpublic information that the average investor has no hope of obtaining through his own diligence.*[170]

Since Justice Ginsburg placed the *Deception* of her *New Theory* squarely ***"only in the trading,"*** where did she place the *Duty* that forbade the illegal trading?

(2) *A Simple Duty: To Disclose to the Investor*

When Justice Ginsburg repeatedly emphasized that the Insider's

> **fraud is consummated only when he uses the information through securities transactions**[171]

she has placed the *Breach* inside the stock sale. In that statement, she effectively and necessarily also placed the *Duty to Disclose to the Investor* inside the stock sale as well.

This necessary and inevitable junction of *Duty* and *Breach of Duty* flows from the intrinsic nature of *"duty"* and *"breach"* in any tort, as well as Insider Trading. Remember:

> Elementary logic moves the reasoning inexorably from the *Violation* of Section 10(b) to the *Duty* that the *Violation* violated. Since the gravamen of the Wrong is *Nondisclosure to the Investor,* the *Duty* is perforce: *To Disclose to the Investor,* to tell him the truth about the value of the stock traded. From the malefaction *Nondisclosure* the illation to the *Duty of Disclosure* can readily be made.[172]

This explains why Justice Ginsburg spent little effort in discussing *"duty"* as such. She needed only to state summarily that her New Theory

> **outlaws trading on the basis of nonpublic, confidential information.**[173]

In this concise pronouncement in the Amalgam, the Justice has declared that *"the law of Insider Trading carries a duty not to trade on the basis of deception."* In and of itself, ***"outlaws"*** is a prohibition, the

169. *Id.* at 2223 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting Transcript of Oral Argument at 8).

170. *Id.* at 2225 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

171. See *The Amalgam, supra* note 105.

172. *Id.*

173. *Id.*

expression of a negative duty. In this unqualified command is the New Theory's *Duty to Disclose to the Investor,* and it concerns only the Insider Trade with the duped Investor, with no mention of a Duty—let alone a *fiduciary* one—to forgo ***"no-risk profits"*** in trading with the *Owner of the Information.*

With that, Justice Ginsburg has placed the second substantive Essential inside the securities transaction. But, where is the Victim of Insider Trading? Was he harmed by the Theft. Or was he deceived *in, during,* ***through***, the stock sale?

(3) *The Victim: The Deceived Investor*

At this late stage in her *"construction"* of her New Theory *"from whole cloth,"* the Justice had painted herself into only one possible conclusion: *The Victim was the deceived Investor.* A syncopation of the Amalgam provides a precise summation of her reasoning:

The Ginsburg *New Theory* outlaws:

> **Trading to gain no-risk profits—that is, the Investor's disadvantage stems from contrivance—a self-serving abuse that will affect the security price when revealed to Investors, with resultant harm to the Investors.**
> **The fraud is consummated only through securities transactions.**[174]

That syllogism effectively places, the Investor as the Victim: at the heart of the securities transaction. **The self-serving abuse, consummated only through a securities transaction, brings resultant harm to the Investor.**

Justice Ginsburg's Fourth *Essential* has now been firmly established. All three *substantive* essentials of the tort are *in connection with* a trade. Therefore, the total tort is necessarily *in connection with a securities transaction.*

A Climactic Fillip: The First Shall Be Last

Before concluding this second Section of the Study, some clinching insights into the Ginsburg reasoning are worthy of comment.

The first paragraph in her Opinion gives pause to the earlier suspicion of this Article that Justice Ginsburg had, as if by chance, naively stumbled onto her New Theory while thinking through her Opinion. And that she was unknowingly driven to her New Theory by a subliminal, unstated realization that James Herman O'Hagan could never be rationally convicted under the Original Theory.

174. *Id.*

That first paragraph speaks sharply otherwise: Rather that hers was a calculated determination to substitute her New Theory for the Original Theory. And thereby affirm O'Hagan's conviction on legitimate grounds.

Her opening words, which posed exactly the technical question her opinion would answer, bespeak a fully excogitated purpose to bypass, finesse, ignore, the Original Theory and "*construct*" her own New Theory "*from whole cloth.*"

With this thought in mind, consider how Justice Ginsburg phrases *her* question before the Court. This is "*the issue*" "*we address*":

> Is a person who trades in securities for personal profit, using confidential information misappropriated in breach of a fiduciary duty to the source of the information, guilty of violating § 10(b) and Rule 10b-5?[175]

"*The issue,*" when examined closely, turns out to be a blending of *two disparate definitions*. The *first* is an approximation of her nascent New Theory, segregated herewith in boldface:

> **Is a person who trades in securities for personal profit, using confidential information**
>
> misappropriated in breach of a fiduciary duty to the source of the information,
>
> **guilty of violating § 10(b) and Rule 10b-5?**[176]

The *second*, inserted *parenthetically* by Justice Ginsburg within the first, is a misleading distortion of the Original Theory:

> Is a person who trades in securities for personal profit, using confidential information
>
> **misappropriated in breach of a fiduciary duty to the source of the information,**
>
> guilty of violating § 10(b) and Rule 10b-5?[177]

This insertion is merely an irrelevant comment on later-to-be-used information. She might just as well have said:

> Is a person who trades in securities for personal profit, using confidential information
>
> **overheard accidentally at the Minneapolis Club bar,**
>
> guilty of violating § 10(b) and Rule 10b-5?[178]

This artful presentation of her chosen "*issue*" in the very first paragraph of her Opinion provides a perfect presage of the work of Justice Ginsburg in *constructing* her New Theory. Her conscious draft of the

175. *O'Hagan*, 117 S. Ct. at 2205.
176. *Id.* (format altered for emphasis).
177. *Id.* (format altered for emphasis).
178. *Id.* (format altered for emphasis).

O'Hagan issue confirms the Thesis of this Study that Ginsburg never addressed—or even intended to address—*the conformity of the Original Theory to Section 10(b).* Rather, she asked: *Is a person who violates the **New Theory*** liable under Section 10(b)?

Close scrutiny of her formally stated "*issue*" yields two reflections in strong corroboration of the overall analysis of the New Theory: (a) *Ginsburg's Garbled Blend of the Two Theories,* and (b) *The Irrelevancy of the Source of the Information.*

(a) *Ginsburg's Garbled Blending of the Two Theories*

The format used above to quote the Ginsburg "issue before the Court" was designed to highlight the purposeful blending of *the two Theories* as if *only the Original Theory* were presented for adjudication.

The New Theory

Separate her "issue"' into the two parts presented above. *First,* the truncated version of her New Theory:

> [W]e address [this] issue[ ]: (1) *Is a person who trades in securities for personal profit, using confidential information . . .,* guilty of violating § 10(b) and Rule 10b-5.[179]

Is that not a syncopated version, somewhat loose perhaps but sufficient, of the *Amalgam* of the New Theory? Implicit is (a) *Nondisclosure to the Investor,* (b) *The Duty to Disclose,* (c) *The Victim: The Deceived Investor,* (d) *In a Deceitful Trade.* She did not spell out the *Essentials,* but they are there.

The Original Theory

Second, Justice Ginsburg inserts into the middle of the New Theory an inaccurate, even distorted, version of the Original Theory:

> [The *use of] confidential information misappropriated in breach of a fiduciary duty to the source* of the information . . . .[180]

But—and here is the clincher—where is Item (4) of the Original Theory: "*(4) regardless of whether he owed any duties to the shareholders of the traded stock*"?[181] Remember that that was finally paraphrased to read:

> The misappropriation theory authorizes the criminal conviction of a person (4) *without taking into account whether or not the Insider owed any duty to disclose to the Investor, deceived the Investor, or harmed the Investor with whom he traded the stock. Liability is pres-*

179. *Id.* (emphasis added).
180. *Id.* (emphasis added).
181. *Clark,* 915 F.2d at 443 (emphasis added).

ent in any case.[182]

Where in the "issue before the Court" are the *four* Essentials of the Original Theory, other than *Theft?*

Her *"issue"* does not address the Original Theory at all. The Original Theory contains Item (4), which negates, emasculates, the central thrust of the entire Theory. Without Item (4) the Original Theory falls.

Her Nascent Theory Takes Shape

The extent of Ginsburg's garbled thinking becomes clearer—as does the growth of her New Theory—as she subtly identifies her New Theory with the *Classical* or *Traditional Theory* of Section 10(b). This is understandable because her New Theory, in the end, embodies most of the *Classical* essentials.

Once the Justice has virtually equated her New Theory with the approach of the SEC's *Cady, Roberts* and its *Classical* progeny, she then tries to pretend that her evolving New Theory is really not inconsistent with the Original Theory. Expectably, the result is neither fish nor flesh nor good red herring. She ignores the genuine, reciprocal antagonism of the two. Note this conciliatory attempt:

> *The two theories* [the *Classical* and the *Misappropriation*] *are complementary,* each addressing efforts to capitalize on nonpublic information through the purchase or sale of securities.[183]

Certainly, this is redolent of her commingling of the *New* and *Original* Theories in her *"issue before the Court."* Further, it is a first step in *supplanting* the Original Theory with her own New Theory.

In the same paragraph, she follows this attempt at conciliation by beginning her *"construction from whole cloth"* of her New Theory. She assumes that the Original Theory is in truth *"complementary"* to the *Classical Theory*—and in turn to her *New Theory*—instead of diametrically opposed. These words eventually appeared in the Amalgam:

> The misappropriation theory [she really means *Classical Theory* or her *New Theory*] is thus designed to "protec[t] the integrity of the securities markets against ***abuses by 'outsiders' to a corporation*** who have access to ***confidential information that will affect th[e] corporation's security price when revealed*** . . . .[184]

This initial instance of her subtle supplanting of the *Original Theory* with the *New Theory* by way of equating the Classical Theory with

182. *See supra, The Translation of Item (4) into English,* at 222-25.

183. *O'Hagan,* 117 S. Ct. at 2207 (emphasis added).

184. *Id.* (quoting Brief for Petitioner at 14) (emphasis added) (recall that the bold typeset for emphasis indicates verbatim *Ginsburg* in the Amalgam.).

her New Theory is corroborative of the Ginsburg approach so fully detailed thus far.

(b) *The Irrelevancy of the Source of the Information*

Whence the Information? is a perennial red herring, diverting the courts from the solution of the Insider Trading problem. It led Justice Powell from the real issue in *Chiarella*, and it has befuddled Justice Ginsburg in *O'Hagan*. It matters not a whit *how*, *where*, or *when* James Herman O'Hagan found out about the Grand Met takeover. He could have been infused with a divine light. The *Source* is of no moment.

The only important point from the deceived Investors' view—and for liability under Section 10(b)—is the one relevant fact that *James Herman O'Hagan knew and acted on* the secret information. *How, where, or when* he got it does not matter.

Recall 1994 and "*Chiarella* and the 'Fiduciary' Fallacy." The Court was niff-naffing over the source of Vinnie's secret information. Here is how that question was answered:

> Does it matter whether Mr. Chiarella learned of the Colgate-induced increase in the value of Riviana Foods from any of a dozen other sources? Would the innocent seller of the undervalued shares care *how* Chiarella heard of the true value, or rather *that* Chiarella did know? Would not the victim be equally injured if the information came from:
>
> — the night janitor at Colgate
> — the mistress of Riviana's CEO
> — the waiter in Colgate's dining room
> — the Riviana switchboard
> — the contrôleur of Colgate
> — [ ] the Pandick markup room?
>
> Merely to pose the question prompts the easy answer. The Second Circuit had no hesitancy: "That [Chiarella] was not [inside Riviana] is true, but irrelevant." *Irrelevant* is the word.[185]

Put James Herman O'Hagan in Vinnie's shoes and ask similar questions:

> Does it matter *when* or *how* or *whence* James Herman O'Hagan learned of the Grand Met takeover of Pillsbury? Would the innocent seller of the undervalued shares care *how* O'Hagan heard of the true value, or rather *that* O"Hagan did know? Would not the victim be equally injured if the information came from:
>
> — the night janitor at Grand Met
> — the mistress of a Dorsey senior partner
> — the waiter in Grand Met's dining room

185. Bayne, *supra* note 68, at 701-02 (quoting *Chiarella*, 588 F.2d at 1364).

— the Dorsey switchboard
— a chance remark at the Minneapolis Club bar
— a water-cooler 'misappropriation' at Dorsey?

Merely to pose the question prompts the easy answer. *Irrelevant* is the word.

Thus, the opening question posed to the Court—the burden Justice Ginsburg set for the Majority to carry—never contemplated addressing the Misappropriation Theory. She stated her position clearly, if only the reader were to read it. Her question addressed the *New Theory*, and her answer replied with the *New Theory*.

The four *Essentials* of her *New Theory* have now been adequately analyzed by Justice Ginsburg and categorized in the logical subdivisions of her definition as synthesized in the Amalgam. This New Theory permit[s] the Majority to reverse the Eighth Circuit and concur in the conviction of James Herman O'Hagan for Insider Trading.

These *Essentials* lend themselves well to graphic representation and in turn are well adapted to facilitate the planned juxtaposition with their counterparts in the Original Theory that sent James Herman O'Hagan to jail.

The New Theory Essentials

The Gravamen:
Nondisclosure to the
Investor

A *Simple* Duty:
To *Disclose* to the Investor

The Victim:
The Deceived Investor

In Connection With
a *Deceitful Trade*

III. THE TWO 'THEORIES' IN JUXTAPOSITION

Because we have ***no regulation*** **squarely setting forth** some version of ***the misappropriation theory*** **as the Commission's interpretation of [Section 10(b)]**, we are left with little more than the Commission's litigating position or ***the majority's completely novel theory that is not even acknowledged, much less adopted by the***

> ***Commission*** **. . . . That position . . .** ***can provide no basis for liability.***
>
> —THOMAS, J., dissenting in *O'Hagan.*[186]

The juxtaposition of the *Original Theory* against the *New Theory* should give conclusive proof that Justice Thomas was correct: "***Until today, the theory has never existed.***"[187]

As a prelude to this setoff, consider the most-succinct-possible definitions of the two Theories:

The Two Theories Distilled

The Original Theory: In the first Section of this Study the Misappropriation Theory was boiled down to the minimum. After laborious analysis, the Original Theory, free of all legalistic verbiage, and in understandable language, came down to this:

> *The Insider "steals" Information from his employer, the Victim. Later he uses the information, in some guiltless way, in an unrelated securities trade.*

According to the Theorists, this *Theft from the Source* was supposed to constitute *Deception of the Investor, "in connection with" a securities transaction.* And hence result in liability under Section 10(b).

The New Theory: Correspondingly, the second Section found that the Amalgam, in Justice Ginsburg's own words, summarized the Insider Trade this way:

> *The Insider uses nonpublic Information in a securities trade to Deceive an Investor, the Victim.*

That overview should crystallize the antipolarity of these two interpretations of the Federal law of Insider Trading.

The wonder is that two knowledgable antagonists, applying their respective Theories, could study the same straightforward violation of Section 10(b) in *O'Hagan* and reach two totally conflicting analyses. Especially when the Insider Trade is in fact a rudimentary business scam that a layman could penetrate in a trice: Witness the five Fables.

As the bare-bones juxtaposition of the four *Essentials* of the two Theories progresses, reflect on the expectable reactions of a mythical Panel of these citizens: (1) The newly-wed couple atop the Nuclear Dump, (2) The Kansas widdie-woman, (3) A TGS investor who sold his ore-laden shares, (4) One of Vinnie's conned sellers, or (5) Any of the innocents who lost $4 million to James Herman O'Hagan.

186. *O'Hagan*, 117 S. Ct. at 2226 (Thomas, J., concurring in the judgment in part and dissenting in part joined by Rehnquist, C.J., and Scalia, J.).

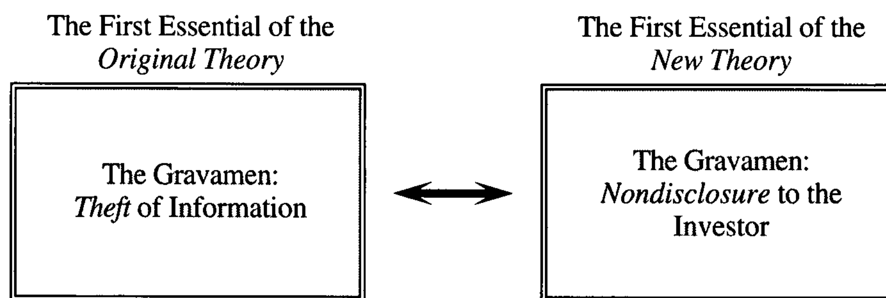
187. *Id.* at 2225 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

Would that Panel conclude for each *Fable* that (1) The *Gravamen* was a *Theft*, or a *Lie?* (2) The *Duty* was *Not To Steal*, or *To Disclose the True Value?* (3) The *Victim* was the *Source of the Undisclosed Information* or the *Cheated Trader?* (4) The Trade was *In Connection With* a *Theft* of some *Information*, or a *Sale of Stock or House?*

The conclusion should be inevitable: The Ginsburg *New Theory* is totally foreign to the *Original Theory*.

This concluding Section will highlight the boiled-down *Essentials* of each Theory: A. *The Gravamen*. B. *The Duty*. C. *The Victim*. D. *The Locus of the Insider Trade*.

A. *The Gravamen*



In this and succeeding comparisons, begin with the Original Theory and follow with the New Theory.

(1) *Theft: The Core of the Original Theory*

At no point did any of the five conflicting Circuits dispute the Theory's central thesis as summed up by the Winter Five in *Chestman:*

> *[T]heft* rather than fraud or deceit, seems the *gravamen* of the [misappropriation] prohibition.[188]

The six-Judge Meskill Majority made that characterization unanimous in *Chestman*:

> Under this *misappropriation theory*, the *"fraud"* requirement of Rule 10b-5 is deemed to be satisfied when *a person "misappropriates material nonpublic information . . . ."*[189]

The only dissentient voices among the Circuits tended to strengthen the position of *Theft* as the heart of the Theory. In the Second, concern had arisen as to whether the *fiduciary* appendage was really needed at all. Thus, in the earliest Theory case, *Newman*:[190]

188. *Chestman*, 947 F.2d at 578 (Winter, J., concurring in part and dissenting in part) (emphasis added).

189. *Bryan*, 58 F.3d at 944 (quoting *Chestman*, 947 F.2d at 566) (emphasis added).

190. United States v. Newman, 664 F.2d 12 (2d Cir. 1981), *cert. denied*, 464 U.S. 863 (1982).

> [T]he [*Newman*] court held that Rule 10b-5's predicate *fraud* requirement was established through the *mere theft* of the confidential information . . . .[191]

This *"mere theft"* was also enough for the Seventh *Cherif* opinion, in 1991 had conjectured that perhaps the Original Theory would apply Section 10(b) *"even to 'mere' thieves"*[192]—with no *"fiducial"* element—as long as the Theft was followed sometime later by an unrelated stock trade, even though that trade was totally free of *deception* or *harm* to an Investor.

In the *Original Theory*, therefore, *Theft* was indisputably the gravamen of the Insider Trade. But what of the *New Theory*?

(2) *Nondisclosure to the Investor: The Core of the New Theory*

The surest way to present Justice Ginsburg's stance on the Gravamen of the Insider Trade is through a condensed reading of the *Amalgam*. That, after all, represents her essential thinking in her own words.

The Amalgam centers on the *Nondisclosure of Inside Information to the Investor.* Witness this edited version:

The Ginsburg *New Theory* outlaws:

> **Trading on nonpublic confidential information**
> **to gain no-risk profits — that is, the Investor's disadvantage**
> **stems from contrivance — a self-serving abuse,**
> **with resultant harm to the Investor when revealed.**
> **The fraud is consummated through the securities transaction.**[193]

Little commentary is needed beyond Justice Ginsburg's own statements. Her objective: To state unequivocally this first *Essential* of the New Theory, the Gravamen of the tort, (1) *Nondisclosure to an Investor,* (2) *In a Stock Sale,* (3) *With an Investor.*

She achieves her goal by the use of several dispositive words. To express the key *"Nondisclosure,"* she relies on ***"nonpublic confidential"*** and ***"when revealed."***[194]

For *"to an Investor,"* her words are an *"Investor's disadvantage"* and ***"to an Investor when revealed."***[195]

To establish that *deceit* was *"of an Investor,"* she says that ***"fraud is***

The *Bryan* court noted: "*Newman* concluded easily that the misappropriation of information constitutes "fraud" under Rule 10b-5. *Bryan*, 58 F.3d at 954.

191. *Bryan*, 58 F.3d at 954 (emphasis added).

192. *Cherif*, 933 F.2d at 412 n.6 (citing *Chiarella*, 445 U.S. at 246 (Blackmun, J., dissenting)).

193. *See supra* text accompanying note 105.

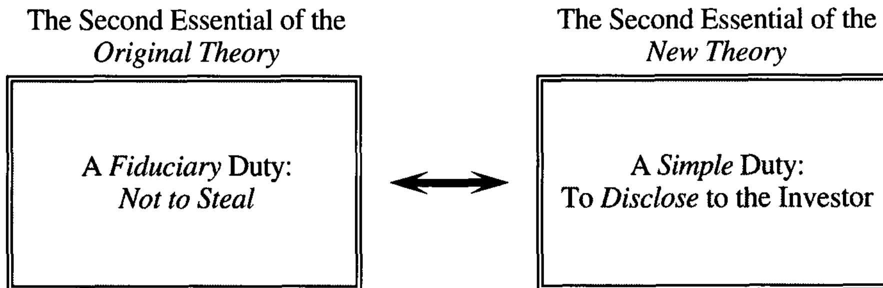
194. *O'Hagan*, 117 S. Ct. at 2207. *See supra* text accompanying note 105.

195. *See id.* at 2207.

consummated through the securities transaction."[196]

Theft from a third party far from the securities trade and unconcerned about it, on one hand, and *Deception of the party to the trade*, on the other, could not be more antipolar concepts.

B. *The Duty*



(1) *The Original Theory:* From *Theft* to the *Duty Not To Steal*

The earlier analysis of *Duty* according to the *Original Theory* concluded with a brief syllogism:

> The reasoning is ready: Move from the *Violation* of the law to the *Duty* that the violation violated. If the offense is Misappropriation, *Theft,* the *Duty* necessarily must be: *Not To Steal.* From the malefaction *Theft,* the illation to the *Simple Duty Not To Steal* easily can be made.[197]

The Limitation to Fiduciary Thieves

The Original Theory then narrowed the compass of liability: *Mere* Thieves had no *Duty* to forgo the Insider Trade. Only *Trusted* Thieves were held to a Duty under Section 10(b).

This sharp restriction of Insider liability—to a limited group of trustees, fiduciaries, friends and confidants—would remain totally incomprehensible unless one knew of the recent history of *Chiarella*[198] and its impact on the law of Insider Trading.

The Timorous Powell had shied away from holding every Insider who deceived an Investor—that would have caught Vinnie in its net—so he insisted that only those Insiders liable for lying would be those in *a fiduciary or other position of trust.* That served Powell's purpose well, but it saddled the Original Theory with absurd baggage. The result:

> [T]he misappropriation theory . . . authorize[s] the criminal convic-

196. *See id.* at 2209.
197. *See supra A Fiduciary Duty: Not to Steal.*
198. *Chiarella,* 445 U.S. 222 (1980). *See generally,* Bayne, *supra* note 68.

tion of a person who "*(1) misappropriates material nonpublic information (2) by breaching a duty arising out of a relationship of trust and confidence . . . .*"[199]

Which states accurately the *Duty* under the *Original Theory: A Fiduciary Duty: Not To Steal.*

(2) *The New Theory:* From *Nondisclosure* to the *Duty to Disclose*

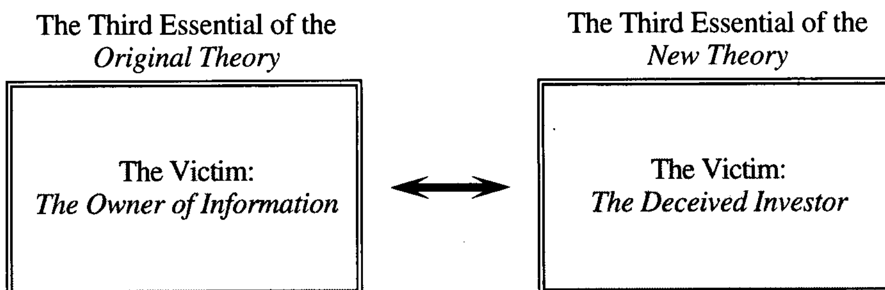
The same inexorable logic that led from *Breach* to the *Duty Breached*, correspondingly led Justice Ginsburg to a brief conclusory statement in the *Amalgam*:

The Ginsburg *New Theory* outlaws:

> **Trading on nonpublic confidential information to gain no-risk profits — that is, the Investor's disadvantage stems from contrivance — a self-serving abuse, with resultant harm to the Investor when revealed. The fraud is consummated through the securities transaction.**[200]

This diametric opposition between the Theories persists in the second Essential of the Insider Trade. *The Duty Not To Steal from a Third Party* shows no resemblance to the *Duty to Disclose to the Investor* who sits across the table in a stock trade.

C. *The Victim*



The *Original Theory* made no attempt to escape the trap it set for itself. It could scarce deny that the only *Victim* of a *Theft* of Information—it persisted in calling "snooping" or "innocent eavesdropping" or simply "learning," *theft*—was he from whom the Information had been howsoever obtained. The Theory called him the *Source.*

It was the Second Circuit's *Newman*—the first *Theory* case — that gave birth to the concept. In *Newman*, the *Source* was an employer:

"The Court [in *Newman*] was . . . influenced by *the damage inflicted*

199. *Bryan*, 58 F.3d at 944 (quoting *Clark*, 915 F.2d at 443) (emphasis added).

200. *See supra* text accompanying note 105.

on the insider trader's *employer by a conniving employee*."[201]

Thus, *Newman* considered that Section 10(b)—the Federal codification of *Deceit* of an *Investor* in a stock sale—would find the *Victim* to be him whence the Insider learned the confidential information that duped the sellers into losing $4 million.

(2) *The New Theory:* From *Deceit of the Investor* to *Harm to the Investor*

No one can accuse Justice Ginsburg of elegant reasoning on the path to her preordained conclusion that the obvious *Victim* of the O'Hagan con had to be the poor Innocent who relied on the lie. But she saw where she had to go, and thither she went, logic or no.

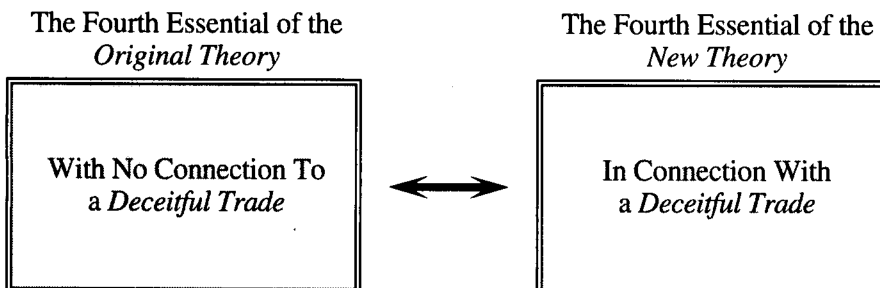
Her classic borrowing from Academe in explaining her logic on the path to her goal will rank high in legal history:

> [A] fraud or deceit can be practiced *on one person [Grand Met], with resultant harm to another person* or group of persons [*the $4-million Investors*].[202]

That memorable sequence led the New Theory to the consequently-then-tenable conclusion that the *Victim* of the Insider Trade was *The Deceived Investor.*

The unjustifiability of the means-to-the-end withal, the end conclusion nonetheless remains—for different, valid reasons—justified: The *Deceived Investor* takes his proper place, *opposite* his antithetical counterpart: *The Owner of the Information.*

D. *The Locus of the Insider Trade*



(1) *The Locus* According to the *Original Theory: In a Theft of Information*

Also recall that the first three *Essentials* of the Insider Trade—the

201. *Bryan*, 58 F.3d at 955 (quoting *Cherif*, 933 F.2d at 409).
202. *See* Aldave, *supra* note 154, at 120 (emphasis added).

necessary substantive elements of the tort, *Deceit,*—had all centered on and were integral to the *Theft:*

> (1) *The Gravamen: Theft of Information,* (2) *A Fiduciary Duty: Not To Steal* and (3) *The Victim: Owner of Information.*

Thus (1) the *Breach* was *Theft,* (2) the *Duty* forbade *Theft,* and (3) the aggrieved one was the *Victim* of *Theft.*

Also recall that this fourth Essential of the tort is only an *accidental* procedural element, whose locus is dictated by the locus of the other three *substantive* Essentials. Since these three were all integral to Theft, the Original Theory concluded necessarily that the tort occurred "*in connection with*" the Theft, that is, the locus of the tort, which the Theorists nonetheless called Insider Trading, would be *inside* the Theft.

However, this truth flew in the face of the Federal proviso "*in connection with*" a stock transaction. So, the *Theory* had to have resort to a little legerdemain. *Simultaneously,* two contradictory steps were taken:

Step One: The Theory effected a camouflaged *in-fact ditching* of the inconvenient proviso, "*in connection with*" a stock sale. By simply adding the virtually unintelligible Item (4) of the consensus definition, that obstacle was removed:

> [T]he misappropriation theory . . . authorize[s] the criminal conviction of a person . . . *(4) "regardless of whether he owed any duties to the shareholders of the traded stock."*[203]

Which, by the meticulous parsing of every word—aided by *Webster's*—yielded a translation that meant, in ordinary every-day English:

> (4) *without taking into account* whether the Insider owed any duty to the public Investor.[204]

And that in turn meant:

> *The Trusted Thief would still be **liable** under the Theory, **even though (a) He owed no Duty to an Investor, (b) Breached No Duty to an Investor, (c) In no way Wronged an Investor,** in a totally guiltless trade.*

That effectively emasculated "*in connection with.*"

Step Two: Then, by the addition of a now-meaningless Item (3) to the consensus definition—"(3) *uses that information in a securities transaction*"—lip-service was duly paid to Section 10(b), and the Theory was satisfied that it had adequately confused the Bench, the Bar, and Academe.

But the net result nonetheless remained: The Theory's tort

203. *Bryan,* 58 F.3d at 944 (quoting *Clark,* 915 F.2d at 443) (emphasis added).

204. *See supra, The Translation of Item (4) into English,* at 222-25.

occurred—*was consummated in*—the *'Theft' of Information*, and hence in fact had *No Connection With a Deceitful Trade.*

(2) *According to the New Theory: In Connection With a Deceitful Trade*

At the far other end of the spectrum, the Ginsburg *New Theory* places the *Deceit as part of, integral to, during, in connection with,* ***through a securities transaction***, the Insider Trade of Section 10(b).

This was inevitable because Justice Ginsburg had already in her Amalgam concluded that *Deceit* is the *essence* of Insider Trading: (1) The *Breach* is *Deceit,* which is a violation of (2) The *Duty Not to Deceive* (3) The *Victim* of the *Deceit,* the Investor.

Thus, the Breach of the Duty to the Investor clearly occurred *"In Connection With a Deceitful Trade."*

The Summation

With that, all four *Essentials* of the New Theory can be herewith gathered together—and thereby state the distillate of the New Theory—in this synoptic reading of the *Amalgam:*

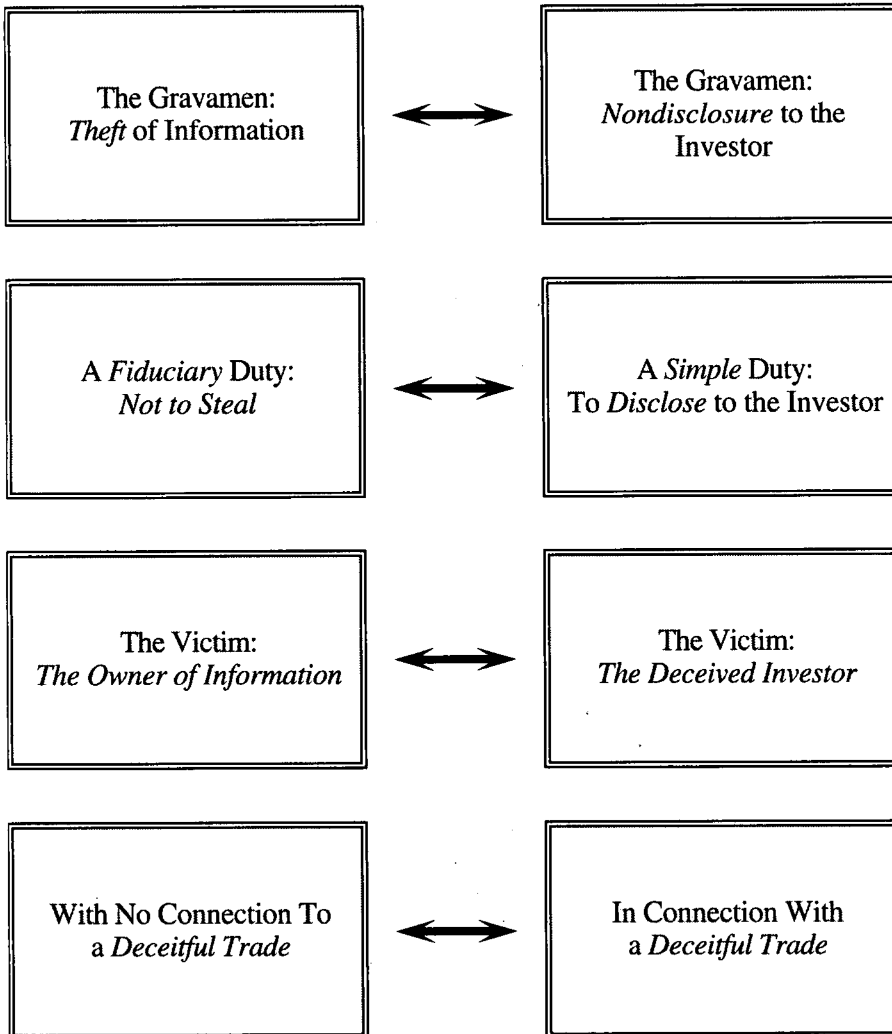
The Ginsburg *New Theory* outlaws:

> **Trading on nonpublic confidential information to gain no-risk profits — that is, the Investor's disadvantage stems from contrivance — a self-serving abuse, with resultant harm to the Investor when revealed. The fraud is consummated through the securities transaction.**[205]

Which has at last afforded a final hill-top view of the objective of this Study to show that the Supreme Court never faced the real question presented on certiorari: *Does the Misappropriation Theory conform to Section 10(b)?* But rather that Justice Ginsburg and the Majority disported themselves in a lengthy *obiter* disquisition on *"a novel New Theory,"* under which James Herman O'Hagan would rightly have been convicted.

The final juxtaposition:

205. *See supra* text accompanying note 105.



In a word, Justice Clarence Thomas, along with Justice Scalia and the Chief Justice, accurately characterized *"the dispositive flaw"* of *O'Hagan*:

> [The Ginsburg Majority] engages in the "imaginative" exercise of constructing *its own misappropriation theory from whole cloth.*
> **[This] new theory . . . suffers from a . . . dispositive flaw**: It is not the theory offered by the Commission. Indeed, . . . *this . . . completely novel* . . . theory has *never* been proposed by the Commission, much less adopted by rule or otherwise.
>
> *Whether the . . . new theory has merit we cannot possibly tell* on

> the record before us . . . because, until today, ***the theory has never existed.*** In short, the . . . ***new theory*** is simply not presented in this case, ***and cannot form the basis for upholding [James Herman O'Hagan's] convictions.***[206]
>
> Because we have ***no regulation*** squarely setting forth some version ***of the misappropriation theory as the Commission's interpretation of [Section 10(b)],*** we are left with little more than the Commission's litigating position or *the majority's completely novel theory* ***that is not even acknowledged, much less adopted by the Commission.*** . . . **That position** . . . ***can provide no basis for liability.***[207]

EPILOGUE

Arguably, the law of Insider Trading is now where it was when Judge Hansen handed down *O'Hagan* for the Eighth Circuit, effecting a 3-to-2 conflict among the Circuits as to the applicability of the Misappropriation Theory to Section 10(b). The Thesis of this Study has been established, and the work has been concluded. That is true, with one notable exception.

The exception? The *obiter* reflections of Justice Ginsburg and the Majority—and perhaps more to the point, the sound convictions of Justice Thomas, and Justice Scalia and the Chief Justice—have given deeper insights than heretofore into the present Court's thinking on the law of Insider Trading.

The future campaign, therefore, will now have further support for a return to the rationality of the Traditional concepts of the SEC's *Cady, Roberts* and its progeny.

The serious errors perpetuated by Ginsburg's *O'Hagan* warrant the ready prediction that the Supreme Court will soon revisit the law of Insider Trading toward cleaning up the mess.

Presumably, with the field now cleared of *O'Hagan* as a credible *adjudicative* ruling, the invitation is loud and forceful to all: Enter the lists. Attack the *obiter* errors of Ginsburg, as well as the longtime fallacies bedevilling the law of Insider Trading antedating *O'Hagan.*

Forward, therefore, to the inevitable articles that the *obiter O'Hagan* is so unmistakably calling for.

And finally, to the second Article of this two-part series, "Insider Trading Ignored."[208]

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206. *O'Hagan,* 117 S. Ct. at 2224-25 (Thomas, J., concurring in the judgment in part and dissenting in part) (emphasis added).

207. *Id.* at 2226 (Thomas, J., concurring in the judgment in part and dissenting in part).

208. David Cowan Bayne, S.J., *Insider Trading: Ginsburg's O'Hagan: Insider Trading Ignored* (forthcoming).