COOPERATION WITH SECURITIES FRAUD

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ABSTRACT

Secondary actors, such as lawyers, accountants, and bankers, are oftentimes critical players in securities fraud. The important question of their liability to private plaintiffs has been, and remains, one of considerable confusion. In Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, the U.S. Supreme Court could have, but failed to, dispel some of this confusion.*

Contrary to the common understanding, Stoneridge *did not foreclose liability on the part of secondary actors who manage to remain anonymous participants in securities fraud. Read carefully,* Stoneridge *instead held that proximity to fraud should drive the liability determination.*

Although "proximity" is itself an indefinite concept, we are not without tools in deciphering it. For we have at our disposal a well-developed, long-tested method of analyzing proximity with an eye toward the just imposition of culpability: moral philosophy's "principles of cooperation." By turning to these principles, we have at our fingertips a ready-made set of factors to consider in assessing whether one's conduct should be deemed proximate versus remote to another's fraud.

The principles of cooperation also provide a framework around which we can organize securities fraud jurisprudence in general. For the insights gleaned from the principles regarding moral culpability in many respects parallel the conclusions reached by courts and commentators construing liability under the securities laws. Perhaps, in addition to the assistance it provides us in resolving the difficult issue of proximity, this framework could serve as a useful aid in resolving other, and future, securities fraud questions.

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INTRODUCTION

> A male servant who knowingly by offering his shoulders assists his master to ascend through windows to ravage a virgin, and many times serves the same by carrying a ladder, by opening a door, or by cooperating in something similar, does not commit a mortal sin, if he does this through fear of considerable damage, for example, lest he be treated wickedly by his master, lest he be looked upon with savage eyes, or, lest he be expelled from the house.[1]

The foregoing proposition was condemned by Church authorities (more specifically, by the Congregation of the Holy Office, otherwise

1. Innocent XI, Various Errors on Moral Subjects Condemned by the Holy Office March 4, 1679, *reprinted in* HENRY DENZINGER, ENCHIRIDION SYMBOLORUM DEFINITIONUM ET DECLARATIONUM DE REBUS FIDEI ET MORUM 328 (Roy J. Deferrari trans., 1955) (13th ed. 1954).

known as the Roman Inquisition) under Pope Innocent XI in 1679.[2] Apparently, at the time, there had been no small debate over the wrongfulness of the conduct in question.[3]

The incentive to answer the question correctly was quite high, for much was at stake—namely, the prospect of eternal damnation (which, by definition, is the worst thing that could conceptually happen to a person[4]).

Although less dreadful than eternal damnation, being named a defendant in a private securities fraud class action is also particularly unpleasant. It is even more unpleasant to be an unsuccessful defendant in such litigation. Thus, the incentive to avoid this predicament is also rather high.

Unfortunately, the contours of securities-fraud liability are anything but clear. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,[5] the U.S. Supreme Court held that no private right of action existed against a defendant accused of aiding and abetting a violation of § 10(b) of the 1934 Securities Exchange Act—the primary antifraud provision of U.S. securities law.[6] In the 2008 decision *Stoneridge Investment Partners LLC v. Scientific-Atlanta, Inc.*,[7] the Court further obfuscated a concept that had been confusing ever since the *Central Bank* decision was rendered: the distinction between conduct that constitutes a primary violation of § 10(b) versus conduct that constitutes merely the aiding and abetting of someone else's violation of § 10(b).[8]

The timing of this obfuscation could not be worse. In the wake of the subprime mortgage fiasco of 2008 and the ensuing economic meltdown, coupled with a host of financial scandals that characterized 2009 (especially including that of Bernard Madoff),[9] a plethora of securities class action lawsuits have been launched (with still more expected to come), naming as defendants a wide range of industry actors.[10] Courts will be faced with the

2. *Id.* at 325.

3. Only sufficiently serious matters were referred to, and addressed by, the Holy Office. *See The Roman Congregations*, *in* 13 THE CATHOLIC ENCYCLOPEDIA 137–39 (1913).

4. *See* COMPENDIUM OF THE CATECHISM OF THE CATHOLIC CHURCH ¶ 395 ("mortal sin . . . leads us to the eternal death of hell") (2006), *available at* http://www.vatican.va/archive/compendium_ccc/docu ments/archive_2005_compendium-ccc_en.html. S*ee* F.X. SCHOUPPE, HELL (TAN ed., 1989) (1883).

5. 511 U.S. 164, 191 (1994).

6. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (2000).

7. 128 S. Ct. 761 (2008).

8. *See* James D. Cox, Randall S. Thomas & Lynn Bai, *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 362 (2008) ("The Court's decision in *Stoneridge Investment Partners*, however, provides no greater specification as to the contours for determining who is a primary participant.") (citation omitted); Todd G. Cosenza, *Applying* Stoneridge *to Restrict Secondary Actor Liability Under Rule 10b-5*, 64 BUS. LAW. 59, 60 (2008) (noting the "confusion" that *Stoneridge* has already engendered in the lower courts).

9. *See, e.g.*, Tina Brown, *Did We All Go Mad?*, DAILY BEAST, Dec. 15, 2008, http://www.thedailybeast.com/blogs-and-stories/2008-12-15/did-we-all-go-mad/; Posting of Frank Pasquale to Concurring Opinions, http://www.concurringopinions.com (Dec. 13, 2008, 15:40 EST) ("A Total Breakdown in Trust").

10. *See* Michael R. Smith & Benjamin Lee, *Securities Class Actions Against Financial Institutions*,

daunting task of separating out those defendants who violated § 10(b) from those defendants who simply aided and abetted a violation of § 10(b).

Rather than reinvent the wheel, I suggest that today's courts, counselors, and commentators turn to Pope Innocent XI's reasoning for guidance.[11] Assuming, as our law generally does, that liability should track culpability,[12] the moral philosophy that animated the aforementioned condemnation can provide valuable assistance to us. Known as "cooperation with evil" analysis, the scholars and philosophers who advanced this field of knowledge painstakingly sought to distinguish cooperation that was seriously wrongful from cooperation that was less wrongful (or possibly not wrongful at all). The factors used to make this distinction could generally be applied to the conduct of those actors involved in securities fraud, in order to help ascertain who should be held culpable (and liable) as a primary violator of § 10(b), versus who should be deemed a nonculpable, and therefore nonliable, aider and abettor of a § 10(b) violation. Additionally, cooperation with evil analysis can serve as a useful mechanism for organizing existing securities law jurisprudence, helping to make more sense out of precedent that can appear at times disjointed and inconsistent.

Part I of this Article provides a general background of § 10(b), explaining its important role in U.S. securities regulation ever since the promulgation of Rule 10b-5 thereunder. Part I proceeds to examine the scope of liability under § 10(b) and Rule 10b-5. Part II sets forth the traditional principles of assessing cooperation with evil, and Part III applies those principles to securities fraud under § 10(b). Part IV suggests certain customizations to the traditional principles of cooperation to produce a better fit with securities law, and Part V utilizes the principles to reconsider the landmark case of *Central Bank of Denver*. The conclusion reached is that, although not dispositive, application of a "cooperation" analysis to issues of securities fraud provides a helpful and justifiable means of distinguishing between those defendants who should be held liable as primary violators post-*Stoneridge*, and those who should not.

LAW360, Oct. 15, 2008, http://securities.law360.com/articles/72925; Jennifer H. Rearden & J. Taylor McConie, *Trends in Subprime-Related Securities Fraud Actions*, LAW360, Oct. 31, 2008, http://securities.law360.com/articles/75220; Lawrence M. Ronick & Thomas E. Redburn Jr., *Post-Financial Meltdown Securities Litigation*, LAW360, Oct. 23, 2008, http://securities.law360.com /articles/73958.

11. For "Catholic moral theology has longstanding tools with which to address" problems such as these, "tools that are insufficiently appreciated by critics. . . ." Edward A. Hartnett, *Catholic Judges and Cooperation in Sin,* 4 U. ST. THOMAS L.J. 221, 225 (2006).

12. *Cf.* Travis S. Souza, Note, *Freedom to Defraud:* Stoneridge, *Primary Liability, and the Need to Properly Define Section 10(B)*, 57 DUKE L.J. 1179, 1204–06 (2008) (asserting that securities liability should be focused upon culpable actors). Of course, an exception to this general principle would be rules of strict liability. *E.g.*, § 12(a)(1) of the 1933 Securities Act.

I. LIABILITY UNDER § 10(B) OF THE 1934 SECURITIES EXCHANGE ACT

A. History and Background of § *10(b) and Rule 10b-5*

The story of U.S. federal regulation of securities is a familiar one. In the wake of the stock market crash of 1929 and the Great Depression that followed shortly thereafter, Franklin D. Roosevelt ousted Herbert Hoover from the White House in the Presidential election of 1932.[13] A major component of Roosevelt's victorious "New Deal" platform was the moral and ethical reform of Wall Street—something deemed critical to the restoration of investor confidence in the capital markets.[14] To achieve these ends, Congress largely federalized the regulation of securities with the passage of the Securities Act of 1933 and the Securities Exchange Act of 1934.[15]

Unlike the prevailing approach to securities regulation taken by state governments at the time, the federal approach was built around mandatory disclosure, rather than merit regulation.[16] In order to bolster the credibility of such disclosure and further protect investors, Congress included in the new legislation a variety of antifraud measures.[17] At the forefront of these measures was § 10(b) of the 1934 Securities Exchange Act.[18]

As important as § 10(b) has grown to become, it is interesting to observe that the section itself is little more than an enabling statute:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
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> . . .

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13. *See* DANIEL R. FUSFELD, THE ECONOMIC THOUGHT OF FRANKLIN D. ROOSEVELT AND THE ORIGINS OF THE NEW DEAL 223–50 (1956).

14. *See* John H. Walsh, *A Simple Code of Ethics: A History of the Moral Purpose Inspiring Federal Regulation of the Securities Industry,* 29 HOFSTRA L. REV. 1015, 1036 (2001). *See also* Ronald J. Colombo, *Buy, Sell, or Hold? Analyst Fraud from Economic and Natural Law Perspectives*, 73 BROOK. L. REV. 91, 119–21 (2007).

15. *See* Colombo, *supra* note 14, at 120–22.

16. *See id.* at 122–23. *See also* Henry Klehm III, *Contractual Shifting of Defense Costs in Private Offering Securities Litigation*, 136 U. PA. L. REV. 971, 975–76 (1988).

17. *See* Colombo, *supra* note 14, at 122; Klehm, *supra* note 16, at 975–76; Kun Young Chang, *Multinational Enforcement of U.S. Securities Laws: The Need for the Clear and Restrained Scope of Extraterritorial Subject-Matter Jurisdiction*, 9 FORDHAM J. CORP. & FIN. L. 89, 93 (2003).

18. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (2000); *see* Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 726 & n.50 (1997).

> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance *in contravention of such rules and regulations as the Commission may prescribe* as necessary or appropriate in the public interest or for the protection of investors.[19]

Thus, there is no such thing as a "direct" violation of § 10(b); rather, an individual violates § 10(b) only derivatively—that is, by engaging in "manipulative or deceptive" conduct "in contravention of such rules and regulations" as the Securities and Exchange Commission may prescribe.[20] And it was not until eight years later—in 1942—that the SEC wielded the authority bestowed upon it under § 10(b) and promulgated such a rule: Rule 10b-5.[21]

Rule 10b-5 attempts to circumscribe the widest range of conduct subject to prohibition under § 10(b) by broadly enjoining any fraud or deceit in connection with the purchase or sale of any security.[22] The text of Rule 10b-5, in its entirety, reads as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.[23]

19. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (2000) (emphasis added).
20. *Id.*
21. 17 C.F.R. § 240.10b-5 (1992). *See* Mary Ellen P. Dooley, *An Implied Right Of Contribution Under Rule 10b-5: An Essential Element of Attaining the Goals of the Securities Exchange Act of 1934*, 61 FORDHAM L. REV. 185, 193 (1993). The story of Rule 10b-5 is famously retold by one of its drafters, Milton Friedman, in *Conference on Codification of the Federal Securities Laws*, 22 BUS. LAW. 793, 921–23 (1967).
22. 17 C.F.R. § 240.10b-5.
23. *Id.*

Section 21 of the 1934 Securities Exchange Act grants the Securities and Exchange Commission authority to enforce the Act, along with the rules and regulations promulgated thereunder.[24] This, of course, includes authority to enforce § 10(b)/Rule 10b-5.[25] But nowhere does the Exchange Act articulate the existence of a private right of action against those who violate § 10(b).[26] Indeed, both § 10(b) and § 21 are devoid of any language that would suggest the existence of a private right of action.[27]

Nevertheless, in 1946, the United States District Court of the Eastern District of Pennsylvania recognized an implied private right of action under § 10(b) in *Kardon v. National Gypsum Co*.[28] This holding was adopted by an "overwhelming consensus of the District Courts and Courts of Appeals"[29] and ultimately endorsed by the U.S. Supreme Court in 1971.[30]

Over the years, the courts—including the Supreme Court—have had to flesh out the elements and scope of a Rule 10b-5 private action.[31] As a general matter, on eight separate occasions the Supreme Court has remarked that the antifraud provisions of the securities laws are to be interpreted "not technically and restrictively, but flexibly to effectuate its remedial purposes."[32] This endorsement of a liberal reading of § 10(b) and Rule 10b-5 has been subsequently restrained by language in four other Supreme Court opinions anchoring the scope and interpretation of Rule 10b-5 to the explicit text of § 10(b): "The starting point in every case in-

24. Securities Exchange Act of 1934 § 21, 15 U.S.C. § 78u.

25. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 78–79 (2006).

26. *See* Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78oo (2000).

27. *See* Securities Exchange Act of 1934, §§ 10(b) & 21, 15 U.S.C. §§ 78j(b) & 78u. The text of Rule 10b-5 would not be consulted to ascertain the existence of a private right of action because Congressional intent, and not agency intent, governs this analysis. *See* Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001).

28. 69 F. Supp. 512, 513–14 (E.D. Pa. 1946). The court reasoned that "the right to recover damages arising by reason of violation of a statute . . . is so fundamental and so deeply ingrained in the law that where it is not expressly denied the intention to withhold it should appear very clearly and plainly." *Id.* at 514. Since § 10(b) (and the 1934 Securities Exchange Act in general) does not expressly, clearly, or plainly deny the existence of a private right of action for a § 10(b) violation, the court held that such an action could proceed. *See id.*

29. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975).

30. *Merrill Lynch*, 547 U.S. at 79 (citing Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971)).

31. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 173 (1994).

32. SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963); SEC v. Zandford, 535 U.S. 813, 819 (2002) (quoting Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972)); Pinter v. Dahl, 486 U.S. 622, 653 (1988) (quoting *Affiliated Ute*, 406 U.S. at 151); Herman & MacLean v. Huddleston, 459 U.S. 375, 386–87 (1983) (quoting *Capital Gains Research Bureau, Inc.*, 375 U.S. at 195); Aaron v. SEC, 446 U.S. 680, 695 (1980) (quoting *Affiliated Ute*, 406 U.S. at 151); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 34 (1979) (quoting *Capital Gains Research Bureau, Inc.*, 375 U.S. at 195); *Blue Chip Stamps*, 421 U.S. 723 at 748 (1975) (quoting *Affiliated Ute*, 406 U.S. at 151); *Affiliated Ute*, 406 U.S. at 151 (quoting *Capital Gains Research Bureau, Inc.*, 375 U.S. at 195). The quoted language also appeared in one dissent, *Cent. Bank of Denver*, 511 U.S. 164, 198 (1994) (Stevens, J., dissenting) (quoting *Affiliated Ute*, 406 U.S. at 151), and in one recitation of a litigant's argument, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 200 (1976) (quoting *Affiliated Ute*, 406 U.S. at 151).

volving construction of a statute is the language itself."[33] Thus, the Court instructs us to ground our analysis of a § 10(b)/Rule 10b-5 case on the text of § 10(b),[34] but also notes that we are not "technically and restrictively" bound by the text.[35] Moreover, we are invited to "flexibly" construct from that textual foundation interpretations necessary to "effectuate" the "remedial purposes" of § 10(b).[36]

Second, a fundamental principle of administrative law is that "the language of the statute must control the interpretation of the Rule."[37] This is because:

> [t]he rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."[38]

Thus, the scope of Rule 10b-5 "cannot exceed the power granted the Commission by Congress under § 10(b)."[39] Conduct apparently prohibited by Rule 10b-5, but not falling within the parameters of § 10(b), is therefore not unlawful.

Two fairly early and undeniably important Supreme Court decisions interpreting the scope of § 10(b) are *Ernst & Ernst v. Hochfelder*[40] and *Santa Fe Industries, Inc. v. Green*.[41]

In *Ernst & Ernst*, the Court tackled the issue of whether one could be deemed to have violated § 10(b) on account of conduct that was negligent in nature.[42] The Court held that a cause of action under § 10(b) required an allegation of scienter to proceed[43] and proceeded to define scienter as

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33. *Blue Chip Stamps*, 421 U.S. at 756 (Powell, J., concurring); *Ernst & Ernst*, 425 U.S. at 197 (quoting *Blue Chip Stamps*, 421 U.S. at 756 (Powell, J., concurring)); Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286, 302 (1993)(Thomas, J., dissenting) (quoting *Ernst & Ernst*, 425 U.S. at 197); Santa Fe Indus. v. Green, 430 U.S. 462, 472 (1977) (quoting *Ernst & Ernst*, 425 U.S. at 197).

34. *See, e.g.*, *Ernst & Ernst*, 425 U.S. at 197.

35. *E.g.*, *Pinter*, 486 U.S. at 653 (quoting *Affiliated Ute*, 406 U.S. at 151).

36. *Id.*

37. *Santa Fe Indus.*, 430 U.S. at 472.

38. *Ernst & Ernst*, 425 U.S. at 213–14 (quoting Dixon v. United States, 381 U.S. 68, 74, (1965)).

39. *Id.* at 214.

40. 425 U.S. 185.

41. 430 U.S. 462.

42. *See Ernst & Ernst*, 425 U.S. at 193. Interestingly, in quite a pregnant footnote, the Court in *Ernst & Ernst* noted that "[i]n view of our holding that an intent to deceive, manipulate, or defraud is required for civil liability under § 10(b) and Rule 10b-5, we need not consider whether civil liability for aiding and abetting is appropriate under the section and the Rule . . ." *Id.* at 193 n.7. Daniel Fischel keenly picked up on this remark, and predicted the demise of secondary liability under § 10(b) and Rule 10b-5 in 1981—fully 13 years before the Supreme Court held this way in *Central Bank*. *See* Daniel R. Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 Cal. L. Rev. 80, 88 (1981).

43. *See Ernst & Ernst*, 425 U.S. at 193.

"a mental state embracing intent to deceive, manipulate, or defraud."[44] On account of this, the Court ruled that an assertion of negligence alone could not sustain a § 10(b) claim.[45] The Court's definition of scienter notwithstanding, the Court also suggested that knowledge alone might satisfy § 10(b)'s scienter requirement[46] and even left the door open to liability premised upon recklessness.[47] Since *Ernst & Ernst*, the Court has not provided much further specificity on the issue of scienter, and many lower courts have held that recklessness and knowing conduct can satisfy the scienter requirement of § 10(b).[48]

In *Santa Fe Industries*, the Supreme Court held that a viable action under § 10(b) (and, *a fortiori,* Rule 10b-5) must limit itself to conduct "involving manipulation or deception," notwithstanding the text of Rule 10b-5 (which could be read more broadly).[49] This result flowed from the previously stated principle that an agency's rule cannot exceed its statutory grant of authority,[50] coupled with the Court's reading of § 10(b) as limited to manipulative and/or deceptive conduct alone.[51] And since "manipulation" was deemed a "'term of art when used in connection with securities markets'"[52] ("[t]he term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity"[53]), what remained of § 10(b) and Rule 10b-5 was a cause of action grounded firmly upon deception.

In terms of the elements of a Rule 10b-5 private cause of action, the Supreme Court recently articulated them as follows:

> (1) a material misrepresentation or omission by the defendant;
>
> (2) scienter;
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> (3) a connection between the misrepresentation or omission and the purchase or sale of a security;
>
> (4) reliance upon the misrepresentation or omission;

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44. *Id.* at 193 n.12.
45. *See id.* at 215.
46. *See id.* at 197 (observing that the language of § 10(b) "strongly suggest[s] that § 10(b) was intended to proscribe knowing or intentional misconduct").
47. *See id.* at 193 n.12 ("We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b-5.").
48. *See* ARNOLD S. JACOBS, 5C DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS §12:73 at 12-339 (2008).
49. *Sante Fe Indus.*, 430 U.S. at 473.
50. *See supra* text accompanying notes 37–39.
51. *See Sante Fe Indus.*, 430 U.S. at 473–74.
52. *Id.* at 476 (quoting *Ernst & Ernst*, 425 U.S. at 199).
53. *Id.* at 476.

(5) economic loss; and

(6) loss causation.[54]

But this articulation, predicated upon a "material misrepresentation or omission,"[55] is not complete; it accounts only for an action predicated upon Rule 10b-5(b), which, as previously reprinted, prohibits the making of "any untrue statement of a material fact" or the omission of "a material fact necessary . . . to make the statements made . . . not misleading."[56] It does not consider the possibility of a cause of action pursuant to Rule 10b-5(a) (which makes it unlawful "[t]o employ any device, scheme, or artifice to defraud"[57]), nor a cause of action pursuant to Rule 10b-5(c) (which makes it unlawful "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person"[58]).

As the Supreme Court has observed in an earlier decision, Rules 10b-5(a) and 10b-5(c) serve to effectuate § 10(b)'s prohibition on the use of "'any manipulative or deceptive device or contrivance'" in connection with the purchase or sale of a security.[59] Unfortunately, unlike the long and rich precedent attached to Rule 10b-5(b) (regarding misstatements and omissions), "there is very little case law explaining more specifically what types of claims are actionable under [Rules 10b-5(a) and 10b-5(c)]."[60] And rather than parse potential causes of action under Rules 10b-5(a) and 10b-5(c) separately,[61] the courts have typically combined these paragraphs, finding that, collectively, they give rise to causes of action predicated upon "[f]raud by conduct."[62] More specifically, such fraud by conduct has been held to include "churning,"[63] "manipulation,"[64] or "schemes."[65] Both "churning" and "manipulation" are terms of art,[66] involving specific forms of wrongdoing that are not relevant to this Article. Quite relevant, howev-

54. Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 768 (2008).
55. *Id.*
56. 17 C.F.R. § 240.10b-5(b) (1992).
57. § 240.10b-5(a).
58. § 240.10b-5(c).
59. Chiarella v. United States, 445 U.S. 222, 225 & n.5 (1980) (quoting 15 U.S.C. § 78j (2008)).
60. Benzon v. Morgan Stanley Distribs., 420 F.3d 598, 611 (6th Cir. 2005).
61. *But see* Regents of the Univ. of Cal. v. Credit Suisse First Boston, Inc., 482 F.3d 372, 378 (5th Cir. 2007) (rare example of court articulating causes of action pursuant to Rule 10b-5(a) and 10b-5(c) separately).
62. O'Connor v. R.F. Lafferty & Co., 965 F.2d 893, 898 (10th Cir. 1992); *see also* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008) (rejecting the view that "there must be a specific oral or written statement before there could be liability under § 10(b) or Rule 10b-5," and observing that "[c]onduct itself can be deceptive" and therefore violative of § 10(b)/Rule 10b-5).
63. *See O'Connor*, 965 F.2d at 898.
64. Lentell v. Merrill Lynch & Co., 396 F.3d 161, 177 (2d Cir. 2005).
65. Cooper v. Pickett, 137 F.3d 616, 624 (9th Cir. 1997).
66. *See O'Connor*, 965 F.2d at 898; *Lentell*, 396 F.3d at 177.

er, are § 10(b) claims predicated upon a defendant's involvement in a "scheme" to defraud, and this is addressed in greater detail below.[67]

One of the few courts to enumerate the elements of a Rule 10b-5(a)/10b-5(c) cause of action has been the Fifth Circuit Court of Appeals, which set forth the elements as follows:

> To violate Rule 10b-5(a) and (c), a person must
>
> (1) employ a device, scheme, or artifice to defraud or engage in a course of business that operates as a fraud
>
> (2) with scienter
>
> (3) on which the plaintiff relied
>
> (4) that proximately caused his/her injury.[68]

Because of its importance to the analysis that follows, the reliance element, which is essential to a private cause of action under all three subsections of Rule 10b-5, merits particular attention.

"Reliance" as ordinarily understood (namely, actual, direct reliance upon a statement or act) satisfies the reliance element of a Rule 10b-5 claim.[69] But, in addition to this, the Supreme Court has recognized a "rebuttable presumption of reliance in two different circumstances":[70]

First, if there is an omission of a material fact by one with a duty to disclose, the investor to whom the duty was owed need not provide specific proof of reliance. Second, under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public (provided that the affected security trades in an efficient market). The public statements are deemed to be reflected in the market price of the security, and it is presumed that an investor who buys or sells stock at the market price relies upon the statement.[71]

The second of these two presumptions (concerning the fraud-on-the-market doctrine) is implicated distinctly by *Stoneridge*, and shall be discussed at length below.[72]

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67. *See infra* text accompanying notes 165–168.
68. Chemetron Corp. v. Bus. Funds, Inc., 682 F.2d 1149, 1163 (5th Cir. 1982) (footnotes omitted), *vacated on other grounds,* 460 U.S. 1007 (1983).
69. *E.g.*, Tcherepnin v. Knight, 389 U.S. 332, 333–34 (1967) (where complaint alleged that "the petitioners had purchased such securities in reliance upon printed solicitations received from City Savings through the mails . . . [which] contained false and misleading statements in violation of § 10(b) of the Securities Exchange Act and of Rule 10b-5 adopted thereunder") (footnote omitted).
70. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008).
71. *Id.*
72. *See infra* text accompanying notes 210–224.

Due to the breadth of its reach and the advantages it affords plaintiffs over other applicable causes of action (largely due to plaintiff-friendly judicial construction of the aforementioned elements[73]), Rule 10b-5 provides "the most important right of action under the Exchange Act."[74]

B. Accomplice Liability

One milestone along Rule 10b-5's march toward pre-eminence within securities law jurisprudence was the 1966 decision of the Northern District of Indiana in *Brennan v. Midwestern United Life Insurance Co.*[75] In *Brennan,* the Northern District was the first court to recognize liability for aiding and abetting a violation of Rule 10b-5 in a private litigation.[76]

Before examining the *Brennan* decision, however, a brief discussion of accomplice liability in general is in order. "Accomplice" is the common designation for one who aids and abets another's (the principal's) wrongdoing.[77] Generally, an accomplice "is one who knowingly, voluntarily, and with common intent unites with another to commit a crime, or in some way advocates or encourages commission of the crime."[78] "Anglo-American jurisprudence has recognized accomplice liability since its inception."[79]

At common law, the subject of accomplice liability "was riddled with 'intricate' distinctions."[80] These distinctions reflected efforts to calibrate an accomplice's liability with his or her culpability.[81] Today, under federal law (and the general rule in most states as well[82]) such distinctions have been abolished.[83] Instead, anyone who "aids, abets, counsels, commands, induces or procures [the commission of a crime], is punishable as a principal."[84]

In assessing whether one is liable as an accomplice by virtue of aiding and abetting, the Supreme Court has endorsed the following test:

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73. For example, the Court has essentially dispensed with the reliance element, essential to common law fraud, by embracing the "fraud-on-the-market" theory of reliance within the context of an efficient market. *See* Basic v. Levinson, 485 U.S. 224, 245–47 (1988).
74. 1 A.A. SOMMER, JR., FEDERAL SECURITIES EXCHANGE ACT OF 1934 § 5.01 (Matthew Bender rev. ed. 2009). *See also* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) ("When we deal with private actions under Rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn."). Indeed, the whole body of insider trading law is predicated upon Rule 10b-5. *See* Chiarella v. United States, 445 U.S. 222, 226–30 (1980).
75. 259 F. Supp. 673 (N.D. Ind. 1966), *cited in* Fischel, *supra* note 42, at 83.
76. *See* Fischel, *supra* note 42, at 83.
77. 21 AM. JUR. 2D *Criminal Law* § 166 (2008).
78. *Id.* (footnote omitted).
79. Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2169 (1988).
80. Standefer v. United States, 447 U.S. 10, 15 (1980).
81. *See* Mueller, *supra* note 79, at 2174–76.
82. *See id.* at 2177–85.
83. *See Stanfeder*, 447 U.S. at 18–19.
84. 18 U.S.C. § 2 (2000).

> In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."[85]

As a result, "The federal courts of appeals now uniformly use 'intent' as the necessary state of mind for accomplice liability, although occasionally 'knowledge' language (or knowledge-like results) can be found in the opinions."[86]

Although aiding and abetting *criminal* liability for a violation of federal law is generally uncontested, the same cannot be said for *civil* liability premised upon one's aiding and abetting a violation of federal law.[87] For:

> "[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." Rather, Congress has adopted a "statute-by-statute approach to civil aiding and abetting."[88]

C. Aiding and Abetting Liability Under Rule 10b-5 Before Central Bank

Bearing the general principles of accomplice liability in mind, we can now review *Brennan* more profitably. *Brennan* concerned the wrongdoing of Dobich Securities Corporation (Dobich), a brokerage firm involved in the sale of stock in Midwestern Life Insurance Company (Midwestern).[89] Dobich allegedly used investors' stock purchase money "as working capital for speculation and other improper purposes" and allegedly made "fraudulent misrepresentations in explaining to purchasers the reason for delays in delivery of the purchased shares of stock."[90]

Plaintiffs in *Brennan* further alleged that Midwestern "knew of Dobich's activities and permitted the activities to continue by failing to report Dobich either to the Indiana Securities Commission or to the Securities

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85. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).
86. G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1389–90 (1996); *but see* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1373–76 (2002).
87. *See* Taurie M. Zeitzer, *In* Central Bank's *Wake, RICO's Voice Resonates: Are Civil Aiding and Abetting Claims Still Tenable*? 29 COLUM. J.L. & SOC. PROBS. 551, 561 (1996).
88. *Id.* (quoting *Central Bank*, 511 U.S. at 182).
89. Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673, 675 (N.D. Ind. 1966).
90. *Id.*

and Exchange Commission."[91] On account of this, plaintiffs asserted that Midwestern was also liable for the fraud.[92] Midwestern moved to dismiss the complaint, arguing, among other things, that "an aider and abettor is not liable, as such, in a civil action for damages under Section 10(b) and Rule 10b-5."[93]

The court denied Midwestern's motion to dismiss.[94] The court opened its opinion by observing that "the provisions of Section 10(b) and Rule 10b-5 were applied to aiders and abettors even before the first case recognizing civil liability under that statute and rule."[95] In response to Midwestern's argument that "there is nothing in the statute indicating a Congressional intent to impose civil liability on persons aiding and abetting violations of Section 10(b) and Rule 10b-5,"[96] the court aptly noted:

> But, likewise, one can search the statute in vain for language indicating that a violator of Section 10(b) and Rule 10b-5 should be liable in a civil action for damages.[97]

Citing *Kardon*, the court proceeded to explain that civil liability for Rule 10b-5 violations was grounded upon "general legal principles"—particularly principles of tort law.[98] The court held that these same principles, especially when combined with the "broad and remedial purpose" of § 10(b), suggest that civil liability extends to aiders and abettors as well.[99] As Daniel Fischel noted, "*Brennan's* underlying rationale was immediately followed by other courts," and liability for aiding and abetting a Rule 10b-5 violation became part of securities law jurisprudence.[100]

However, what exactly constitutes liability for aiding and abetting a Rule 10b-5 violation, and how that differs from a primary violation of Rule 10b-5, has never been clear. [101] The widespread recognition of aiding and abetting liability since *Kardon* (and until *Central Bank*,[102] discussed below[103]), has contributed to this ambiguity because plaintiffs have historically not been compelled to carefully distinguish between a primary viola-

91. *Id.*
92. *Id.*
93. *Id.* at 675–76.
94. *Id.* at 682–83.
95. *Id.* at 676 (citing SEC v. Timetrust, Inc., 28 F. Supp. 34, 43 (N.D. Cal. 1939)).
96. *Id.* at 680.
97. *Id.*
98. *See id.*
99. *Id.* at 680–81.
100. *See* Fischel, *supra* note 42, at 84.
101. Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1224 n.8 (10th Cir. 1996) ("Commentators have long recognized vagaries in the borders between primary and secondary liability.").
102. 511 U.S. 164 (1994).
103. *See infra* Part I.D.

tion of Rule 10b-5 versus aiding and abetting liability.[104] Oftentimes, both were simply asserted, and courts were not particularly precise in distinguishing one from the other.[105] Additionally, "the formulation of aiding and abetting liability brought very little conduct under the liability blanket of Section 10(b)/Rule 10b-5 that was not already there and punishable as primary conduct."[106] Thus, the "courts seldom troubled themselves to draw any sort of a line between primary liability on the one hand, and aiding and abetting liability on the other."[107] Nevertheless, as explained below,[108] post-*Central Bank*, this distinction becomes crucial.[109]

D. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.

As previously indicated, prior to *Central Bank*, aiding and abetting liability was generally presumed in actions brought under § 10(b)/Rule 10b-5 of the 1934 Securities Exchange Act.[110] Consistent with the general federal standard for assessing aiding and abetting liability,[111] in order to allege a claim of aiding and abetting securities fraud, plaintiffs had to show:

> (1) a primary violation of Section 10(b);
>
> (2) actual knowledge (or at least a general awareness) by the aider and abettor as to the existence of the primary violation; and
>
> (3) substantial assistance given to the primary violator by the aider and abettor.[112]

And recognition of aiding and abetting liability was in line with the general trajectory of § 10(b) and Rule 10b-5 jurisprudence toward more expansive, more pro-plaintiff interpretations.[113] But this trend was not to

104. *See* Robert A. Prentice, *Locating That "Indistinct" and "Virtually Nonexistent" Line Between Primary and Secondary Liability Under Section 10(b),* 75 N.C. L. REV. 691, 704 (1997).
105. *See id.*
106. *Id.*
107. *Id.*
108. *See infra* Part I.D.
109. *See* Gareth T. Evans & Daniel S. Floyd, *Secondary Liability Under Rule 10b-5: Still Alive and Well After* Central Bank*?*, 52 BUS. LAW. 13, 14 (1996); Kimberly Brame, *Beyond Misrepresentations: Defining Primary and Secondary Liability Under Subsections (A) and (C) of Rule 10b-5*, 67 LA. L. REV. 935, 938 (2007).
110. *See supra* Part I.C.
111. *See supra* Part I.C.
112. Tracy A. Nichols & Stephen P. Warren, *Gatekeepers Under Fire From Securities Plaintiffs and Regulators: When Doing Your Job Can Amount to "Scheme Liability" Under Rule 10b-5(a) and (c) or Constitute Aiding and Abetting According to the SEC*, 1562 PLI/CORP. 611, 614 (2006).
113. *See* E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The*

last forever.[114] By 1973 most Supreme Court securities law opinions adopted a narrower approach to securities law liability in general, and to liability under § 10(b) and Rule 10b-5 in particular.[115] One of the most significant decisions narrowing the reach of § 10(b) and Rule 10b-5 is the Supreme Court's 1994 opinion in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*[116]

In *Central Bank*, the Court held that, contrary to the conclusions reached in "*hundreds* of judicial and administrative proceedings in every Circuit in the federal system," no cause of action existed for aiding and abetting a § 10(b)/Rule 10b-5 violation.[117] Instead, the only properly named defendants in such an action were those actors concerning whom "*all* of the requirements for primary liability under Rule 10b-5 are met."[118]

The defendant whose conduct was at issue in *Central Bank* was Central Bank of Denver ("Central Bank").[119] In *Central Bank*, the Colorado Springs-Stetson Hills Public Building Authority issued bonds (in 1986 and in 1988) to finance a "planned residential and commercial development in Colorado Springs."[120] "The bonds were secured by landowner assessment liens . . . [and] bond covenants required that the land subject to the liens be worth at least 160% of the bonds' outstanding principal and interest."[121] Central Bank served as the indenture trustee for bonds, pursuant to which Central Bank was responsible for (among other things) seeing to it that this 160% test was being met.[122] AmWest Development, the developer of the Colorado Springs development, was responsible for providing Central Bank with "an annual report containing evidence that the 160% test was met."[123]

AmWest's 1988 appraisal data (furnished to Central Bank) "showed land values almost unchanged from the 1986 appraisal."[124] This was suspicious, as a senior underwriter for the 1986 bonds pointed out to Central Bank in a letter, because property values had been declining in Colorado Springs.[125] Following up on this letter, Central Bank's in-house appraiser reviewed the situation and concluded that "the values listed in the apprais-

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Vanishing Importance of Securities and Antitrust, 53 EMORY L.J. 1571, 1578–84 (2004).

114. *See id.*

115. *See* Sullivan & Thompson, *supra* note 114, at 1580–82.

116. 511 U.S. 164, 191 (1994).

117. *Id.* at 192 (Stephens, J., dissenting) (emphasis in original).

118. *Central Bank*, 511 U.S. at 191 (emphasis in original).

119. *Id.* at 167.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

al appeared optimistic considering the local real estate market," and he suggested "an independent review of the 1988 appraisal."[126]

Crucially, after discussions with AmWest, Central Bank "agreed to delay independent review of the appraisal until the end of the year, six months after the June 1988 closing on the bond issue."[127] This delay proved significant because the Colorado Springs-Stetson Hills Public Building Authority defaulted on the 1988 bonds before the independent review was completed.[128]

Plaintiffs, who had purchased $2.1 million of the 1988 bonds, alleged fraud in the sale of the 1988 bonds on the part of the Colorado Springs-Stetson Hills Public Building Authority and AmWest.[129] Plaintiffs also alleged that defendant Central Bank was "secondarily liable under § 10(b) for its conduct in aiding and abetting" the fraudulent sale of the 1988 bonds, and so found the United States Court of Appeals for the Tenth Circuit. [130] The U.S. Supreme Court granted certiorari "to resolve the continuing confusion over the existence and scope of the § 10(b) aiding and abetting action."[131]

After briefly reviewing the history of § 10(b),[132] and the Court's own precedent regarding the same,[133] the court remarked that "the statutory text controls the definition of conduct covered by § 10(b)."[134] And in interpreting this text, the Court concluded that "the text . . . does not itself reach those who aid and abet a § 10(b) violation."[135] The Court then refused to recognize a private cause of action for aiding and abetting a violation of § 10(b),[136] primarily justifying its refusal on the fact that "Congress did not attach private aiding and abetting liability to any of the express causes of action in the securities Acts"[137] and the fact that recognition of such liability would allow plaintiffs "to circumvent the reliance requirement . . . on 10b-5 recovery mandated by [its] earlier cases."[138] *A fortiori*, the case against Central Bank was dismissed.[139]

Concern and dissatisfaction with the *Central Bank* decision prompted Congressional action within months.[140] By 1995, Congress passed the Pri-

126. *Id.* at 167–68.
127. *Id.* at 168.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 170.
132. *See id.* at 170–72.
133. *See id.* at 172–75.
134. *Id.* at 175.
135. *Id.* at 177.
136. *See id.* at 179–80.
137. *Id.* at 179.
138. *Id.* at 180.
139. *See id.* at 191–92.
140. *See* Gregory E. Van Hoey, *Liability for "Causing" Violations of The Federal Securities Laws:*

vate Securities Litigation Reform Act,[141] which included among its various provisions an amendment to the 1934 Securities Exchange Act clarifying (if not restoring) the ability of the Securities and Exchange Commission to file suit against aiders and abettors of securities fraud.[142] The language used by the PSLRA to accomplish this appears to codify the pre-*Central Bank* standard for determining whether a defendant has aided and abetted a securities law violation:

> (f) PROSECUTION OF PERSONS WHO AID AND ABET VIOLATIONS
>
> For purposes of any action brought by the Commission under paragraph (1) or (3) of section 21(d) [§§21(d)(1) and 21(d)(3) of the 1934 Securities Exchange Act], any person that knowingly provides substantial assistance to another person in violation of a provision of this title, or of any rule or regulation issued under this title, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.[143]

*E. Primary Liability Versus Accomplice Liability Post-*Central Bank

Although restoring the right of the SEC to bring suit against securities-fraud accomplices, the PSLRA was conspicuously silent on the ability of private litigants to bring suit for aiding and abetting violations of §10(b)/Rule 10b-5.[144] Not surprisingly, therefore, the Supreme Court interpreted the PSLRA as leaving undisturbed this aspect of the *Central Bank* decision.[145] Thus, contrary to pre-*Central Bank* days, it has now become critical for private litigants and courts to distinguish between conduct that constitutes merely aiding and abetting, versus conduct that constitutes a primary violation of § 10(b) and Rule 10b-5.[146]

This distinction becomes particularly difficult to discern when the defendant in question is a secondary actor—namely, an accountant, banker, or lawyer involved in a securities fraud spearheaded by his or her client.[147]

Defining the SEC's Next Counterattack in the Battle of Central Bank, 60 WASH. & LEE L. REV. 249, 259 (2003).

141. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.).

142. *See id.*

143. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, 757 (codified as amended at 15 U.S.C. § 78t (2000)).

144. *See* id.

145. *See* Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc., 552 U.S. 148, 128 S. Ct. 761, 768–69 (2008). The Supreme Court has also recognized, in dicta, the continuing authority of states to impose civil aiding and abetting liability. *See id.* at 770–71.

146. *See supra* note 109 and accompanying text.

147. *See* Daniel L. Brockett, *Line Between Primary and Secondary Liability Still Blurred in Securities*

In such situations, the role of the secondary actor is supportive by nature (suggestive of aiding and abetting), if not by definition. The importance of resolving this difficulty is heightened in light of the considerable role that private plaintiffs play in effectuating U.S. securities law.[148]

Fortunately, the difficulty of making the distinction is somewhat assuaged by the fact that *Central Bank* did not, strictly speaking, immunize those who aid and abet a § 10(b)/Rule 10b-5 violation from liability in private litigation, but rather held that liability cannot be predicated upon aiding and abetting alone.[149] In other words, the dichotomy between aiding and abetting on one hand, and a primary violation on the other, is false. Liability in private litigation must simply be grounded upon conduct that constitutes a primary violation of § 10(b)/Rule 10b-5.[150] And sometimes, the standards overlap. That is, in many situations, a secondary actor's wrongful conduct could constitute both aiding and abetting and a primary violation of § 10(b)/Rule 10b-5. In such a case, the secondary actor could be held liable in civil litigation as a primary violator of § 10(b)/Rule 10b-5; the fact that the actor's conduct also amounted to an aiding and abetting violation would simply be irrelevant to the analysis.[151] Thus, the task before us is to properly delineate the scope of primary liability; we need not struggle with the contours of aiding and abetting.

Divergent interpretations of the scope of primary liability under Rule 10b-5 have led, unsurprisingly, to divergent opinions on the importance of *Central Bank*.[152] This is because the degree to which *Central Bank* reduced the liability exposure of secondary actors to securities fraud (that is, the exposure of accountants, lawyers, and investment bankers who collaborated with a corporate client engaged in securities fraud, and who were commonly sued as aiding and abetting codefendants) was not immediately clear. For, as *Central Bank* itself recognized:

Cases, 50 FED. LAW. 29, 30 (2003).

148. *See* Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 310 (1985) ("[W]e repeatedly have emphasized that implied private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'") (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964)).

149. *See* Central Bank of Denver, N.A. v. First Interstate Bank of Denver, 511 U.S. 164, 179–80 (1994).

150. *Id.*

151. *E.g.*, *In re* Parmalat Sec. Litig., 376 F. Supp. 2d 472, 493 (S.D.N.Y. 2005) ("The basic question here thus is not whether the banks' actions made them aiders and abettors—even if they were, it would be immaterial—but rather whether the banks are subject to private civil liability as primary violators of Rule 10b-5.").

152. Richard H. Walker & David M. Levine, *The Limits Of* Central Bank*'s Textualist Approach—Attempts To Overdraw The Bank Prove Unsuccessful*, 26 HOFSTRA L. REV. 1, 2–3 (1997); Elizabeth A. Nowicki, *10(b) or Not 10(b)?: Yanking the Security Blanket for Attorneys in Securities Litigation*, 2004 COLUM. BUS. L. REV. 637, 639 (2004); Prentice, *supra* note 105, at 697–98.

> Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b-5, assuming *all* of the requirements for primary liability under Rule 10b-5 are met.[153]

The Ninth Circuit, for example, recognized little real practical difference in the post-*Central Bank* world of securities litigation.[154] That Circuit was quick to hold secondary actors liable as primary violators for their "substantial participation" in a securities fraud, regardless of whether these actors actually made a material misstatement or omission.[155] Under this standard, a defendant's "substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability" even if (1) the statement was not attributable to the defendant (by signature or otherwise), and (2) the defendant was unaware that the statement would ultimately be disseminated to the public.[156]

In contrast, some commentators foresaw a sea of change as a result of the *Central Bank* decision, with Roberta Karmel pronouncing it "a watershed in federal securities law jurisprudence."[157] Indeed, in the Tenth Circuit (soon joined by the Second and Eleventh Circuits), it became much more difficult for plaintiffs to hold secondary actors liable for their involvement in securities fraud.[158] For these circuits adopted a bright-line test, pursuant to which only those defendants who actually "made" a material misrepresentation or omission could be held liable under § 10(b)/Rule 10b-5.[159] Making a misrepresentation was linked to attribution:

> The critical element separating primary from aiding and abetting violations is the existence of a representation, either by statement or omission, made by the defendant, that is relied upon by the

153. *Central Bank*, 511 U.S. at 191.
154. *See* Ameena Y. Majid, *Diminishing the Expected Impact of* Central Bank of Denver v. First Interstate Bank of Denver*: Secondary Liability Masquerading as Primary Liability Under Section 10(b)*, 28 LOY. U. CHI. L.J. 551, 579–80 (1997).
155. *See id.*
156. Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061 n.5 (9th Cir. 2000) (citing *In re* Software Toolworks Inc. Securities Litigation, 50 F.3d 615, 628–29 (9th Cir. 1994)).
157. Prentice, *supra* note 105, at 695 (quoting Roberta Karmel, *The Implications of* Central Bank, 49 BUS. LAW. 1429, 1430 (1994)).
158. *See* Brockett, *supra* note 147, at 30; Majid, *supra* note 154, at 572–79.
159. *See* Brockett, *supra* note 147, at 30.

> plaintiff. Reliance only on representations made by others cannot itself form the basis of liability.[160]

Under the bright-line test, therefore, a secondary actor's misrepresentation or omission can be actionable as a primary violation only if it was communicated to the plaintiff—or the investing public generally—and if the secondary actor "knew or should have known that his representation would be communicated."[161]

The Second Circuit's version of the bright-line rule was stricter still.[162] In addition to the requirement that a "defendant must know or should know that *his* representation would be communicated to investors"[163] the representation in question must also be "attributed to [the defendant] at the time of [its] dissemination."[164]

Yet another post-*Central Bank* development concerning the exposure of secondary actors to charges of securities fraud is scheme liability.[165] Predicated upon paragraphs (a) and (c) of Rule 10b-5 (rather than the more commonly used paragraph (b), which addresses misstatements and omissions), and also adopted by the Ninth Circuit, scheme liability reaches defendants whose involvement in securities fraud is not pegged to a misstatement or omission that is made by, or linked to them.[166] Instead, scheme liability includes as a primary violator of Rule 10b-5 any defendant who "'committed a manipulative or deceptive act in furtherance of'" a scheme to defraud.[167] As the Ninth Circuit explained:

> We hold that to be liable as a primary violator of § 10(b) for participation in a "scheme to defraud," the defendant must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme. It is not enough that a *transaction* in which a defendant was involved had a deceptive purpose and effect; the defendant's *own conduct* contributing to the transaction or overall scheme must have had a deceptive purpose and effect.[168]

160. Anixter v. Home-Stake Prod. Co., 77 F.3d 1215, 1225 (11th Cir. 1996).
161. *Id.* at 1226.
162. *See* Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998).
163. *Id.* (emphasis in original; internal quotations omitted).
164. *Id.*
165. Taavi Annus, *Scheme Liability Under Section 10(b) of the Securities Exchange Act of 1934*, 72 MO. L. REV. 855, 861–63 (2007).
166. *Id.* at 861.
167. Simpson v. AOL Time Warner Inc., 452 F.3d 1040, 1048 (9th Cir. 2006) (quoting Cooper v. Pickett, 137 F.3d 616, 624 (9th Cir. 1997)).
168. *Id.* at 1048 (emphasis in original); *but see* Daniel A. McLaughlin, *Liability Under Rules 10b-5(a) & (c)*, 31 DEL. J. CORP. L. 631, 658 (2006) ("In short, while 'conduct' or 'schemes' can be part of a section 10(b) violation, such conduct alone does not give rise to a 'deceptive' act within the mean-

F. Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.

The Supreme Court was presented with an opportunity to shed light on the question of secondary actor liability in its 2008 decision, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*[169] In *Stoneridge* the Court explicitly addressed the circuit split that followed the *Central Bank* decision.[170] In doing so, the Court appeared to reject the substantial participation and the scheme liability approaches,[171] and generally confirmed that *Central Bank* was, indeed, a watershed event in securities law jurisprudence.[172] The Court did not, however, adopt the bright-line test as typically formulated by the Second, Tenth, and Eleventh Circuits.[173] In fact, the Court provided very little guidance or clarification for those seeking to distinguish primary violations from mere aiding and abetting.

The clear primary violator of § 10(b)/Rule 10b-5 in *Stoneridge* was Charter Communications, Inc., a cable television operator.[174] Charter had "engaged in a variety of fraudulent practices so its quarterly reports would meet Wall Street expectations for cable subscriber growth and operating cash flow."[175] These included:

> . . . misclassification of its customer base; delayed reporting of terminated customers; improper capitalization of costs that should have been shown as expenses; and manipulation of the company's billing cutoff dates to inflate reported revenues.[176]

Despite all these fraudulent undertakings, Charter would still "miss projected operating cash flow numbers by $15 to $20 million" in 2000 unless something else was done.[177] Here enter the defendants who are the focus of the *Stoneridge* decision: Scientific-Atlanta and Motorola.[178]

Scientific-Atlanta and Motorola supplied Charter with its digital cable boxes.[179] Beginning in 2000, Charter persuaded Scientific-Atlanta and Mo-

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ing of section 10(b) unless the defendant has made a misrepresentation or violated a duty to disclose."). The Court in *Stoneridge* appears to have rejected Mr. McLaughlin's interpretation of § 10(b). *See* Stoneridge Inv. Partners, LLC v. Scientific Atlanta, Inc., 128 S. Ct. 761, 769 (2008).

169. For a summary of the background of the *Stoneridge* case, along with its oral argument before the Supreme Court, see JOHN P. MORIARTY & CURTLAN R. MCNEILY, REGULATION OF FINANCIAL PLANNERS §5:2 (2008).

170. *See Stoneridge*, 128 S. Ct. at 767–68.

171. *See id.* at 770.

172. *See supra* text accompanying note 157.

173. *See Stoneridge*, 128 S. Ct. at 769; s*ee also supra* text accompanying note 159.

174. *See Stoneridge*, 128 S. Ct. at 766.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

torola to revise their pre-existing agreements with Charter.[180] Pursuant to the revised agreements, Charter would pay an additional $20 for each cable box it ordered from Scientific-Atlanta and Motorola, and Scientific-Atlanta and Motorola would purchase an equal amount of additional advertising from Charter.[181] Although the transaction apparently "had no economic substance," it nevertheless enabled "Charter to fool its auditor into approving a financial statement showing it met projected revenue and operating cash flow numbers" because Charter improperly capitalized its purchases of the cable boxes while recording the advertising fees as current, additional revenue.[182] Charter's deception of its auditor was further enabled by Scientific-Atlanta and Motorola's acquiescence to the backdating of the revised cable box sale agreements, which helped obscure the link between the increased price paid for the cable boxes and the additional advertising purchased.[183]

Charter's cable-box / advertising machinations enabled it to report on its financial statements revenue and operating cash flow numbers inflated by approximately $17 million.[184] These inflated numbers passed muster under Charter's audit, and were subsequently filed with the Securities and Exchange Commission and reported to the public.[185]

The issue before the Court in *Stoneridge* was whether Scientific-Atlanta and Motorola were properly named defendants in the action.[186] As discussed, after *Central Bank*, the answer to that question turns on whether plaintiffs allege facts that would constitute a primary violation of § 10(b)/Rule 10b-5 on the part of Scientific-Atlanta, Motorola, or both.[187] The Court granted certiorari to resolve the circuit split that had developed over the contours of primary liability in the wake of *Central Bank*.[188]

The Court began its analysis by recalling that "Rule 10b-5 encompasses only conduct already prohibited by § 10(b)."[189] It then proceeded to lay out the elements of "a typical § 10(b) private action."[190]

Eschewing the bright-line test as ordinarily formulated, which is predicated upon the making of a misstatement or omission, the Court acknowledged that "[c]onduct itself can be deceptive."[191] Observing that

180. *Id.*
181. *Id.* at 766–67.
182. *Id.* at 766.
183. *Id.* at 767. Further, Scientific-Atlanta "sent documents to Charter stating—falsely—that it had increased production costs." *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *See supra* text accompanying notes 135 and 153.
188. *See Stoneridge*, 128 S. Ct. at 767–68; s*ee also supra* text accompanying notes 154–159.
189. *See Stoneridge*, 128 S. Ct. at 768.
190. *Id.*
191. *Id.* at 769.

Scientific-Atlanta and Motorola conceded the deceptiveness of their conduct, the Court proceeded to hold that the key question was whether "any deceptive statement or act" on their part "[had] the requisite proximate relation to the investors' harm."[192]

"[R]equisite proximate relation," the Court explained, goes to the reliance element of a § 10(b) action, and demands existence of a "requisite causal connection between a defendant's misrepresentation [or conduct] and a plaintiff's injury."[193] Whether this connection exists depends upon whether defendant's acts "were immediate or remote to the injury."[194]

As there was no allegation that plaintiffs somehow directly relied upon anything Scientific-Atlanta or Motorola did or said, plaintiffs' case was dependent upon invoking one of two recognized presumptions of reliance.[195] The first is properly invoked when "there is an omission of a material fact by one with a duty to disclose."[196] The second stems from the "fraud-on-the-market doctrine," under which "reliance is presumed when the statements [or actions] at issue become public," and thereby impact the price of the security in an efficiently trading market.[197] Under this doctrine, it is "assumed that an investor who buys or sells stock at the market price relies upon the statement [or action]."[198]

The Court concluded that neither presumption of reliance was applicable in *Stoneridge*:[199]

> [Defendants] had no duty to disclose; and their deceptive acts were not communicated to the public. No member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times. Petitioner, as a result, cannot show reliance upon any of respondents' actions except in an indirect chain that we find too remote for liability.[200]

One key ambiguity in the *Stoneridge* opinion is the standard for determining whether an act or statement has "become public."[201] On the one hand, the conclusion quoted above begins by suggesting a clear-cut metric: whether the deceptive acts were "communicated to the public" and whether any member of the investing public "had knowledge, either actual or

192. *Id.*
193. *Id.*
194. *Id.* at 770.
195. *Id.* at 769.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*

presumed, of [such] deceptive acts."[202] Not surprisingly, this is how most courts seem to be interpreting *Stoneridge*.[203] But perhaps this language does not set forth a rule, but rather merely represents an observation; the Court is simply laying out the evidence that justified its finding that defendants' actions had not become public in this particular case. Support for interpreting this language as mere observation comes from the final sentence of the excerpt quoted above, in which the Court remarks that plaintiff "cannot show reliance upon any of respondents' actions except in an indirect chain that we find too remote for liability."[204] This seems to hold out the possibility that something short of direct communication to the public could indeed suffice, but that in the instant case the indirect chain of communication just happened to be too remote.[205] At least one court, and one commentator, appear open to this less restrictive interpretation of *Stoneridge*.[206] As Bromberg and Lowenfels explained:

> A second time the *Stoneridge* majority wrote that respondents acts' were "too remote" for liability. . . . The reason was *something more than the invisibility of those acts to the investor plaintiffs* (i.e., the absence of statements) when the investors were buying Charter stock. The added factor was the intervention of one or two communicators between the secondary parties and the investors:
>
>> In all events we conclude respondents' deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirements of reliance. It was Charter, not respondents, that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did.
>>
>> Stoneridge, 128 S.Ct. 770. Cf, id. 770 ("As stated above, reliance is tied to causation, leading to the inquiry whether respondents' acts were immediate or remote to the injury.").[207]

202. *Id.*
203. *See, e.g.*, *In re* DVI Inc. Sec. Litig., 249 F.R.D. 196, 217–18 (E.D. Pa. 2008); *In re* Parmalat Sec. Litig., 570 F. Supp. 2d 521, 525–526 (S.D.N.Y. 2008); *In re* Enron Corp. Sec. Litig., 586 F. Supp. 2d 732, 794–95 (S.D. Tex. 2008); *In re* Nature's Sunshine Prods. Sec. Litig., No. 2:06-CV-267, 2008 WL 4442150, at *3–4 (D. Utah Sept. 23, 2008).
204. *Stoneridge*, 128 S. Ct. at 769.
205. *Id.*
206. *See In re* Bristol Myers Squibb Co. Sec. Litig., 586 F. Supp. 2d 148, 169–70 (S.D.N.Y. 2008); 3 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG & LOWENFELS ON SECURITIES FRAUD & COMMODITIES FRAUD § 6:54.251 (2d ed. 2009).
207. BROMBERG & LOWENFELS, *supra* note 206, § 6:54.251 (emphasis added).

Admittedly, situations where a defendant's cooperative misconduct would be both *undisclosed* and *sufficiently proximate* to an underlying securities fraud do not leap readily into mind. Nevertheless, the point that *Stoneridge* leaves open the possibility of liability in such contexts remains significant, as the following example will hopefully demonstrate.

Consider a beleaguered company president who wishes to tout the success of his latest corporate initiative. He prepares a press release designed to trumpet the achievement, which he expects will increase the price of his company's stock and, consequently, help him retain his position as president for at least another few months (just the time he needs to "turn things around"). Imagine that, before its issuance to the media, the press release is held up. The reason: a fellow officer questions its veracity, fearing that the release contains substantial exaggerations. To allay his colleague's fears, the president agrees to run the release by the company's outside accounting firm first, for a quick and dirty review. The accountant who reviews the press release readily discovers that it is indeed misleadingly optimistic. Nevertheless, since the accountant is a long-time friend of the president, she agrees to unofficially (and off the record) give her green light to the press release in a private phone call to the skeptical officer. In light of the call, the officer's concerns are put to rest, he drops his objections, and the press release goes out. The release has its desired short-term effect: share prices climb and the president keeps his job. Several months later the truth is revealed, share prices fall back down, and investors sue. Among others, the accountant who gave her green light to the release is named as a defendant.

The accountant certainly committed a deceptive act: she lied about the accuracy of the press release. However, her deception was not communicated to the public or to any investors—it was relayed only to one other individual, a corporate insider, on a private phone call. Whether the accountant could be held liable as a primary violator of Rule 10b-5 depends on our interpretation of *Stoneridge*. If, as I suggest, *Stoneridge* does not require that a deceptive act or statement be disclosed to the investing public (or to the plaintiff(s)) in order for primary liability to attach,[208] the accountant can and should be held liable in this lawsuit. For here we have an example of a deception that was *undisclosed yet proximate* to the securities fraud.[209] On the other hand, if *Stoneridge* is read as limiting private liabili-

208. *See supra* text accompanying notes 201–207.

209. Some may question whether a deceptive statement made to one party (in this case, the corporate insider) should serve to satisfy the elements of a Rule 10b-5 action brought by another party (the investor–plaintiffs). As awkward as this may seem, it is consistent with the approach taken by securities law in the context of insider trading: pursuant to the misappropriation theory of insider trading, a deceptive breach of trust against one party (such as a corporate insider) can serve to satisfy the elements of a Rule 10b-5 insider trading claim brought by another party. *See* STEPHEN M. BAINBRIDGE, SECURITIES LAW: INSIDER TRADING 94–111 (1999).

ty to those actors whose deception is disclosed, then, of course, the accountant could only be found liable as an aider and abettor, and thus not properly named a defendant in a private right of action under Rule 10b-5.

Particularly important to this determination is *Stoneridge's* apparent discussion of scheme liability.[210] Addressing plaintiffs' argument that "in an efficient market investors rely not only upon the public statements relating to a security but also upon the transactions those statements reflect" the Court responded that "respondents' deceptive acts, which were not disclosed to the investing public, are too remote to satisfy the requirement of reliance."[211] Is this a blanket rule, regarding all acts that are not disclosed to the investing public (thereby spelling the death knell of scheme liability), or rather a conclusion regarding the particular deceptive acts of Scientific-Atlanta and Motorola within the context of *Stoneridge*? Here, again the Court reiterates that "reliance is tied to causation, leading to the inquiry whether respondents' acts were immediate or remote to the injury,"[212] and here again it is unclear whether undisclosed acts or statements are per se too remote for reliance to be found. By adding the further observation that "nothing [Scientific-Atlanta and Motorola] did made it necessary or inevitable for Charter to record the transactions as it did,"[213] the Court appears to suggest that disclosure of defendants' deceptive acts is not a prerequisite to defendants' liability, but that other factors must nevertheless also be considered before concluding that a defendant's conduct does not run afoul of § 10(b). For this reason, courts and commentators are divided over whether scheme liability survives *Stoneridge*.[214]

The Court did, however, apparently hold that deceptive but undisclosed transactions that occur within "the realm of ordinary business operations" are presumptively too remote a basis upon which a Rule 10b-5 private cause of action could be predicated.[215] "Were this concept of reliance to be adopted," the Court explained, "the implied cause of action

210. *Stoneridge*, 128 S. Ct. at 770. Although, in granting certiorari, the Court specifically referred to sections (a) and (c) of Rule 10b-5, *see* Petition for a Writ of Certiorari, *Stoneridge*, 128 S. Ct. 761 (No. 06-43), 2006 WL 1909677, the Court failed to mention these sections, or to discuss their independent import, in its ultimate decision, *see Stoneridge*, 128 S. Ct. 761.

211. *Stoneridge*, 128 S. Ct. at 770.

212. *Id.*

213. *Id.*

214. *Compare* Pugh v. Tribune Co., 521 F.3d 686, 697 (7th Cir. 2008) (rejecting availability of scheme liability post-*Stoneridge*) *and* A.C. Pritchard, Stoneridge Inv. Partners v. Scientific Atlanta: *The Political Economy of Securities Class Action Reform*, 2008 CATO SUP. CT. REV. 217, 217 (2008) (same), *with* SEC v. Simpson Capital Mgmt., Inc., 586 F. Supp. 2d 196, 207–08 (S.D.N.Y. 2008) (recognizing continued viability of scheme liability post-*Stoneridge*), 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 13:21 (2009) (same); *In re* Enron Corp. Sec. Litig., 586 F. Supp. 2d 732, 793 (S.D. Tex. 2008) (same); *In re* Able Labs. Sec. Litig., No. 05-2681, 2008 WL 1967509 at *21–22 (D.N.J. Mar. 24, 2008) (same); Stuart M. Grant & James J. Sabella, Stoneridge*: Did It Close the Door to "Scheme Liability"?*, PLI/CORP. 429, 431 (2008) ("reports of the death of scheme liability may have been greatly exaggerated").

215. *Stoneridge*, 128 S. Ct. at 770.

would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule."[216] The Court observed that extending liability "to the practices described here" would impermissibly expand the § 10(b) private right of action "beyond the securities markets—the realm of financing business—to purchase and supply contracts—the realm of ordinary business operations."[217] The Court proceeded to complain that plaintiffs' "view of primary liability makes any aider and abettor liable under § 10(b) if he or she committed a deceptive act in the process of providing assistance,"[218] and endorsed restraint in the reach of the judicially constructed § 10(b) private right of action,[219] observing that secondary actors, such as Scientific-Atlanta and Motorola, "are subject to criminal penalties . . . and civil enforcement by the SEC" in any event.[220]

Some commentators have criticized *Stoneridge*'s refusal to apply the fraud-on-the-market doctrine to find reliance in that case.[221] As Robert Prentice notes, "[u]ltimately, the required reliance is reliance upon the misleading statements (or actions), not reliance upon the defendant's identity."[222] Thus, the fact that plaintiffs were unaware of Charter Communication's and Motorola's behind-the-scenes involvement in the fraud should not bar recovery from these defendants; both engaged in conduct that gave rise to the misleading financial statements that were ultimately relied upon.[223]

I highlight this criticism not to condemn the merits of the *Stoneridge* decision, but rather for a more modest purpose. Namely, this criticism

216. *Id.*

217. *Id.* at 770.

218. *Id.* at 771.

219. *Id.*

220. *Id.* at 773.

221. *E.g.*, Robert A. Prentice, Stoneridge*, Securities Fraud Litigation, and the Supreme Court*, 45 AM. BUS. L.J. 611, 653 (2008).

222. *Id.* at 656; *see also id.* at 654 ("There is little sense . . . in limiting fraud liability to those whose involvement [in fraud] is public and direct. The vast bulk of securities law makes clear that behind the scenes involvement in fraudulent *disclosure* (or actionable nondisclosure), as opposed to mere participation in the fraud, by no means absolves the participant from culpability.") (quoting Donald C. Langevoort, *Words from on High about Rule 10b-5:* Chiarella's *History*, Central Bank's *Future*, 20 DEL. J. CORP. L. 865, 889 (1995)).

223. *See* Prentice, *supra* note 221, at 653–66; *see also* Nelson Waneka, Stoneridge Investment Partners v. Scientific-Atlanta*: Rethinking the Fraud-on-the-Market Presumption and the Policy Considerations Permeating the Court's Decision*, 86 DEN. U. L. REV. 303, 318 (2008) (asserting that "[t]he economic principles permeating the fraud-on-the-market theory are equally applicable to information contained in a public misrepresentation as to information contained in a nonpublic deceptive act that is later disseminated to the public," and suggesting that "[w]hen the *Stoneridge* Court . . . acknowledg[ed] that a deceptive act could include conduct other than a misrepresentation or omission, it should have also considered how this expansion would affect the fraud-on-the-market presumption"). It should be noted that although originally limited to "suits involving misrepresentations made by issuers," the fraud-on-the-market doctrine has been more recently interpreted as applicable to "misinformation was transmitted by an issuer, an analyst, or anyone else." 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 5:26 (5th ed. 2008) (quoting *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 481 (2d Cir. 2008)).

serves to suggest the most reasonable way of interpreting *Stoneridge*: as a statement of reliance limited largely to its facts, and not as a blanket rule rejecting assertions of fraud-on-the-market in every situation where defendants' involvement in the fraud was nonpublic. Whether such involvement can be deemed to give rise to reliance should depend primarily on that which the Court repeatedly emphasized it should depend on: its proximity to the fraud.[224]

Thus, as of this date, it is clearer than ever that there is no private right of action against someone who solely aids and abets a § 10(b) violation. Unfortunately, the critical distinction between conduct that constitutes mere aiding and abetting, and conduct that constitutes a primary violation by a secondary actor, still remains quite murky. Post-*Stoneridge*, at the core of this distinction is whether a defendant's actions "were immediate or remote to the injury," because this informs whether a proximate relation exists between the defendant's conduct and investors' harm (which, in turn, supplies the causal connection needed to satisfy the reliance element of a § 10(b) cause of action).[225]

II. Cooperation With Evil

Stoneridge has provided little guidance to courts and counsel struggling with the distinction between primary and merely secondary liability under § 10(b).[226] In fact, by rejecting the bright-line rule articulated by some circuits, *Stoneridge* has arguably made this distinction more challenging.[227]

But sources of additional guidance are not completely lacking.[228] One such source is "cooperation with evil" analysis. Developed painstakingly over the last few hundred years, cooperation-with-evil analysis can shed much needed light upon the question of where the limits of primary liability should lie.[229]

224. *See Stoneridge*, 128 S. Ct. at 769.
225. *Id.* at 769–70.
226. *See supra* Part I.F.
227. *See supra* text accompanying note 191.
228. An obvious source of guidance here would be tort law, which has long concerned itself with the related question of proximate cause. *See generally* W. Page Keeton et al., Prosser and Keeton on Torts 263–321 (5th ed. 1984). This is certainly a fertile field from which to gather ideas. However, as "[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion," than the tort concept of proximate cause, Keeton, *supra* at 263, perhaps another guide might be useful as well.
229. Because cooperation-with-evil analysis may not be familiar to a law review audience, this Article shall be particularly thorough in expounding the analysis, and shall not limit itself to describing only those facets of the analysis strictly applicable to the instant inquiry concerning securities fraud liability.

A. Background and Applicability of Cooperation-With-Evil Analysis

Cooperation-with-evil analysis (otherwise referred to as "the principles of cooperation"), is a development of moral philosophy.[230] Moral philosophy is that philosophical science which examines:

> everything relating to man's free actions and the last, or supreme, end to be attained through them, . . . ; in other words, it includes the supernatural end, the rule, or norm, of the moral order, human actions as such, their harmony or disharmony with the laws of the moral order, their consequences, the Divine aids for their right performance. [231]

As such, moral philosophy has been, and remains, concerned with the weighty issues of sin, salvation, and damnation.[232] But this concern is not theoretical in nature; rather, moral philosophy "is essentially a practical science":[233]

> Its instructions must extend to moral character, moral behaviour, the completion and issue of moral aspirations, so that it can offer a definite norm for the complex situations of human life. For this purpose, it must examine the individual cases which arise and determine the limits and the gravity of the obligation in each. . . . As jurisprudence must enable the future judge and lawyer to administer justice in individual cases, so must moral theology enable the spiritual director or confessor to decide matters of conscience in varied cases of every-day life . . . it must enable the spiritual guide to distinguish correctly and to advise others as to what is sin and what is not, what is counselled and what not, what is good and what is better . . . .[234]

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230. Russell Smith, *Formal and Material Cooperation*, ETHICS & MEDICS, June 1995, *available at* www.consciencelaws.org/Examining-Conscience-Ethical/Ethical02.html. Although originally categorized as a branch of moral theology, the principles of cooperation are more appropriately considered a subject of moral philosophy, hence that is how I shall treat them in this article. Further, although the principles of cooperation have been developed within the context of Christian moral philosophy, the concept that one should avoid cooperating with evil is, of course, not a uniquely Christian perspective. *E.g.*, HARIDAS T. MUZUMDAR, GANDHI VERSUS THE EMPIRE 31 (Universal Publishing Company 1932) (in a speech in Ahmadabad, Gandhi stated: "In my humble opinion, non-cooperation with evil is as much a duty as is cooperation with good.").

231. 14 THE CATHOLIC ENCYCLOPEDIA, *Theology* 601 (1913). For a short history of the development of moral theology and moral philosophy in general, *see id.* at 604–11.

232. *Id.* at 601–02.

233. *Id.* at 603.

234. *Id.* at 603.

The tools of cooperation analysis, therefore, are well suited to our present purposes—they were designed with the aim of providing concrete, practical advice on how to appropriately conduct one's self. And given the ultimate object of moral philosophy, the incentives to construct an effective system of distinguishing culpable conduct from nonculpable conduct were naturally quite high.[235]

Admittedly, the principles of cooperation have been applied to conduct that, in many ways, has nothing to do with securities fraud. On one level, cooperation analysis ordinarily addresses behavior that many today do not consider wrongful or immoral—let alone illegal. Moreover, the principles of cooperation are not concerned with differentiating between a "primary violator" of a moral precept versus the aider and abettor of a violation, but, rather, are concerned with moral culpability generally. Neither of these points extinguishes the usefulness of the analysis as proposed.

With regard to the first point, the fact that moral philosophy condemns as sinful much conduct that many individuals today consider unproblematic is irrelevant. This is because the facet of moral philosophy that we shall be employing (namely, the principles of cooperation), is methodological rather than substantive. Principles of cooperation do not identify underlying wrongful acts per se but, rather, assist one in confronting and navigating such acts once they have already been identified. Thus, in the analysis which follows, I shall not be importing from moral philosophy specific norms of behavior but, rather, shall apply the principles of cooperation to conduct that has already been identified as wrongful by our society (namely, securities fraud).

The second point poses a more serious challenge to this article's undertaking. For if our goal is to marshal assistance in delineating the contours of primary liability, how can employment of a methodology that fails to distinguish between accomplice liability and direct liability be helpful? Moreover, principles of cooperation deal largely with accomplice liability, and accomplice liability in private rights of action is apparently "off the table" post-*Stoneridge*.

Here, it is important to recall that the subset of conduct that constitutes accomplice liability overlaps, in significant part, with the subset of conduct that constitutes primary liability.[236] So, the mere fact that the principles of cooperation largely concern the behavior of accomplices does not mean that these principles fail to also reach behavior that would give rise to primary liability as well.

Additionally, and more importantly, this article is proceeding from the perspective that liability should generally track culpability.[237] Although

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235. *See supra* text accompanying note 4.
236. *See supra* text accompanying notes 149–150.
237. *Cf.* Mitchell N. Berman, *On the Moral Structure of White Collar Crime*, 5 OHIO ST. J. CRIM. L.

Central Bank and *Stoneridge* make clear that, within the context of private actions brought under § 10(b), certain clearly culpable actors cannot be held liable, the utilization of a culpability analysis within that universe of actors who can still be held liable remains helpful. And the principles of cooperation provide us with a means of engaging in such analysis.

B. Principles of Cooperation

As a threshold matter, it should be noted that, in all cases subject to cooperation analysis, at issue is the conduct of (at least) two distinct parties.[238] The first party, whom we shall call the "primary wrongdoer," is the person or entity engaged in a certain wrongdoing.[239] The inappropriateness of the primary wrongdoer's conduct is not in question; it is taken as given. Instead, it is the second party, whom we shall call the "cooperator," whose conduct is under scrutiny.[240] Further, the cooperator is "someone involved in another's wrongdoing by an act more or less distinct from" the wrongdoer's acts or actions themselves.[241]

And given our "interdependent" world, rife with wrongdoing, much of what any of us does inevitably helps others further their wrongdoing in some way.[242] As philosopher Germain Grisez has noted:

> Some unreflective and/or unsophisticated people imagine problems [involving] cooperation can (and perhaps should) be avoided by altogether avoiding cooperation. That, however, is virtually impossible and sometimes inconsistent with doing one's duty. Grocers materially cooperate with gluttonous eating, letter carriers with the use of pornography, and so on; and in many cases such people need their jobs to support themselves and their families.[243]

The challenge confronted by cooperation analysis is to ascertain whether the cooperator's cooperation—however tenuous to the primary wrongdoer's misconduct—is morally culpable, or, instead, morally appropriate.[244]

The first acceptable, systematic articulation of the principles of cooperation has been attributed to St. Alphonsus Ligori,[245] who set them forth

301, 301 (2007) (book review) ("[T]he contours of white collar criminal offenses . . . ordinarily do, and ought to, closely track the judgments of common-sense morality.").

238. 1 KARL H. PESCHKE, CHRISTIAN ETHICS 320 (1986).
239. *See id.*
240. *See id.*
241. 3 GERMAIN GRISEZ, THE WAY OF THE LORD JESUS 872 (1997).
242. Hartnett, *supra* note 11, at 230.
243. *Id.* (quoting 3 GRISEZ, *supra* note 241, at 871).
244. *See* 1 GRISEZ, *supra* note 241, at 301.
245. *See* Smith, *supra* note 230.

in his 1753 work *Theologia Moralis*.[246] In *Theologia Moralis*, Ligori established certain basic divisions of conduct that remain key components of cooperation analysis to this day;[247] additional divisions and factors have rounded out Ligori's offerings over the past two hundred years.[248]

The primary division in cooperation analysis is between "formal cooperation" versus "material cooperation."[249] Formal cooperation is present when the cooperator shares the same wrongful intention of the primary wrongdoer.[250] Thus, not only do the cooperator's actions somehow further the primary wrongdoer's misconduct to some greater or lesser degree, but, additionally, the cooperator intends, by his or her actions, to so further the misconduct.[251] Not surprisingly, "[f]ormal cooperation is always morally wrong and cannot be justified under any circumstances."[252]

In contrast, material cooperation is present when the cooperator, *without* sharing the same wrongful intention of the primary wrongdoer, nevertheless commits some otherwise innocent act that foreseeably furthers the wrongdoing in question.[253] The critical difference, therefore, between

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246. 1 THE CATHOLIC ENCYCLOPEDIA *St. Alphonsus Liguori* 334–41 (1913); *see also* ALPHONSI DE LIGORIO, THEOLOGIA MORALIS 1 (P. Mich. Heilig, ed. 1852).

247. *See* LIGORIO, *supra* note 246.

248. *See* Vatican Statement, *Moral Reflections on Vaccines Prepared From Cells Derived From Aborted Human Foetuses* (June 9, 2005) *available at* www.immunize.org/concerns/vaticandocument.htm.

249. *See* 1 PESCHKE, *supra* note 238, at 320. It is important to point out here the very different—arguably opposite—meanings attached to the terms "formal" and "material" within moral philosophy, versus the use of those terms within the legal profession and academy. Hartnett, *supra* note 11, at 232. As shall be explained, in moral philosophy formal cooperation is quite serious and never countenanced. *See infra* text accompanying note 252. Material cooperation, however, is not necessarily that serious, and can, under certain circumstances, be deemed morally licit. *See infra* text accompanying note 255. This is at odds with the ordinary usage of the terms in the law, where "'formal' . . . frequently suggests a mere technicality," and where "'material,' by contrast, frequently suggests significant or meaningful." *See* Hartnett, *supra* note 11, at 232.

250. *See* 1 PESCHKE, *supra* note 238, at 320.

251. AUSTIN FAGOTHEY, RIGHT AND REASON 338 (2d ed. 1959).

252. *Id.* It should be noted that some philosophers "distinguish between explicit and implicit formal cooperation." 1 PESCHKE, *supra* note 238, at 321. "Explicit formal cooperation" is cooperation along the lines described: cooperation where the primary wrongdoer's wrongdoing "[was] directly intended" by the cooperator. *Id.* "Implicit formal cooperation" occurs where, despite lacking the primary wrongdoer's wrongful intent, the cooperator's assistance "is of such a nature that it necessarily joins in the sinful deed of the other." *Id.* In other words, explicit formal cooperation is any cooperation accompanied by a sharing of the primary wrongdoer's wrongful intent; implicit formal cooperation is "knowing" (rather than truly "intentional") assistance that is deeply intertwined with the primary wrongdoer's wrongful act. The better view, in my opinion, is held by philosophers who do not distinguish between explicit and implicit formal cooperation, but, rather, recognize the latter as "immediate material cooperation." *Id.*; *see also infra* text accompanying notes 259–262. I find this view superior because, whereas formal cooperation is deemed always impermissible, there may be times, albeit rare, when conduct characterized as "implicit formal cooperation" could, indeed, be justifiable (such as when, "under threat of death one . . . help[s] a robber to break into a house or shop"). 1 PESCHKE, *supra* note 238, at 321.

253. *See* FAGOTHEY, *supra* note 251; 3 GRISEZ, *supra* note 241, at 873. Conceptually, one could imagine an act in furtherance of the primary wrongdoer's misconduct that is itself morally illicit—such as, killing a witness who was about to telephone the police in order to assist someone else (the primary wrongdoer) in stealing a car. We could further imagine, in this example, that the cooperator did not share in the same wrongful intention of the primary wrongdoer—that is, the cooperator did not wish to

formal versus moral cooperation is not the *actus reus*, but rather, the *mens rea*: what distinguishes the two is not the conduct of the cooperator but, rather, the cooperator's intent. Formal cooperation is marked by the specific intent to further a particular wrongdoing; material cooperation is marked by the absence of such specific intent but, instead, accompanied by simple knowledge of the wrongdoing (and of the actor's foreseeable furtherance of such wrongdoing by his or her conduct). As previously indicated, unintentional cooperation with wrongdoing is difficult for even the most scrupulous to avoid, given our interdependent world where none of us is an island unto himself or herself.[254] Also not surprisingly, therefore, material cooperation is not always morally wrong, but can be morally permissible depending upon the circumstances.[255] In Ligori's own words:

> That [cooperation] is formal which concurs in the bad will of the other, and it cannot be without sin; that [cooperation] is material which concurs only in the bad action of the other, apart from the cooperator's intention. But the latter [material cooperation] is licit when the action is good or indifferent in itself; and when one has a reason for doing it that is both just and proportioned to the gravity of the other's sin and to the closeness of the assistance which is [thereby] given to the carrying out of that sin.[256]

Over time, the circumstances weighing upon the licitness or illicitness of cooperation have been expanded upon, such that today cooperation can be analyzed along three binary dimensions: whether the cooperation was (a) "immediate" versus "mediate"; (b) "proximate" versus "remote"; and (c) "necessary" versus "free."[257] Some moral philosophers also apply a fourth dimension: "active" versus "passive" cooperation.[258]

Immediate (or direct) material cooperation is conduct that, by its very nature, apart from the cooperator's subjective intent, "directly tends to produce the evil effect" intended by the primary wrongdoer.[259] This is to be distinguished from mediate (or indirect) cooperation that merely "ful-

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see the car stolen. The cooperator could have acted, instead, out of a love or friendship—out of a desire simply to protect the primary wrongdoer from potential apprehension by the police. Moral philosophers have not dwelled on such cases, because the commission of an intentionally wrongful act (i.e., the killing of an innocent person) is itself immoral and thereby circumscribed by traditional moral philosophy, *see* FAGOTHEY, *supra* note 251, at 151, thereby rendering cooperation in this way morally impermissible, *see* 3 GRISEZ, *supra* note 241, at 872, 876.

254. *See supra* text accompanying notes 242–243.

255. *See* FAGOTHEY, *supra* note 251, at 338.

256. 3 GRISEZ, *supra* note 241, at 876 (quoting and translating ALPHONSUS LIGUORI, THEOLOGIA MORALIS, ed. L. Gaude (Ex Typographia Vaticana, 1905–12), 1:357 (lib. II § 63)).

257. *See* Smith, *supra* note 230.

258. Vatican Statement, *supra* note 248.

259. HERIBERT JONE, MORAL THEOLOGY 87 (1993).

fill[s] the conditions" that serve to enable the primary wrongdoer's misconduct.[260] Although the cooperator does not share the primary wrongdoer's wrongful intent in cases of immediate cooperation, the nature of the cooperator's conduct is such that he or she can fairly be deemed to be acting with knowledge of the primary wrongdoer's intent.[261] Given, therefore, that immediate material cooperation constitutes an act directly and knowingly intertwined with the primary wrongdoer's misconduct, such cooperation is almost invariably condemned as impermissible.[262] Mediate material cooperation, however, remains potentially justifiable.[263] The justifiability of such cooperation turns, in large part, on how the remaining factors of analysis play out.[264]

Proximate versus remote cooperation in moral philosophy concerns, as it does in law, the distance—"be it in terms of *temporal* space or *material* connection"—between the act of cooperation and the wrongdoing in question.[265] Although all immediate cooperation would clearly be proximate to the wrongdoing, not all mediate cooperation would be necessarily remote.[266] "A person who deposits his money in a bank is . . . remotely cooperating with a person who uses a loan from that bank to publish pornographic magazines, but the bank official who grants the loan for that specific purpose is cooperating . . . *proximately*."[267] Naturally, the more proximate the cooperation is to the wrongdoing, the more likely the cooperation will be found impermissible.[268]

Necessary cooperation is that without which the primary wrongdoer's misconduct could not occur, or without which the misconduct would be significantly more difficult to occur; free or contingent cooperation exists when the wrongdoing would occur regardless of the cooperator's assistance.[269] "If forgoing [cooperation] certainly or probably would prevent the wrongdoing or impede it and greatly mitigate its bad effects, there is a stronger reason to forgo the [cooperation] than if forgoing . . . would have little or no effect on the wrongdoing."[270] Thus, if because of a pre-existing

260. Vatican Statement, *supra* note 248.
261. *See* FAGOTHEY, *supra* note 252.
262. *See* JONE, *supra* note 259, at 87. The only exception recognized is when the wrongdoing concerns injury of another's property, in which case immediate material cooperation can be justified if the cooperator "intends and is able to make reparation, or if the injustice will be committed also without his cooperation, or if the damage done is small," or if the cooperator would "suffer a very grave harm himself, e.g., loss of life," by failing to cooperate. *Id.* at 237.
263. *See id.*
264. *See supra* text accompanying notes 257–258.
265. Vatican Statement, *supra* note 248.
266. Editorial Staff of the Seido Foundation, *Morality of Cooperation in Evil*, July 1985, *available at* www.ewtn.com/library/theology/cooprtn.htm.
267. *Id.* (emphasis altered from original).
268. *See id.*
269. Smith, *supra* note 245.
270. 3 GRISEZ, *supra* note 241, at 882–83.

relationship, only one accounting firm is in a position to enable a company to pull off a time-sensitive financial fraud, the firm's cooperation would be deemed necessary. To the extent that any accounting firm could enable the company to pull off its fraud, the cooperation in question would be free.

Active cooperation occurs when the cooperator actually commits an act that serves to assist the primary wrongdoer; passive cooperation refers to a cooperator's failure to denounce or impede the primary wrongdoer's misconduct. [271] Under the principles of cooperation, passive cooperation is only problematic in situations when the cooperator has a duty to act to prevent the wrongdoing, and even then it is considered less problematic than active cooperation.[272]

After establishing whether the cooperation in question is proximate versus remote, necessary versus free, and active versus passive (and well after establishing whether the cooperation is formal or material, and if material, whether immediate or mediate), the moral theologian proceeds to examine the gravity of the primary wrongdoing itself, and thereafter, the purported justifications for the cooperation.[273] The question asked is: "'Is there a proportionate reason for cooperating with th[e] evil action?'"[274] At this point, the analysis is essentially utilitarian: is the good to be obtained by cooperation, or the harm to be avoided, sufficient to justify cooperation with the particular wrongdoing in question?[275] Thus, the "cause or motive that justifies a material cooperation in evil must be all the more important" as the evil is more serious.[276] As Germain Grisez explained: "To be proportionate, the reason to do the act must be sufficiently strong that doing it is reasonable despite the more or less strong reasons to forgo it."[277]

However, the utilitarian analysis is not a straight and simple one, but rather affected by the factors previously discussed.[278] These factors serve as weights on the proportionality scale, such that a greater or lesser showing of good to be obtained, or harm to be avoided, will be required to justify the cooperation.[279] Specifically, the more proximate the cooperation, the more necessary the cooperation, and the more active the cooperation, the greater the good to be obtained, or harm to be avoided, must be in order to justify the cooperation in question.[280] Conversely, the more re-

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271. *See* Vatican Statement, *supra* note 248.
272. *See id.* It should be noted that formal passive cooperation, like all formal cooperation, is also wrongful. *See id.*; *see supra* text accompanying note 252.
273. *See* 1 PESCHKE, *supra* note 238, at 322.
274. William P. Saunders, *Cooperation with Evil*, ARLINGTON CATHOLIC HERALD, Sept. 5, 2002, *available at* http://catholicexchange.com/2002/09/23/80703/.
275. Editorial Staff of the Seido Foundation, *supra* note 266.
276. *Id.*
277. *See* 3 GRISEZ, *supra* note 241, at 878.
278. Editorial Staff of the Seido Foundation, *supra* note 266.
279. *See id.*
280. *See* 1 PESCHKE, *supra* note 238, at 322–23.

mote the cooperation, the more free the cooperation, and the more passive the cooperation (barring a duty toward the victims of the harm on the part of the cooperator), the less significant the good to be obtained, or the harm to be avoided, must be in order to justify the cooperation in question.[281]

It must be admitted that this proportionality analysis can be terribly difficult.[282] Measurement of both the kind of harms involved, and measurement of the magnitudes of the harms involved, will oftentimes present the problem of attempting to compare apples to oranges.[283] But it needs also to be observed that such difficulties are not unique to cooperation analysis, but plague utilitarian philosophies in general, including the economic analysis of the law.[284] Additionally, legal jurisprudence is replete with tests calling for the balancing of various parties' interests—tests which raise the same problems.[285]

In sum, the effect and interaction of the variables impacting cooperation analysis can be represented graphically in the following chart:

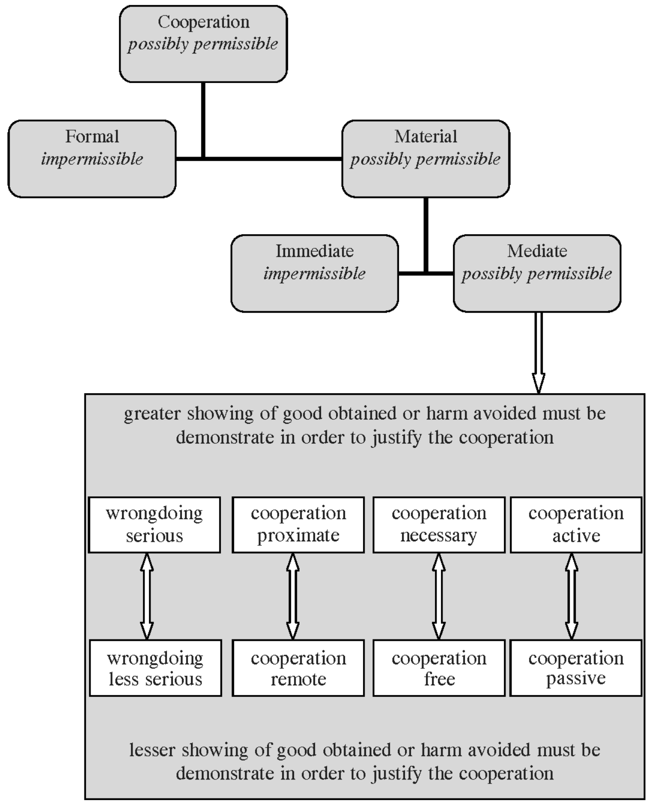
281. *Id.*

282. For a superb discussion of this difficulty, *see* 3 GRISEZ, *supra* note 241, at 879–86.

283. *See id.* at 884–85 (observing "the impossibility of measuring and comparing the intelligible goods and bads so as to use the results as premises for a rational judgment that one's reasons for cooperation would, or would not, be proportionate").

284. *See id.*

285. *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945) (setting forth balancing test for use in determining presence of *in personam* jurisdiction).



III. APPLICATION OF COOPERATION ANALYSIS TO SECURITIES FRAUD

Moral philosophy's principles of cooperation can serve as a compass to help us navigate the poorly chartered waters of primary liability under Rule 10b-5. Moreover, these principles can be imported rather smoothly into securities law jurisprudence thanks to several pre-existing analogues already present in securities law. Indeed, for the most part, these principles do not proffer novelties, but rather a framework for systematically organizing the existing corpus of securities law precedent relating to Rule 10b-5. For rules and concepts drawn from securities law jurisprudence can be mapped onto the principles of cooperation, giving form and structure to a hodgepodge of precedent that has become a difficult basis from which to render opinions, advice, and predictions.[286] Thus, in situations where the principles of cooperation would deem an actor's conduct as impermissible,

286. Which, according to Holmes, at least, is the principal role of the legal profession. *See* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

we shall consider that same conduct as constituting a primary violation of Rule 10b-5.[287]

A. Formal Cooperation and Conspiracy

As noted, moral philosophy condemns as universally impermissible *any conduct* that furthers another's wrongdoing if such conduct is coupled with specific intent to so further the wrongdoing.[288] Initially, an apparent divergence between moral philosophy and securities law jurisprudence presents itself. For although precedent construing § 10(b) requires some degree of intent on the part of a defendant in order for liability to attach (with even recklessness sufficing to some courts),[289] specific intent to commit securities fraud does not amount to a primary violation of Rule 10b-5 in the absence of *deceptive conduct* on the part of the defendant[290] (or, perhaps, as some have argued, substantial participation in a course of deceptive conduct[291]). Indeed, the Second Circuit has held that "whether [a defendant] was a primary violator rather than an aider and abettor turns on the nature of his acts, not on his state of mind when he performed them."[292] Thus, whereas moral philosophy deems impermissible even conduct which is innocent per se, if such conduct is undertaken with the specific intent of furthering (someone else's) wrongdoing, securities law precedent demands that the conduct itself be fundamentally deceptive before liability can be found.[293] Nevertheless, moral philosophy's approach to formal cooperation can be applied to Rule 10b-5. Serving as the bridge between the two worlds is conspiracy.

Admittedly, the consensus reached by most is that *Central Bank* has "precluded the use of conspiracy" in civil suits under Rule 10b-5.[294] But

287. This approach is premised upon the propriety of linking liability to moral culpability in general. *See supra* notes 12 and 81 and accompanying text.

288. *See supra* text accompanying notes 250–252.

289. *See supra* text accompanying notes 43–48.

290. *E.g.*, Batwin v. Occam Networks, Inc., No. CV 07-2750, 2008 WL 2676364, at *16 (C.D. Cal. July 1, 2008) ("[T]he Court follows *Central Bank* and *Stoneridge* and concludes that plaintiff's failure to point to a deceptive act on the part of the . . . defendants forecloses liability under § 10(b).").

291. *See supra* text accompanying notes 165–168.

292. SEC v. U.S. Env'l, Inc., 155 F.3d 107, 111 (2d Cir. 1998).

293. *See* 3 GRISEZ, *supra* note 241, at 872 ("*cooperator* usually refers to someone whose act seems morally acceptable in itself").

294. ARNOLD S. JACOBS, 5B DISCLOSURE AND REMEDIES UNDER THE SECURITIES LAWS §11:3 (2009); Garth T. Evans & Daniel S. Floyd, *Secondary Liability Under Rule 10b-5: Still Alive and Well After* Central Bank*?*, 52 BUS. LAW. 13, 14 (1996) ("The only area of general consensus has been with respect to conspiracy liability, which the courts universally have rejected as a basis for liability under section 10(b) pursuant to the reasoning of *Central Bank*"); *see also* Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, 135 F.3d 837, 840–43 (2d Cir. 1998); *In re* GlenFed, Inc. Sec. Litig., 60 F.3d 591, 592 (9th Cir. 1995). Indeed, this was the understanding of the dissenting justices in *Central Bank*. *See* Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 200 n.12 (1994) (Stevens, J., dissenting).

this consensus has not been unanimous.[295] As James Cox has persuasively explained, "[c]onspiracy, although overlapping with aiding and abetting liability, has very different requirements," and thus *Central Bank*'s preclusion of civil aiding and abetting liability should not be read as extending to conspiracy as well.[296]

Since "few securities law violations have been premised on conspiracy,"[297] "few opinions discuss the parameters of conspiracy."[298] The general parameters of conspiracy, and how these differ from aiding and abetting, are set forth by Cox as follows:

> Conspiracy requires an agreement among the co-conspirators to carry out a violation, and generally no defendant is liable unless one or more of the conspirators commits a violation in furtherance of the conspiracy. In contrast, no agreement, either express or tacit, is necessary for one to be an aider or abettor; the focus of aiding and abetting is the defendant's knowing assistance in furtherance of the offense.[299]

Since "[t]he role of a conspiratorial agreement is to attribute to each conspirator" the actions of one another, the undertaking of a fraudulent act by one conspirator is attributed to all.[300] This serves to satisfy the requirement under *Central Bank* and *Stoneridge* that a defendant commit a deceptive act in order to be held liable as a primary violator of § 10(b).[301]

Although many have reasoned that "recognition of a cause of action for conspiracy would . . . largely undue the effect of [*Central Bank*] . . . inasmuch as many aiding and abetting claims would simply be repleaded as conspiracy claims,"[302] this reasoning overlooks the fact that "the essence of aiding and abetting is knowing assistance," whereas the essence

295. *See* James D. Cox, *Just Deserts For Accountants and Attorneys After Bank of Denver*, 38 ARIZ. L. REV. 519, 528–29 (1996) (arguing that a conspiracy theory of liability survives *Central Bank*); *see also* Wenneman v. Brown, 49 F. Supp. 2d 1283, 1289 (D. Utah 1999); Anderson v. Clow, No. 92-1120-R, 1994 WL 525256, at *21 (S.D. Cal. June 29, 1994).
296. Cox, *supra* note 295, at 528.
297. *Id.*
298. 5B JACOBS, *supra* note 294, at §11:3.
299. Cox, *supra* note 295, at 528. For a more thorough explanation of the elements of conspiracy, *see* 5B JACOBS, *supra* note 294, at §11:3.
300. Cox, *supra* note 295, at 530.
301. *Id.* at 530. *See also* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 7.13[1][B] (6th ed. 2009) (opining that "there is a strong likelihood that the conspiracy theory would not be available as a basis for implied liability" but recognizing that "conspiracy is based on the acts of each co-conspirator and thus would be more properly characterized as primary as opposed to secondary liability").
302. Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, 135 F.3d 837, 843 (2d Cir. 1998).

of conspiracy is "an agreement to make a false representation or manipulative act."[303] Hence, as Cox points out:

> [T]here are very different levels of involvement between, on the one hand, aider and abettors, and, on the other hand, conspirators. A conspirator is not a participant in another's scheme; the conspirator is a participant in his own misrepresentation or manipulative act.[304]

Coincidentally, perhaps, the difference between "conspiracy" versus "aiding and abetting" mirrors the definitional difference between "cooperation" versus "aiding and abetting." For "cooperation" is defined by the *Oxford English Dictionary* as "working together towards the same end, purpose, or effect; joint operation."[305] "Aiding," however is defined as "[h]elping, assistance,"[306] and "abetting" as "[t]he encouragement, promoting, or instigation (usually of anything culpable)."[307] The language used by both William Prosser and Edgar Kinkead, in the torts context, displays a similar distinction.[308] Prosser wrote:

> All who actively participate in a tortious act, by cooperation or request, *or who lend aid* or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him.[309]

Observe how Prosser equates "cooperation" with "actively participat[ing]" in the tortious act, and distinguishes from such cooperation those "who lend aid . . . to the wrongdoer."[310] Similarly, Kinkead wrote:

> One may become a joint wrongdoer not only by co-operating in, but by encouraging, aiding, advising or assenting to the commission of a wrongful act.[311]

Again, although all parties identified in the quotation above are joint tortfeasors, we see a distinction drawn between "co-operating in" the

303. Cox, *supra* note 295, at 530.
304. *Id.*
305. OXFORD ENGLISH DICTIONARY 551 (2d ed. 1989).
306. *Id.* at 49.
307. *Id.* at 5.
308. *See* Robert A. Prentice, Stoneridge*, Securities Fraud Litigation, and the Supreme Court*, 45 AM. BUS. L. J. 611, 627 (2008) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §109, 1094 (1st ed. 1941) and EDGAR B. KINKEAD, 1 COMMENTARIES ON THE LAW OF TORTS § 41, 79 (1903)).
309. *Id.* at 626 (emphasis added; emphasis in original removed).
310. *See id.*
311. *Id.* (emphasis in original removed).

wrongdoing versus, among other things, "aiding . . . the commission of a wrongful act."[312]

Thus, as with the legal theory of conspiracy, the term "cooperation" describes the actions of a co-adventurer; of one who jointly performs—and hence is, arguably, jointly responsible for—the act(s) in question. This is distinct from the conduct of someone engaged in mere aiding and abetting, which connotes a supporting, rather than a primary, role.[313]

The linkage between cooperation analysis and conspiracy theory is made complete by the role of specific intent. For one cannot have an "agreement" (as is necessary under conspiracy theory) without an intent to agree.[314] Moreover, for liability under a theory of conspiracy, the agreement in question need not be express, but can be tacit.[315] And it should not be difficult to infer a tacit agreement to violate Rule 10b-5 if one has evidence of (a) specific intent to further a violation of Rule 10b-5, coupled with (b) an act, *any act*, that serves to so further the violation.[316] Finding the existence of such a tacit agreement on those facts is reasonable if not compelled; the only question is one's willingness "to find such an agreement circumstantially."[317]

This, of course, brings us full circle on the issue of formal cooperation. The commission of any act, however innocent, in willful furtherance of another's wrongdoing is impermissible formal cooperation under the principles of moral philosophy. In the language of the law, this same innocent act, coupled with the same specific intent, can readily be translated as "evidence of a conspiratorial agreement," thereby triggering primary liability under Rule 10b-5 once another coconspirator commits the requisite deceptive act.

B. Material Cooperation

Material cooperation occurs when an actor assists another's wrongdoing without the specific intent to do so.[318] The permissibility of such cooperation turns largely on its proximity to the wrongdoing in question, in addition to the interplay of various factors.[319] This approach meshes well with the Supreme Court's opinion in *Stoneridge*, which referred multiple times to the importance of proximity versus remoteness in ascertain-

312. *See id.* (emphasis in original removed).
313. *See* Jacobs, *supra* note 294, at § 11:3 at 11–39 to 11–40 ("Aiding and abetting connotes a person assisting a more active wrongdoer, while conspiracy might be thought of as a group of related activities which could be of equal importance.").
314. *Cf.* Cox, *supra* note 295, at 531.
315. *See id.*
316. *Cf. id.*
317. *Id.* at 532.
318. *See supra* text accompanying note 255.
319. *See supra* text accompanying notes 257–258.

ing whether a defendant's conduct constituted a primary violation of Rule 10b-5 versus merely aiding and abetting.[320]

1. Immediate Material Cooperation and the Creation Test

Recall that at one end of the spectrum is a defendant's conduct that is "directly and knowingly intertwined with the primary wrongdoer's misconduct."[321] The principles of cooperation condemn such conduct as impermissible, on the grounds that there is little of moral significance that divides the cooperator's actions with those of the primary wrongdoer.[322]

A securities law analogue to this situation would be the debate over what constitutes the "making" of a misstatement under Rule 10b-5.[323] According to the SEC's "creator test," the standard is: "when a person, acting alone or with others, creates a misrepresentation, the person can be liable as a primary violator—assuming, of course, that he or she acts with the requisite scienter."[324] Pursuant to this test, the misstatement in question need not be publicly attributable to the defendant, nor must it have originated with the defendant, nor must it have been made public by the defendant.[325] The key question is whether the defendant did something to bring the misstatement into being.[326] In an opinion that was later vacated, the Third Circuit adopted this test, holding that a defendant can be held liable as a primary violator of Rule 10b-5 for misstatements or omissions contained in a document "even when [the defendant] did not sign or endorse the document and the investor is therefore unaware of [the defendant's] role in the fraud."[327]

More recently, in *Lopes v. Vieira*,[328] the Eastern District of California refused to dismiss a Rule 10b-5 action against a law firm that "played a significant role in drafting and editing" its client's fraudulent disclosures

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320. *See* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769–70, 776 (2008).
321. *Supra* text accompanying note 263.
322. *See supra* text accompanying notes 259–262.
323. *E.g.*, Evans & Floyd, *supra* note 294, at 23–27.
324. Brief of the Securities and Exchange Commission, Amicus Curiae, at 13, Klein v. Boyd, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,316 (3d Cir. Feb. 12, 1998), *available at* www.sec.gov/litigation/briefs/klein.txt.
325. *See id.* at 13–14.
326. *Id.*
327. *See* Nowicki, *supra* note 152, at 663 (quoting *Klein*, [1998 Transfer Binder] Fed. Sec. L. Rep. at ¶ 90,318); *but see* Aegis J. Frumento, *Misrepresentations of Secondary Actors in the Sale of Securities: Does* In re Enron *Square With* Central Bank?, 59 BUS. LAW. 975, 996 (2004) ("The plain language of § 10(b) and Rule 10b-5(b), therefore, appears aimed not against the person who causes a misstatement to come into existence, its 'creator,' but rather against the person who, after it has been created, puts it into action to its fraudulent end. He who 'makes' a misrepresentation is he who employs it to defraud, and that is he who communicates it to the victim in order to induce the victim's reliance on it. The creation of a misrepresentation, without communication to a victim, is a non-event.").
328. 543 F. Supp. 2d 1149 (E.D. Cal. 2008).

and filings, despite the fact that the law firm was neither mentioned in nor publicly identified with the disclosure.[329] Although not mentioning the "creator test" by name, *Lopes* essentially applied it.

The creator test is analogous to immediate material cooperation because, in both cases, the conduct in question is not intrinsically, or per se, wrongful. For example, the mere drafting of a misleading statement, taken by itself, is not a violation of Rule 10b-5 without the subsequent publication of that misstatement. Only when combined with other conduct (such as the publication of the misstatement, as in this example), does such conduct become problematic. When coupled with scienter (namely, intent, knowledge, or recklessness with regard to the fact that such conduct is a component part of a Rule 10b-5 violation), holding the actor liable for securities fraud does not offend the sensibilities.

Prior to *Stoneridge*, there was much debate over the merits of the creator test, and it seemed to gain little traction in the federal courts.[330] *Stoneridge*, unfortunately, does little to settle this debate. For although *Stoneridge* explicitly rejected the notion that there must be a "specific oral or written statement" for Rule 10b-5 liability, and observed that "[c]onduct itself can be deceptive,"[331] it did not discuss what it means to "make" or "create" a misstatement, nor whether public attribution of a misstatement is required for liability to arise. Application of the principles of cooperation would counsel in favor of recognizing liability for a defendant in these circumstances, on the grounds that defendant's "making" of a misstatement (via its creation, and which is ultimately broadcast to investors) constitutes immediate, material cooperation with wrongdoing.

2. Mediate Material Cooperation and Proximity Analysis

When confronted with mediate material cooperation, moral philosophers commonly refer to four factors to consider the propriety of such cooperation: (1) the proximity of the cooperation to the wrongdoing; (2) the necessity of the cooperation to the wrongdoing; (3) the activity of the cooperation; and (4) the seriousness of the wrongdoing itself.[332] Three of these factors have analogues in securities law jurisprudence.

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329. *Id.* at 1176.

330. *See* Brame, *supra* note 109, at 940–41, 954–57; *but see* SEC v. Wolfson, 539 F.3d 1249, 1251 (10th Cir. 2008) (holding, albeit in a civil action brought by the SEC in which the element of reliance need not be demonstrated, that "when a non-employee consultant causes misstatements or omissions within periodic financial reports submitted to the Commission, knowing that those misstatements or omission will reach investors, he can be held primarily liable under the antifraud provisions of the federal securities laws"). More successful was the bright-line test for determining whether a defendant had "made" a misrepresentation in violation of Rule 10b-5. *See supra* text accompanying notes 159–64.

331. Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008).

332. *See supra* text accompanying notes 263–277.

i. Proximity

As indicated, moral philosophy scrutinizes the proximity of the cooperation in question to the underlying wrongdoing;[333] cooperation that is "closer" (physically, conceptually, or both) is more likely to be found unacceptable.[334] This very same factor is arguably the most critical factor addressed in *Stoneridge*.[335] For the Court in *Stoneridge* stressed the importance of "the requisite proximate relation" between "any deceptive statement or act" of defendants and "the investors' harm."[336] This factor was critical, the Court observed, because of the reliance element in a private cause of action under Rule 10b-5: "reliance is tied to causation, leading to the inquiry whether respondents' acts were immediate or remote to the injury."[337] The Court concluded, of course, that plaintiffs could not show reliance "except in an indirect chain that we find too remote for liability."[338]

A careful reading of the Court's discussion of proximity belies the common interpretation of *Stoneridge.* According to the common interpretation, *Stoneridge* held that undisclosed statements or conduct cannot serve as the basis of liability under Rule 10b-5 in a private right of action.[339] But such an interpretation would render superfluous the Court's repeated discussions of proximity. For if the simple fact that defendants' conduct in *Stoneridge* was undisclosed compelled dismissal of plaintiffs' claim, the Court did not need to discuss, at length, the remoteness of defendants' conduct to the underlying wrongdoing. Thus, I suggest that it was not the undisclosed nature of the acts at issue in *Stoneridge* that led to plaintiffs' failure to satisfy the reliance element of Rule 10b-5, but rather the *remoteness* of the particular deceptive acts alleged in that case to plaintiffs' harm that doomed the Rule 10b-5 claim.[340]

Certainly, the undisclosed nature of defendants' conduct in *Stoneridge* played a significant role in the Court's finding that the conduct was indeed remote—and that the reliance element of Rule 10b-5 was not met. It is, admittedly, far easier to demonstrate reliance when some statement has

333. *See supra* text accompanying notes 265–267.

334. *See supra* text accompanying note 280.

335. *See* HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, GOING PUBLIC HANDBOOK § 10:99.20 (2008) ("Justice Kennedy . . . regarded as critical to the issue of reliance/causation 'whether respondents' acts were immediate or remote to the injury.'") (quoting *Stoneridge*, 128 S. Ct. at 770).

336. *See Stoneridge*, 128 S. Ct. at 769.

337. *See id.* at 770.

338. *See id.* at 769.

339. *See supra* note 203 and accompanying text.

340. *See* BROMBERG & LOWENFELS, *supra* note 206, at § 6:54.251 (stressing the importance of "remoteness" in the Court's analysis of reliance and causation). *Cf.* Elizabeth Cosenza, *Rethinking Attorney Liability Under Rule 10b-5 in Light of the Supreme Court's Decisions in* Tellabs *and* Stoneridge, 16 GEO. MASON L. REV. 1, 50–52 (2008) (suggesting that scheme liability predicated upon a defendant's undisclosed conduct furthering a securities fraud remains viable post-*Stoneridge*).

been publicly uttered or some conduct has been publicly revealed. But *Stoneridge* should not be read as holding that the absence of such public revelation is dispositive. In the Court's own words:

> No member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times. Petitioner, as a result, cannot show reliance upon any of respondents' actions *except in an indirect chain that we find too remote for liability*.[341]

Observe that the Court did not actually say that reliance was foreclosed via the absence of any deceptive acts "communicated to the public."[342] Rather, the Court conceded that plaintiffs had shown reliance, but nevertheless dismissed plaintiffs' case because such reliance was within "an indirect chain" that the Court found "too remote for liability."[343] And this was largely because the conduct in question concerned "ordinary business operations," and not the "realm of financing" in which the fraud was carried out and which § 10(b) was promulgated to address.[344] The conduct "took place in the marketplace for goods and services, not in the investment sphere."[345]

And again addressing the interplay of reliance with remoteness, the Court observed that within a common-law action for fraud, "there could be a finding of reliance" on the facts of *Stoneridge*.[346] But such a finding of reliance could not be applied within the context of a § 10(b) cause of action because § 10(b) "should not be interpreted to provide a private cause of action against the entire marketplace in which the issuing company operates."[347] Note how the Court rejects a finding of reliance this time around without any reference to disclosure whatsoever—but rather solely due to concerns of proximity.

In juxtaposition to *Stoneridge* stands the 2005 opinion of Judge Kaplan of the Southern District of New York in *In re Parmalat Securities Litigation*.[348] In *Parmalat*, the cooperating defendant was alleged to have securitized and factored Parmalat invoices that were worthless.[349] This, in turn, enabled Parmalat to prepare misleading financial statements.[350] Such con-

341. *Stoneridge*, 128 S. Ct. at 769 (emphasis added).
342. *Id.*
343. *Id.*
344. *Id.* at 770.
345. *Id.* at 774.
346. *Id.* at 771.
347. *Id.*
348. *In re* Parmalat Sec. Litig., 376 F. Supp. 2d 472 (S.D.N.Y. 2005).
349. *See id.* at 504.
350. *See id.* at 481–82. As the court explained:

duct was viewed by Judge Kaplan as intrinsically deceptive because it was "impossible to separate the deceptive nature of the transactions from the deception actually practiced upon Parmalat's investors."[351] Moreover, although not explicitly addressed in the *Parmalat* opinion, Parmalat's cooperation here certainly concerned "the investment sphere," and not simply the market for "goods and services." Consequently, the plaintiffs in *Parmalat* were able to allege reliance. [352] Here, the proximity of the cooperation to the underlying fraud was such that the argument "in an efficient market investors rely not only upon the public statements relating to a company but also upon the transactions those statements reflect" could appropriately be pressed.[353]

Additionally, whereas in *Stoneridge* the Court concluded that "nothing [defendants] did made it necessary or inevitable for Charter [the primary wrongdoer] to record the transactions as it did,"[354] in *Parmalat*, Judge Kaplan felt otherwise.[355] All of this led to the conclusion that defendants' acts in *Stoneridge* were "too remote to satisfy the requirement of reliance,"[356] whereas defendants' acts in *Parmalat* were indeed actionable.[357]

> The deception allegedly stemmed from Parmalat's billing system, under which many of the invoices were in effect duplicates that did not represent anything actually due. Parmalat supplied supermarkets and other retailers through a network of wholesale dealers. These dealers were invoiced for each delivery and typically paid Parmalat the full amount of the invoices. The dealers sometimes sold to retailers on their own account and sometimes distributed Parmalat's products to supermarkets on Parmalat's behalf. In the latter case, the dealer would furnish to Parmalat proof of delivery to the supermarket. Parmalat then would issue a second invoice, this one directly to the supermarket, and undertake to reimburse the dealer for the goods it distributed to the supermarket. In other words, when a dealer acted purely as Parmalat's distributor, amounts that the dealer owed Parmalat for goods distributed for Parmalat were offset by Parmalat's corresponding obligation to reimburse the dealer. Like the securitization of receivables, there appears to have been nothing remarkable or deceptive about this billing system which the complaint implies had been used for forty years standing alone.
>
> The problem was that Parmalat assigned to Archimedes and Eureka, and they then securitized, both the supermarket invoices, which represented receivables, and the corresponding dealer invoices for the same goods. The latter did not represent a real revenue stream for Parmalat because Parmalat was obligated to reimburse the dealers the same amounts that the dealers owed Parmalat. In other words:
>
> Citibank sold investors the supermarket invoices and the dealer invoices, even though . . . Parmalat was entitled to receive money from just one set of invoices. Citibank therefore double counted the invoices . . . .

The arrangement generated approximately $348 million during the Class Period.

Id. (citations omitted) (emphasis in original removed).

351. *See id.* at 354.

352. Todd G. Cosenza, *Scheme Liability: Secondary Actors' Role Post-*'Stoneridge,' N.Y. L.J. at 4 (Sept. 12, 2008).

353. *Id.* at 6.

354. Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 770 (2008).

355. More accurately, *Parmalat* was a decision denying a motion to dismiss, and as such caused Judge Kaplan to "draw from the complaint all reasonable inferences in the plaintiffs' favor." *In re Parmalat*, 376 F. Supp. 2d at 504 n.160.

356. *Stoneridge*, 128 S. Ct. at 770.

357. *See generally In re Parmalat*, 376 F. Supp. 2d 472.

Of course, *Parmalat* was decided prior to *Stoneridge*. And, post-*Stoneridge*, Judge Kaplan decided differently.[358] For, on a motion to dismiss the Third Amended Complaint in 2008, Judge Kaplan agreed with defendants that *Stoneridge* "forecloses" liability on the part of defendants where such defendants had not themselves made "any actionable misrepresentations or omissions."[359] This is in keeping with the common interpretation of *Stoneridge*. For the reasons previously discussed,[360] this interpretation is incorrect, and Judge Kaplan unnecessarily reversed course in *Parmalat*.

In contrast, the Fourth Circuit in *In re Mutual Funds Investment Litig.*,[361] held that *Stoneridge* did not preclude the liability of certain secondary defendants. *In re Mutual Funds* concerned material misstatements in the prospectus of certain mutual funds to whom Janus Capital Management ("JCM") served as investment advisor.[362] Plaintiffs alleged that JCM should be held responsible (and, *a fortiori*, liable) for these misleading prospectuses because JCM "participat[ed] in the writing and dissemination of the prospectuses."[363] After concluding that plaintiff's complaint "alleges that defendants made the statements in question,"[364] the Fourth Circuit quickly noted that this conclusion "does not end our reliance inquiry."[365] Critical to the question of reliance was "whether these statements were sufficiently attributable" to defendant JCM.[366] Eschewing a bright-line rule, the Court held that "the attribution determination is properly made on a case-by-case basis by considering whether interested investors would attribute to the defendant a substantial role in preparing or approving the allegedly misleading statements."[367]

After analyzing "the precise relationship between the defendant and the entity issuing the allegedly misleading statement," the Court concluded that "interested investors would infer that JCM played a role in preparing or approving the content of the Janus Fund prospectuses," and as such plaintiffs' lawsuit could proceed.[368]

The Fourth Circuit expressly distinguished the case from *Stoneridge*, arguing that *Stoneridge* "has no application to a situation in which the allegedly misleading statements are indisputably public and the inquiry is focused solely on whether the investing public would have attributed a

358. *In re* Parmalat Sec. Litig., 570 F. Supp. 2d 521, 526 (S.D.N.Y. 2008).
359. *Id.* at 524.
360. *See supra* text accompanying notes 201–207.
361. 566 F.3d 111 (4th Cir. 2009).
362. *See id.* at 115–16.
363. *Id.* at 121.
364. *Id.*
365. *Id.*
366. *See id.*
367. *Id.* at 124.
368. *Id.* at 125, 127.

particular statement to a particular defendant."[369] But upon close inspection, it is remoteness, arguably, that distinguished the defendants in *Stoneridge* from the defendants in *In re Mutual Funds* more than anything else. For in both cases, defendants undeniably contributed to the making of the false statements that were publicly released, the difference being one of degree. The defendants in *In re Mutual Funds* allegedly had a role in actually drafting the misstatements—an extraordinarily close connection to the deception.[370] In *Stoneridge*, the defendants helped make the false statements by furnishing Charter Communications with the sales figures and misdated contracts it needed to compile crooked financials. This is a connection significantly removed from the public deception—but a role in the deception's making nonetheless. By focusing on attribution, the Fourth Circuit essentially focused on the issue of remoteness (albeit remoteness from the vantage point of the investing public). In other words, critical to the liability determination in *In re Mutual Funds* was how closely affiliated the defendant was with the fraud in the eyes of the public.

In sum, the Supreme Court's language in *Stoneridge* regarding reliance strongly suggests that remoteness, not disclosure, is the critical factor in assessing whether a Rule 10b-5 violation has been properly alleged by a private plaintiff. Case law both before and after *Stoneridge* supports this approach. Thus, the Court's finding that the plaintiffs in *Stoneridge* failed to properly allege reliance should be read as a fact-sensitive conclusion turning on the remoteness of defendants' conduct to the underlying securities fraud, given its potentially legitimate purpose, and not on a per se rule of law in which an undisclosed act can never be used to satisfy the reliance element of Rule 10b-5.[371] If any per se rule regarding reliance can be drawn from *Stoneridge*, therefore, it should be that a defendant's actions outside of the "realm of financing business," such as those within the "realm of ordinary business operations" will, generally, be considered too remote to a securities fraud and thus not actionable under Rule 10b-5.[372]

369. *Id.* at 127.

370. Arguably, defendants in *In re Mutual Funds* engaged in immediate material cooperation with the wrongdoing, and should be held liable on that basis alone. *See supra* Part III.B.1.

371. Elizabeth Cosenza persuasively argues that, for policy reasons, even post-*Stoneridge*, plaintiffs should be able to fulfill the reliance element based upon defendant's substantial participation in a securities fraud. *See* Cosenza, *supra* note 340, at 50–52.

372. *See* Jonathan C. Dickey, *The New Securities Class Action Landscape: Views From the Defense Bar*, 1692 PLI/CORP. 67, 82–83 (2008); Sherrie R. Savett, *Plaintiffs' Vision of Securities Litigation: Current Trends and Strategies*, 1692 PLI/CORP. 143, 182 (2008) ("*Stoneridge* leaves open the possibility that secondary actors operating in the 'investment sphere' . . . may face liability under § 10(b) if they engage in a fraudulent transaction that investors are made aware of."); *accord* Dennis J. Hough, Jr., *Injured Investors are Without a Private Right of Action Against Aiders and Abetters of Primary Actors Where the Investors Did Not Rely on the Secondary Actors*, 11 DUQ. BUS. L.J. 61, 76 (2008) ("It may be inferred from the Court's opinion that in a future case involving secondary actors engaged in a transaction of a financial nature, the secondary actors may be subject to a different set of elements to prove reliance.").

ii. Necessity

Just because the purported cooperator is transacting with an entity he or she knows—or should know—is engaged in wrongdoing, does not necessarily mean that the cooperator's transactions are actually furthering the fraud in any significant way.[373] More culpable, therefore, under moral philosophy, is cooperation "without which the primary wrongdoer's misconduct could not occur."[374] Such cooperation is labeled "necessary," and is distinguished from "free" or "contingent" cooperation which is not indispensible to the wrongdoer's misconduct.[375] The closest legal analogue to this principle is "but for causation": a "showing that the plaintiff would not have purchased but for" the misstatement or deceptive conduct.[376] In other words, defendant's cooperation in the fraud was a contributing factor without which plaintiff would not have invested.[377]

But this analogue is an imperfect one. The "necessity" analysis is undertaken from the vantage point of the wrongdoers: was the cooperation in question indispensible to the wrongdoers' ability to consummate the wrongdoing?[378] The "but-for causation" analysis, however, is undertaken from the vantage point of the victim: did the defendant's actions in fact cause the victim(s) to somehow be duped by the fraud? Put differently, necessity concerns itself with the whether a defendant's conduct was an indispensable ingredient to the wrongdoing, whereas causation concerns itself with who in fact supplied the ingredient(s) which contributed to plaintiff's ultimate harm—regardless of whether anyone else might have potentially been available to supply those same ingredients. "Necessary" cooperation, therefore, goes entirely to the question of what was needed for the wrongdoing to occur; it does not consider whether the cooperation somehow actually caused a particular victim to be victimized by the wrongdoing.

Additionally, whereas necessity is simply one of many factors to consider in assessing culpability under the principles of cooperation, causation under the securities laws is an indispensible element (referred to as "transaction causation" or "reliance"[379]) for a finding of liability under Rule 10b-5.

373. *See* 3 GRISEZ, *supra* note 241, at 882.
374. *See supra* text accompanying note 269.
375. *See id.*
376. Merritt B. Fox, *After Dura: Causation In Fraud-On-The-Market Actions*, 31 J. CORP. L. 829, 837 (2006); *see also* McLaughlin, *supra* note 223, at § 5:26.
377. *See* Fox, *supra* note 376, at 837. The requirement of proving "but-for" causation is dispensed with in fraud on the market cases. *See id.* at 839.
378. Smith, *supra* note 230.
379. *See* Prentice, *supra* note 221, at 659–60.

Nevertheless, the differences between the concept of necessity and that of causation should not be overstated, and, moreover, are outweighed by the similarities they share.

For once the fraud-on-the-market theory of causation is invoked (which is often the case in the largest and most serious of securities frauds[380]), the difference between enabling a fraud via the provision of indispensible cooperation, and causing an investor to be ensnared in a fraud, largely dissipates. This is because under the fraud-on-the-market doctrine, causation is presumed so long as the deception is (1) material and (2) occurs within an efficient market. [381] Thus, within the context of fraud on the market, merely committing the fraud generates the requisite causation. Consequently, an act indispensible to the carrying out of the fraud would also be an act indispensible to a finding of causation.

The practical difference between the concept of necessity and causation, then, is that necessity is viewed by moral philosophy as a continuum, bounded by the poles of "necessary" and "free"; causation is viewed by securities law as simply a toggle switch—causation is either present or lacking. The two concepts, though not identical, are not inconsistent. Obviously, to the extent that causation (reliance) was found lacking, further inquiry into a defendant's culpability would be cut off as pointless. But to the extent that the element of causation (reliance) did exist, there is nothing awkward or inconsistent with turning to the necessity continuum to assess the weight of a particular defendant's contribution to that element—ranging from more indispensible to less indispensible—and to use that weight to assess whether an actor should be deemed primarily versus secondarily liable.

iii. Activity

Generally, only active cooperation with wrongful behavior is morally culpable; passive cooperation is not.[382] The exception to this occurs when the actor in question owes a duty to his or her victim, in which case failure to take action to prevent or impede the wrongdoing can indeed be found to be morally culpable—or where the cooperator in question shares in the wrongful intent of the primary wrongdoer (as that gives rise to formal cooperation, which is always impermissible).[383]

380. *See* Daniel R. Fischel, *Efficient Capital Markets, the Crash, and the Fraud on the Market Theory*, 74 CORNELL L. REV. 907, 908 (1989).

381. *See* Fox, *supra* note 366, at 839–40 (under the fraud-on-the-market doctrine, investors are deemed to have relied upon a security's price a price effected by the fraud but not directly upon the fraudulent misstatement(s) or omission(s) per se); *see also* Peter H. Huang, Moody Investing *and the Supreme Court: Rethinking the Materiality of information and the Reasonableness of Investor*, 13 SUP. CT. ECON. REV. 99, 118–19 (2005).

382. *See supra* text accompanying notes 271–73.

383. *See id.*

This generally tracks the treatment of passivity within traditional securities law jurisprudence. In cases predicated upon misstatements or omissions, *Stoneridge* reminds us that omissions are only actionable if the defendant in question has "a duty to disclose."[384]

Similarly, in cases predicated upon deceptive conduct, courts have held that "inaction could lead to liability only when there was an independent duty to act."[385] This comports well with the principles of cooperation, which only condemn passive cooperation as immoral when the cooperator has a duty to act.[386]

iv. Balancing of Harms

The final stage of cooperation analysis involves comparing the harm occasioned by the underlying wrongdoing to the benefit procured, or harm avoided, by the cooperator's cooperation.[387] The more serious the harm caused by the wrongdoing, the greater must be the benefits flowing from one's cooperation with it in order to justify such cooperation.[388] The comparison must be conducted in light of the previous factors just discussed (proximity, necessity, and activity[389]).[390] To the extent that one or more of these factors cuts in the direction of greater moral culpability, the greater must be the cooperator's justification for cooperating.[391] Conversely, to the extent that one or more of these factors cuts in the direction of lesser moral culpability, the lesser need be the cooperator's justification for cooperating.[392]

384. Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 769 (2008).

385. Paul Vizcarrando, Jr. & Andrew C. Houston, *Liabilities Under Sections 11, 12, 15 and 17 of the Securities Act of 1933 and Sections 10, 18 and 20 of the Securities Exchange Act of 1934* 537, 659 (PLI Corporate Law & Practice, Course Handbook Series No. 8902, 2006). Some courts have also recognized liability, but only aiding and abetting liability, where inaction was coupled with "a specific intent to further the primary violation of the securities laws," regardless of one's duties toward the victim(s). *Id.*

386. *See supra* text accompanying note 383. The breadth of this rule can be quite significantly broadened if one reads securities "gatekeepers," such as accountants and lawyers, as owing a duty to the investing public generally. *See* 3 GRISEZ, *supra* note 241, at 883 (articulating the position that a cooperator's "special responsibilities" should trigger liability within the failure-to-act context); *see generally* Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411 (2008) (discussing gatekeeper theory); *see also* SEC v. Tambone, 550 F.3d 106, 135 (1st Cir. 2008), *vacated* 573 F.3d 54 (1st Cir. 2009) ("In light of [its] duty to review and confirm the accuracy of the material in the documentation that it distributes, an underwriter impliedly makes a statement of its own to potential investors that it has a reasonable basis to believe that the information contained in the prospectus it uses to offer or sell securities is truthful and complete."). And such a reading has been suggested by at least one lower court post-*Stoneridge*. *See* Lopes v. Viera, 543 F. Supp. 2d 1149, 1177–78 (E.D. Cal. 2008).

387. *See supra* text accompanying notes 273–277.

388. *See id.*

389. *See supra* Parts III.B.2.a–c.

390. *See supra* text accompanying notes 279–281.

391. *See id.*

392. *See id.* As Prof. Grisez noted, in assessing the harms imposed by the underlying wrongdoing,

Application of this particular aspect of cooperation analysis to securities fraud yields both a peculiar fit and a peculiar challenge. As for the fitness of the balancing test, its application to securities fraud avoids the problem that plagues such "balance of harms" tests in most other contexts: the difficulty of comparing substantially different harms.[393] Utilitarian thinking, of which the balancing test is a form, has been sharply criticized for its notorious efforts to weigh and compare harms and benefits that have little in common, and therefore lack a metric for comparison.[394] (How, for example, does one compare the harm to someone who would have one of his kidneys forcibly removed with the benefit to someone else whose life would be prolonged by transplantation of that same kidney?) But in securities fraud cases, application of the balancing test does not involve a comparison of apples to oranges, but rather of dollars to dollars. And, unlike other forms of harm, it is not altogether difficult to quantify the economic cost of a particular securities fraud, nor the economic benefit to someone who cooperates with such fraud. Moreover, it is not particularly difficult to compare the two.[395]

The more serious challenge posed by applying the balancing test is that, initially at least, it appears to lack a securities law analogue. Further, it seems to run counter to our intuitions. That is, under the test as ordinarily applied, a defendant's cooperation with a very serious wrongdoing can be justified if such cooperation serves to greatly benefit the defendant. Put differently, a defendant would be deemed *less culpable* to the extent that he or she benefitted *more handsomely* from his or her involvement in the wrongdoing. That seems backwards. Ordinarily, the law is harsher upon those who benefit more greatly from their involvement in wrongdoing.[396]

Nevertheless, the balancing test can be reconciled with existing jurisprudence if one construes the "benefits to the cooperator" prong narrowly. Instead of construing the prong to encompass any and all benefits that

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versus the harms avoided by cooperation, one should take into account the probabilities that such harms would be realized. See 3 GRISEZ, *supra* note 241, at 882–84. Thus, a very great harm with a very low probability of being realized should be considered on the same level as a very small harm with a very high level of probability of being realized.

393. *See, e.g.*, John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 415–20 (1999).

394. *See* J. BUDZISZEWSKI, WRITTEN ON THE HEART 145–60 (1997); 1 GRISEZ, *supra* note 241, ch. 6 ("Critique of the Proportionalist Method of Moral Judgment").

395. Although we are comparing dollar amounts, we should bear in mind that we are doing so only as a proxy in assessing the magnitude of harm, and this proxy should be adjusted to better comport with reality if the evidence so suggests. Complicating things, therefore, would be consideration of Grisez's suggestion that in measuring the magnitude of the harms inflicted upon innocent investors, and the magnitude of the harms avoided by the cooperator, one should consider not simply absolute dollar amounts, but the effects of the loss on the victim groups. *See* 3 GRISEZ, *supra* note 241, at 882–84. This is because losses to the poor are more harmful than the same losses (in absolute dollar terms) to the wealthy. *See id.*

396. *E.g.*, Elaine Buckberg & Frederick C. Dunbar, *Disgorgement: Punitive Demands and Remedial Offers*, 63 BUS. LAW. 347, 352–53 (2008).

someone might realize via his or her cooperation with wrongdoing, we should instead consider only that harm which is avoided via the cooperation. Indeed, this is how the balancing test is usually employed.[397] As one authority framed it: "[t]he amount of evil my cooperation helps others to do" must be weighed against "[t]he amount of evil that will happen to me if I refuse to cooperate."[398]

This formulation of the balancing test is suggestive of the legal concepts of "duress" and "necessity." As the Supreme Court has noted, these are concepts that "the common law has utilized to assess the moral accountability of an individual for his antisocial deeds."[399] Under modern criminal law, duress or necessity can serve as an excuse or justification, respectively, when a defendant claims to have been forced into committing his or her wrongdoing.[400] The force in question must be considerable, involving the fear of either a greater evil, unlawful coercion, or both.[401] Similar defenses are available in tort law.[402]

When the coercion in question is financial in nature (as it is in the instant context), we are presented with "economic duress."[403] Unlike non-economic duress (and justification), "economic duress" can serve as a defense only to a breach of contract claim, and not as "a defense to, or an exemption from, criminal prosecution."[404] That said, the criminal law does often take economic duress into account as a mitigating factor when adjudicating penalties.[405]

Given the historical understanding of the role that coercion plays in assessing legal culpability, it seems appropriate to consider coercion, even "merely" economic coercion, as a factor in assessing a defendant's liability for cooperating with securities fraud. However, given the fact that the law does not recognize economic coercion as a defense to a breach of law, nor to an action in tort, this factor should be viewed as nondispositive.

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397. *See* FAGOTHEY, *supra* note 251, at 339.

398. *Id.* at 48; *see also* 1 GRISEZ, *supra* note 241, at 301 (observing that the principles of cooperation help answer the question: "[a]t what point must a person . . . take a stand and accept some level of martyrdom?"). Clearly, harm that could have been avoided via another course of action that did not involve cooperation should not be factored into the analysis. *See id.* at 883.

399. Powell v. Texas, 392 U.S. 514, 535–36 (1968) (plurality opinion).

400. *See* Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1264 (2008).

401. *See id.*; *see also* Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1339 (1989).

402. *See* 74 AM. JUR. 2D *Torts* §45 (Sept. 2008).

403. *See* Rob Remis, *Analysis of Civil and Criminal Penalties in Athlete Agent Statutes and Support for the Imposition of Civil and Criminal Liability Upon Athletes*, 8 SETON HALL J. SPORT L. 1, 49 (1998).

404. *See id. Accord* Allan G. King, *Resist and Report: A Policy to Deter Quid Pro Quo Sexual Harassment*, 50 BAYLOR L. REV. 333, 348 (1998).

405. *See* Remis, *supra* note 403, at 50.

IV. Recapitulation and Customization of Principles for Purposes of Securities Law

Having presented the principles of cooperation,[406] and having demonstrated how these principles interrelate to existing securities law jurisprudence,[407] this Part shall recapitulate and customize the principles for optimal application to securities law regulation.

1. A defendant who specifically intends to further the actionable wrongdoing of another, and who acts in any way upon that intent, should be deemed a primary violator. This is the direct application of the principle against "formal cooperation" with evil,[408] and predicated upon the argument that conspiracy liability persists post-*Central Bank* and *Stoneridge*.[409]

2. A defendant who is integrally involved in the "making" or "creation" of an actionable misstatement or omission, should be deemed a primary violator. Such integral involvement amounts to impermissible "immediate material cooperation,"[410] and is predicated upon the "creator" test of liability successfully advanced by the SEC before the Third Circuit.[411]

3. The primary liability of all other defendants who cooperated with the actionable wrongdoing of another will turn upon the proximity of the cooperation to the wrongdoing in question. Having dispensed with formal cooperation and immediate material cooperation, the remaining branch of analysis under the principles of cooperation is that concerning mediate material cooperation.[412] Here, a variety of factors are consulted to ascertain culpability, one of which is proximity.[413] Proximity is also the critical determinant of liability for secondary actors under *Stoneridge*.[414] Thus, it is consistent with both Supreme Court precedent and cooperation analysis to reference proximity in assessing liability. An initial rule to guide us in this analysis is the bright line drawn for us in *Stone-*

406. *See supra* Part II.
407. *See supra* Part III.
408. *See supra* Part II.B.
409. *See supra* Part III.A.
410. *See supra* Part II.B.
411. *See supra* Part III.B.1.
412. *See supra* Part II.B.
413. *See supra* Part II.B.
414. *See supra* Part III.B.2.i.

ridge: cooperation that occurs outside of the realm of financing will be deemed "remote."[415]

4. The necessity and activity of a defendant's cooperation are guides to assessing the proximity of the defendant's cooperation. Rather than fabricate a multifactor test where the Supreme Court has not, perhaps the best way to incorporate the insights of cooperation analysis is to view two of the remaining three factors as guides to assessing the proximity of a defendant's conduct to the wrongdoing in question. Thus, cooperation that is indispensible to the culmination of a wrongdoing should be deemed more proximate to said wrongdoing.[416] Similarly, cooperation that is merely passive in nature should be deemed more remote than that which is active in nature—with an exception recognized for those actors under a duty to protect the victims of the wrongdoing or otherwise prevent the wrongdoing.[417]

5. A showing of duress or coercion on the part of a defendant who cooperated with actionable wrongdoing should be weighed against a finding of liability. An attempt to link the ultimate step in cooperation analysis—namely, the balancing of harms test—with existing securities law jurisprudence might present a bridge too far.[418] As discussed, a ready analogue for the balancing of harms test does not exist within securities law.[419] From this insight of cooperation analysis we should take and utilize a concept that is cognizable in law: that of duress.[420] To the extent that a defendant can demonstrate that he or she was coerced into cooperating, that defendant should be less likely to be found liable as a primary violator.

An obvious criticism to application of the principles of cooperation is their indeterminacy. For it could fairly be claimed that utilization of these principles does not yield obvious, predictable results. And this critique is

415. *See supra* text accompanying notes 343–346.
416. *See supra* Part II.B. and Part III.B.2.ii. Although such cooperation might be physically, or even temporally, quite "remote" to the wrongdoing, it certainly is not a stretch to consider it *conceptually* very close.
417. *See supra* Part II.B. and III.B.2.iii. To the extent that gatekeepers are recognized as having such a duty to the investing public in general, their passivity in the face of wrongdoing will not weigh in their favor, but rather further a finding of liability on their part. *See supra* Part III.B.2.iii.
418. *Cf.* CORNELIUS RYAN, A BRIDGE TOO FAR (1974).
419. *See supra* Part II.B.
420. *See supra* Part III.B.2.iv.

all the more forceful given the strong desire for determinacy in the field of securities law.[421]

In brief response, two things should be noted. First, the status quo regarding the contours of primary liability is currently most unclear.[422] To this ambiguity, application of the principles of cooperation brings greater clarity and predictability—not less.

Second, although securities regulation is "an area that demands certainty and predictability,"[423] the primary importance of such certainty and predictability is to the marketplace. Businessmen and businesswomen require clear and predictable laws in order to appropriately conduct themselves and their businesses. Ambiguity regarding behavior that is permissible versus behavior that is impermissible is harmful to business and society. Here, however, there is little such ambiguity. For practically all the conduct that would be deemed culpable (and therefore, actionable) under the principles of cooperation as proffered in this Article, would also be deemed "aiding and abetting." In other words, culpable cooperation is, largely, a subset of conduct that would generally be considered to constitute aiding and abetting. As such, the conduct in question is already unlawful, and already subjects the person or entity engaging in it to SEC prosecution.[424] Thus, market participants are already on notice that such conduct is unlawful, and subjects them to potential liability—the only open question is whether a private right of action could be initiated over that very same conduct.

V. *CENTRAL BANK* REVISITED

Since the principles of cooperation, as articulated above,[425] build upon the parameters set forth in *Stoneridge*, they unsurprisingly yield results consistent with *Stoneridge*. Scientific-Atlanta and Motorola's cooperation was neither formal (as specific intent to further the fraud was not alleged) nor immediate (as it was not integral to the fraud in the same way as actually drafting the misleading financial statements would have been). Thus, those grounds for finding Scientific-Atlanta and Motorola liable under Rule 10b-5 are lacking.

Instead, Scientific-Atlanta and Motorola were typical mediate cooperators with wrongdoing. The question becomes, therefore, whether their cooperation was proximate or remote. Because their cooperation occurred outside the realm of financing, *Stoneridge* informs us that such coopera-

421. *See* Pinter v. Dahl, 486 U.S. 622, 652 (1988).
422. *See supra* Part I.F.
423. *See Pinter*, 486 U.S. at 652.
424. *See supra* text accompanying notes 142–143.
425. *See supra* Part IV.

tion is presumptively remote, and thus cannot give rise to liability in a private right of action under Rule 10b-5.

Interestingly, however, application of the principles of cooperation to *Central Bank* suggests a different result.

Recall the facts of *Central Bank*: indenture trustee Central Bank delayed a planned property-value appraisal, enabling a developer to successfully sell bonds (secured by the property in question) according to inflated property values.[426] The developer defaulted on the bonds, and litigation against Central Bank (among others) ensued.[427]

There was no evidence that Central Bank specifically intended to further the developer's fraudulent issuance of bonds, so formal cooperation does not present itself. However, Central Bank was, apparently, on notice of the developer's fraud, and either actually knew, or should have known, that something quite irregular was going on—hence the scienter elements of both Rule 10b-5 and the principles of cooperation were satisfied.

It cannot be said that Central Bank's cooperation was so deeply integrated into the underlying fraud that we have a situation of immediate material cooperation, and thus Central Bank could not be held liable on that ground. Instead, *Central Bank* presents a classic case of mediate material cooperation—the culpability of which turns on the issue of proximity (under the principles of cooperation as modified above[428]).

Under the *Stoneridge* test, Central Bank's behavior cannot be labeled automatically remote; Central Bank's involvement in the underlying fraud did not fall outside of the field of financing.[429] Turning to the elements of "necessity" and "activity" for guidance, we see that each of them cuts in favor of finding liability. Central Bank's decision to delay its appraisal of relevant property values was critical to the success of the fraud, for an accurate appraisal would have made it difficult if not impossible for the developer to sell the bonds under the terms upon which they were sold. And although Central Bank's cooperation could be deemed "passive,"[430] Central Bank, as indenture trustee, owed a fiduciary duty to act in the best interests of the bondholders. Given this relationship, Central Bank's passive cooperation is just as culpable as another party's active cooperation would be. As for duress, the opinion did not reference any serious coercion on Central Bank that would give rise to an argument of economic duress.

426. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 167–68 (1994).
427. *Id.* at 168.
428. *See supra* Part IV.
429. *See supra* Part IV.
430. This characterization could be disputed. After all, Central Bank actively decided to delay its appraisal.

Application of these principles would seem to suggest that Central Bank be held liable for its conduct in furthering the fraud at issue. Yet the Court decided otherwise. Does this present a disconnect between the principles and precedent? It does not. For the plaintiffs in *Central Bank* declined to assert that Central Bank was liable as a primary violator of Rule 10b-5, but rather asserted liability solely on the basis of aiding and abetting grounds.[431] And since the Court held that aiding and abetting liability was not available to private litigants in a Rule 10b-5 cause of action, Central Bank was, *a fortiori*, victorious.[432] Had Central Bank been accused of breaching Rule 10b-5 as a primary violator, rather than as merely an aider and abettor, the Court would have had to confront issues that had not, at that time, been deeply considered (such as scheme liability and whether conduct alone could be deemed deceptive). As a result, the case might have been, and based upon the analysis of this Article, should have been, resolved differently.

Conclusion

Secondary actors, such as lawyers, accountants, and bankers, are oftentimes critical players in securities fraud. The important question of their liability to private plaintiffs has been, and remains, one of considerable confusion. *Stoneridge* could have, but failed to, dispel some of this confusion.

Contrary to the common understanding, *Stoneridge* did not foreclose liability on the part of secondary actors who manage to remain anonymous participants in securities fraud. Read carefully, *Stoneridge* instead held that *proximity* to fraud should drive the liability determination.

Although "proximity" is itself an indefinite concept, we are not without tools in deciphering it. For we have at our disposal a well-developed, long-tested method of analyzing proximity with an eye toward the just imposition of culpability: the principles of cooperation. By turning to these principles, we have at our fingertips a ready-made set of factors to consider in assessing whether one's conduct should be deemed proximate versus remote to another's fraud.

The principles of cooperation also provide a framework around which we can organize securities fraud jurisprudence in general. For the insights gleaned from the principles regarding moral culpability in many respects parallel the conclusions reached by courts and commentators construing liability under Rule 10b-5. Perhaps, in addition to the assistance it provides us in resolving the difficult issue of proximity, this framework could serve as a useful aid in resolving other, and future, securities fraud questions.

431. *See* Prentice, *supra* note 221, at 647.
432. *Id.*