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Insider Trading: Ginsburg's O'Hagan: Insider Trading Ignored

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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.


Justice Ginsburg, as ineptly as she did handle O’Hagan, is not to be too harshly criticized. She was, after all, a victim, the inheritor of fifteen years of serious maltreatment of the law of Insider Trading at the hands of both courts and commentators.

Try as she might, however, her O’Hagan has done nothing to put the law back on a rational basis. Rather, O’Hagan failed to exterminate the Misappropriation Theory — the forceful objective of the Circuit below — and confirmed as well all the old fallacies of the recent past. In short, the law of Insider Trading is right where Justice Ginsburg found it. With a few flaws of her own thrown in.

Interjectory Foreword

Before another word is written, the ultimate goal of the present endeavor must be explicitly stated. This work must be placed in context, and its broadest conclusions succinctly previewed.

This Article will complete a two-part Study of O’Hagan, the latest Supreme Court word on the law of Insider Trading.

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3. As Justice Ginsburg, author of the O’Hagan opinion noted, “Twice before we have been presented with the question whether criminal liability for violation of § 10(b) may be based on a misappropriation theory.” O’Hagan, 521 U.S. at 650 n.4. She then points out that both times the Court “declined to address the question,” evidently preferring to rule on the perceived inequities in
The First Part: The Misappropriation Theory Ignored

O’Hagan was expected to adjudicate the legitimacy of the so-called Misappropriation Theory, a recent attempt to interpret the 60-year-old Section 10(b).¹⁴

For seventy years the Insider Trade had a simple meaning: The Insider could be any Tom, Dick or Harry who deceives his fellow trader, using inside information, in a stock transaction.

In the early 80s the Misappropriation Theory appeared, and argued that the Insider Trade should consist of the Theft of Information in a breach of a Fiduciary Duty to the Source of the Information. The information did have to have some unrelated, unspecified use in connection with a security trade. But the Theory required no duty to, deception of, or harm to, any Investor.

In its analysis of the transformation of the Insider Trade to a Theft of Information, the first half of this two-part Study — “Insider Trading: The Misappropriation Theory Ignored: Ginsburg’s O’Hagan.”⁵ reached an unsettling conclusion: That the Supreme Court never judicially faced the question before it: Does the Misappropriation Theory conform to Section 10(b)?

To the contrary, that Article found “that Justice Ginsburg and the Majority disported themselves in a lengthy obiter disquisition on ‘a novel New Theory’”⁶ But finessed the Misappropriation Theory itself.

The Second Part: Insider Trading Ignored

This second half of the Study has reached an equally unsettling conclusion: That the Supreme Court in O’Hagan, (1) Abandoned all

¹⁶ Bayne, Misappropriation Theory Ignored, supra note 1, at 68 (quoting Thomas, J., dissenting).
judicial consideration of Insider Trading, and (2) Substituted Theft, an ancient crime, in its place.

Patently, with both the Misappropriation Theory and Insider Trading stripped from the Opinion, O'Hagan is left virtually denuded, with its only content some obiter reflections as guides for the future.

Background and Perspective

Any Supreme Court opinion demands attention. But an opinion attempting to resolve a 3-2 conflict in the Circuits has heightened significance. Add to that the intrinsic magnitude of the Insider Trading problem, and O'Hagan takes on an importance worthy of intense scrutiny. The exact scope of this intense scrutiny, however, must be sharply delineated.

Begin this delineation with a broad overview of Ginsburg’s O'Hagan. What is left among the ruins? What deserves comment? Two points emerge: (i) Justice Thomas Was Correct: The Misappropriation Theory Was Ignored and (ii) Many Fallacies Remain in the Ruins.

The Misappropriation Theory Ignored

The split in the Circuits had presented Justice Ginsburg with only one assignment. In her own words, this was her objective:

We address . . . the Court of Appeals’ reversal of O'Hagan’s convictions under § 10(b) and Rule 10b-5. Following the Fourth Circuit’s lead . . . , the Eighth Circuit rejected the misappropriation theory as a basis for § 10(b) liability.

Thus, a lone question faced Justice Ginsburg: Could the Supreme Court hold, contrary to the dissenting Circuits, “[T]hat criminal liability under § 10(b) may be predicated on the misappropriation theory”? Her failure to answer this question was summed up by Justice Thomas, speaking for himself, Justice Scalia and the Chief Justice:

Because we have no regulation squarely setting forth . . . the misappropriation theory as the Commission’s interpretation of [Section 10(b)], we are left with . . . the majority’s completely novel

9. Id. at 650.
theory that is not even acknowledged, much less adopted, by the Commission. . . . That position . . . can form no basis for liability.10

[The Ginsburg Majority] engages in the “imaginative” exercise of constructing its own misappropriation theory from whole cloth.11

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.12

The three dissenting Justices, led by Justice Thomas, were absolutely right. Justice Ginsburg wandered off into a discussion of her own New Theory and completely ignored, bypassed, the Misappropriation Theory. And so the conflicting Circuits, 3 to 2, remain in the same darkness that enveloped them before O’Hagan came up on certiorari.

Understandably, the Ginsburg holding came under immediate, strong attack.13 Witness the first Part of this Study, “The Misappropriation Theory Ignored”:

The O’Hagan Court by Justice Ginsburg never directly faced the concise question posed by the five Circuits: Does the Misappropriation Theory conform to Section 10(b)?14

The failure of the Court even to address the Misappropriation Theory was analyzed and forcefully confirmed in great detail in the first half of this Study. Accordingly, Ginsburg’s deist sidestep of the subject requires no further discussion at present.

Moreover, the Misappropriation Theory has been critiqued to death in three other predecessor studies. First, the history and deficiencies of the Theory were lengthily laid out in 1994 in “The Insider’s Natural-Law Duty: Chestman and the ‘Misappropriation Theory.’”15

Then, as a follow-up, Judge Luttig’s superb Bryan on the Circuit level — which was embraced in toto by Judge Hansen’s O’Hagan below16 — was closely analyzed, and praised, in “The Awakening”17 in

10. Id. at 692 (Thomas, J., concurring in part and dissenting in part) (emphasis added).
11. Id. at 687 (Thomas, J., concurring in part and dissenting in part) (emphasis added).
12. Id. at 688-89 (Thomas, J., concurring in part and dissenting in part) (emphasis added).
15. Bayne, Chestman, supra note 5.
Finally, again in 1997, the Eighth Circuit *O’Hagan* was hailed — prematurely, thanks to Justice Ginsburg — as "The Demise of the Misappropriation Theory."\(^{18}\)

In short, many of the principal errors bedeviling the law have been addressed. But what does still demand analysis?

**Fallacies Amid the Ruins**

The *obiter* remarks of the Court left abundant evidence of a large residue of error that requires refutation.

The immediate burden, therefore, is to address those interrelated errors still obvious in the Court’s thinking in *O’Hagan*. That is the ‘sharp delineation’ of this Study.

**A Precise Presage of the Ginsburg Lapses**

In the opening paragraph of her Opinion, Justice Ginsburg appropriately posed the “prime questions”\(^{19}\) she set for answer, and in it gave a preview of the course of her thinking, and her de facto elimination of the *Insider Trade* itself:

[W]e address and resolve . . . : *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*?\(^{20}\)

That, in germ, is the Court’s abbreviated version of the ‘Insider Trade’ of which James Herman was found guilty.

All the major Ginsburg deficiencies come together in that formal statement of the Court’s objective. Therein lies the outline of her Opinion, and the questions facing this Article: (i) *Who Is an ‘Insider’?* (ii) *Wherein Lies the Deception of the Trade?* (iii) *Why a ‘Fiduciary Duty’?* (iv) *Is the ‘Source’ of the Information the Insider’s Victim?* (v) *What Happened to the Insider Trade?*

But most important: *All those questions coalesce* and are answered in the proof of the overall Thesis of this Study: *The Insider Trade of the past is nowhere to be found in O’Hagan.*

**A Necessary Prelection**

As befitting the gravity of the subject, however, six pertinent reflec-

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20. *Id.* (emphasis and capitalization added).
tions are necessary to set the scene: (1) The Pervasive Harm of Insider Trading, (2) The Utter Simplicity of the ‘Insider’ Scam, (3) The Governing Law: Section 10(b) and Its Elements, (4) The Congressional Purposes Behind Section 10(b), (5) The Legal Elements of the Insider Trade, (6) James Herman O’Hagan’s Road to the Supreme Court.

(1) The Pervasive Harm of Insider Trading

The human propensity to cheat one’s neighbor has found increasing expression in the modern-day scam of the Insider Trade. That elemental fraud has joined its common-law predecessors as the modern variant of the other numerous ‘deceit’ stratagems by which the trusting innocent has been parted from his money.

Chairman Levitt of the SEC has recently expressed his concern about the prevalence of this stock swindle. He adduced as evidence the marked proliferation of SEC prosecutions for the crime.

In a recent speech to securities lawyers, SEC Chairman Arthur Levitt identified insider trading as a growing problem. He cited the record 48 insider cases the agency filed in the past fiscal year, ended Sept. 30, [1997] and a record number of investigations under way. Most of last year’s cases involved corporate insiders.\(^{21}\)

In the same speech, Chairman Levitt noted:

“[Y]ou can split hairs all you want, but ethically, it’s very clear: If analysts or their firms are trading — knowing this [inside] information, and prior to public release — it’s just as wrong as if corporate insiders did it.”\(^{22}\)

In short, the problem of Insider Trading is serious today, and has been for nearly a century.

Indeed, the Courts, the Commission and the Bar have been trying with great sincerity and diligence to solve this problem. The SEC has been in the forefront, notably with its Section 10(b) of the 1934 Act. The days of Chairman William Cary — 1961-1964 — had given great promise of success. The twenty years following his “case of first impression,”\(^{23}\) Cady, Roberts, and the progeny it sired, were the Golden Age.\(^{24}\)

But in 1980 the Timorous Powell perpetrated Chiarella,\(^{25}\) and from

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24. See Bayne, *Chestman, supra* note 5, at 93-135, for an outline and discussion of these cases.
then to the present all the valiant efforts to distinguish away the errors of *Chiarella* only led the courts further and further from the rudimentary simplicity of the Insider Trade itself, and from the time-proven law that could and should deal with it.26

**O’Hagan, the Watershed**

Now, the fallacious attempts to circumvent *Chiarella* have produced Ginsburg’s *O’Hagan*.27 Yet here was the ideal moment: Judge Luttig of the Fourth Circuit28 — followed unqualifiedly by Judge Hansen’s *O’Hagan*29 in the Eighth — gave the Supreme Court the unparalleled opportunity to wipe the slate clean. To get rid of the principal obstacle, the Misappropriation Theory, and get to the task of correcting the lesser errors antedating *Chiarella*.

Were the Misappropriation Theory at last in the dustbin, the Court could then have addressed (a) the correct definition of the Insider, (b) the total distinction of *Deceit* from *Theft*, (c) the intrusion of Fiduciary Duty into a totally *nonfiduciary* ‘*Deceit,*’ (d) the Misdirected Solicitude for the Source of the ‘inside’ information, (e) the easy identification of the true Victim of the Insider Trade, the public Investor. And most of all: The marked difference between an *Insider Trade* and the *Theft of Information*.

But the Court assigned the case to Justice Ginsburg, and the result was a lost opportunity. And the chaos of *O’Hagan*.

Now comes the salvage process. What can be done to make the most of the present predicament? If strong steps are not now taken, a decade of continued chaos could ensue.

(2) **The Utter Simplicity of the ‘Insider’ Scam**

Four stories — so simple as to be Parables — will set the stage, and show just how elementary are the perceived ‘complexities’ of the law of Insider Trading:

*The Widdie and the Friar Lands*: The Widow Strong, minority owner of the famed Friar Lands of the Philippines, was approached, secretly and indirectly, toward the sale of her shares. But the would-be buyer, the firm’s CEO, failed to disclose the impending sale of the Friar Lands to the U.S., at well above market. The Widow sold. The U.S. bought. The Widow Strong lost millions. That was in 1909.

*Markup Vinnie*: In the early eighties a lowly markup man at a Wall

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26. See Bayne, *Chestman*, supra note 5.
27. See Bayne, *Misappropriation Theory Ignored*, supra note 1.
Street financial press learned of a soon-to-be consummated takeover. Knowing of the certain jump post-takeover in the target’s stock, Vinnie Chiarella bought low from unknowing sellers. And sold high afterwards. Investors’ loss: $30,000. That was 1980.

*The Market Guru:* Longtime revered market guru and editor of the widely circulated *Value Time* newsletter, rushes out of a closed meeting of “favorite Wall Street analysts” staged by a midcapped firm to announce a doubling of the quarterly dividend. At the telephones the trusted analyst buys heavily before the press release. Sells after. Upshot: Clueless sellers lose, trusted analyst pockets, thousands. That was in 1998.

*James Herman, Con Artist:* James Herman O'Hagan, securities lawyer, got wind of the imminent absorption of Pillsbury, the American household favorite, by the Brit megafirm, Grand Met. Secretly buying Pillsbury before the press release, and selling after, James Herman O'Hagan netted an illicit $4 million from uninformed public Investors. That was the mid-nineties.

The subject of Insider Trading has become so convoluted that everyone involved — courts, counsel, commentators — forgets that the Insider Trade is really a garden-variety con. These Parables should help the return to reality.

(3) *The Governing Law: Section 10(b) and Its Elements*

The courts in the last ten years have been so embroiled in disputes revolving around the “misappropriation theory” vis-à-vis the “traditional” or “classical theory” — Justice Ginsburg spends three lengthy paragraphs on them early in her Opinion — that one ignores the fact that James Herman O'Hagan was sent to jail for violating Section 10(b), a longstanding and long-known provision of the Securities Exchange Act of 1934.33

Remember henceforward, therefore, that this Study is an analysis of Section 10(b) as applied to the facts in O'Hagan. Not a digression further away from Section 10(b).

Toward a constant reminder of that salient fact, read Justice Ginsburg's cautionary words. She did clearly recognize that this was the true focus of her Opinion:

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31. All are embroidered but actual cases: except the third, which is in potentia.
33. See id. at 649.
Pursuant to its § 10(b) rulemaking authority, the Commission has adopted Rule 10b-5, which, as relevant here, provides:

"It shall be unlawful for any person . . .

“(a) To employ any device, scheme, or artifice to defraud, [or]

. . .

“(c) To engage in any act, practice, or course of business which operates . . . as a fraud or deceit upon any person,

“In connection with the purchase or sale of any security.”

Codified Common-Law Deceit

After the Wall Street cataclysm of 1929, the Congress determined to restore integrity to the securities market, with particular attention to the victimized public Investor.

To this end, Congress prudently reached back into the common law, and codified the age-old tort of Deceit. And then added a Federal nonsubstantive prescription: The Investor deception must occur “in connection with” the “purchase or sale” of a security.

After years of judicial implementation, the courts reached a black-letter consensus as to the nature of Section 10(b). The Fifth Circuit in the 1981 Huddleston — a favorite of law-school casebooks — expressed, the prevailing interpretation:

ELEMENTS OF THE CAUSE OF ACTION UNDER SECTION 10(b) AND RULE 10b-5

The elements necessary to prove a Section 10(b) claim have been so often applied by the lower federal courts that they can be stated in black letter fashion. To make out a claim under Section 10(b), which is based on the common law action of deceit, the plaintiff must establish (1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused his injury.

These black-letter basics — “so often applied” — will be the foundation stone for this Study. And the Congressional purposes underlying them and Section 10(b) will give controlling guidance to the analysis of O’Hagan. As indeed they avowedly did for Justice Ginsburg. Recall this when the discussion drifts off to matters unrelated to the sale of a security.

34. Id. at 651 (quoting 17 C.F.R. § 240.10b-5 (1996).
35. See Bayne, Misappropriation Theory Ignored, supra note 1.
37. Huddleston, 640 F.2d at 543 (emphasis added).
(4) The Congressional Purposes Behind Section 10(b)

Since O’Hagan is an analysis of the essence of Section 10(b), Justice Ginsburg, willy-nilly, founds her holding on the ‘deceit’ elements of Section 10(b) and the intent of the Congress behind it.38 Thus Justice Ginsburg properly approaches the O’Hagan adjudication by [c]onsidering the inhibiting impact on market participation . . . and the congressional purposes underlying § 10(b) . . . .39

She specifies these purposes broadly and accurately: [A]n animating purpose of the Exchange Act: to insure honest securities markets and thereby promote INVESTOR confidence.40

A point that Justice Ginsburg will emphasize throughout should be stressed now by highlighting her reference to the Congressional intent to protect the trading Investor, victimized by the Insider who trades in securities for personal profit, using confidential information.41

The SEC concurs with Justice Ginsburg. The Commission’s classic statement of the purpose of Section 10(b) came early, in Cady, Roberts, “a case of first impression and one of signal importance in our administration of the Federal securities acts.”42 There, Cady, Roberts stressed the protection of the Investor: Section 10(b) concentrates on “the plight of the buying public wholly unprotected from the misuse of special information.”43

(5) The Legal Elements of the Insider Trade

For four decades the Commission and the courts have addressed the Insider Trade as a violation of Section 10(b), and, necessarily, its underlying common-law essentials.44 In short, the Insider Trade is defined by the specific requisites of Section 10(b) as tailored expressly for the sale-of-security context.

Those basics of Deceit — as just quoted from the Fifth Circuit Huddleston45 and long memorized by every securities-law student — are the constituents of the Insider Trade:

40. Id. at 658.
41. Id. at 647.
43. Cady, Roberts, 40 S.E.C. at 913 (emphasis added).
44. See Bayne, Chestman, supra note 5, at 96; see generally Bayne, The Essence, supra note 5.
45. Supra note 37 and accompanying text.
A misstatement of a material fact, made knowingly, scienter, to induce reliance, with consequent reliance, and damage.\textsuperscript{46} Which, of course, track the requisites of every tort: Duty, Breach, Proximate Cause, Damages, Absence of Defenses.

Aided by the four Parables, these Section-10(b) elements find easy adaptation to the Insider Trade:

\textit{The Insider} — any person whosoever — on the basis of material nonpublic information, arising from any source, deceives, by the misstatement or nondisclosure of the true value of a security, the Investor on the other side of the trade.

That is the precise definition of the Insider Trade prohibited by Section 10(b) of the 1934 Act,\textsuperscript{47} and historically implemented by the courts and Commission. That definition will be the reference point of this analysis of \textit{O'Hagan}.

The Definition Analyzed in the Parables

The presentation of the four Parables was founded on the valid assumption that every reader — from the least erudite Everyman, legally deprived, to the most captious securities expert, even the Academic enmeshed in the net of nether-world formalisms — would spontaneously realize that each aggrieved Investor in each Parable had been blatantly cheated in an unadorned instance of the well-known sale-of-securities con, the Insider Trade.

Take the black-letter basics and find them in the four Parables:

\textit{The Insider}

The Parables set out designedly to illustrate that the word ‘Insider’ is a total misnomer. That the “any person” of the so-called ‘Insider’ Trade need not be inside anything. He simply has come upon information, confidential and secret, that the Investor does not have. The fact that the term ‘Insider’ is a misnomer, must be emphasized repeatedly.

The CEO of the corporate owner of the Friar Lands was privy to the counsels of the company, true, but his nondisclosure would have cheated the Widdie Strong just as thoroughly and painfully had he been the janitor in the company men’s room, \textit{as long as he had the nonpublic information and used it to deceive the Widow}.

Vinnie Chiarella could not have been further outside the target

\textsuperscript{46} 2 David C. Bayne, S.J., Practitioner’s Corporations Casebook 2-4-1 (perm. ed. 1987) (quoted in Bayne, Chestman, supra note 5, at 88-89, n.77); see Restatement (Second) of Torts §525 (1976).

company, yet his information fully deceived his sellers and netted him $30,000 in illicit Investor loot.

James Herman was just as distant from Pillsbury as Vinnie was from the target company, but his information was just as effective.

And the closest the Value Time ‘trusted analyst’ came to the corporation was at its staged meeting, when the dividend hike was privately announced pre-press-time.

The Deception

Every Investor — the Widow Strong, Markup Vinnie’s “unknowing sellers,” James Herman’s “uninformed public Investors,” Market Guru’s “clueless sellers” — was deceived, in each case by the nondisclosure of nonpublic information, to which he had a right and which was material, even essential, to an informed investment judgment.

The Source of the Information

Not one of the in-the-dark Investors cared a whit where the CEO, Vinnie, James Herman, the expert analyst, came by their Information. All each Investor knew was that the four flimflam men actually had the secret information, and used it to defraud him. The Source meant nil.

The Victim: the Investor

Every Parable told the same story: In a securities transaction the Investor Victims were on the other side of a stock trade and lost valuable dollars. In no story was the Source of the secret a Victim. The Source played no direct role in the Insider Trade.

(6) James Herman O’Hagan’s Road to the Supreme Court

James O’Hagan began his predestined path to self-destruction in his midfifties, if not before. By age 56 he was sentenced to eight concurrent terms in prison for theft from the Dorsey-and-Whitney client trust fund.48 As a senior partner at Minnesota’s most prestigious law firm, he was a successful attorney for 26 years, “highly respected by clients and fellow attorneys, . . . specializing in . . . securities cases.”49

Next he was found guilty of $750,000 in tax delinquencies, was subjected to protracted SEC scrutiny in the late eighties, and finally dis-

49. See Bayne, Misappropriation Theory Ignored, supra note 1, at 9 n.35.
barred.\textsuperscript{50} At this writing he faces sentencing for bald Insider Trading.\textsuperscript{51}

The Insider Trade

The fourth Parable told the tale. Privy to incontrovertible and confidential information, via a Dorsey partner, that Dorsey’s client Grand Met, the Brit megacorp, was about to absorb the foodstuff giant Pillsbury, James Herman secretly amassed Pillsbury common before, and sold after, the news broke.

On October 4, 1988, Grand Met publicly announced its tender offer for Pillsbury stock [which] immediately rose from $39 per share to almost $60 per share.\textsuperscript{52}

Result: $4 million in illicit gain from unknowing innocents. That was the Insider Trade.

Note too that O’Hagan’s Inside Information was not only certain, but reliable, not conjectural, nonpublic, relevant and material to an informed trade . . . which . . . the Shareholder has a right to know\textsuperscript{53} as the Compendium\textsuperscript{54} — 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.\textsuperscript{55}

From SEC to Ginsburg’s O’Hagan

The SEC began the criminal process at an early date, and shortly secured a 57-count indictment in the District Court in Minnesota. The grounds: 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


\textsuperscript{51} United States v. O’Hagan, 139 F.3d 641, 645 (8th Cir. 1998).

\textsuperscript{52} See Bayne, Misappropriation Theory Ignored, supra note 1, at 8 n.28.

\textsuperscript{53} Cf. Bayne, The Essence, supra note 5, at 353.

\textsuperscript{54} The Compendium was the distillate of the reasoning excogitated in “Insider Trading: The Essence of the Insider’s Duty,” id. (the Compendium itself can be found at id., 352-53).

\textsuperscript{55} Id. at 352-53.
imprisonment. O’Hagan appeals.\(^{56}\)

This conviction was founded solely on the Misappropriation Theory. The pleadings left the Court no alternate route.

On appeal, the Eighth Circuit vacated — to O’Hagan’s happy surprise — all of O’Hagan’s convictions. But the crux 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, ruled: The Misappropriation Theory does not conform to Section-10(b) requisites, and hence will not support a conviction of James O’Hagan.\(^{57}\)

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

Justice Ginsburg

In 1997 the Supreme Court finally addressed the uncertainty of the conflict. Or so the Bench, Bar and investing public had hoped. The Circuits were head-to-head. The Second led the charge, and was in fact the creator of and principal protagonist for the Misappropriation Theory, albeit indecisively, with an inconclusive 6-to-5 en-banc bench.\(^{58}\)

Aligned with the Second were single, and half-hearted, opinions by the Seventh and Ninth.\(^{59}\)

Bryan in 1995, by the astute 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 the reversal by Ginsburg’s O’Hagan, 6 to 3. The dissent was written by Justice Clarence Thomas, joined by Justice Scalia and Chief Justice Rehnquist. Justices Breyer, Kennedy, O’Connor, Souter and Stevens joined the Majority, but without comment.

The Court also addressed a tender-offer question involving fraudulent practices under Section 14(e) of the 1934 Act\(^{61}\) and Rule 14e-3(a).\(^{62}\)

The Court affirmed the Eighth Circuit and ruled that the Commission did not exceed its rulemaking authority in enacting Rule 14e-3(a).\(^{63}\)

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56. O’Hagan, 92 F.3d at 615.
57. Id. at 613. See Bayne, Thereafter, supra note 18.
59. SEC v. Cherif, 933 F.2d 403 (7th Cir. 1991), cert. denied, 502 U.S. 1071 (1992); SEC v. Clark, 915 F.2d 439 (9th Cir. 1990).
60. United States v. Bryan, 58 F.3d 933 (4th Cir. 1995).
This ruling does not impinge on the Misappropriation Theory. So too with the mail and wire fraud.\textsuperscript{64}

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

Then, on remand to the Eighth Circuit, the earlier reversal of the Court below was dutifully rescinded.\textsuperscript{65} An abandoned District Judge in Minnesota will now rule on the length of the sentence of a jailed O'Hagan.

In summary pronouncement on the Court's reinstatement of O'Hagan's conviction, it must forcefully be said with the elegance of T.S. Eliot's Thomas à Becket:

The last temptation is the greatest treason:
To do the right deed for the wrong reason.

— Murder in the Cathedral\textsuperscript{66}

The truth still remains: The 'end' does not justify the 'means.' Chiarella is the culprit. Address it directly.

With that prelection, the way lies clear for the principal argumentation.

\textit{The Thesis Set for Proof}

One major objective will occupy this Article: To establish:

That the Supreme Court in \textit{O'Hagan}, (1) Abandoned all judicial consideration of the tort of \textit{Insider Trading}, and (2) Substituted an ancient crime, \textit{Theft}, in its place.

Five divisions will undertake this objective: I. \textit{O'HAGAN'S ELUSIVE 'INSIDER,'} II. \textit{THE ABSENCE OF 'DECEIT' IN THE 'THEFT,'} III. \textit{THE INEXPLICABLE INTRUSION OF A 'FIDUCIARY DUTY,'} IV. \textit{A FOREIGN VICTIM, WITHOUT A REMEDY,} V. \textit{'THEFT OF INFORMATION' VIS-À-VIS INSIDER TRADING.}

This presentation designedly embodies all four of the substantive essentials of the definitive Insider Trade of history: (1) The Insider himself, (2) Deceit, (3) Duty to Disclose, (4) the Investor Victim. The question of the nonsubstantive Federal appendage — "in connection with" a securities transaction\textsuperscript{67} — is adequately answered en route.

The culmination of the proof of the Thesis will be reached in the fifth division in which the essentials of the tort of \textit{Insider Trading} —

\textsuperscript{64} Id. at 677-78.
\textsuperscript{65} United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998).
\textsuperscript{66} T.S. Eliot, \textit{Murder in the Cathedral} 44 (1935).
totally ignored in *O’Hagan* — will be juxtaposed against the essentials of the Misappropriation Theory, the *Theft of Information*. Thereby emphasizing the total absence of an *Insider Trade* in *O’Hagan*.

Preliminary Postulates

This Study approaches the analysis of the Supreme Court’s position on Insider Trading, as of 1999, in full recognition of three handicaps to a satisfying commentary. These are legal facts of life, and produce three valid assumptions that impact the analysis.

Shifting Sand

The most recent history of the Court in the matter of Insider Trading — the years from *Chiarella*, 68 1980, to *O’Hagan*, 1998 — has been characterized by turmoil. *Chiarella* was “an enigma”69 and the “disputes among the Justices in Chiarella”70 were decried.

As for *O’Hagan*, earlier commentary,71 and this Article, tell the story. The *O’Hagan* Court was divided, 6 to 3, and Justice Thomas and the minority were compelling. This dissonance portends radical shifts of attitudes and position, and bodes ill for stability.

Further, the political flux in the nation promises imminent changes in the Court’s complexion. Any pronouncements on the ‘mind of the Court’ could be short-lived.

Clairvoyance Required

The *O’Hagan* Majority — whence the bulk of the present conclusions emanate — is so difficult to understand, so filled with contradictions, so superficial in analysis, as to render positions of this Study open to immediate question. Yet these conclusions are the only ones that logic will permit. The dangers, however, in forming judgments supported by such garbled argumentation are inevitable, and must be postulated at the outset.

Ambivalence and Vacillation

To prove the Thesis of this Article — that the Court has not addressed *Insider Trading* at all, but is speaking throughout, formally and adjudicatively, to an ancient crime, *Theft*, now latterly used to sup-

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71. See supra note 5.
plant the Insider Trade — a third, particularly important obstacle stands in the way. The Court is *ambivalent*. It cannot seem to make up its mind.

*Thus,* Justice Ginsburg pays convincing lip-service to the Misappropriation Theory. The result: Everyone — the Circuits at odds below, the Government, the attorneys, Bench, Bar and certainly Academe — all publicly hailed, or decried, *O'Hagan* as an approbation of the Misappropriation Theory. A less-than-scrutinizing reader would surely conclude that *O'Hagan* was an endorsement of the Theory. Thus spoke the Eighth Circuit’s *O'Hagan*, on remand: “The Supreme Court . . . holding [was] based on the ‘misappropriation theory.’”

*But,* Justices Thomas, Scalia, the Chief — and in 1998 “The Misappropriation Theory Ignored” concluded that Justice Ginsburg never addressed the Theory at all, and clandestinely based her decision on her own *New Theory*. The effect: The Court was at odds with itself.

(Perhaps ‘clandestinely’ is not the right word, as it means ‘secret’ or ‘surreptitious’ and implies such an intent. The impugning exchanges in the Opinion between Justices Ginsburg and Thomas withal, better to conclude that Justice Ginsburg’s ‘maneuvers’ are more the result of muddled thinking than stealth or sharp rhetoric.)

These three admonitions must accompany the proof of the Thesis.

In constructing that proof, each building block — the several essentials of the Insider Trade — will be sought out in the Opinion, and found to be missing. Nowhere can *Insider Trading* per se be discovered in the Court’s analysis of the ‘tort’ committed by James Herman O’Hagan. In the Court’s judicial approbation of the Misappropriation Theory, *Insider Trading* is absent.

And, very much to the point, this plain old crime, ‘*Theft,*’ totally lacking an Insider Trade, has remarkably been called ‘*Insider Trading.*’

The fruitless search for the Insider Trade leads to the inevitable conclusion, the *Subthesis* of this Article: *Because each individual essential to an Insider Trade is lacking, the totality of Insider Trading is, eo ipso, lacking.*

### I. *O’HAGAN’S ELUSIVE ‘INSIDER’*

This first, and arguably a paramount, essential of the Insider Trade, the *Insider* himself, is nowhere to be found in the *O’Hagan* Opinion. ‘*Elusive*’ is an understatement. Justice Ginsburg abandoned every

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attempt at a definition. In the end, no 'Insider' of any stripe can be found.

The current Court's thinking on Insider Trading has become so confused that its terminology must be sharply defined. Explicit concepts are basic to clarity. Foremost in the confusion is the definition of the Insider.

The Divergent Versions of the 'Insider'

Four distinctly different 'Insiders' — each at odds with each — can be extracted from the pages of O'Hagan: (i) The Traditional Consensus of the common law and the SEC, (ii) Powell's 'Fiduciary' corruption of the Traditional position, in Chiarella, (iii) The Misappropriator 'Outsider' of the Misappropriation Theory, formally endorsed by O'Hagan, and (iv) The Ginsburg 'Insider,' subtly implied in O'Hagan in order to justify the incarceration of Mr. O'Hagan. Herewith a concise précis of each:

<table>
<thead>
<tr>
<th>The Four 'Insiders'</th>
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<tbody>
<tr>
<td><strong>The Traditional 'Tom, Dick or Harry'</strong></td>
</tr>
<tr>
<td>This embodiment of the consensus Insider of the common law (Strong v. Repide, 1909), was canonized by the SEC with the words &quot;any person . . . no matter who,&quot; in Cady, Roberts, 1961, and its Federal progeny, Texas Gulf Sulphur and Merrill Lynch, 1961-1980. Never directly discussed by O'Hagan. Rejected as foreign to its thinking.</td>
</tr>
<tr>
<td><strong>The Powell 'Fiduciary Insider'</strong></td>
</tr>
<tr>
<td>This work of Justice Powell's Chiarella and Dirks held that Only (1) &quot;corporate insiders&quot; who hence are (2) trusted confidants of the Victim, are liable for Insider Trading. All others, scot-free. Ruled inapplicable by O'Hagan.</td>
</tr>
<tr>
<td><strong>The Misappropriator 'Outsider'</strong></td>
</tr>
<tr>
<td>This creation of the Misappropriation Theory was designed to circumvent Powell's Chiarella. Substituted 'Theft-of-Information from the Source' for the Insider Trade. Hence, the Thief became the 'Insider.' Eliminated duty to, deception of, and harm to, the conned Victim. Nominally endorsed by O'Hagan, without a true definition.</td>
</tr>
<tr>
<td><strong>The Ginsburg 'Insider'</strong></td>
</tr>
<tr>
<td>Inferences point to an 'Insider' redolent of 'Tom, Dick or Harry,' but Ginsburg's New Theory never overtly attempted an explicit definition. Value: Obiter statements for future argumentation.</td>
</tr>
</tbody>
</table>

At this point recall the Subthesis of this Article: Because each element of the Insider Trade is absent, necessarily the whole is absent. A prime constituent is the Insider himself. Without an Insider, the Subthesis approaches proof.
The Successive Rejection of Each 'Insider'

Each one of the four divergent versions of an Insider is successively excluded from acceptance. Recall this as Justice Ginsburg first adverts to each one in turn, perhaps discusses it, but then rejects it in one way or other. Thus does she succeed in eliminating the Insider from her O'Hagan.

(At times the wonder even arises if the Justice really knows the Insider Trade of the Parables. Or who an Insider really is. She seems to be talking of some other tort and of some other malefactor. Ask this question: About whom is she speaking now? A Vinnie, Ivan, Michael or James Herman? Or a second-story man in an intellectual-property heist? Or a Willie Sutton who by chance makes off with 'inside' merger plans along with looted cash?)

The First 'Insider': The Traditional 'Tom, Dick or Harry'

When stripped of all its collateral nonessentials, the Insider Trade — as the four Parables so clearly illustrated — is 2-plus-2 in simplicity. It is an elemental scam. But the sad fact remains that these 'collateral nonessentials' have not been stripped away. This is in spite of the commendable efforts by both the Commission and the courts during the decades of the sixties and seventies.

Chief among the causes for the persistent inability of the legal community to understand the law of the Insider Trade has been a failure at the very threshold of its thinking. The law has not, thus far, accepted the correct definition of the Insider. Yet how ridiculous it is to speak at all, without first knowing about whom to speak.

The Cause of the Misunderstanding

The genuine Insider of the Insider Trade can blame two causes for this misunderstood persona, one totally accidental, the other rooted in a truly substantive distortion of the Insider's essential nature.

The accidental cause has defied correction for decades, despite all the earnest attempts — seemingly now abandoned — by Commission and courts. The substantive cause has, moreover, become even more pernicious in recent years, reaching a nadir with Chiarella\textsuperscript{74} — so many serious errors are rooted in Chiarella\textsuperscript{75} — and is now further entrenched by Ginsburg's O'Hagan.

A brief discussion of these causes, (1) the accidental, then (2) the

\textsuperscript{74} Chiarella v. United States, 445 U.S. 222 (1980).
\textsuperscript{75} See Bayne, Chiarella, supra note 5.
substantive, will clear the path to the proper, and truly elementary, definition of the Insider.

(1) The Genesis of the Misnomer: The Red Herring, Section 16(b)

When Congress set out in 1933 to protect the Investor and eradicate the securities abuses of the twenties and early thirties, two sections of the 1934 Act addressed two unrelated areas of justified concern. One was the ‘deceit’ prevalent in the purchase and sale of securities — hence Section 10(b) and whence the law of Insider Trading — and the other was the ‘short-swing profit’ — honest in se but susceptible of misuse — which was covered by Section 16(b).^{76}

The True Insider: The Short-Swing Profiteer

Section 16(b) prohibited any profits earned — innocently, even without the infallible aid of inside information — by an actual insider of a corporation, an officer, director or owner of 10 percent of corporate stock, as long as the profits were gained in a six-month period.^{77}

Section 16(b) was a strict-trust, absolute-liability statute designed to ban such, often honest, profits on the theory that such an Insider, with inside access to corporate counsels, was possibly, even probably, up to no good if he bought, and then soon sold, stock in his own company.

The Misnomer

That guiltless definition of a true Insider misled, confused, the unthinking court and commentator when they later read Section 10(b). Even though Section 10(b) was totally unrelated and totally foreign to Section 16(b). Section 10(b) requires full culpability, is an intentional tort, and had nothing to do with an ‘Insider.’ But applied to “any person, directly or indirectly,” as both Section 10(b) and its implementing Rule 10b-5 explicitly state.^{78}

The Commission in 1961 set out to clarify exactly the definition in its earliest, first-impression case, Cady, Roberts. The goal: To abort the misnomer at its conception.

Section [10(b)] and Rule 10b-5 apply to securities transactions

77. Id.
78. Section 10(b): “It shall be unlawful for any person, directly or indirectly . . . (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance . . . .” Securities Exchange Act of 1934, 15 U.S.C. §78j.
   Rule 10b-5: “It shall be unlawful for any person, directly or indirectly, . . . .” C.F.R. § 240.10b-5.

See generally Bayne, Essence, supra note 5.
by “any person.” Misrepresentations will lie within their ambit, no matter who the speaker may be.”

The Second Circuit in the famed Texas Gulf Sulphur—sired by Cady, Roberts—joined the chorus:

Insiders, as directors or management officers are, of course, by this Rule, precluded from so unfairly dealing, but the Rule is also applicable to one possessing the information who may not be strictly termed an “insider” within the meaning of Sec. 16(b) of the Act. Cady, Roberts, supra. Thus, anyone in possession of material inside information must... disclose it to the investing public...

But to no avail. The misnomer persists, and continues to the present to contribute to the sloppy thinking.

(2) The Timorous Justice Powell

Far more serious was the impact of that latter-day societal malady: The consuming fear of placing moral responsibility on anyone, even on the most flagrant of malefactors. The odium of being ‘judgmental,’ of ever ascribing blame.

Mr. Justice Powell was beset by this fear. His Chiarella remains to this day the standard-bearer of the forces fearful of labeling “any person” an ‘Insider,’ lest too many miscreants be caught in the Section-10(b) net, as they justly ought to be.

Justice Powell — first in Chiarella and then later in his Dirks — kept narrowing and narrowing his definition of an Insider until the ambit of Insider liability included only ‘fiduciaries,’ who were also ‘corporate insiders.’ The Insider, to be liable, must be in “a relationship of trust and confidence” with his Victim. All others, a Chiarella, Boesky, Milken or O’Hagan, could lie with impunity about the true value of the traded stock.

That, in briefest summary, is the sad state into which the Insider has fallen. Yet a readily-understood definition of the true Insider is easily at hand.

“Tom, Dick or Harry”

Throughout the law of Insider Trading, the legalisms of the Theorists have led them further and further from reality. Their futile attempts
to define the ‘Insider’ add appreciably to this unreality. The experts, especially in Academe, seem incapable of grasping this simple concept.

Yet the four Fables, understood by the most untutored Investor, show instantaneously who this misnamed ‘Insider’ really is. Thirty years ago came this uncluttered definition:

Section 10(b) has not and never has had any connection whatsoever with “the definition of an insider,” but applies to any old Tom, Dick or Harry in the land who withholds a material fact from any other Tom, Dick or Harry in the sale or purchase of a security . . . .

The essence of the definition lies not in the person — he is any person — but in the “withhold[ing of] a material fact from any” fellow Investor. The ‘Insider’ is not ‘inside’ anything at all. Unless he could be said to have an ‘inside track’ on the information. Or his bilked victim is ‘outside the loop,’ and he is ‘inside.’ No, the word is truly a misnomer and goes back to the mixup with the short-swing seller. And to Powell’s twins, Chiarella 84 and Dirks 85 in the earliest eighties.

Chairman Levitt: Reality Sets In

Just a few months ago, the respected Chairman of the SEC spoke out the truth and showed how rudimentary the concept is:

“[Y]ou can split hairs all you want but, ethically, it is very clear: If analysts or their firms are trading — knowing this information, and prior to public release — it’s just as wrong as if corporate insiders did it.”

Substitute “Tom, Dick or Harry” for Mr. Levitt’s “analysts” and the thrust of his argument persists. The Chairman knew that ‘corporate insiders’ were not the only culprits.

It is irresistible to note that when an honest, forthright observer extricates himself from the ‘split hairs’ of Chiarella, Dirks, and now O’Hagan, the primitive nature of this noninside ‘Insider’ emerges. Chairman Levitt paid no heed to his SEC staff as they argued O’Hagan. Or, apparently, vice versa. Mirabile!

In the same speech Chairman Levitt again refers to the instantane-

ous transparency of the concept. And he stresses that the essence of the
definition of the so-called ‘Insider’ lies in the *deception*, the *nondisclosure*. Not in the *person* deceiving.

Mr. Levitt said “any investor looking at this situation would think it is wrong for those who have received this information to trade before the public announcement — or to tip off their friends, family members or colleagues in their firms.”

The Technical Synthesis of the Definition

Some seven years ago, incorporating the intuitive thinking of the Everyman of the Parables, the instinctive rationality of SEC Chairman Levitt, the SEC in its *Cady, Roberts* and twenty years of Federal-court sanity, the *Compendium of the Insider’s Duty* in “Essence” proposed the black-letter definition of the true Insider and the essentials of his persona:

**The Compendium of the Insider’s Duty**

The tort of Insider Trading must satisfy all the standard requisites for common-law deceit and fulfill the specifics of Insider Trading as well.

The Insider may be any person, with or without a fiduciary relation, inside or outside the corporation, contrôleur, director or officer, tipper, tippee, eavesdropper, bystander, who possesses... Information of any kind, reliable not conjectural, nonpublic, relevant and material to an informed trade, from any source and not necessarily misappropriated, which the Shareholder has a right to know, and the Insider a right to disclose.

The Shareholder may be any legal person, an actual or potential buyer or seller of shares, unprotected and endangered by... Nondisclosure, which carries culpability, is unrelated to the Insider’s trading but consists solely in the failure to disclose.

That concludes the conspectus of the *Traditional Consensus* of the Insider that the Courts, Commentators, the Bar and most of all the investing Public had long embraced. The Insider could be any *Tom, Dick or Harry* who deceives his fellow trader, using inside information.

Justice Ginsburg overtly abandoned this definition.

**The Traditional Consensus Rejected**

Throughout her entire Opinion, Justice Ginsburg gave only a glim-

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mer of suspicion that she even knew of the commonly accepted Insider of the Parables and Cady, Roberts. And tellingly, at the very moment that she revealed that she suspected that “any person” at all could be an Insider, she rejected the thought summarily.

The Justice revealed incontrovertibly that the Insider Trade she was forced to lip-serve was neither ‘inside’ nor a ‘trade.’ Rather, it was a theft by an outsider. In footnote six came the brief glimmer.

Justice Ginsburg actually did not even directly discuss Mr. O’Hagan as an ‘insider,’ but only as a thief who owed a duty to tell his employer that he was about to ‘misappropriate’ some secret information. She expressed James Herman’s duty this way:

*Under the misappropriation theory...* the disclosure obligation runs to the source of the information, here, Dorsey & Whitney and Grand Met.\(^90\)

Patently, the Justice is not concerned with whether James Herman is an ‘insider’ or ‘outsider,’ or who he is. But only with the object of his ‘duty,’ his law firm.

From this discussion, no conclusion may be reached as to Justice Ginsburg’s definition of an ‘Insider’ “under the misappropriation theory.”

**Justice Burger and the Traditional ‘Insider’**

But her discussion then becomes important. As Justice Ginsburg continues to discuss Mr. O’Hagan’s duty, “to the source of the information, here, Dorsey & Whitney,” she — possibly unwittingly, but nonetheless effectively — rejects outright and summarily the Insider of Tradition, the “any person” of Cady, Roberts.

True, this rejection has to be pried out of her remarks, but the rejection is there without doubt. Here is the line of reasoning that contains her rejection of Tom, Dick or Harry.

Justice Burger, in his dissent in Chiarella, was proposing and discussing the traditional viewpoint of Section 10(b) as involving common-law deceit, which imposed on the traditional ‘insider’ the standard duty to disclose the true value of the security traded to the Investor. (But not to the source, Dorsey & Whitney.) Justice Ginsburg explains:

Chief Justice Burger, dissenting in Chiarella, advanced a broader reading of § 10(b) and Rule 10b-5 [that is, to cover “any old Tom, Dick or Harry”]; the disclosure obligation, as he envisioned, ran to those with whom the misappropriator traded.\(^91\)

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90. O’Hagan, 521 U.S. at 655 n.6 (emphasis added).
91. Id. at 2208 n.6 (citing Chiarella, 445 U.S. at 240 (Burger, C.J., dissenting)) (emphasis added).
She has stated well the major tenet of the traditional consensus of the SEC and the courts: The Duty of Disclosure rests on "any person, no matter who [he] may be," to tell the truth about the value of the traded stock to the Investor.

The Justice then quotes directly from Chief Justice Burger:

"[A] person who has misappropriated nonpublic information has an absolute duty to disclose that information or to refrain from trading"...

Arguably, Justice Ginsburg had some idea that she and the Chief were talking about the traditional approach of the SEC and Cady, Roberts. (At another point in her Opinion she quoted Cady, Roberts on an innocuous collateral point. So someone on her staff knew about that leading case.)

Justice Burger explained this position and strongly emphasized that the duty was owed, not to the party from whom the Insider learned the information, but rather to the party he deceived in using the information, the Investor he bilked.

In so emphasizing the nature of the traditional trade, Justice Burger necessarily included the consensus definition of the Insider, the person who cheated the Investor.

Further, he was definitely not talking at all about the Misappropriation Theory which was not even before the Chiarella Court, but about the old-line interpretation of Section 10(b).

At the end of Justice Ginsburg’s brief excursion into the mind of the Chief Justice came her categorical rejection of the Burger position. And necessarily and of current overriding import, her total rejection of the Traditional Consensus of the definition of the Insider.

She gave the very thought of the Burger argument the coup de grace, out of hand:

*The Government does not propose that we adopt a misappropriation theory of that breadth.*

She was right about the “breadth.” That Traditional ‘theory’ of the Chief Justice would indeed “catch [much] of the misbehavior that all too often makes investment in securities a needlessly risky business for the uninitiated investor,” to paraphrase Justice Blackmun in *Chiarella*.

But she was wrong in another matter. Chief Justice Burger was not
talking about "a misappropriation theory" at all. It was plain old Section 10(b).

So with that perfunctory rejection of the all-inclusive Insider, Justice Ginsburg has eliminated the first of the four versions, the Traditional 'Tom, Dick or Harry Insider':

The Traditional 'Tom, Dick or Harry'
This embodiment of the consensus Insider of the common law (Strong v. Repide, 1909), was canonized by the SEC with the words "any person . . . no matter who," in Cady, Roberts, 1961, and its Federal progeny, Texas Gulf Sulphur and Merrill Lynch, 1961-1980. Never directly discussed by O'Hagan. Rejected as foreign to its thinking.

Henceforward, the technical synthesis of the Traditional Consensus will be the point of reference for each spurious 'insider.' But always place special emphasis on the SEC's official definition: The Insider is "any person . . . no matter who [he] may be."96

Understand, moreover, that the curious construction of the remaining three disparate — even conflicting — definitions, leaves only two discernible truths: (i) The Court never presents a defined Insider, and (ii) Only the third — and it was rejected — of the three intimations of an 'Insider,' either individually or in combination, bears any resemblance to the Public's "any old Tom, Dick or Harry in the land." Or Chairman Levitt's inclusive analysts. Or the "any person" of the SEC's Cady, Roberts97 and the Compendium.98 And, most of all, to the "any person" of Section 10(b) itself.

The Second 'Insider': The Powell 'Fiduciary Insider'
The second 'Insider' was referable to the Timorous Powell:

One would think that the first task for an opinion on Insider Trading would be to define an 'Insider.' But no. Justice Ginsburg's admonitions to the nature of the Insider seemed almost inadvertent, as if there were no need to identify the real malefactor in the Insider Trade.

This left the present path to an 'Insider' a tortuous one, with corresponding difficulty for the reader.

As a helpful guide, three questions and their answers should map the way. In her first 'attempt' at a definition, Justice Ginsburg relied on her view of the 'Insider' of Justice Powell in his Chiarella99 and Dirks.100

96. See Bayne, Chestman, supra note 5, at 109.
This choice immediately prompts the three questions: (1) Why did Justice Ginsburg choose the Powell 'Fiduciary Insider' for her focus? (2) How could she call this latter-day aberration, "traditional," as she did? (3) And finally, what is the explanation for Powell's aberration?

Answer these in order.

(1) The Supreme Court's Latest Word: The Powell 'Fiduciary Insider'

One fact of life explains the preoccupation with the Powell 'Fiduciary Insider': Chiarella and Dirks were, and arguably still are, the Supreme Court's controlling pronouncement. Justice Ginsburg had no option.

Powell's Chiarella and Dirks have been a brooding presence, long lowering over the law of Insider Trading. These two opinions account for most of the long line of errors afflicting the law, notably the definition of an Insider. Justice Ginsburg was faced with this Powell heritage whether she liked it or not.

But instead of damning Chiarella outright, she waffled - ruled it inapplicable to O'Hagan - and thereby in the process removed the Powell 'Fiduciary Insider' from the Court's holding.

All that explains the Ginsburg 'preoccupation' with what she cavalierly called "the Traditional Consensus."

(2) A Truncated View of History

Thus Justice Ginsburg was understandably trapped with the Court's nouveau 'Insider' bequeathed by Powell. Nothing to do but discuss it, and do her best to reconcile it with her about-to-be-endorsed Misappropriator 'Outsider.' But that unfortunate predicament did not explain, or justify, her next untenable move.

What could have prompted Justice Ginsburg to call Powell's brand-new 'Fiduciary Insider' the product of "the 'traditional' or 'classical' theory of insider trading liability"? The law of Insider Trading began 90 years ago. Powell broke with the tradition in the 1980s.

Is this duplicitous revisionism? Or is Justice Ginsburg merely naively ingenuous in ignoring the long line of precedents that began with Strong v. Repide in 1909, the Supreme Court's first Insider Trading case. The tradition crystallized with the definitive SEC case, Cady,

102. Id. at 660-61.
103. See Bayne, 'Fiduciary' Fallacy, supra note 5; Bayne, Dirks, supra note 5.
104. See O'Hagan, 521 U.S. at 653 n.5, 661-62.
105. Id. at 651.
Roberts,\textsuperscript{107} in 1961. Cady, Roberts was followed by 20 years of District and Circuit opinions, notably Texas Gulf Sulphur\textsuperscript{108} and Merrill Lynch.\textsuperscript{109} These decades produced the "any person . . . no matter who [he] may be." This was the heart of the truly Traditional definition.

To the contrary, Chiarella\textsuperscript{110} in 1980 — and Powell's companion Dirks\textsuperscript{111} in 1983 — rejected the Classical tradition, repudiated it. And surely did not represent it.\textsuperscript{112} Chiarella was an aberration.

Whether one views this historical lapse as scholarly ignorance or deliberate revisionism, the clear fact remains: Justice Ginsburg certainly drifted far from the truly traditional 'Tom, Dick or Harry' of the SEC and the pre-Chiarella courts. Rather, this was her own untraditional view.

(3) Powell's Breach with History

But the ultimate culpability lay with Justice Powell. It was he who ignored tradition. Justice Ginsburg was the 'innocent' pawn of stare decisis.

Her sin was the refusal to repudiate Chiarella, invalidate the Misappropriation Theory and its Misappropriator 'Outsider.' And get on with cleaning up the pre-Powell fallacies.

Which understandably inspires the question: Why did Powell himself flout 70 years of relative consensus? His errancy lay not with historical deficiency or conscious twisting of the past. Rather, his arguably was an excess of virtue. His mercy was unbounded, even extending to a denial of the rights of the defrauded Victims of Insider Trades. But the Vinnie Chiarellas, Michael Milkens, Ivan Boeskys of the world he inexplicably absolved. Or at least left unpunished, and with their booty still in their pockets.

Justice Powell could readily intuit the four Parables.\textsuperscript{113} He was not naive. His Vinnie even starred in the second. Yet he could not bring himself to hold Vinnie liable for lying to his $30,000 buyers.

But view Powell's Chiarella less emotionally and more as a Powell-partial academic analyst. The Powell 'Fiduciary Insider' can only be properly judged in connection with its antecedents. It was Powell's

\textsuperscript{109} Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 495 F.2d 228 (2d Cir. 1974).
\textsuperscript{112} See Bayne, Chiarella, supra note 5; Bayne, Dirks, supra note 5.
\textsuperscript{113} See supra notes 27-31 and accompanying text.
attempt to tailor the all-inclusive "any person, . . . whoever" to fit his overweening desire to limit insiders to a very, very few people. It made him nervous to convict anyone of cheating his fellow man.

Why he had no solicitude for those who were bilked can be explained perhaps by their anonymity. And their numerosity. They were a nameless mass of unknown traders, on an impersonal exchange, the distant objects of abstract SEC concern.

Justice Powell probably even thought he was refining *Cady, Roberts*, mitigating its 'harsh, draconian measures.' Rather, he distinguished "any person" into oblivion. One hesitates to suspect that Powell approved the dog-eat-dog, sharp-trading practices that allowed Chiarella, Boesky, Milken and countless others to reap illicit fortunes in the whirlwind of the Exchange. But that nonetheless was the Powell result.

This threefold prelection provides some understanding of the brooding presence of the Powell 'Fiduciary Insider.' And gives some perspective to the Ginsburg preoccupation with the Powell aberration of the 1980s.

*The Two Essentials of the Powell 'Fiduciary Insider'*

To accomplish his task of mercy to remove the harshness from the long-held definition — "any person . . . no matter who" — of the SEC's *Cady, Roberts*, Powell made two surgical cuts: (i) His limitation to "corporate insiders," who became (ii) Trusted confidants of the swindled Victim, if their inside information came to them "by reason of" their corporate position.

To reach this final narrow ambit, Justice Ginsburg went through several stages.

(i) *The First Narrowing: "Corporate Insiders"*

Justice Ginsburg begins with a general limitation on the all-inclusivity of the Traditional 'Tom, Dick or Harry,' "[a]ny person . . . no matter who." Rather, Justice Ginsburg loosely characterizes the Powell 'Fiduciary Insider' as exclusively

- a corporate insider [who] trades in the securities of his corporation on the basis of material, nonpublic information.

But that Ginsburg narrowing is just the beginning. The small class

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114. Chiarella, 445 U.S. at 228.
of ‘liable’ Insiders grows even smaller. Many other, less-inside ‘corporate insiders’ are free of culpability for Insider Trading.

(ii) Only Trusted Confidants

The Powell Court had fretted over this narrowing, page after page. Every fluctuation of the Justices was tracked in the 1994 “Chiarella and the ‘Fiduciary’ Fallacy.” At the end of its long indecision, the Court concluded with a totally inconclusive pronouncement.

Cave, however. Read this statement closely, because it is the core of the result of the Powell vacillation, or better, pusillanimity.

Note first, however, that Justice Ginsburg does not quote this following section of Chiarella which was the key to the holding, and is necessary to an understanding of where Powell was going:

No duty could arise from [Chiarella’s] relationship with the sellers of the target company’s securities, for [he] had no [1] prior dealings with them. He was not their [2] agent, he was not [3] a fiduciary, he was not [4] a person in whom the sellers had placed their trust and confidence.

The Timorous Powell was never able to define his ‘Insider’ any more explicitly than that. Consequently he left all the later courts with this tenuous conclusion: Only those ‘Insiders’ who were (1) the trusted confidants of the deceived innocent would be liable for lying, as long as they were (2) also ‘corporate insiders.’

That summary statement is an attempt to distill reams of commentary, and a holding that was 6-3, and disputed ever since. Justice Blackmun, dissenting, expressed the concern of this Article:

The Court continues to pursue a course . . . designed to transform § 10(b) from an intentionally elastic “catchall” provision to one that catches relatively little of the misbehavior that all too often makes investment in securities a needlessly risky business for the uninitiated investor.

In addition to the intrinsic unreliability of Chiarella itself, Justice Ginsburg gave as her source for the two Powell ‘surgical cuts,’ a lone quotation: Query whether she had read that Powell précis of his thinking just quoted above. Here is the Ginsburg source:

“[A] relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that
A parsing of that sentence gives support to the ‘two essentials’ of the Powell ‘Fiduciary Insider.’

The ‘trusted confidant’ becomes so only if and when he is so ‘inside’ his corporation as to be privy to inside information. He must be both (1) a ‘trusted confidant’ and (2) an inside ‘Insider.’

The ‘Temporary Insider’

However, Justice Ginsburg does seem to include a few less-inside Insiders — as did Powell in the companion, Dirks — with this:

The [three-year-old] classical [sic] theory applies not only to officers, directors, and other permanent insiders of a corporation, but also to attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation. See Dirks v. SEC . . . (1983).121

When the O’Hagan Court defined the ambit of Insider to other than “permanent insiders” it was referring to those in a “special confidential relationship,” “attorneys, accountants, consultants and others.”122 These were they to whom

[under certain circumstances . . . corporate information is revealed legitimately [as] to an underwriter, accountant, lawyer, or consultant working for the corporation . . . .123

As a result, Dirks had included — and O’Hagan consequently also included — them in its definition of Insider, even though they are “outsiders.”

Interestingly, this is only further evidence of the inaccuracy of the term ‘Insider.’

[T]hese outsiders may become fiduciaries of the shareholders. The basis for recognizing this fiduciary duty is not simply that such persons acquired nonpublic corporate information, but rather that they have entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes.124

121. Id. (emphasis added).
122. Id. (emphasis added).
124. Id. (emphasis added) (cited by O’Hagan, 521 U.S. at 652). The absurdity of this reasoning is exposed in Bayne, Dirks and Bayne, Chestman, supra note 5.
In the end, according to Justice Ginsburg, the *Powell 'Fiduciary Insider'* is even an Outsider, as long as he is in

"a relationship of trust and confidence [with] the shareholders of a corporation."\(^{125}\)

A less involved and labored explanation — and one more intelligible and exact — would draw on established rules of agency. These professionals act as alter egos of the 'fiduciary insider' and understandably shoulder all the legal obligations of their assumed positions. They are reducibly indistinguishable from their principals, and as such are similarly defined. And demand no separate, tortured definition.

The *Powell 'Fiduciary Insider'* is a direct rebuff to just about every precedent. To the Public and its traditional 'Tom, Dick or Harry.' To the SEC and its canonized definition: "Any person . . . no matter who [he] may be." To Chairman Levitt, who would hold liable the Wall Street analysts and their firms, because "ethically" their misrepresentation is "just as wrong as if corporate insiders did it."\(^{126}\)

And who can discern any resemblance of the *Powell 'Fiduciary Insider'* to the Compendium's all-inclusive: "The Insider may be any person."\(^{127}\) And most important of all, to the explicit words of the governing Section 10(b): "[A]ny person." In fact, virtually no one would be liable for that patent fraud, the Insider Trade. Justice Blackmun, dissenting, was correct. The Powell narrowing "catches relatively little of the misbehavior."

**The Court's Elimination of the Powell 'Fiduciary Insider'**

Expectably, the Ginsburg Majority gave short shrift to the spurious 'Insider' of Justice Powell and his aberration of the early 80s. In one clipt phrase, in a footnote to boot, Justice Ginsburg removes the 'Fiduciary Insider' from the *O'Hagan* holding:

*The Government could not have prosecuted O'Hagan under the classical [Powell] theory, for O'Hagan was not an "insider" of Pillsbury, the corporation in whose stock he traded.*\(^{128}\)

With that, all judicial commentary on the 'Fiduciary Insider' of Powell joins the few remarks on the *Traditional Consensus* "any person" of Section 10(b), as merely *obiter* reflections worthy of later reflection.

\(^{125}\) *O'Hagan*, 521 U.S. at 652 (quoting *Chiarella*, 445 U.S. 222, 228 (1980)).


\(^{127}\) Bayne, *The Essence*, supra note 5, at 352; see *supra* text accompanying note 94.

\(^{128}\) *O'Hagan*, 521 U.S. at 653 n.5.
Thus the second of the four Divergent Versions of the 'Insider' is eliminated from the 'Insider Trading' of O'Hagan.

The Powell 'Fiduciary Insider'
This work of Justice Powell's Chirella and Dirks held that Only (1) "corporate insiders" who are hence (2) trusted confidants of the Victim, are liable for Insider Trading. All others, scot-free. Ruled inapplicable by O'Hagan.

The Third 'Insider': The Misappropriator 'Outsider'

As Justice Ginsburg approached head-on this central question of her Opinion — who is the 'Insider' of this Insider Trading now before the Court? — consider what she has just done by eliminating the Powell 'Fiduciary Insider' from her Opinion.

As a preface to her most basic problem — defining an Insider pursuant to the Theory — rephrase the sharp dilemma she has just set before herself. Witness this concise syllogism:

First Premise: The Powell 'Fiduciary Insider' has two constricting limitations: He must be both (1) Inside the corporation whose stock he trades and hence (2) A fiduciary to the trader with whom he trades. A rara avis, indeed, who will scarce ever be found.

Second Premise: But James Herman O'Hagan is neither (1) an Insider nor (2) a Fiduciary.

Therefore: James Herman "could not have [been] prosecuted [as a Powell 'Fiduciary Insider'], for O'Hagan was not an 'insider' of Pillsbury, the corporation in whose stock he traded." 129 Justice Ginsburg thus ruled out a conviction of James Herman as a Powell 'Fiduciary Insider'.

With Insider Trading — as the Powell Court saw it — eliminated, what does the O'Hagan Court propose to do? What other route could lead to liability? Since James Herman is not guilty under the regnant law of the Supreme Court, what now?

The split Circuits below — and the legal world in general — awaited a ruling on an Insider Trading case premised on the interpretation of Section 10(b) according to the Misappropriation Theory. O'Hagan came up as an Insider Trading case.

The Justice, therefore, was hamstrung, doubly. First, all observers had proclaimed James Herman guilty of Insider Trading. Second, his conviction was founded on only one particular interpretation of Section 10(b), the Misappropriation Theory.

129. Id.
Here was Justice Ginsburg’s sharp dilemma: Either she rules that James Herman was an Insider guilty of Insider Trading under the Misappropriation Theory, or she outlaws the Theory as unable to support a conviction under Section 10(b).

The Ginsburg Rationalization

Justice Ginsburg, of course, cast her lot with the Misappropriation Theory. Her task now: Find Insider Trading in the Misappropriation Theory. And the first step in finding Insider Trading is locating the Insider. Can she find a Theory Insider, or must she repudiate this third Insider in her Opinion?

(1) The ‘Thief’

In the light of her choice, Justice Ginsburg was faced with the necessity of drawing all the elements of the ‘Insider’ from within the four corners of the Misappropriation Theory.

The Source of the ‘Insider’ Definition: The Theory Itself

The first Article of this Study of O’Hagan reached the conclusion that the Misappropriation Theory, although long since exactly defined by the courts, was nonetheless an artfully worded concoction that appeared superficially straightforward, but was on analysis deliberately confusing, even misleading. It seemed simple enough, but really was difficult to penetrate.

The uniformly accepted statement of the Theory, crystallized by the Circuits since the mid-eighties, was the only version before the five conflicted Circuits below and the definition under which James Herman O’Hagan was convicted and which is now under discussion by the Supreme Court.

Unedited and unannotated, herewith the Misappropriation Theory sent up from the Eighth Circuit below:

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.”

The first Article of this Study found nothing misleading with the

first three of the definition's essentials. They seemed honest enough. But the fourth was perplexing.

At a second and third reading, the meaning was still elusive. As a result, parsing was employed, and Webster's called in for help. After many paragraphs of dissection and analysis, the phrase was translated into English with this more revealing result. The original version,

(4) regardless of whether he owed any duties to the shareholders of the traded stock.

next became this more intelligible rendering:

(4) without taking into account whether the Insider owed any duty to the public Investor.

Which readily became, by elemental extrapolation:

The misappropriation theory authorizes the criminal conviction of a person (4) without taking into account whether 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.

The Theory Emasculated

This innocent little section threw the entire thrust of the Theory into reverse. The Theory (1) required a theft of secret information, (2) by a fiduciary, and then (3) the use of the secret "in connection with" a stock trade. Well enough.

But then, in (4), it turns out that the stock trade of (3) is an irrelevant appendage. The stock trade could be totally innocuous. Totally useless. The Investor in the trade need not be deceived, not be harmed at all. The information could be 'used,' "without taking into account" whether any Investor was bilked or not.

With this correct understanding of the role of the Insider in the Theory version of Insider Trading, proceed to consider the Ginsburg approach, as best discernible, to the definition of an Insider according to the Theory.

Justice Ginsburg did not directly address the question: Who, or what, is the Insider, according to the Theft-of-Information concept? But that did not deter her from dilating at length about Insider Trading. But who this 'Insider' is — he who 'trades' — can be gleaned only with difficulty from two sources: (1) a few direct statements that approach a 'definition,' and (2) inferential reasoning from her overall presentation of the new Theft-of-Information tort.

131. Bayne, Misappropriation Theory Ignored, supra note 1, at 17-22.
132. Id. at 22-23.
Emphasize that the Justice is now only concerned with the ‘Insider’ according to the Misappropriation Theory.

The opening paragraph of the Opinion typifies the inattention given to the Insider. This impression of inattention persists throughout. The identity and nature of the guilty person in the Insider Trade is of little importance.

The Court poses the question to be adjudicated:

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?133

No mention of an Insider. Is this “Person who trades” the “any person” of the Traditional ‘Tom, Dick or Harry’?

When the Justice later sets off the Powell ‘Fiduciary Insider’ from the Misappropriator ‘Outsider,’ she comes closest to explicitness and reiterates the seemingly all-inclusive generic ‘person’:

The “misappropriation theory” holds that a person [i.e., the ‘insider’] ... violates § 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information.134

Thus the malefactor in the Insider Trade is first and foremost a Thief of the Information. That would seem to be an unqualified identification of the ‘Insider’ about whom all are concerned, and Mr. O’Hagan would be he, the “person” who “misappropriates,” that is, steals, “confidential information.”

Thus, so far her Theory has no ‘Insider’ at all. Only a Thief from a Source, i.e., a Misappropriator.

(2) The “Outsider” ‘Insider’

Once the Justice has identified her ‘Insider’ as a Thief, a Misappropriator, she then has but one step more to complete her definition, such as it is. Recall that Powell emphasized that his ‘Fiduciary Insider’ was just that, an “insider”:

The classical [that is, Powell’s nouveau] theory targets a corporate insider’s breach of duty to shareholders with whom the insider transacts.135

But Powell and his ‘Fiduciary Insider’ are anathema to the Theory and hence to the Justice.

133. O’Hagan, 521 U.S. at 647 (emphasis and capitalization added).
134. Id. at 652 (emphasis added).
135. Id. (emphasis added).
So Justice Ginsbury consciously sets off, willy-nilly, her "fiduciary" against the Powell 'Fiduciary Insider' by stressing that

The misappropriation theory outlaws trading on the basis of non-public information by a corporate "outsider" who breaches a duty owed not to a trading party, but to the source of the information.136

So now it is known that the "person" who "violates § 10(b)" and the law of Insider Trading is not an Insider at all, but an "Outsider." And since he has already been established as a Misappropriator, he obviously becomes a Misappropriator 'outsider.' Moreover, he owes no duty to the "trading party," the Investor. Which, of course, is exactly the conclusion reached in the labored parsing of Item (4).

It is also now abundantly clear that the Theft-of-Information 'Insider' is not the all-inclusive "any person" of the Traditional 'Tom, Dick or Harry' consensus.

One further point: Whatever Justice Ginsburg may call the 'Insider' of her 'Insider Trade,' she too should be ready to proclaim the word a total misnomer.

Because the Justice never set out ex professo to define the nature and qualities of the central actor in her never-mentioned Insider Trade, these two are the only characteristics that are readily discernible: Thief and 'Outsider.'

The later sections of this Study will fill in some further insights as to what this Misappropriator 'Outsider' might be like.

But Justice Ginsburg does stress the point now being proven: The malefactor of the Theory is not "a corporate insider" who is the Insider of history, or even of Justice Powell. Rather he is a Thief and an 'Outsider.'

The Theory has, according to the court, no Insider at all. Thus does Justice Ginsburg, step by step, emphatically eliminate the third Divergent Version of an Insider.

(Note too that the Ginsburg Court, as now next will be emphasized, never gives the Misappropriation Theory any real support — lip service at best. Even if she had genuinely adopted the Theory, she would nonetheless have eliminated the Insider from any Theory she would have embraced. So she in fact doubly excised any true Insider from her Opinion.)

136. Id. at 652-53 (emphasis added).
The Misappropriator ‘Outsider’

This creation of the Misappropriation Theory was designed to circumvent Powell's Chiarella. Substituted 'Theft-of-Information from the Source' for the Insider Trade. Hence, the Thief became the 'Insider.' Eliminated duty to, deception of, and harm to, the conned Victim. Endorsed by O'Hagan, without a true definition.

The Fourth ‘Insider’: The Ginsburg ‘Insider’

The analysis now reaches the most subtle section of Ginsburg’s O'Hagan. To read the mind of a Justice in the pages of an opinion is a perilous task at best. The first Article of this Study nonetheless undertook this task, and produced two sharp results fundamental to any definition of the ‘Insider’: (1) Ginsburg’s New Theory Was Unavowed, and (2) O’Hagan Was a Formal Endorsement of the Misappropriation Theory.

(1) The Unavowed ‘New Theory’

The pitfalls in mind-reading appear immediately. At first, Justice Ginsburg’s construction of her “own misappropriation theory from whole cloth,” in Justice Thomas’s words,137 seemed unwitting, as if she did not advert to the process. But then the suspicion came that she was subtly inserting her own valid, foreign-to-the-misappropriation-theory, rationale for sending James Herman to jail.

But whatever mind-reading conclusion prevails, one controlling factor emerges: Justice Ginsburg never openly presented or endorsed her own “novel” New Theory. As Justice Thomas stated:

Whether the . . . new theory has merit we cannot possibly tell on the record before use . . . 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.138

The upshot: The elements of the New Theory therefore — prominent among them, the Ginsburg ‘Insider’ — are not the judicial holding of O'Hagan and are at best a presage of a hoped-for future Ginsburg conversion to the true doctrine. O’Hagan contains no Ginsburg ‘Insider.’

(2) O’Hagan’s Formal Endorsement of the Misappropriation Theory

The legal world — the conflicted Circuits below, the several parties to the litigation, Bench, Bar and Public — uniformly regarded O’Hagan

137. Id. at 687 (Thomas, J., concurring in part and dissenting in part).
138. Id. at 688-89 (Thomas, J., concurring in part and dissenting in part) (emphasis added).
as an Insider Trading case, up on certiorari to test the validity of the Misappropriation Theory as an interpretation of Section 10(b) as applied to James Herman O’Hagan’s $4-million swindle of public investors by lying to them as to the true value of their Pillsbury stock.

And that was exactly what Justice Ginsburg gave the legal world: A formal, judicial endorsement of the Misappropriation Theory:

We agree with the Government that misappropriation, as just defined, satisfies § 10(b)’s requirement...\(^{139}\)

The result of these two conclusions leaves the Ginsburg ‘Insider’ without judicial support and effectively eliminated from O’Hagan.

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**The Ginsburg ‘Insider’**

Inferences point to an ‘Insider’ redolent of ‘Tom, Dick or Harry,’ but Ginsburg’s New Theory never overtly attempted an explicit definition. Value: *Obiter* statements for future argumentation.

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The *obiter* insertions by Justice Ginsburg, however, are worthy of study, perhaps more so than her other statements, as a possible future course of the Court. With the three dissenters, Scalia, Thomas and the Chief, and the imminent retirement of Stevens, Justice Ginsburg could soon join a rational majority.

Fully cognizant of the totally *obiter* nature of the Ginsburg ‘Insider,’ what manner of being did the Justice produce? Is he to be all-inclusive, as the “any person” of the Code? Or the narrow ‘corporate insider’ who must also be a ‘trusted confidant’ of his conned victim?

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**The Amalgam of Ginsburg Thinking**

The first Article of this two-part Study\(^{140}\) culled the Opinion and pieced together key statements into a mosaic of controlling thinking — an *Amalgam* of the tenets of her new theory — that arguably served as the justification of James Herman’s conviction for Insider Trading.

Whereas the unqualified and unaltered Theory itself was foreign to Section 10(b) and its common-law-deceit base, Justice Ginsburg slipped in enough orthodoxy to warrant James Herman’s incarceration.

The collection of the Court’s verbatim pronouncements produced this synthesis:

**The Amalgam**

The Ginsburg New Theory outlaws:

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139. *Id.* at 653 (emphasis added).
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.\footnote{Id. at 54.}

The question now: What definition of an 'Insider' do these obiter words of Justice Ginsburg yield?

\textit{The Two-Source Definition of the Ginsburg 'Insider'}

The Amalgam was prepared to present the Majority's true thinking on the correct application of Section 10(b) to the decades-old scam of the Insider Trade. That Amalgam contained all the essentials of the traditional Section-10(b) 'deceit' action.

But the definition of the Insider himself is only one of these essentials. The scrutiny on the Amalgam, therefore, must be narrowed for present purposes to those words which impinge directly on the nature of the Insider as such. Some further emendation yields only these direct relevancies:

The Ginsburg New Theory outlaws:

Trading on . . . confidential information, by an outsider . . . to gain no-risk profits . . . with resultant harm to Investors. [T]he fraud is consummated only when he uses the information through securities transactions.

This distillate permits some worthwhile conclusions. Toward orderliness, these conclusions may be appropriately approached according to their twofold Source: (i) Explicit References to an Insider and (ii) Construction by Deduction.

Surprisingly, this brief analysis yields some unexpected and valid insights.

\textit{(i) Explicit References to an Insider}

Throughout her Opinion the Justice consistently refers to the malefactor of the Insider Trade as "an outsider to a corporation." The later reference to the "he" who "uses the information" is obviously that same "outsider." No other direct reference to the malefactor occurs.
Which leads to the obvious question: Who is this “outsider”? What is his real persona? What weight must be given to this lone explicit usage? Does the New Theory cover no one else?

Two factors probably carry the key to the puzzle of the Ginsburg ‘outsider.’

The Pall of Powell

The most revealing influence on the Ginsburg terminology is the looming presence of Mr. Justice Powell. Recall the emphasis that was placed on the continuing impact of Chiarella and Dirks on the definition of the Insider. These two holdings are the current law, the latest word of the Court. And these Opinions were explicit: The Insider must be ‘inside the corporation’ and hence the ‘trusted confidant’ of the Victim of the scam.

Yet O’Hagan held:

The Government could not have prosecuted O’Hagan under the [Powell reasoning], for O’Hagan was not an “insider” of Pillsbury, the corporation in whose stock he traded.142

So Justice Ginsburg was hamstrung. She was forced to conform, or overrule Chiarella. She chose lip service. Willy-nilly, her ‘insider’ had to be called an ‘outsider.’

But arguably, ‘outsider’ was pure expediency. All Justice Ginsburg intended was (a) To affirm O’Hagan’s conviction, (b) To avoid the negative effect of Powell and Chiarella — which would free James Herman — and (c) call him anything that would be consonant with that twin objective. Remember, too, the malefactor under the Misappropriation Theory has consistently been the ‘Thief Outsider.’

Close scrutiny of O’Hagan supports the thesis that the Majority was not concerned with any broader, unforeseen and unintended consequences of such a delimitation. Only the immediate task at hand was in focus: Convict O’Hagan and distinguish away the miserable Chiarella. The Opinion carries no evidence that the Majority paused long enough to face the question. The treatment was strictly ad hoc.

The matter was far different in the earlier, more thoughtful cases, pre-Theory. The SEC in its 1961 Cady, Roberts143 — “a case of first impression and one of signal importance in our administration of the Federal securities acts”144 — saw the serious implications of the compass of the Insider.

142. O’Hagan, 521 U.S. at 653 n.5.
144. Id.
The Commission was painstaking. Section 10(b) and companion legislation, the SEC held, applied
to securities transactions by 'any person.' Misrepresentations will lie within their ambit, no matter who the speaker may be.145

And the Second Circuit expatiated on Cady, Roberts in Texas Gulf Sulphur:

Insiders, as directors or management officers are, of course, by this Rule, precluded from so unfairly dealing, but the Rule is also applicable to one possessing the information who may not be strictly termed an "insider" within the meaning of Sec. 16(b) of the Act. Cady, Roberts, supra. Thus, anyone in possession of material inside information must . . . disclose it to the investing public . . . .146

And:

The essence of the Rule is that anyone . . . trading . . . in the securities of a corporation . . . [has a duty] "to those with whom he is dealing," i.e., the investing public. Matter of Cady, Roberts.147

But Justice Ginsburg never felt the necessity of an exact definition of the malefactor in the Insider Trade. Arguably, therefore, her explicit words should not bind her. Her true, inner meaning can best be divined by the far-more-revealing, and operative, words of the Amalgam.

(ii) Construction by Deduction

By some deft reasoning — the ensuing sections of this Study will expand these thoughts — Justice Ginsburg could be justly accused of being on the brink of endorsing both Cady, Roberts and Texas Gulf Sulphur. The first Article of this O'Hagan Study certainly reached this conclusion.148

Unfortunately, however, for the present state of the law, O'Hagan never overtly adopted the Amalgam. Rather, the Opinion expressly, albeit only nominally, embraced the Misappropriation Theory, thereby repudiating any such subliminal sentiments of Justice Ginsburg.

A close look at the Amalgam justifies four conclusions: (i) The "trading on confidential information" is 'outlawed.' (ii) The 'profits' were not the result of market savoir, but were 'no-risk.' Thus trade was not at market, and not innocent. (iii) The 'harm' was 'to the Investor,' not to the Source, Grand Met or Dorsey. (iv) This was 'deceit' of an Investor in a stock scam, not a Theft from an employer.

145. Id. at 911.
147. Id. (quoting Cady, Roberts, 40 S.E.C. at 912).
148. Bayne, Misappropriation Theory Ignored, supra note 1.
INSIDER TRADING

Such a series of premises leads only to a swindle personified in the Parables. Surely a Majority that embraces such reasoning would not inexplicably limit the ambit of liability for such an Insider Trade to an Insider who would not include "any person, no matter who the speaker may be."

With this removal of the fourth of the Divergent Versions of the Insider, O'Hagan has correspondingly eliminated that first, and arguably paramount, essential of the Insider Trade, the Insider himself. Without an Insider, scarcely an Insider Trade.

But what of the second essential according to the Misappropriation Theory?

II. THE ABSENCE OF 'DECEIT' IN THE 'THEFT'

Recur to the Thesis of this Article:
That the Supreme Court in O'Hagan, (1) Abandoned all judicial consideration of the tort of Insider Trading, and (2) Substituted an ancient crime, Theft, in its place.

And then to the Subthesis:
Because each individual essential to an Insider Trade is lacking, the totality of Insider Trading is, eo ipso, lacking.

The first essential was missing: The Insider Trade had no 'Insider.'

The Removal of Deceit

The immediate task now becomes: To show that the Majority has removed all Deceit from O'Hagan. That this Second Essential to the Section-10(b) Insider Trade is absent from the Theory's Theft-of-Information crime espoused in O'Hagan.

The Reasoning Pushed to the Basics

To accomplish this 'immediate task,' the argumentation must explore more precisely five seemingly obvious truths. In the past, these truths have been taken for granted as if apparent to all. But they have not been, and their clarification and illumination remains crucial to the current Insider Trading crisis.

All five truths conduce to one conclusion: 'Deceit' is integral to a true Insider Trade, yet nowhere in O'Hagan is 'Deceit' to be found.

The reexamination is fivefold: A. Deceit, the Essence of the 'Insider Scam,' B. The Long-Accepted Meanings of 'Deceit' and 'Theft,' C. The 'Deceit' Requisites of the Section-10(b) Action, D. The Twisting of 'Deceit' into 'Theft,' E. Latent Illogicalities in the Theory's 'Deceit.'
A. 'Deceit,' the Essence of the 'Insider Scam'

The central subject under litigation in *O'Hagan* is concededly an 'Insider Trade.' Everyone involved has so proclaimed it. Hence the nature of this 'Insider Trade' in *O'Hagan* becomes focal.

To this end, the four Parables were meant to transform living lawsuits — living lawsuits, that is, except Chairman Levitt's *Market Guru*, living but not yet a lawsuit — into childlike tales, designed to remove the perceived complexity of a Wall Street deal. These primitive stories were to be ABC examples of the *Insider Trade*. Everyone, from Everyman to Academic, would recognize them as the same elemental scam.

But the *Theory*, unfortunately, contorted this common con of the Parables into a complex phenomenon, with none of the essentials, notably *Deceit*, of the four simple stories. The contortion of history's Insider Trade into a 'Theft of Information' requires this reexamination.

The *Insider Trade* of Public Perception

The choice of the perfect paradigm was obvious. James Herman was ready and waiting. This boxed reproduction should refresh the recollection:

### The Prototypal Insider Trade of History: 1909-1999

*James Herman, Con Artist:* James Herman O'Hagan, securities lawyer, got wind of the imminent absorption of Pillsbury, the American household favorite, by the Brit megafirm, Grand Met. Secretly buying Pillsbury before the press release, and selling after, James Herman O'Hagan netted an illicit $4 million from uninformed public Investors. That was the mid-nineties.

*James Herman, Con Artist,* is a perfect companion to the other three swindlers, and contains all the well-known indicia of the *Insider Trade*, a swindle since stocks first traded. *'Deceit'* was at the heart. In earlier days, buyers were sold an "infertile bull, a house with an inoper-
able furnace, a car with a cracked engine-block."  

(2) The Theory's Substitute for the Insider Trade

But now the new 'Insider Trade' emerges with little resemblance to the Widdie Strong of the first Supreme Court Insider Trade in 1909. Or to Markup Vinnie. Or Chairman Levitt's Market Guru. Or, most remarkably, to James Herman, Con Artist. The new creation is devoid of all Deceit.

The truth is that the O'Hagan crime, according to the Theory, is simply not an Insider Trade at all. The Theorists even avoid calling it an 'Insider Trade.' To them it is 'Misappropriation of Information.'

To others: Theft of Information. In fact the so-called crime in O'Hagan is not even Theft. It is nothing other than Snooping by a person who has no right to pry into private matters.

A distant relative of this O'Hagan malefaction could be Theft of Intellectual Property. Or the Taiwanese 'knockoffs' of Movados, Rolexes and Polos By Ralph Lauren. Or the Mainland's pirated CDs, videos and tapes.

Which led to the present conclusion that the Snooping, according to the Theory, deserved its own 2+2 portrayal. Herewith the 'Section 10(b) Insider Trade' as O'Hagan saw it:

The Prototypical 'Insider Trade' of O'Hagan: 1980

Willie 'Sutton' Smythe, 'Outsider': For three decades a second-assistant teller at stodgy Wheat City Bank, disgruntled and disloyal, Willie 'Sutton' Smythe earned his nom de guerre in one midnight visit to the vaults, made off with $151,500 in cash, bonds and, in spite, two files, 'Top Secret': Plans of the new building, and Details of the consummated-but-unannounced takeover of crosstown Wellington Bank.

Now affluent, Willie sank $150,000 in a new home. But he had made good use of the secrets of the Wellington takeover. He reasoned: Banks make good targets. Upshot: Willie 'Sutton' put the $1,500 in statewide Topeka MegaBank, at market. MegaBank finally dropped 1/2 point. Willie was proud of the result of his study of the takeover file: No losses.

Clearly, Willie 'Sutton' Smythe, 'Outsider,' is on all fours with the Misappropriation Theory: (1) Willie misappropriated the material, non-public information of the takeover of Wellington, (2) Thus breaching his duty to his 'trusting' Wheat City, (3) Then he used the secret details of the merger to conclude that bank stocks in general look surefire. (4) All this without any deception, breach of duty or harm to the public Investor. Willie had no connection whatsoever with Topeka MegaBank, and his trade was innocent and at market.

149. Id. at 3.
Recall Justice Ginsburg’s “prime questions”:

[W]e address and resolve . . . : 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?151

The Theory’s answer for Willie is an emphatic ‘yes!’ He met every requisite.

This graphic setoff should clarify the Nature of the Insider Trade. Which of the two was truly an Insider Trade? Who of the two, Willie or James Herman, was an Inside Trader? Who of the two deceived whom? Was Wheat City Bank deceived at all? Or were the Pillsbury sellers the only real Victims?

The next misconception confusing the current debate is perhaps even more pernicious. The Theorists have not only contorted the Insider Trade. They have also done violence to two rudimentary English concepts, long entrenched in the English language and Anglo-Saxon law.

B. The Long-Accepted Meanings of ‘Deceit’ and ‘Theft’

Deep in the short history of the Misappropriation Theory lie buried two hidden forces that have driven the Theorists to preposterous legal positions. Expose these forces, and the reason then becomes clear why the Theory twisted the rigid, canonized concept of Deceit — defined exactly for centuries — into the equally ancient and rigid crime of Theft.

The Laudable Objective

The first latent force: The Theorists had a well-intentioned determination to counteract the baneful effects of the illogic of Chiarella. The Theorists knew that the Vincent Chiarellas of the world were guilty of common-law ‘deceit.’ The Theorists saw the absurdity of the Chiarella ruling that said: ‘Vinnie has no duty not to lie.’ This realization resulted in a powering drive to circumvent Chiarella, to finesse that absurdity.

Emboldened by this laudable ‘end,’ the Theorists succumbed to a less-than-laudable ‘means.’ They embraced a second, unstated guiding tenet, an ancient fallacy:

‘The End Justifies the Means’

The Theorists would never admit it, but they are prepared to sell their souls to the most patently untenable propositions — both legal and linguistic — in order to concoct a Theory that will catch a James Herman, otherwise scot-free under Chiarella. This explains their readiness

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to appear as illiterate wordsmiths, as well as ignorant of the law, as long as their laudable end, incarceration of James Herman, is achieved.

These twin forces conjoined to produce the distortion of two ancient Crimes and two hallowed Words: Deceit and Theft.

The Wellspring of the Illogicality

How remarkable that (1) The malusage and distortion of two well-defined English Words could aid in (2) The blurring, even contorting, of two sharply different Crimes. Yet this twin maltreatment has succeeded — even been straight-facedly applauded — in twisting the nature of the Insider Trade and the essence of Section 10(b). And removing the requisite 'Deceit.'

The Need for a Strong Antidote

Yet the deliberate misdefinition of both the Words and the Malefactions has been so persistent that both the philological and legal communities must be awakened to reality. Oft-repeated falsity cannot become fashionably acceptable.

The only remedy would seem to be an outspoken and detailed refutation of the twin distortion. The matter may seem trivial and purely semantic. But witness the mess. Recall the SEC’s Ferrarra: "'When you have to justify common sense rules in the mold of misappropriation, you get into twisted arcane analysis.'"152

Toward Clarification and Illumination of the Concepts

A categorical and unqualified truth underlies the twin terms, Deceit and Theft. This proposition is herewith set for proof:

Nothing in the meaning of the English word Deceit and its counterpart, the Deceit crime, has any elements whatsoever in common with the unrelated English word, Theft, and its counterpart crime. The two concepts are totally foreign, alien to each other.

This may appear to be overkill, but the loose thinking and casual misuse of the words and terms have been so long overlooked that only a strong antidote will cure the malady.

The proof of the proposition will proceed in two parts, first the Words, then the Crimes.

(1) The Disparity of the English Words

The two words, Deceit and Theft, have never in their long histories

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shared essential elements. They are not even first cousins. To be able to classify them together at all, one must generalize to the point of irrelevancy. Both are sins, true, transgressions against the nature of man and against one’s fellow man. But beyond that, nothing in Deceit is in Theft. Or nothing in Theft is in Deceit. The concepts are mutually exclusive.

Consult the ultimate American authority, Webster’s Unabridged, and juxtapose the two definitions.

deceit . . . n . . . [fr. L decepta, fem. of deceptus, past part. of decipere to deceive] 1: the act or practice of deceiving (as by falsification, concealment, or cheating): DECEPTION . . . 2 a: an attempt to deceive: a declaration, artifice, or practice designed to mislead another: wily device: TRICK, FRAUD b: any trick, collusion, contrivance, false representation, or underhand practice used to defraud another...

syn DECEIT, DUPLICITY, DISSIMULATION, CUNNING, GUILE can mean, in common, the quality, act, or practice of imposing on credulity by dishonesty, fraud, or trickery. DECEIT implies the intent to mislead and can cover misrepresentation, falsification, fraud, or trickery of any kind . . . . 153

The heart of ‘deceit’ is the purpose to mislead. Nowhere in the definition is even an intimation of a taking or stealing or misappropriation. Even the synonyms do not drift over toward ‘theft’ or ‘larceny.’

theft . . . n . . . [ME thiefthe, thesthe, thefte, thifte . . .] 1 a: the act of stealing; specif: the felonious taking and removing of personal property with intent to deprive the rightful owner of it b: an instance of such an act . . . . 154

The essential element of Theft is the taking and removing. As with Deceit, nothing in the essence of Theft entails in any way the purpose to mislead.

The more comprehensive and famous British counterpart, the Oxford English Dictionary, concurs regarding Deceit:

deceit . . . cf. DECEIVE.]

1. The action or practice of deceiving; concealment of the truth in order to mislead; deception, fraud, cheating, false dealing.

. . . 1794 S. WILLIAMS Vermont 170 The deceit, knavery, and fraud of the European traders. . . .

deceive . . .

(The literal sense of L. d cip re was app. to catch in a trap, to entrap, ensnare; hence, to catch by guile; to get the better of by fraud; to cheat, mislead.)


154. Id. at 2369 (1993).
2. To cause to believe what is false; to mislead as to a matter of fact, lead into error, impose upon, delude, 'take in'.

... 1533 LD. BERNERS Huon xxiv. 69 By hys fayr langage he may dyssayue vs. ... 155

And, expectably, Theft:

theft...

1. The action of a thief; the felonious taking away of the personal goods of another; larceny; ... 

... 1300 Cursor M. 15973 Iudas . Of his thift and his felunni, His moder al he tald. ... 156

(2) The Distinctiveness of the Two Crimes

As would be expected, the Anglo-Saxon law has tracked the meanings of the English words in defining the torts and their correlative crimes. Expectably, therefore, the malefactions, Deceit and Theft, likewise have nothing in common. Nothing, that is, beyond their sinful nature. Both are the illegalization of violations of the persons of a fellow man and the natural rights possessed by him.

For a hundred years, Black's has been the lawyer's accepted handbook for legal definitions. Blackstone, and before him, Henry of Bracton, confirm the current definitions. 157 Black's, joining Webster's, gives the coup de grace to the Theory's muddling of Deceit and Theft.

Deceit. A fraudulent and deceptive misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon. ... 158

Black's goes on to track the essential constituents of Deceit, and might just as well have been paraphrasing Section 10(b), which is nothing other than codified common-law Deceit:

Deceit. ... To constitute "deceit," the statement must be untrue, made with knowledge of its falsity or with reckless and conscious ignorance thereof, especially if parties are not on equal terms, made with intent that plaintiff act thereon or in a manner

156. 17 OXFORD ENGLISH DICTIONARY 886 (J.A. Simpson & E.S.C. Weiner, eds. 1989).
157. HENRI DE BRACTON, DE CONSUETUDBNIBUS ET LEGIBUS ANGLIAE (George E. Woodbine, ed. 1915) (c. 1269); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1778).

Blackstone, in his Commentaries — which inevitably reflected the Blackstone of the thirteenth century Henry of Bracton, the lawyer-priest through whom all English law "passed as through a funnel" ... 158

DAVID COWAN BAYNE, S.J., CONSCIENCE, OBLIGATION, AND THE LAW 16-17 (1966) (quoting Miriam T. Rooney, Borrowings in Roman Law and Christian Thought, 6 THE JURIST 457 (1946)).
apparently fitted to induce him to act thereon, and plaintiff must act in reliance on the statement in the manner contemplated, or manifestly probable, to his injury.\textsuperscript{159}

When the law undertakes to define the crime of \textit{Theft}, the parallel with the English word persists. Thus \textit{Black’s} reiterates \textit{Webster’s}:

\textbf{Theft.} A popular name for larceny. The act of stealing. The taking of property without the owner’s consent. . . . The fraudulent taking of personal property belonging to another, from his possession . . . without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.\textsuperscript{160}

Blackstone, cogent and precise in his discussion of Theft, identifies four essential elements:

\textbf{Larceny, or theft, . . . .}

\textbf{Simple} larceny then is “the felonious taking, and carrying away, of the personal goods of another.” This offence certainly commenced then, whenever it was, that the bounds of property, or laws of \textit{meum} and \textit{tuum}, were established. . . .

1. \textit{It} must be a \textit{taking}. This implies the consent of the owner to be wanting. . . .

2. \textit{There} must not only be a \textit{taking}, but a \textit{carrying away}: \textit{cepit et asportavit} was the old law-latin. . . .

3. \textit{This} taking, and carrying away, must also be \textit{felonious}; that is, done \textit{animo furandi}; or, as the civil law expresses it, \textit{lucr	extit{i} causa}. . . .

4. \textit{This} felonious taking and carrying away must be of \textit{the personal goods of another} . . . .\textsuperscript{161}

\textbf{The Branches of Theft}

Note well: The Theorists have attempted — but are now being rebuffed — to corrupt the definition of the crime \textit{Deceit}. But not vice versa. Why? Because \textit{Theft} has made it unnecessary. Theft has some looser subdivisions that lend themselves to the Theorists’ machinations by supplying ready-made alterations suitable for blurring the two crimes, clearly poles apart in their original state.

Thus \textit{Theft} has spawned many hybrid forms of “\textit{taking and removing}.” Robbery is the forcible taking of personality from the person of the victim. And ‘\textit{embezzlement}’ is the taking of personality entrusted to another. Henry of Bracton noted this distinction in the 13th century:

\textsuperscript{159} \textit{Id.}  
\textsuperscript{160} \textit{Id.} at 1477.  
\textsuperscript{161} 4 \textit{William Blackstone, Commentaries on the Laws of England} 229-33 (1769).
Theft, according to the laws, is the fraudulent mishandling of another's property without the owner’s consent, with the intention of stealing, for without the *animus furandi* it is not committed. I say ‘fraudulent’ [because] there is also another kind of mishandling without the owner’s consent, rapine, which is the same with us as robbery. That is why a robber is a thief *a fortiori* 

Black’s makes this strikingly clear in this following entry: *Theft by deception.* [A] person is guilty of theft by deception if he purposely obtains property of another by deception.163

These variants are not pure Theft. They contain an admixture of elements unrelated to, or in addition to, the core of Theft, the taking unlawfully. But as between Deceit and pure Theft, no elements exist common to each. A complete disjunction is present. A perfect dichotomy.

And most to the present point: Never has the concept Deceit been corrupted by any essentials borrowed from Theft. No looser subdivisions muddy-up Deceit. The element of ‘taking’ is totally alien to Deceit. And so it has been from the medieval period to the present Webster’s.

The Modern Deceit: Section 10(b)

To fail to align the central concern of *O’Hagan*, Section 10(b), alongside its lineal antecedent would be inexcusable. Recall Justice Ginsburg’s own statement of the true focus of her Opinion:

Pursuant to its § 10(b) rulemaking authority, the Commission has adopted Rule 10b-5, which, as relevant here, provides:

“It shall be unlawful for any person...

“(a) To employ any device, scheme, or artifice to defraud, [or]

“(c) To engage in any act, practice, or course of business which operates . . . as a fraud or deceit upon any person,

“In connection with the purchase or sale of any security.”164

Those provisions of Rule 10b-5 track exactly Webster’s, the *OED*, Bracton, Blackstone and Black’s.

Which brings the matter to the *third* murked-up truth.

C. The ‘Deceit’ Requisites of the Section-10(b) Action

The historical unanimity of the courts and commentators makes all

the more remarkable the Theory's attempt to stretch Section 10(b) to include clear-cut Theft within its ambit. And remove the 'Deceit.'

So consistent have the courts been, that the briefest references will establish the requirements of an action under Section 10(b) of the 1934 Act, and its implementing SEC Rule 10b-5.

The most expeditious and authoritative approach is resort to a standard law-school-casebook opinion as declarative of the long consensus regarding Section 10(b).

Ponder these rudimentary requirements in their application in the four, now five, Parables. Recall, Huddleston,\(^{165}\) handed down in 1981, the year of the birth of the Theory, by the Fifth Circuit:

**ELEMENTS OF THE CAUSE OF ACTION UNDER SECTION 10(b) AND RULE 10b-5**

The elements necessary to prove a Section 10(b) claim have been so often applied by the lower federal courts that they can be stated in black letter fashion. To make out a claim under Section 10(b), which is based on the common law action of deceit, the plaintiff must establish (1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused his injury.\(^{166}\)

As recently as mid-1998, the black-letter Huddleston has been confirmed by the Federal court in Scone.\(^{167}\) Note the explicit equation of common-law Deceit with Section 10(b).

**IV. COMMON LAW FRAUD**

The requirements of common law fraud are (1) false representation of a material fact; (2) intent to defraud; (3) reasonable reliance on the misrepresentation; and (4) damage caused by such reliance. *May Dep't Stores Co. v. Int'l Leasing Corp.*, 1 F.3d 138, 140 (2d Cir. 1993). . . . Thus the elements of common law fraud are essentially the same as those which must be pleaded to establish a claim under § 10(b) and Rule 10b-5. See Pits. Ltd. v. American Express Bank Int'l, 911 F. Supp. 710, 719 (S.D.N.Y. 1996).\(^{168}\)

The categorical explicitness of the judiciary makes all the more unsettling the backdoor twisting of those essentials by the Theory.


\(^{166}\) Huddleston, 640 F.2d at 543 (emphasis added).


\(^{168}\) Id. at *10.
The Legislative History

As to the legislature's view of the inner gist of Section 10(b) and its implementing Rule 10b-5, the position of the originating source of the law, the SEC, is concisely summarized in the story of the first beginnings of the Rule:

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.169

To dilate in further lengthy commentary would be wasteful. 'Deceit' was at the heart of Section 10(b), not Theft. Commissioner Pike called it "fraud," and never even thought of 'Theft of Information.'

D. The Twisting of 'Deceit' into 'Theft'

With the traditional Section-10(b) as a backdrop, trace the unfolding of the Ginsburg reasoning. The goal: To rationalize a Theory version of the 'Section 10(b) Insider Trade.' To do her best to make Willie 'Sutton' look like an Inside Trader. The result: A specious 'Insider Trade,' an Ignotum X, replete with internal inconsistencies.

Advert along the way to the obeisance paid, necessarily, to Section 10(b). O'Hagan is, after all, an Insider Trading case. And is founded exclusively on Section 10(b).

Remarkably, in light of her later reasoning, the Justice does admit that 'Deceit,' or 'Deception' as she calls it, is focal to Section 10(b) and the litigation:

Deception through nondisclosure is central to the theory of liability for which the Government seeks recognition.170

Translated: Even under the Misappropriation Theory — the Government's 'interpretation' of Section 10(b) — the central requisite is still the Deceit of the Victim, through nondisclosure of material information, in connection with a securities transaction.

This surely is redolent of the common-law 'Deceit' of Huddleston and Scone:

(1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused his injury.171

The Metamorphosis

But what ensues? With that opening truth conceded, the Justice builds the Theory argument, and immediately begins the departure from both an Insider Trade and Section 10(b). She proceeds to explain the peculiar manner in which this "central" Deceit shows itself in the Misappropriation Theory.

Cautionary Note

The Theory, as a synthetic construct to finesse Chiarella, has essentially no true element of 'deceit' in its content. But as an attempt to use Section 10(b) to catch Insiders untouchable under Chiarella, the Theory was trapped. 'Deceit' was obligatory.

Burdened with this obligation, the Theory pretended that the Theft of Information really did have 'deceit' in its essence.

Therefore, lacking the presence of any real 'deceit,' the following Ginsburg attempt to give existence to the nonexistent becomes very strained. The process is somewhat surreal, and must be recognized as such.

The Justice injects 'deception' into her specious 'Insider Trade' in two ways: First, she maintains that the core element of the Theory, the actual misappropriation — the stealing of the secret information — is a

deceitful act itself. Although the ‘taking and removing’ is primarily plain old Theft, this Theft has a deceptive content to it as well, so she argues.

Second, over and above the allegedly fraudulent taking, a second element of deception is present: “Feigned Fidelity” on the part of the ‘Insider.’

These two elements, so the Court reasons, coalesce to form the ‘Deceit’ in the ‘Insider Trade.’ Thus, this “central” Deceit manifests itself in two ways: (1) In the Theft of the ‘Exclusive Use of the Information,’ and (2) In “Feigning Fidelity,” the Principal Deceptive Element.

Unfortunately, neither of the two alleged manifestations upon inspection proves to have any ‘deceit’ content at all.

(1) Deceit in the Theft of the “Exclusive Use”

What is the ‘deceit’ content of this major constituent of the ‘Section-10(b) Insider Trade’? Find that content, or discover its absence, and the issue of ‘deceit’ in the ‘Theft’ begins to be solved.

The Justice begins by stating the ultimate fundament of the Theory’s ‘Insider Trade.’ She couches it in ‘fraud’ terms:

Under this theory, a fiduciary's undisclosed, self-serving use of a principal’s information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information.\(^{172}\)

Shorn of surplusage, that reads:

\[
\begin{align*}
[A] \text{fiduciary's undisclosed ... use of a principal's information ... defrauds the principal of the exclusive use of that information.} \\
&\quad \text{Shorn of surplusage, that reads:} \\
&\quad \text{[A] fiduciary's undisclosed ... use of a principal's information ... defrauds the principal of the exclusive use of that information.}
\end{align*}
\]

Note that the Court has begun the transformation of the simple theft of a property right into fraud. Instead of saying ‘steals,’ the Court says “defrauds.” By the simple and untenable use of the word ‘defrauds’ in place of ‘steals,’ ‘deceit’ is inserted into the act of misappropriation itself.

The added importance of this ‘use of information’ lay in its alleged nature as a property right. The use of information ranked with ‘money and goods’ as a right to be protected. It was the stealing of this property right that now became ‘fraudulent,’ the first major constituent of the “deception” that was “central to the theory of liability.”

A company’s confidential information, we recognized in Carpenter, qualifies as property to which the company has a right of exclusive use.\(^{173}\)

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173. Id. at 654 (citing Carpenter v. United States, 484 U.S. 19, 25-27 (1987)).
O'Hagan next introduces the 'Theft of the exclusive use' as 'embezzlement of property,' by further resort to the four-to-four Supreme Court Opinion in *Carpenter*. Again 'theft' has become 'fraud':

The undisclosed misappropriation of such information, in violation of a fiduciary duty, the Court said in *Carpenter*, constitutes fraud akin to embezzlement . . . . 174

To clinch this point, O'Hagan again goes to *Carpenter* which goes to another Supreme Court opinion:

[E]mbezzlement [is] "the fraudulent appropriation to one's use of the money or goods [add "use of information"] entrusted to one's care by another." 175

By the use of the word 'defrauds' the Justice has arbitrarily moved Section 10(b) from pure 'deceit' to 'deceitful parting-of-goods-from-another.' That was the metamorphosis.

But the truth is that 'Deceit' has no true deceptive element at all integral to the Theft of the Information. The substitution of 'defrauds' for 'steals' was purely gratuitous, without justification.

'Fraud' and 'Theft': Alien Concepts

Yet it has just been shown over many pages that (i) *The words*, (ii) *The crimes*, and (iii) *Section 10(b)*, have all categorically indicated that no connection exists between 'Deceit' and 'Theft.'

(i) *The words*, as defined by both the *OED* and *Webster's*, are totally foreign to each other:

**deceit** . . . n . . . [fr. L decepta, fem. of deceptus, past part. of decipere to deceive] 1 . . . DECEPTION . . . 2 a : an attempt to deceive: a declaration, artifice, or practice designed to mislead another: wily device: TRICK, FRAUD . . . . 176

And so with its incompatible:

**theft** . . . n . . . [ME thiefthe, thefthe, thefte, thifte . . .] 1 a : . . . the felonious taking and removing of personal property with intent to deprive the rightful owner of it . . . . 177

(ii) *The crimes* track the words. The current *Black's* speaks for the medieval Bracton and his disciple Blackstone:

**Deceit.** A fraudulent and deceptive misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and

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177. *Id.* at 2369.
And likewise:

**Theft.** A popular name for larceny. The act of stealing. The taking of property without the owner’s consent. . . . The fraudulent taking of personal property belonging to another, from his possession . . . without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.\(^{179}\)

(iii) *Section 10(b)* and its historic progenitor is summed up in the Fifth Circuit *Huddleston*:

The elements necessary to prove a Section 10(b) claim have been so often applied by the lower federal courts that they can be stated in black letter fashion. To make out a claim under Section 10(b), which is based on the common law action of deceit, the plaintiff must establish (1) a misstatement or an omission (2) of material fact (3) made with scienter (4) on which the plaintiff relied (5) that proximately caused his injury.”

Huddleston was brought up to mid-1998 by the Federal Scone.\(^{181}\)

So a startling revelation has surfaced: According to the Theory, this ‘deception,’ ‘central’ to the ‘deceit’ action of Section 10(b), really lies in the Theft of the secret from Grand Met. And not in James Herman’s lie to the $4-million public Investors. The twisting has been successful.

James Herman “defrauds [Grand Met] of the exclusive use of” the news of its takeover of Pillsbury.\(^{182}\)

The Justice has thereby established the Defrauding of Grand Met as the gravamen of the new species of a Section-10(b) Insider Trade. All the ‘insider’ con men of history, right down to the Vinnies, Milkens and Boeskys of today, even Willie ‘Sutton’ Smythe, would be dumbfounded.

Henceforward, ‘defrauding’ will mean ‘stealing.’ But ‘stealing’ really means ‘snooping.’

That concludes the attempted injection of ‘Deceit’ into the Theft of the ‘Exclusive Use’ itself.

(2) “Feigning Fidelity,” the Principal Deceptive Element

Justice Ginsburg continues to construct the Theory’s peculiar ‘Sec-

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179. Id. at 477.
180. Huddleston, 640 F.2d at 543 (emphasis added).
tion 10(b) Insider Trade.’ Herewith the Theory’s second infusion of ‘Deceit’ into the new ‘Insider Trade’:

[The deception essential to the misappropriation theory involves feigning fidelity to the source of information . . . .]

The use of that verb “involves” raises questions. The court says “the deception involves feigning fidelity.” Does that mean that the “deception” — which is “essential to the misappropriation theory” — consists solely of “feigning fidelity” and nothing more. That there is a total absence of ‘lying’ “to the source of the information?” No outright ‘misrepresentation’? Merely ‘feigning fidelity’?

Yet the word “involves” seems to say that the “deception” has a broader ambit and encompasses more than just “feigning fidelity.” That “feigning fidelity” is only one collateral facet of the Insider’s deception of the person he hoodwinks. The person hoodwinked, according to the Theory, is he who has secret information.

But immediately the realization arises: The definition of the Theory stated that the ‘taking and removing property’ by the Insider was the major constituent of the Theory’s new ‘Insider Trade.’ Yet it is clear that ‘taking and removing’ does not per se involve any deceit. The conclusion is inevitable therefore: If no deceit whatsoever is present in the major constituent, then the lesser constituent must contain all the ‘deceit’ that is present in the ‘Insider Trade.’

Therefore, “feigning fidelity” is in no way merely a collateral addition to “defraud[ing] the principal of the exclusive use of the information.” It is the sole ‘deceit’ element present.

How Essential Is “Feigning Fidelity”?

The nub of the matter then becomes: How important is “feigning fidelity” in the ‘taking and removing’ of the goods of another? Is “feigning fidelity” integral to the crime of Theft?

The answer to that question has already come from Bracton, Blackstone, Black’s, the OED and Webster’s: Repetition would be fruitless.

Nothing in the meaning of the English word Deceit and its counterpart, the Deceit crime, has any elements whatsoever in common with the unrelated English word, Theft, and its counterpart crime. The two concepts are totally foreign, alien to each other.

The crime of Theft of Information has no ‘deceit’ content at all.

183. Id. at 655 (emphasis added).
184. Id.
185. Id.
186. Id. at 652. (emphasis added).
187. See supra note 153 and accompanying text.
Danny and Willie

A vivid answer in summary could come from a brief reflection on the Fifth Parable — which told the story of an ‘Insider Trade’ according to Theory specifications — and also on a prototypal Theory case, the Seventh Circuit’s Cherif.

The penetration of the vaults of First Chicago and Wheat City by Danny Cherif and Willie ‘Sutton’ illustrates exactly how intimately “feigning fidelity” was “involve[d]” in the deprivation of the banks “of the exclusive use of [their secret] information.”

Danny had not even worked for First Chicago for a year. “Feigning fidelity” was far from his mind. Certainly First Chicago did not conceive Danny’s caper as a ‘breach of loyalty,’ as infidelity. So non-existent was ‘fidelity’ that the Seventh Circuit openly opined that “even mere thieves” would be liable. To First Chicago, it was ‘Breaking and Entering.’

The extent of Willie ‘Sutton’s’ fidelity was equally absent. Neither he nor Wheat City had any concept of an admixture of infidelity in his break-in. To both it was a plain old bank heist and required no proof of ‘infidelity’ or ‘breach of fiduciary duty’ to establish liability.

Understandably, in any event, the break-in would certainly not be Insider Trading under Section 10(b). The wrong was Burglary of a Bank.

The O’Hagan Court tried evidently to twist ‘Deceit’ into ‘Theft’ — calling it an ‘Insider Trade’ — in two ways: (1) In the actual ‘Theft of Exclusive Use of the Information’ itself. But on inspection the Theft itself proves devoid of all ‘deceit.’

And now (2) In the “Feigning Fidelity,” the Principal Deceptive Element, the same had to be said. Thus Justice Ginsburg’s rationalization of the Theory’s ‘Section 10(b) Insider Trade’ produced no ‘deception’ or ‘deceit’ at all, anywhere.

E. Latent Illogicalities in the Theory’s ‘Deceit’

“When you have to justify common sense rules in the mold of misappropriation, you get into twisted arcane analysis.”


“[T]he [Supreme Court] decision [in Carpenter] indicated ‘pretty strongly’ that the [misappropriation] theory was ‘a fairly dubious proposition.’”

188. SEC v. Cherif, 933 F.2d 403, 412 n.6 (7th Cir. 1991), cert. denied, 112 S. Ct. 966 (1992).


190. Barbara B. Aldave, The Misappropriation Theory: Carpenter and its Aftermath, 49 Ohio
As Justice Ginsburg proceeded in her construction of the Theory’s new version of the ‘Section 10(b) Insider Trade’ she laid bare three fault lines that revealed the chasms of illogic in her attempt to intrude ‘Deceit’ into the ancient crime of ‘Theft.’ In O’Hagan she called it Theft of Information. And said it was ‘Insider Trading.’

These three fissures are not claimed to be exhaustive. Undoubtedly others will surface. But these three serve to emphasize the futility of trying to insert ‘Deceit’ into ‘Theft.’ These are unintended and unenvisioned consequences of the irrationality at the core.

The three illogicalities: (1) James Herman Outfoxes the Theory, (2) The Paradox of the Uncaused Harm and (3) Property Right? Or Phantom Possession? The Broken Promise.

(1) James Herman Outfoxes the Theory

A preposterous thought arises. Suppose James Herman O’Hagan were to have put his securities-law expertise to work, anticipated resort to the Theory, and posed this devious query to himself: ‘Suppose I don’t deceive Grand Met at all? Suppose, instead, some minutes before the deed, I eliminate the so-called ‘deception’ required by the Theory for liability?’

Put James Herman’s query into practical terms. Make slight alterations to the fourth Parable, James Herman, Con Artist,191 and produce this variant adapted to the Theory:

<table>
<thead>
<tr>
<th>James Herman, Master Shyster</th>
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**Analysis:** The facts are succinct. James Herman in no way “defrauds the principal,”192 the Source. Grand Met is fully informed, completely unharmed. No “feigned fidelity.” No “deceptive device.” To the contrary, James Herman lied only to the $4-million Investors. The deception lay in James Herman’s stock trade. But not in the Theory’s ‘malefaction.’ Verdict: Not Guilty of Insider Trading.

Undoubtedly that stretches one’s credulity, but there it is. According to the Theory and the Majority, a simple fax to Grand Met and

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191. See supra note 31 and accompanying text.
neither James Herman's $4-million Investors would have any remedy under Section 10(b), nor would Grand Met. The $4-million Investors, unharmed. The Source, Grand Met, unscathed.

Justice Ginsburg explicitly endorses this remarkable result:

Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no "deceptive device" and thus no § 10(b) violation . . . .\textsuperscript{193}

Note the clear meaning here: If the "feigned fidelity" is absent, "there is no deceptive device." Therefore, the "feigned fidelity" is the sole deceptive element in the Theory's 'Insider Trade,' because, according to the Court, no 'deceit' is present in the Theft itself. So if not in the 'feigned fidelity,' 'deceit' is nowhere.

Therefore "the deception essential" does not merely "involve[ ] feigning fidelity." The "deception essential" is solely constituted by the "feigned fidelity."

Aliis verbis,

[The] deception . . . central to . . . liability\textsuperscript{194} [and] essential to . . . the theory\textsuperscript{195} [is constituted solely] by feigning fidelity to the source of information . . . .\textsuperscript{196}

The result of that synthesized premise is the rationale for the innocence of the Master Shyster:

[Therefore] if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no "deceptive device" and thus no § 10(b) violation . . . .\textsuperscript{197}

Government Support for the Illogic

Lest some realist might assume that the logic were all her own, the Justice continues:

As counsel for the Government stated in explanation of the theory at oral argument: "To satisfy the common law rule that a trustee may not use the property that [has] been entrusted [to] him, there would have to be consent. To satisfy the requirement of the Securities Act that there be no deception, there would only have to be disclosure."\textsuperscript{198}

\textsuperscript{193} ld. at 655 (emphasis added).
\textsuperscript{194} ld. at 654.
\textsuperscript{195} ld. at 655.
\textsuperscript{196} ld.
\textsuperscript{197} ld. (emphasis added).
\textsuperscript{198} ld. at 654 (emphasis added).
Later in her Opinion the Justice reiterated her position in order to remove all doubt, and to emphasize that she saw nothing unusual in pronouncing James Herman, Master Shyster, totally guiltless in his $4-million gambit.

(Deeper importance attaches to this reiteration because it addresses directly one of the two supports to the rejection below of the Theory by the Eighth Circuit O'Hagan.)

The Court of Appeals rejected the misappropriation theory primarily on two grounds. First, as the Eighth Circuit comprehended the theory, it requires *neither misrepresentation nor nondisclosure.*... As we just explained, however, *... deceptive nondisclosure is essential to the § 10(b) liability at issue.* Concretely, in this case, "it [was O'Hagan's] *failure to disclose* his personal trading to Grand Met and Dorsey, in breach of his duty to do so, that ma[de] his conduct *'deceptive' within the meaning of [*§] 10(b).” Reply Brief 7.199

The Court places no *'deception' in the use itself of the information. It is simply the *'failure to disclose his personal trading to Grand Met and Dorsey.’* The actual use of the secret — e.g., to cheat the $4-million sellers — is perfectly legitimate. And with simple disclosure causes Grand Met no harm.

This is a far-reaching conclusion for the Theory. Without the *'feigning fidelity,' all deception disappears. The actual use of the information is not integral to the violation of Section 10(b). Nor is consent to the use. Nor approval of the use. Merely knowledge. Remove the *'feigned fidelity’ — that is, *'disclose the plans’ — and *‘there is no ‘deceptive device' and thus no § 10(b) violation.’" A frank and unqualified statement.

But no sooner had Justice Ginsburg fully exonerated the Master Shyster and let him outfox the Theory completely, than she proceeded to commit one of the law’s more arresting nonsequiturs.

(2) The Paradox of the Uncaused Harm

The Justice fully realized that no tincture of deception was present in the actual use of the secret information. She had just said so: The *’failure to disclose his personal trading ... ma[de] his conduct deceptive.’”200 Not the later trading itself. Absent nondisclosure *‘there is no ‘deceptive device' and thus no § 10(b) violation.’*

That posed a looming problem that surfaced in the very next paragraph: *If no deceit is present in the trading, how can the deceit be in connection with the trading?* She saw the predicament well enough.
We turn next to the § 10(b) requirement that the misappropriator's deceptive use of the information be "in connection with the purchase or sale of [a] security." 201

With the problem posed, came a perplexing follow-up:
This element is satisfied because the fiduciary's fraud is consummated not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities. 202

But the Justice had just said: With full disclosure, "there is no deceptive device" anywhere. Query: If no deception is present in the trading, what can nondeceptive trading possibly add of a deceptive nature to an earlier, wholly distinct act of Theft? 'Nemo dat quod non habet.' ‘No one can give what he has not got.'

But that ancient adage was no obstacle to the O'Hagan Court. The answer — as the first Article of this two-part Study decried at length — produced the remarkable illogic in her nonsequitur:
"[A] fraud or deceit can be practiced on one person, with resultant harm to another person or group of persons." 203

Lest one question what one reads, the Court rephrases its mind-stopping position:
This is so even though the person or entity defrauded is not the other party to the trade, but is, instead, the source of the nonpublic information. 204

Since Justice Ginsburg had borrowed her fallacy from Barbara Bader Aldave, she hastened to make it her own in a more delicately framed paraphrase:
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. 205

Once again the Justice fails to explain how "feigning fidelity" to an employer "simultaneously harms the investing public." What is the causal connection?
Remember, from the Theory's earliest days with Newman in 1981, no fraud needs to be perpetrated on the investing public. And if no fraud, scarcely could the absent fraud inflict harm. Thus Newman:
The . . . statement that fraud perpetrated upon purchasers or sellers

201. Id. at 655-56 (quoting Section 10(b)) (emphasis added).
202. Id. at 656 (emphasis added).
203. Id. (quoting Aldave, 13 Hofstra L. Rev. at 120) (emphasis added).
204. Id. (emphasis added).
205. Id. (citing Aldave, 13 Hofstra L. Rev. at 120-21 & n.107) (emphasis added).
of securities is a "requisite element" under the securities laws" is, therefore, an overbroad and incorrect summary of the law.

. . . [T]he language of Rule 10b-5 . . . contains no specific requirement that fraud be perpetrated upon the seller or buyer of securities.¹⁰⁶

Chestman, the bellwether Second Circuit Theory case, backs up Newman:

In contrast to Chiarella and Dirks, the misappropriation theory does not require that the buyer or seller of securities be defrauded.²⁰⁷

Chestman went even further in severing the "resultant harm" from the Theft and the Source:

The source of the nonpublic information need not be . . . in any way connected to or even interested in the purchase or sale of securities.²⁰⁸

Justice Ginsburg could well have been beguiled into her paradox by another early Second Circuit opinion, Materia. Materia at least stops short of an attempted explanation of the inexplicable:

Even though the defendant 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.²⁰⁹

The next question would be: What is the nature of this alleged harm to Investors? Willie "Sutton" would have been liable under the Theory, even though his sellers made half a point from their sale. What harm did Willie inflict by his use of the secret merger details? What harm can a harmless "use," "thereafter," inflict?

What cause of action under the Theory would the "members of the investing public" have for the "resultant harm" inflicted on them by the "fraud or deceit . . . practiced" on the banks by all the Danny Cherifs and Willie "Suttons" in burgling the banks?

These questions are all unanswerable, because the ancient adage does pose an obstacle to this second illogicality. The Paradox of the Uncaused Harm is intrinsically insoluble.

¹⁰⁷ Chestman, 947 F.2d at 566 (emphasis added).
¹⁰⁹ Bryan, 58 F.3d at 944-45 (citing SEC v. Materia, 745 F.2d 197, 202 (2d Cir. 1984) ("[W]hether a defendant has breached a duty to a particular plaintiff" is not "germane" in a criminal prosecution under section 10(b)), cert. denied, 471 U.S. 1053 (1985)) (emphasis added).
The Final Thrust from Justice Blackmun

The unsuccessful attempt by Justice Blackmun in his *Chiarella* dissent to save the legal world from the evils of *Chiarella* has already been extolled at considerable length.\(^{210}\) Again, now, his dissent deserves praise. Justice Blackmun did achieve two goals, both now pertinent: (1) He repudiated the holding in *Chiarella*, a repudiation which, remarkably, rarely occurs today. And (2) He serves as a fine conclusion to this current expose of the illogic in the injection of an ersatz ‘deceit’ into the ‘taking and removing’ of property.

... I write separately because, in my view, it is unnecessary to rest petitioner’s conviction on a “misappropriation” theory. [The Theory was not before the Court.] The fact that petitioner Chiarella purloined, or, to use THE CHIEF JUSTICE’s word, ... “stole,” information concerning pending tender offers certainly is the most dramatic evidence that petitioner was guilty of fraud. ... But I also would find [his] conduct fraudulent within ... § 10(b) ..., even if he had obtained the blessing of his employer’s principals before embarking on his profiteering scheme. Indeed, I think petitioner’s brand of manipulative trading, with or without such approval, lies close to the heart of what the securities laws are intended to prohibit.\(^{211}\)

(3) Property Right? Or Phantom Possession? The Broken Promise

The Court’s compulsion to inject some ‘deceit’ into its version of the ‘Section 10(b) Insider Trade’ produced a third inherent illogicality. Illogic, as does a lie, inevitably spawns an unforeseen and unwanted progeny.

As an aid in testing this third illogic, view the ensuing story through the eyes of the main object of Theory solicitude, the principal Victim of the new ‘Section 10(b) Insider Trade,’ the Source of the stolen inside secrets. Grand Met is the center of the new tort. (Not the $4-million sellers.)


\(^{210}\) See Bayne, *Chiarella*, supra note 5.

The Tale of the Duped Victim

This is the sad story of the hundreds of Grand Mets of the legal world who have been gulled by the broken promises of the Misappropriation Theory. The Theory led those Grand Mets — "those who entrusted others" with access to confidential information — to believe they would be protected from the faithless fiduciaries who abused them.

The Theory assured those so-called 'owners' that their right to their secret information would be inviolable. That the Theory would stand behind "the principal" in his legal right to "the exclusive use of that information." That "the principal" possessed a cause of action against a person [who] violates § 10(b) and Rule 10b-5, . . . in breach of a duty owed to the source of the information.212

The gist of the story is this: The Theory, in the same breath that it made its promise, broke the promise. The very same tenet of the Theory that bestowed the solemn right, emasculated the right. Grand Met's exclusive Property Right was a Phantom Possession. On paper for one paragraph, but snatched away in the next.

Unfold this story in two parts:

(1) The Promise Given

Justice Ginsburg began to lay out the details of the Theory's promise by first noting the principal objective of the Theory:

The "misappropriation theory" [recognizes the] duty owed to the source of the information. See Brief for United States 14.213

The Government Brief, speaking for the SEC, expressed the concept similarly:

Under the misappropriation theory of insider trading, [the] fraud [is] on the source of the information [Grand Met] in a breach of a fiduciary or similar duty owed to the source.214

The primary solicitude of the Theory is directed at "those who entrusted" others with "confidential information." The duty is to protect the rights of the Victim, him from whom the secrets are stolen.

And what are the specifics of this solemn promise made by the Theory?

The Terms of the Promise

The Duty burdening the Theory, therefore, was explicit: To protect

213. Id.
the Grand Mets, the Sources who possessed secret inside information, in "the exclusive use of the information."

This first step in the grand delusion was the open assurance that the Theory is designed to enforce the Duty owed to the Victim of the 'Insider Trade,' the Source of the information.

The Court expresses the breach of this Duty — the violation of Section 10(b) — in this way:

Under this theory, a fiduciary's undisclosed . . . use of a principal's information in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information.\(^{215}\)

The Right Protected by the Duty

The Theory took great pains to spell out exactly the nature of this right to "the exclusive use of the information." The "exclusive use of the information" was a property right. To support this proposition, and further refine its nature, the Court began with a litany of authority, using its own earlier pronouncements:

A company's confidential information, we recognized in Carpenter, qualifies as property to which the company has a right of exclusive use.\(^{216}\)

It then classified 'confidential information' among such tangible personalty as money and goods, again relying on Carpenter:

The undisclosed misappropriation of such information . . . constitutes fraud akin to embezzlement — "'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.'"\(^{217}\)

In further explanation the Justice again relies on Carpenter which in turn relies on its own Grin v. Shine:

[E]mbezzlement [is] "'the fraudulent appropriation to one's use of the money or goods [add "use of information"] entrusted to one's care by another.""\(^{218}\)

The Court stressed 'property right' because it was consistent with the crux of its new 'Insider Trade,' namely, the Theft rather than the Deceit of the past. The 'inside information' of its 'Insider Trade' as a property so tangible that it could be 'stolen,' just as could "money or goods."

The idea behind that stratagem was to create a new wrong totally

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215. *Id.* at 652 (emphasis added).
216. *Id.* at 654 (emphasis added).
distinct from the con of the old-time Insider Trade which consists of lying about the true value of stock. *Tangible personality* was ‘stealable.’ ‘Taking and removing’ goods — or the use of information — was genuine stealing. But mere ‘lying’ was not. A big difference.

The Formal Guarantee of a Property Right

The Source has been assured repeatedly: Grand Met has an ironclad *property* right to the *Exclusive Use* of its secret information. A new tort law has been created to protect the new right. The tort will be called ‘*Insider Trading*’ so it can be fit into the old Section 10(b).

But really it will be the Theft of Property. This tort protects the right to the exclusive use of the secret information. Hence, if anyone steals that property, *uses it without permission*, or *without full approval*, Grand Met as Plaintiff may adduce in a legal action the harm suffered in the unapproved use. That is the main promise made by the Theory to all the Victims of this new, specious ‘*Insider Trade*.’

That should express quite clearly the nature and seriousness of the promise given by the Theory to the Victims, the chief beneficiaries of its new Section 10(b).

(2) The Promise Broken

But no sooner had these words been uttered, than the Theory was forced to welsh on its formal promise of a guaranteed property right to the *Exclusive Use* of its information.

The Theory was trapped by a legal compulsion: The strictures of fifty years of the *‘deceit’* of the common law at the heart of Section 10(b). Hence, Justice Ginsburg was compelled to write:

_Deception through nondisclosure is central to the theory of liability for which the Government seeks recognition._

This is the prime constituent of both the common law and Section 10(b).

The Justice followed that up by analyzing the *Deception’s content*:

_[T]he deception essential to the misappropriation theory involves [read: ‘is solely constituted by’] feigning fidelity to the source._

This was the legal compulsion that led the Theory, willy-nilly, into this third illogic. The pity is that the Theorists did not take the time to ask whether the compulsion would lead them. Had they thought the matter through, perhaps the Theory would have died aborning, or been aborted.

But the fact is that the insertion of ‘*Deceit*’ as a constituent of the

219. *Id.* (emphasis added).

220. *Id.* at 655 (emphasis added).
misappropriation itself was the prelude to the broken promise. How? Consider the ramifications, the consequence of this tenet of the Theory.

Remove the Deception, Liability Disappears

If "nondisclosure is central to liability," then it follows inexorably that with disclosure, liability is absent.

Justice Ginsburg put this syllogism into explicit words:
Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no "deceptive device" and thus no § 10(b) violation ... .

This succinct presentation put the final imprimatur on the third gaffe.

Mere Disclosure Cancels the Property Right

The logic is incontrovertible. If liability for the tort disappears, the rights protected by the tort disappear. And the solemn property right to the Exclusive Use of the confidential information disappears as well.

So the Theory did not mean it when it assured the Grand Mets of the legal world that they had a property right to exclusive use. Rather they had only a right to the "undisclosed . . . use." They had no right to the "I disclosed . . . use."

Those words were explicit. All the embroidery of a property right akin to "money or goods" was misleading.

Nothing could be more disastrous for the gullied Source. The mere disclosure of the plan to use the secrets removes all claim to the right. All James Herman needed to do was fax Grand Met:

"Heard of your takeover and plan immediate use of your info toward quick killing in Pillsbury."

— James Herman, Master Shyster

With that, Grand Met's 'property right to the exclusive use of the secret information' has evanesced.

In fact, Grand Met, and all the duped Sources who are relying on the Theory, now find that their property right was a Phantom. That what they had been promised — and presumably, albeit gullibly, on what they relied — was nothing other than a delusion, a fleeting 'possession,' on paper for a paragraph, but snatched away in the next:

[If the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no "deceptive device" and thus no

221. Id. (emphasis added).
§ 10(b) violation . . .

The Theory does not explicitly require anything more than mere disclosure of “plans to trade on the nonpublic information.” Remove the “deceptive device” and hence “no §10(b) liability.” There is no requirement of permission to use the information. Or of Grand Met’s approval of the Insider’s invasion of Grand Met’s property right. No, Justice Ginsburg emphasizes the point, quoting the Government on behalf of the SEC:

“To satisfy the requirement of the Securities Act that there be no deception, there would only have to be disclosure.”

Since no deception is present in the trade, and mere disclosure removes deception from the ‘taking and removing’ of the Exclusive Use, mere disclosure removes all deception, and hence all liability for the actual use of the secret information.

The upshot? Behind Grand Met’s back, the solemn promise to protect the property right — canonized in the opening words of the Theory — has been emasculated completely, rendered useless by a second, incompatible, conflicting, prescription.

The guarantee of a property right to the exclusive use was illusory. The so-called ‘right’ was transitory, a Phantom Possession.

These three illogicalities are lesser buds on the parent tree, true. But they nonetheless coalesce to form a collective pronouncement: No true ‘deceit’ is present in the Theory’s new version of a ‘Section 10(b) Insider Trade.’ A ‘deceit’ that is triply riven with illogic cannot be the genuine article.

All of which arguably completes this division of the Subthesis: To show that the Second Essential to the ‘Section 10(b) Insider Trade,’ Deceit, is absent from the Theory’s Theft-of-Information crime as espoused in O’Hagan.

The first absent essential was the Insider himself. But now, what of the third? Which just happens to be a nonessential addition and a pernicious intrusion?

III. THE INEXPLICABLE INTRUSION OF A ‘FIDUCIARY DUTY’

Recur to the Thesis of this Article:
That the Supreme Court in O’Hagan, (1) Abandoned all judicial
consideration of the tort of Insider Trading, and (2) Substituted an ancient crime, Theft, in its place.

The first essential: The ‘Insider’ of the Insider Trade. The second: ‘Deceit.’ Both were missing.

Now with this third departure from the canonized tort of Insider Trading, the Theory has altered both history and the nature of the Insider Trade by the Inexplicable Intrusion of a ‘Fiduciary Duty.’

‘Fiduciary Duty’ and the Chaos Its Presence Has Wrought

Before embarking on the analysis of the curious intrusion of the fiducial into the simple concepts of, first, ‘deceit’ — no one ever thought a person had to be a ‘trusted confidant’ to be ‘deceitful’! — and, then, ‘theft’ — no one ever thought a person had to be a ‘thief’ to be deceitful — consider the confusion that this intrusion has visited on Section 10(b) Insider Trading. With such a background, an orderly consideration will be possible of the role that ‘fiduciary duty’ has been given to play in the Theory.

Two revealing pronouncements of the Court adequately express the Theory’s position on the matter. Many supporting citations as well are scattered throughout O’Hagan, this Article and other Theory opinions.

Begin with this Ginsburg statement, speaking of the Insider Trade, to lay the groundwork:

Under the misappropriation theory . . ., the disclosure obligation runs to the source of the information . . . Grand Met. [Under the traditional theory] the disclosure obligation . . . ran to those with whom the misappropriator trades [the $4-million sellers].

This highlights two major points: (1) The Duty in both theories is To Disclose. That is, Deceit is forbidden. (2) In neither theory is the Disclosure Duty said to be a Fiduciary Duty.

Yet elsewhere, the courts uniformly do refer to the Disclosure Duty as Fiduciary. Thus:

In lieu of premising liability on a fiduciary relationship between a company insider and purchaser or seller of the company’s stock [as in the traditional theory], the misappropriation theory premises liability on a fiduciary-turned-trader’s deception of those who entrusted him with access to confidential information [i.e., the Source].

With these two pronouncements, two prior principles, according to O’Hagan, are clear: (1) Both theories hold that the Duty is both one of Disclosure and Fiduciary, and (2) In the Traditional Theory the Fiduci-

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224. Id. at 655 n.6 (emphasis added).
225. Id. at 652 (emphasis added).
ary Disclosure Duty flowed from Insider to his Trader, and in the Misappropriation Theory the Fiduciary Disclosure Duty flowed from the 'Insider,' now a Thief or Misappropriator, to the Source from whom he stole the confidential information.

This summary picture explains the necessary division of the Intrusion of a Fiduciary Duty into two parts: (1) The Inexplicable Intrusion of a 'Fiduciary Duty' into the Traditional Theory and (2) The Explicable Intrusion of a 'Fiduciary Duty' into the Misappropriation Theory.

Interestingly, each intrusion is more remarkable than the other.

(1) The Inexplicable Intrusion of a 'Fiduciary Duty' into the Traditional Theory

That title is inaccurate if the word 'inexplicable' is used literally. As an expletive, however, it hits the mark. There is in truth a patent explanation for the intrusion: Timorous Powell. The presence of 'fiduciary duty' and 'fiduciary' in the Traditional Theory — and correspondingly, eventually, in the Misappropriation Theory and O'Hagan — goes back to his same two infamous opinions of the early 80s, the last Supreme Court rulings on Insider Trading.226

Chiarella, Dirks and the 'Fiduciary' Genesis

Again comes the constant refrain: As with the bulk of the errors afflicting the current law, Justice Powell and his twin opinions bear the chief responsibility for this unexpected narrowing of Inside Traders to fiduciaries and to no one else.

These pages have already told the story. The Justice so feared finding fault with anyone that he abandoned outright all liability for the all-encompassing "any person no matter who."

Did he perhaps fear the slightest interference with freedom to trade on an open market, the 'free-market theory' espoused at the time by academic Economists? More likely, he misunderstood the practical exercise of the true Insider's Duty, thinking that Tom, Dick or Harry would be burdened with a Herculean duty to disclose God-knows-what every time he approached the trading floor.

For whatever reason, Justice Powell tightened the scope of culpability to this limited few: Only those "corporate insiders" who hence are "trusted confidants" of the cheated trader. All the Vinnies, Milkens and James Hermans would therefore be guiltless.

(Remember that these are O'Hagan conclusions as to what

Chiarella said. But Chiarella itself was far, far less clear-cut. The Chiarella Court wavered and wandered. "Chiarella and the Fiduciary Fallacy" tracked this vacillation thoroughly. Suffice for now, necessarily, that this is the Ginsburg view of what Chiarella held.

Nothing in the history of the law, from Strong v. Repide in 1909 to Chiarella in 1980, had even an intimation of a 'fiduciary' or a 'fiduciary duty.' These Powell accretions have resisted removal ever since.

The History of Section 10(b)

The painstaking study of 'Deceit,' both the Word and the Malefaction, left the same conclusion: Nothing in the history of Section 10(b) and its antecedents contained even a notion of a 'fiduciary relation.'

The overall judgment is curt: 'Fiduciary Duty' is a notion that Chiarella inflicted in 1980 on the Traditional Theory. This Powell affliction has acted on the law of Insider Trading as if a computer virus, corrupting the simplest concepts and destroying memory in case after case. Justice Ginsburg simply lacked the courage to attack the virus directly.

The thought undoubtedly has arisen: Are these few paragraphs sufficient to explain the speciousness of the insertion of a 'fiduciary' element into the simple duty incumbent on everyone — "any person no matter who" — to tell the truth to his fellow trader, to avoid deceiving him? The answer is this:

The presence of a 'fiduciary duty' and a 'fiduciary relationship' of the insider to his trading partner requires no lengthy explanation. (1) The concepts began with Timorous Powell in Chiarella. They had no other genesis or other rationale than his. No other Supreme Court opinion has passed on them.

(2) The concepts have been in the law of Insider Trading only these few years since the early eighties and have endured that long only because later courts, bound by stare decisis, have unthinkingly mouthed them.

That accounts for the brevity of this condemnation of the 'fiduciary' in the traditional Insider Trade, antedating the advent of the next wave of contamination by the Misappropriation Theory.

Justice Ginsburg, therefore, inherited the aberration engrafted on the law of Cady, Roberts, Merrill Lynch and Texas Gulf Sulphur by Chiarella and Mr. Justice Powell.

What Justice Ginsburg did with this sorry heritage is the second half of the tale.

227. Bayne, 'Fiduciary' Fallacy, supra note 5.
(2) The Explicable Intrusion of a ‘Fiduciary Duty’ into the Misappropriation Theory

A summary history of the growth of an illogical thesis invariably brings insights into the several elements constituting that thesis. This is singularly true of the construction of the Misappropriation Theory and its perplexing constituent: The burden on the Misappropriator of a Fiduciary Duty owed to his Victim, him from whom the secrets were stolen. How remarkable that the Thief must also be a trustee or a confidant of him whom he thieved, or snooped.

The Ultimate Explanation

Go back into the minds of the Theorists when first they sat down to concoct the Theory. Why did they even want or need a new theory? They had seventy years of respectable success fighting Insider Trading, first by means of common-law Deceit, and then with Section 10(b).

The answer to that question is patent: In 1980 Chiarella stopped the sincere opponents of the scam in their tracks. The crooked Insider no longer had a duty not to cheat his seller. Vinnie Chiarella went scot-free.

So, instead of a continued frontal attack on Chiarella, the craven-but-still-sincere Theorists decided to cook up a wholly different approach. They decided to try to keep Section 10(b), but nonetheless find their new tort embedded somewhere hitherto unseen.

(Others, more cynical, would callously maintain that the Theorists were anything but craven, yet totally insincere. Their goal from the beginning was to legalize insider trading, rationalizing it as a ‘natural and necessary process’ in a free-market economy, as an aid to investors in establishing realistic stock prices in an impersonal market. The legal prohibitions of Section 10(b), they reasoned, could be finessed or bypassed, given the erudite content of securities law in general, not to mention the bar’s and the trading public’s general misunderstanding of it. All à la Henry Manne.228)

This first decision by the Theorists to reinterpret Section 10(b) led to the next vexing question: What form would this new version of Section 10(b) take? What would the new Wrong be? Who the Victim? The Malefactor? The Damages suffered?

The Concoction of the Tort

The new Tort was driven by negatives. Chiarella told the Theorists

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that the Victim could no longer be the deceived Investor. The damages could not be the Investor’s losses. The wrong must be other than deceit of an Investor. And certainly the malefactor could never be the con artist of the past, because Vinnie was white as a driven lamb.

These negatives were not the only circumscriptions. Once the Theorists opted to redesign Section 10(b), they inherited the confining words of the code and Rule 10b-5. Therefore the tort must foremost make “deception essential to the misappropriation theory” and “central to liability.”

But the Theorists also inherited that noted Powell aberration: The Fiduciary Duty. It still burdened the Insider Trade. Therefore, with Vinnie ruled innocent, on whom must the Fiduciary Duty fall?

The Chicken or the Egg?

From here on, who knows how the Theorists reasoned? Query if even they could tell which of the circumscribing forces dictated which pieces of the puzzle were first selected. Perhaps the analogy to a stew is best. They threw all the Verbotens of Chiarella, and all the several mandates, together, stirred them and came up with the fantasy result, the Theft of Information. But that bluntness sounded too foreign to Section 10(b) and Insider Trading, so the Theorists called it the Misappropriation Theory.

In one stroke all the parts of the puzzle were thereby forced into place. Since the wrong was Theft of secrets, the malefactor was necessarily the Thief — now inferentially the ‘Insider’ — who was the person who was snooping on his employer.

Correspondingly the injured one — the potential plaintiff in a tort action — was he who was the Victim of the Theft, the principal or the ‘Source’ of the confidential information.

The damages, as the Theory spelt them out meticulously, were the loss of a property right, so tangible as to be akin to money or goods, namely, the right to the exclusive use of the information.

Into the Theory was also inserted the mandatory ‘deceit,’ so the Thief has somehow deceived his source at some point in the process of the thievery.

Finally the Theorists, at Powell’s insistence, engrafted the Chiarella Fiduciary aberration onto the nascent Theory. Henceforward, the Thief must be also the trusted satellite of his Victim.

(That begins to explain the ill-fitting presence of a Fiduciary Duty

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230. Id. at 654.
burdening a Thief. Conversely, that also explains why all ‘thieves of information’ who are not trusted confidants are not liable under Section 10(b)!

Of all the elements of this mélange, the presence of the Fiduciary Duty is the sole immediate concern.

**Harken Back to Willie ‘Sutton’**

The simple escapade of Willie ‘Sutton,’ and particularly the intimacy of his ‘fiduciary’ relationship to his bank — about as tenuous as any other denizen of that little ‘Wheat Capital of the World’ would have — were borrowed directly from the real-case scenario of Danny Cherif, and his virtually nonexistent relationship with First Chicago.

Danny Cherif was, as was Willie ‘Sutton,’ an amateur bank robber. Long before his heist Danny had done unspecified work in a research department of First Chicago until he was ‘downsized’ in 1987. A year later he falsified his way into the vaults, made off with secret, nonpublic information and used it in a securities trade.

Since the Second Circuit in *Chestman* found that Keith Loeb had no ‘fiduciary relation’ with his own happily married wife, Susan, Danny Cherif could scarce be conceived to be a ‘fiduciary’ of his former firm. Or could a second-teller like Willie ‘Sutton.’

Even the Seventh Circuit adverted to its doubts about Danny’s ‘fiduciary’ status:

> There has been some suggestion that Rule 10b-5 should apply even to “mere” thieves. See *Chiarella* . . . (Blackmun, J., dissenting) (suggesting that any time information is acquired by an illegal act, *whether in breach of a fiduciary duty or not*, there is a duty to disclose that information to the purchaser or seller with whom the acquirer trades). . . .

SEC v. Cherif remains one of the main *Theory* cases. And illustrates again the fragility of the intrusion of ‘fiduciary’ into what is plain old ‘Theft.’ Or, in *Cherif*, into bank robbery.

As the final word, the eminent Judge Luttig put it best in *Bryan*:

> 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’être*

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231. SEC v. Cherif, 933 F.2d 403, 406-07 (7th Cir. 1991).
232. Id.
233. *Chestman*, 947 F.2d at 568.
234. *Cherif*, 933 F.2d at 412 n.6 (emphasis added).
of the misappropriation theory in fact is concern over "the unfairness inherent in trading on [stolen] information." 235

The grafting of a 'Trusted Thief' onto the Insider Trade of history was the third violence inflicted by the Theory. The first was the absence of the essential Insider. The second, the missing Deceit. Now, the fourth.

IV. A FOREIGN VICTIM, WITHOUT A REMEDY

Recur to the Thesis of this Article:
That the Supreme Court in O'Hagan, (1) Abandoned all judicial consideration of the tort of Insider Trading, and (2) Substituted an ancient crime, Theft, in its place.

And then to the Subthesis:
Because each individual essential to an Insider Trade is lacking, the totality of Insider Trading is, eo ipso, lacking.

The central concern of the Securities Acts — and hence Section 10(b) — has always been "the buying public — wholly unprotected from the misuse of special information," as the SEC itself put it in 1961 in Cady, Roberts. 236 The Investor, as the Victim, is the foremost essential of the Insider Trade.

The Investor as Victim Supplanted

This fourth of the Theory’s contortions of the traditional Insider Trade requires a two-pronged study: (1) The Victims, Before and After, and (2) Two Wrongs, No Rights. Each prong of this study involves a comparison of the Victim’s status under both the Theory and the traditional law.

The Theory persists in its maltreatment of the Insider Trade by eliminating both the Victim — the $4-million Investors are nowhere to be found — and any Remedy for the aggrieved party under either the Theory or its traditional predecessor.

(1) The Victims, Before and After

Even the chief Theory case, Chestman, 237 admitted that the Victim of the traditional Insider Trade had been eliminated, that now

[the Theory] is clearly beyond the pale of the traditional theory of

insider trading. More remarkably, Chestman openly stated that the misappropriation Theory had abandoned the past, that

[N]one of the prongs of liability under the traditional theory applied.\textsuperscript{239}

O’Hagan followed Chestman and juxtaposed the ‘victims before and after’ in one summary paragraph. Here the $4-million Investors are banished. Grand Met is now the Victim:

Under the misappropriation theory . . . , the disclosure obligation runs to the source of the information . . . Grand Met. [Under the traditional theory] the disclosure obligation . . . ran to those with whom the misappropriator trades [the $4-million sellers].\textsuperscript{240}

Chestman, as a presage of Justice Ginsburg, explained this sharp disparity between the Victim before and after:

[T]he 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.\textsuperscript{241}

The switching of Victims was abrupt and wrenching. Now, no thought for the conned $4-million Investors. Now, all solicitude for Grand Met, wounded by the Theft of its secret.

(2) Two Wrongs, No Rights

But the consequences of the substitution of Grand Met for the $4-million Investors were more tangible and more poignant. With the change of Victims came a total change of the Wrongs suffered by the Victims and the legal Remedies available to right those Wrongs. Their differences were notable.


For seventy years — from the Supreme Court’s Strong v. Repide\textsuperscript{242} in 1909 to Powell’s Chiarella — an individual Investor cheated in an Insider Trade could bring an individual action for dollars lost against the Insider himself. A civil recovery was routine. Witness Mrs. Strong’s success against con man Repide, the Widdie Hotchkiss’s recovery against her lying buyer in 1932, Mr. Shapiro’s personal action against

\begin{itemize}
  \item \textsuperscript{238} Chestman, 947 F.2d at 567.
  \item \textsuperscript{239} Id.
  \item \textsuperscript{240} O’Hagan, 521 U.S. at 655 n.6 (emphasis added). As corroborative, see id. at 2207.
  \item \textsuperscript{241} Chestman, 947 F.2d at 566.
  \item \textsuperscript{242} 213 U.S. 419 (1909).
\end{itemize}
Merrill Lynch affirmed by the Second Circuit in 1974.243

The End of Personal Recoveries: 1980-

But in 1980 those halcyon days ended with a muffled thud — “not with a bang, but a whimper”244 — with Chiarella and its putative antidote, the Misappropriation Theory. Now the Victim to be protected is Grand Met. Its injury? The theft of Information.

The Mother of All Anomalies: The Theory Victim Has No Standing

The Theft of Information is a Section-10(b) tort. As such, it is governed by the long-encrusted Birnbaum Rule of 1952.245 For thirty years — as the Theorists knew full well in the eighties — the Supreme Court canonized that Birnbaum Rule in Blue Chip Stamps.246 As the Journal reported on Blue Chip:

[O]nly stock-fraud victims who have actually bought or sold securities can sue for damages growing out of the transactions.247

Thus, by the Theory definition, no Victim will ever bring an individual action. This sole Victim under the theory should have a cause of action but the victim of a theft has no standing under Section 10(b). The Securities laws were not designed to protect the Grand Mets. Hence the total absence of a private Theory plaintiff in the history of the Misappropriation Theory.

All Investor Recovery Precluded

And the practicalities of legal life bear out a second alarming truth. Not one Theory case, not one, including O’Hagan, has seen a single conned Investor bring a personal action for damages suffered for Insider Trading. As “Chestman and the Misappropriation Theory” said:

Thus, in the long litany of ‘misappropriation’ cases, the unvarying presence of the Government or the SEC as plaintiff is no accident. At first Rothberg appeared to be an exception. But it involved a collateral defense in a contract action. No Theory case has yet to afford compensatory damages to anyone. The Theory fails completely when the remedy is reached. Section 10(b) has been emasculated.248

244. T.S. ELIOT, THE WASTELAND (1922).
247. Wayne E. Green, Supreme Court Limits Antifraud Suits to Actual Buyers or Sellers of Securities, WALL ST. J., June 10, 1975, at 6 (commenting on the Manor Drug holding).
248. Bayne, Chestman, supra note 5, at 154 (citing Rothberg v. Rosenbloom, 771 F.2d 818 (3d Cir. 1985), cert. denied, 481 U.S. 1017 (1987)).
Consider the ‘big three’ Theory cases: United States v. Chestman, SEC v. Clark, SEC v. Cherif. All are government plaintiffs. And lesser lights: Newman, Materia, Carpenter, Musella, Tome, Reed, Willis. Either the United States or the SEC.

Under the Misappropriation Theory, the legal world must now rely on the Government personally for all redress. Whether for Grand Met, the Victim of Theft, or the $4-million Investors, the Victim of a scam, Section 10(b) has been hamstrung. The Theory version of Section 10(b) gives no standing for a private action by anyone. Big Brother watches over all.

Under the traditional theory, Chiarella gave the Vinnies, Milkens, James Hermans, a free pass. Their duped Investors were denied relief. And the Theory has no remedy for any of them.

So, in the end, the Theory gives recovery to no one. Not to the victims of the theft. Or the investing public.249

This fourth essential, the true Victim, “the buying public — wholly unprotected,” is absent from the Insider Trade. Even the Victim of the Theft has no real cause of action.

V. ‘THEFT OF INFORMATION’ VIS-À-VIS INSIDER TRADING

Recur to the Thesis of this Article:
That the Supreme Court in O’Hagan, (1) Abandoned all judicial consideration of the tort of Insider Trading, and (2) Substituted an ancient crime, Theft, in its place.

Each of the four substantive essentials of the Insider Trade nave now been diligently sought in the pages of Ginsburg’s O’Hagan. They were nowhere to be found. Further commentary would pall.

A graphic presentation of the substantive essentials of the traditional Section-10(b) tort of Insider Trading juxtaposed against the Theory’s new version should recall the extent to which the Thesis of this Article has been proven.

249. Bayne, Chestman, supra note 5, at 154.
The Insider Trade

The Section-10(b) Essentials

The Insider: Anyone who deceives an Investor in a Stock Sale

The Gravamen: Deception of the Investor

A Simple Duty: To Disclose to the Investor

The Victim: The Deceived Investor

The Essentials of the Misappropriation Theory

The ‘Insider’: A Thief of Information from a Source

The Gravamen: Theft of Information

A Fiduciary Duty: Not to Steal

The Victim: The Owner of Information

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EPILOGUE

This Article completes the second of a two-part Study of O’Hagan, the latest Supreme Court word on the law of Insider Trading and the first since the ill-advised Chiarella.

The first half of this two-part Study — “Insider Trading: The Misappropriation Theory Ignored: Ginsburg’s O’Hagan.”250 — in its analysis of the transformation of the Insider Trade to a Theft of Information, reached an unsettling conclusion: That the Supreme Court never judicially faced the question before it: Does the Misappropriation Theory conform to Section 10(b)?

To the contrary, that Article found “that Justice Ginsburg and the Majority disported themselves in a lengthy obiter disquisition on ‘a novel New Theory.’”251 But finessed the Misappropriation Theory itself.

Now, with O’Hagan shorn of all adjudicative content on Insider Trading itself — and the Misappropriation Theory gone as well — O’Hagan is indeed denuded.

The remaining obiter reflections of the Court can serve only as stimuli to a frontal attack on Chiarella. Or at least a typical gradual erosion.

The forceful dissent of Justice Thomas supported by the Chief and Justice Scalia, the wavering of Justice Souter, the rumored retirement of Justice Stevens and a latterly hobbled President, all give promise of imminent success.

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250. Bayne, Misappropriation Theory Ignored, supra note 1.
251. Id.