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Civil Aiding and Abetting Liability

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NOTES

Civil Aiding and Abetting Liability

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1. PROLOGUE

A WOMAN RECENTLY ASKED HOW I could, in good conscience, write an instruction book on murder.

It is my opinion that the professional hit man fills a need in society and is, at times, the only alternative for "personal" justice. Moreover, if my advice and the proven methods in this book are followed, certainly no one will ever know.

[W]ithin the pages of this book you will learn one of the most successful methods of operation used by an independent contractor. Step by step you will be taken from research to equipment selection to job preparation to successful job completion. You will learn where to find employment, how much to charge, and what you can, and cannot, do with the money you earn.

[And when] [y]ou've read all the suggested material . . . you [will be] confident and competent enough to accept employment.

[When you go to commit the murder, you will need] several (at least four or five pairs) of flesh-tone, tight-fitting surgical gloves. If these are not available, rubber gloves can be purchased at a reasonable price in the prescription department of most drug stores in boxes of 100. You will wear the gloves when you assemble and disassemble your weapons as well as on the actual job. Because the metal gun parts cause the rubber to wear quickly, it is a good practice to change and dispose of worn gloves several times during each operation.

[If you decide to kill your victim with a knife,] [t]he knife . . . should have a six-inch blade with a serrated edge for making efficient, quiet kills.

The knife should have a double-edged blade. This double edge, combined with the serrated section and six-inch length, will insure a deep, ragged tear, and the wound will be difficult, if not impossible, to close without prompt medical attention.

Make your thrusts to a vital organ and twist the knife before you withdraw it. If you hit bone, you will have to file the blade to remove the marks left on the metal when it struck the victim's bone.

Using your six inch, serrated blade knife, stab deeply into the side of the victim's neck and push the knife forward in a forceful movement. This method will half decapitate the victim, cutting both his main arteries and wind pipe, ensuring immediate death.

[If you plan to kill your victim with a gun,] you will learn [on the following pages] how to make, without need of special engineering ability or expensive machine shop tools, a silencer of the highest quality and effectiveness. The finished product attached to your 22 will be no louder than the noise made by a pellet gun. Because it is so inexpensive (mine cost less than twenty dollars to make), you can easily dispose of it after job use without any great loss. . . . Your first silencer will require possibly two days total to assemble . . . as you carefully follow the directions step by step. After you make a couple, it will become so easy, so routine, that you can whip one up in just a few hours.

The following items should be assembled before you begin [to build your silencer]:

-- Drill rod, 7/32 inch (order from a machine shop if not obtainable locally)

-- One foot of 1-1/2 inch (inside diameter) PVC tubing and two end caps

-- One quart of fiberglass resin with hardener

-- One yard thin fiberglass mat

[List continues]

When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be at pointblank range to avoid having the victim's blood splatter you or your clothing. At least three shots should be fired to ensure quick and sure death.

[If you plan to kill your victim from a distance,] use a rifle with a good scope and silencer and aim for the head--preferably the eye sockets if you are a sharpshooter. Many people have been shot repeatedly, even in the head, and survived to tell about it.

To test your guns and ammunition, set up a sheet of quarter-inch plywood at distances of two to seven yards maximum for your pistol, and twenty to sixty yards maximum for your rifle. Check for penetration of bullets at each range. Quarter-inch plywood is only a little stronger than the human skull.

If the serial number is on the barrel of the gun, grinding deeply enough to remove it may weaken the barrel to the point that the gun could explode in your face when fired. To make these numbers untraceable, [instructions follow].

[After shooting your victim] run a [specified tool] down the bore of the gun to change the ballistic markings. Do this even though you intend to discard the crime weapon. . . . If, for some reason, you just can't bear to part with your weapon . . . alter the [specified parts of the gun according to the directions that follow].

[If you plan to kill your victim with a fertilizer bomb,] purchase a fifty pound bag of regular garden fertilizer from your garden center [and follow these detailed instructions for constructing the bomb]. Extend the fuse and light....

[In order to dispose of a corpse,] you can simply cut off the head after burying the body. Take the head to some deserted location, place a stick of dynamite in the mouth, and blow the telltale dentition to smithereens! After this, authorities can't use the victim's dental records to identify his remains. As the body decomposes, fingerprints will disappear and no real evidence will be left from which to make positive identification. You can even clip off the fingertips and bury them separately.

If you choose to sink the corpse, you must first make several deep stabs into the body's lungs (from just under the rib cage) and belly. This is necessary because gases released during decomposition will bloat these organs, causing the body to rise to the surface of the water.

The corpse should be weighted with the standard concrete blocks, but it must be wrapped from head to toe with heavy chain as well, to keep the body from separating and floating in chunks to the surface. After the fishes and natural elements have done their work, the chain will drag the bones into the muddy sediment....

If you bury the body, again deep stab wounds should be made to allow the gases to escape. A bloating corpse will push the earth up as it swells. Pour in lime to prevent the horrible odor of decomposition, and lye to make that decomposition more rapid.

[After you killed your first victim,] you felt absolutely nothing. And you are shocked by the nothingness. You had expected this moment to be a spectacular point in your life. You had wondered if you would feel compassion for the victim, immediate guilt, or even

experience direct intervention by the hand of God. But you weren't even feeling sickened by the sight of the body.

After you have arrived home the events that took place take on a dreamlike quality. You don't dwell on them. You don't worry. You don't have nightmares. You don't fear ghosts. When thoughts of the hit go through your mind, it's almost as though you are recalling some show you saw on television.

By the time you collect the balance of your contract fee, the doubts and fears of discovery have faded. Those feelings have been replaced by cockiness, a feeling of superiority, a new independence and self-assurance.

Your experience in facing death head-on has taught you about life. You have the power and ability to stand alone. You no longer need a reason to kill.

Start now in learning to control your ego. That means, above all, keeping your mouth shut! You are a man. Without a doubt, you have proved it. You have come face to face with death and emerged the victor through your cunning and expertise. You have dealt death as a professional. You don't need any second or third opinions to verify your manhood.

Then, some day, when you've done and seen it all; when there doesn't seem to be any challenge left or any new frontier left to conquer, you might just feel cocky enough to write a book about it.¹

II. INTRODUCTION

Criminal liability for aiding and abetting constitutes an ancient doctrine of criminal law.² Commentators describing English law at the beginning of the fourteenth century recognized that "the law of homicide is quite wide enough to comprise . . . those who have 'procured, counseled, commanded or abetted' the felony. . .for it is

1. The foregoing passages from *Hit Man: A Technical Manual for Independent Contractors* were among those selected by the Fourth Circuit panel in *Rice v. Paladin Enterprises, Inc.*, as representative, both in substance and presentation, of the instructions in *Hit Man*. 128 F.3d 233, 235-39 (4th Cir. 1997). The court stated that the quoted passages "are but a small fraction of the total number of instructions that appear in the 130-page manual. The court has even felt it necessary to omit portions of these few illustrative passages in order to minimize the danger to the public from their repetition herein." *Id.* at 239 n.1.

2. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994).

colloquially said that he sufficiently kills who advises.”³ In 1909, Congress enacted a general aiding and abetting statute applicable to all federal criminal offenses.⁴

Civil liability for aiding and abetting, however, represents a very underdeveloped theory within common law tort.⁵ Courts have stated, seemingly in jest, that precedents in this area of law are “largely confined to isolated acts of adolescents in rural society.”⁶ Notwithstanding the banter, there is recognition that “the implications of tort law in this area as a supplement to the criminal justice process and possibly as a deterrent to criminal activity cannot be casually dismissed.”⁷ With continued development, the theory of civil aiding and abetting presents the availability of an improved law of torts, better able to provide justice for private victims of crime and tort.⁸

Recent cases illustrate the ability of the civil theory of aiding and abetting to reach conduct that likely would not be privately actionable otherwise. Two such cases are *Rice v. Paladin Enterprises, Inc.*⁹ and *Boim v. Quranic Literacy Institute*.¹⁰

In *Rice*, the Fourth Circuit held that the First Amendment does not pose a bar to civil liability for aiding and abetting criminal conduct, specifically murder for hire.¹¹ James Perry, a neophyte hit man, brutally murdered Mildred Horn, her eight-year-old quadriplegic

3. *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (citing Pollock & Maitland, Vol. II, p. 507).

4. *Cent. Bank*, 511 U.S. at 181 (citing Act of Mar. 4, 1909, § 332, 35 Stat. 1152 (codified at 18 U.S.C. § 2)).

5. *Halberstam v. Welch*, 705 F.2d 472, 489 (D.C. Cir. 1983).

6. *Id.* The only somewhat developed area of civil liability involves statutory securities violation cases. *Cent. Bank*, 511 U.S. at 181. However, this area of the law was stopped in its tracks by *Central Bank*, in which the Supreme Court held that the 1933 Securities Act does not permit civil liability for aiding and abetting. *Id.* As a result, the only developed area of civil aiding and abetting no longer provides a cause of action. Still, cases prior to *Central Bank* that recognize civil aiding and abetting under the 1934 Exchange Act provide many of the principles underlying civil aiding and abetting generally.

7. *Halberstam*, 705 F.2d at 489.

8. *See id.* (predicting that tort law will evolve and be adapted for aiding and abetting cases, just as it evolved in products liability cases). As discussed in Part III, *infra*, criminal liability provides justice on behalf of society, which is thought to be a collective victim of criminal conduct, whereas tort provides justice via a private right of action for a particular plaintiff's legal injury.

9. 128 F.3d 233 (4th Cir. 1997).

10. 291 F.3d 1000 (7th Cir. 2002).

11. 128 F.3d at 241. The First Amendment was held to bar claims of damages allegedly resulting from incitement by a violent movie and video games in the infamous Columbine High School shooting. *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264, 1279-1281 (D. Colo. 2002).

son Trevor, and Trevor's nurse, Janice Saunders.¹² Perry shot Mildred Horn and Saunders through the eyes at close range and strangled Trevor Horn.¹³ Perry did not know his victims, for Perry acted as a contract killer, or "hit man," hired by Mildred Horn's ex-husband, Lawrence Horn.¹⁴ Lawrence Horn's motive for contracting the murder of his family was that he would receive the \$2 million that his young son had received in settlement for the injuries that rendered him quadriplegic for life.¹⁵

In the course of soliciting, preparing for, and committing the triple homicide, Perry meticulously followed the detailed factual instructions of how to commit murder and become a professional killer outlined in *Hit Man: A Technical Manual for Independent Contractors*.¹⁶ The relatives and representatives of the three victims instituted a wrongful death action against Paladin Enterprises, the publisher of *Hit Man*, alleging that Paladin aided and abetted Perry in the commission of his murders through the publication of the book's killing instructions.¹⁷ Paladin defended solely on First Amendment grounds. To that end, Paladin stipulated, for purposes of summary judgment, that (1) Perry followed the book; (2) Paladin's marketing of the book was "intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes;" (3) Paladin "intended and had knowledge" that *Hit Man* actually "would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire;" and (4) Paladin's publication and sale of the book assisted Perry, in particular, in the perpetration of the murders at issue in the case.¹⁸ Reversing the district court's grant of summary judgment for Paladin, the Fourth Circuit held that "long-established caselaw provides that speech—even speech by the press—that constitutes criminal aiding and

12. *Rice*, 128 F.3d at 239.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* The book instructs beginners to solicit clients " 'through a personal acquaintance whom you trust.' " *Id.* (citing REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 87). Perry found Lawrence Horn through a man who was both a "good friend" of Perry's and Lawrence Horn's first cousin. *Id.* The solicitation of clients represents one of nearly twenty examples where Perry's conduct precisely mimicked the book's instructions, from solicitation of clients to concealing the crime after committing the murders. *Id.* at 239-41. *Hit Man* is available online. See REX FERAL, HIT MAN ONLINE: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS, at <http://ftp.die.net/mirror/hitman/index.html> (last visited Apr. 1, 2005).

17. *Rice*, 128 F.3d at 241.

18. *Id.*

abetting does not enjoy the protection of the First Amendment.”¹⁹ The court explained that it was “convinced that such caselaw is both correct and equally applicable to speech that constitutes civil aiding and abetting of criminal conduct.”²⁰

In *Boim*,²¹ the Seventh Circuit held that the defendants could be civilly liable for aiding and abetting acts of terrorism if they knowingly and intentionally funded such acts.²² Although there is no general presumption that a plaintiff may sue aiders and abettors under a statutory right, the court held that Congress clearly intended to create a private right of action for citizens injured by an act of international terrorism.²³ Further, the court held that Congress intended civil aiding and abetting liability because “Congress intended to extend section 2333 liability beyond those persons directly perpetrating acts of violence” and because the “statute itself defines international terrorism so broadly—to include activities that ‘involve’ violent acts.”²⁴ In reaching this conclusion, the court held that civil liability for funding a foreign terrorist organization does not offend the First Amendment rights of freedom of association and advocacy.²⁵

Given these and other recent developments, the theory of civil liability for aiding and abetting is claiming a position of new importance in the law of torts.²⁶ This position of importance can be

19. *Id.* at 242.

20. *Id.* at 242-43.

21. *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002).

22. *Id.* at 1028.

23. *Id.* at 1015.

24. *Id.* at 1020 (interpreting 18 U.S.C.A. § 2333).

25. *Id.* at 1027.

Given the stringent requirements that must be met before a group is designated a foreign terrorist organization, Congress carefully limited its prohibition on funding as narrowly as possible in order to achieve the government’s interest in preventing terrorism. We note that Congress did not attach liability for simply joining a terrorist organization or zealously espousing its views. By prohibiting funding alone, Congress employed means closely drawn to avoid unnecessary abridgement of associational freedoms.

26. See *Halberstam v. Welch*, 705 F.2d 742, 489 (D.C. Cir. 1983) (stating that continued development of the civil aiding and abetting theory would improve the law of torts, making it better able to provide redress to private victims of crime and tort); see also DAN B. DOBBS, *THE LAW OF TORTS* § 340, at 937 (2000) (footnotes omitted):

[T]he Restatement of Apportionment has recognized that the concert of action rule may be appropriately expanded in the light of two contemporary developments in joint and several liability and in comparative responsibility. In particular, if comparative fault rules are applied to a landlord who negligently creates dangers that tenants will be criminally attacked, the landlord may escape any significant liability on the ground that his fault is miniscule in comparison to the rapist who attacks the tenant, at least where joint and several liability is also abolished. Such a morally unacceptable result is perhaps not inevitable, since some reasonable people may think a great deal of responsibility should be assigned to the landlord, but it is a result that is all too likely.

expected to expand rapidly given the natural tendency of injury victims and their attorneys to attempt to enlarge the universe of potentially responsible parties. Unfortunately, the theory of civil aiding and abetting liability remains underdeveloped. There is no clearly defined test for civil aiding and abetting liability because courts apply different tests and often obfuscate their analyses. A "sliding scale" analysis, also known as "in tandem" analysis, has emerged as a potential solution for the difficult nature of the test for civil aiding and abetting liability; however, the "sliding scale" analysis and other judicial formulations actually frustrate the inquiry and represent a mistaken and unwarranted departure from the traditional formulations of aiding and abetting liability as articulated in both the Restatement of Torts²⁷ and the criminal law. Indeed, the Second Circuit has expressed great frustration over the ambiguity of the law surrounding civil aiding and abetting claims:

After studying the many cases we might be inclined to wonder whether the elaborate discussions have added anything except unnecessary detail to Judge L. Hand's famous statement, made in a criminal context, that, in order to be held as an aider and abettor, a person must "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed."²⁸

Despite expressing doubts about the fruitfulness of evolution of the relevant law, the Court of Appeals then, with apparent reluctance, proceeded to "discuss the question in the terms that have become conventional."²⁹ This Note contends that the conventional terms are disadvantageous and proposes a better alternative.

Given the confusion surrounding this theory of tort liability, as well as the relative dearth of precedent, a comprehensive analysis is necessary. This Note aims to provide that analysis by exploring the theory of civil aiding and abetting liability in tort. This Note will contend that neither the Restatement approach nor the judicial formulations based thereon provide the most desirable analytical framework. Instead, this Note will conclude that a mixture of the

With cases like this in mind, one draft of the Apportionment Restatement suggested that the concert of action rules can be expanded so that the landlord and those similarly situated would be subjected to full liability, jointly and severally with the criminal, even in jurisdictions that have abolished joint and several liability generally.

27. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979); accord RESTATEMENT (FIRST) OF TORTS § 876(b) (1939).

28. IIT, an Int'l Invest. Trust v. Cornfield, 619 F.2d 909, 922 & n.15 (2d Cir. 1980) (citing "United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938), cited and approved in Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)").

29. *Cornfield*, 619 F.2d at 922.

various approaches provides an improved analytical framework relative to the methodology currently used by the courts.

III. COMPARISON OF CRIMINAL AND TORT LAW GENERALLY

Criminal law and tort law enjoy a close historical and conceptual relationship.³⁰ As a result, a given actor's wrongful conduct often renders him both civilly and criminally liable.³¹ Several crimes and torts bear the same name, such as assault, battery, and libel. This Part aims to highlight both the similarities and the distinctions between criminal and tort law. These similarities and distinctions are relevant to understanding of civil aiding and abetting liability.

The historical ties between the two bodies of law are extensive.³² In fact, the law of torts arose from criminal law during the early development of English law.³³ As the law continued to evolve, judges and lawyers began to recognize that criminal and civil law served related but distinct purposes, eventually leading to two distinct bodies of law.³⁴ Since their inception, both areas of the law have continued to influence greatly the evolution of one another.³⁵

Conceptually speaking, both criminal and tort law are concerned with identifying and sanctioning wrongful conduct;

30. JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 31 (2004).

31. WAYNE R. LAFAYE, CRIMINAL LAW § 1.3, at 14 (4th ed. 2003). Professor Goldberg also notes, "The same acts and events also give rise to criminal and tort suits." GOLDBERG ET AL., *supra* note 30, at 33 (discussing the recent example of former football star O.J. Simpson being prosecuted and acquitted for the murder of ex-wife Nicole Brown Simpson and her acquaintance Ronald Goldman; however, Simpson was later found guilty of the death in a private tort suit by the decedents' families and was held liable for millions in damages).

32. LAFAYE, *supra* note 31, § 1.3, at 12.

33. DOBBS, *supra* note 26, § 2, at 4 ("Judges who imposed punishment upon lawbreakers at one time also occasionally imposed civil liability.").

34. *Id.*

35. Courts presiding over civil cases often look to relevant criminal statutes to analyze the reasonableness of the defendant's conduct. *Id.* § 134, at 315. This reliance exists because criminal statutes are legislative expressions what best promotes public policy. *See id.* § 2, at 5. The majority of courts apply statutory standards of conduct under the rule of negligence per se. *Id.* § 134, at 315. The rule of negligence per se holds that violation of a statute is negligence in itself, where the tort defendant's violation of the statute has caused the kind of harm the statute sought to protect against and where the plaintiff was within the class of persons the statute was intended to protect. *See Wawanesa Mut. Ins. Co. v. Matlock*, 60 Cal. App. 4th 583, 587, 590 (Cal. Ct. App. 1997) (reversing verdict against youth for fire damage resulting from illegal underage smoking because the statute was intended to protect minors from early cigarette addiction and not to prevent fires); accord DOBBS, *supra* note 27, § 134, at 315. For a complete exposition of the elements of negligence per se, see RESTATEMENT (SECOND) OF TORTS § 286 (1965). It is also important to note that whether the criminal defendant's conduct is a tort is not important in the determination of whether conduct violates the criminal law. DOBBS, *supra* note 26, § 2, at 4-5.

however, the two bodies of law serve different functions and pursue their differing functions through distinctive procedures and processes to achieve each body of law's intended purpose.³⁶ The several distinctions between criminal and tort law primarily stem from their roles as public and private law, respectively. A possible laundry list of differences includes distinct functions, initiators, moral emphases, liabilities, and procedures.

First, the basic functions of the two bodies of law differ. The function of criminal law is both to punish the criminal for his misconduct and to protect the public against harm by punishing conduct that causes or is likely to cause harm,³⁷ as well as to deter future actors from behaving in a like manner.³⁸ The primary purpose of tort law is to enable an injured party to seek redress for the harm he or she has suffered at the hands of a wrongdoer.³⁹ William Blackstone recognized the distinct functions of private and public law:

THE distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's [sic] social aggregate capacity.⁴⁰

Contemporary commentators continue to recognize the same distinction:

A tort is a private wrong. A tort action is a civil proceeding seeking reparation for the party wronged in person or property. A crime, on the other hand, is an offense against society, or the state, and the state is responsible for the institution of proceedings against the accused. A criminal action involves a public wrong, and its purpose is to satisfy public justice. While only an individual might be affected by a public wrong, yet,

36. GOLDBERG ET AL., *supra* note 30, at 31; LAFAVE, *supra* note 31, § 1.3, at 15-16 (describing the functions and procedures for each body of law).

37. *E.g.*, *State Highway & Pub. Works Comm'n v. Cobb*, 2 S.E.2d 565, 567 (N.C. 1939) ("The distinction between a tort and a crime with respect to the character of the rights affected and the nature of the wrong is this: A tort is simply a private wrong in that it is an infringement of the civil rights of individuals, considered merely as individuals, while a crime is a public wrong in that it affects public rights and is an injury to the whole community, considered as a community, in its social aggregate capacity."); LAFAVE, *supra* note 31, § 1.3, at 15-16 (describing the functions and procedures for each body of law).

38. GOLDBERG ET AL., *supra* note 30, at 32. Commentators also emphasize that a critical difference between tort and criminal law is the different manner in which actual harm is treated. *E.g.*, DOBBS, *supra* note 26, § 2, at 5 ("Criminal law redresses the state's interests in the security of society. It may punish conduct that threatens those interests *even when no harm has been done*. Speeding increases risks to others and so may be punished criminally. Tort law, aimed at protection of individuals, would never impose liability for speeding alone; *tort law would impose liability only if harm results.*") (emphasis added).

39. LAFAVE, *supra* note 31, § 1.3, at 13.

40. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 5 (Univ. of Chicago Press 2002) (1769).

because of their evil effects on society as a whole, either the common law or a statute has made those who commit such wrongs subject to prosecution.⁴¹

In short, the primary goal of tort law is to provide redress to a victim, most commonly in the form of monetary damages, whereas the primary goal of the criminal law is to protect and vindicate society's interests.⁴²

Second, different parties initiate the legal process under each of the two bodies of law: the state in criminal law, and an injured plaintiff in tort law.⁴³ This distinction also existed several centuries ago, when Blackstone wrote that English criminal law was deemed the doctrine of the pleas of the crown:

so called, because the *king*, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public right belonging to that community, and is therefore, in all cases, *the proper prosecutor for every public offense*.⁴⁴

Modern law continues to recognize this distinction.⁴⁵

Third, the two bodies of law have different levels of emphasis on morality, i.e., a bad mind.⁴⁶ Moral concerns underlie much of the criminal law, which seeks to deter and punish certain conduct where an "evil mind" accompanies the conduct. Tort law, on the other hand, focuses primarily upon redressing a plaintiff's injury by achieving the

41. J.D. LEE & BARRY LINDAHL, *MODERN TORT LAW: LIABILITY AND LITIGATION* § 2.2 (2d ed. 2003).

42. *Id.* Debate exists, however, regarding the proper purpose for criminal law, beyond the simple deter and punish philosophy. For an expanded discussion on the purposes of criminal law, see generally LAFAVE, *supra* note 31, § 1.5 (discussing theories of punishment, such as prevention, restraint, rehabilitation, deterrence, education, and retribution). The functions of tort law can be grouped into at least five broad categories: compensation-deterrence theory, enterprise liability theory, economic deterrence theory, social justice theory, and individual justice theory. For an expanded discussion on the various theories of the functions of tort law, see generally, John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 *GEO. L.J.* 513 (2003).

43. LAFAVE, *supra* note 31, § 1.3, at 15-16 ("With crimes the state itself brings criminal proceedings to protect the public interest but not to compensate the victim; with torts, the injured party himself institutes proceedings to recover damages (or perhaps to enjoin the defendant from causing further damage)") (footnotes omitted). Professor Goldberg illustrates this point by noting that in a criminal proceeding, the court documents would read *State v. Defendant* because the action would have been "commenced not by the victim, but by a government official, such as a district attorney, who represents all citizens of the jurisdiction." GOLDBERG ET AL., *supra* note 30, at 32.

44. 4 BLACKSTONE, *supra* note 40, at 2 (emphasis added).

45. CHARLES R. TORCIA, *WHARTON'S CRIMINAL LAW* § 7, at 27 (15th ed. 1993) ("In the case of a tort, the injured individual need not bring a civil action against the wrongdoer; in the case of a crime, the victim cannot prevent a criminal prosecution from being launched against the offender.")

46. LAFAVE, *supra* note 31, § 1.3, at 15.

desired social result between the parties to the litigation, with a lesser emphasis on morality.⁴⁷

At English common law, crimes generally arose from notions of natural law, at least for crimes considered *malum in se*.⁴⁸ Generally speaking, a particular act (*actus reus*) without a bad mind (*mens rea*) cannot be the basis for criminal liability.⁴⁹ Tort law, however, readily imposes liability without a bad mind, e.g., when a defendant's conduct fails to meet the reasonable standard of care.⁵⁰ Thus, even where tort uses terms such as "malice" or "intent," the actual wickedness such terms describe is not an element in the civil wrongs to which those terms are applied.⁵¹ As tort law focuses upon redressing the plaintiff's injury, it inherently follows that the plaintiff must have suffered a legally cognizable injury.⁵² Criminal law, by contrast, emphasizes

47. See *id.* § 1.3, at 16 ("With torts the emphasis is more on a fair adjustment of the conflicting interests of the litigating parties to achieve a desirable social result, with morality taking on less importance.") (quotation marks and footnote omitted); GOLDBERG ET AL., *supra* note 30, at 33 (stating that criminal law may be described as "primarily public, rather than a law of private redress"). For an expanded discussion on the functions of criminal and tort law, see *supra* note 42.

48. 4 BLACKSTONE, *supra* note 40, at 7:

It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. . . . Whatever power therefore individuals had of punishing offenses against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community.

Blackstone proceeds to state, "AS to offenses merely against the laws of society, which are only *mala prohibita*, and not *mala in se*; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions: and this by the consent of individuals . . ." *Id.* at 8.

49. LAFAVE, *supra* note 31, § 1.2, at 8. But, LaFave points out that "[o]f all the basic premises, this is doubtless the one least adhered to in modern criminal law, which has often created strict criminal liability based upon actus or omissions alone, and vicarious liability based upon another's acts or omissions." WAYNE R. LAFAVE, CRIMINAL LAW § 1.2, at 14 (3rd ed. 2000) n. 9.

50. DOBBS, *supra* note 26, § 2, at 5 ("Some kind of intent is also required for some torts, but more commonly mere negligence coupled with actual harm will suffice for liability."). Of course, the standard of reasonable care is not without its critics. See OLIVER W. HOLMES, JR., THE COMMON LAW 111-12 (39th ed. 1946):

[I]t is . . . clear that the featureless generality that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances.

51. HOLMES, *supra* note 50, at 130.

52. See generally John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636-41 (2002) ("There is a fundamental distinction between criminal law, on the one hand, and tort law, on the other. Criminal law sometimes prohibits and punishes genuinely inchoate wrongs - uncompleted wrongful acts. Tort law does not."); accord DOBBS, *supra* note 26, § 2, at 5.

deterrence and morality and thus does not require an actual injury, as evidenced by criminal sanction for inchoate crimes.⁵³

Fourth, a particular defendant's potential liability provides another obvious distinction: criminal law largely utilizes imprisonment, whereas tort law generally involves monetary damages. Thus, while the defendant found liable in tort commonly pays monetary damages to compensate the victim, Justice Holmes once pointed out that "[t]he prisoner pays with his body."⁵⁴ The severity of criminal punishment constitutes the primary reason for the disparity between the criminal and civil burdens of proof, which are, respectively, beyond a reasonable doubt and by a preponderance of the evidence.⁵⁵ The severity of criminal punishment also provides a basis for the modern usage of statutes to define conduct as criminal, as statutes provide superior notice and certainty relative to a mass collection of common law precedent.⁵⁶

IV. BASIC ELEMENTS OF AIDING AND ABETTING IN TORT LAW

A. Restatement (Second) of Torts Section 876(b)

The elements of civil aiding and abetting are at the center of the confusion surrounding the tort. The Restatement (Second) of Torts Section § 876 provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."⁵⁷ General confusion has surrounded the question of

53. See *supra* note 52; see also BLACK'S LAW DICTIONARY 776 (8th ed. 2004) (defining "inchoate" as "[p]artially completed or imperfectly formed; just begun"). *Black's* provides the following examples of inchoate, or preliminary, crimes: attempt, conspiracy, and incitement. *Id.* at 777.

54. HOLMES, *supra* note 50, at 41; see also TORCIA, *supra* note 45, § 7, at 26 ("As a result of the criminal prosecution, the offender may be imprisoned; as a result of the civil action, the injured individual may recover money damages.")

55. Cf. TORCIA, *supra* note 45, § 7, at 26 ("In a criminal proceeding, the defendant's guilt must be established beyond a reasonable doubt; in a civil action, the defendant's liability may be established merely by a preponderance of the evidence.")

56. Cf. *id.* § 9, at 32-35:

As the need for systematizing the existing body of law and for creating new offenses came to be recognized, state legislatures enacted comprehensive penal codes. . . . Although, in the remaining codes, there is silence on the matter, the mere enactment of a comprehensive penal code impliedly suggests an intended abrogation of common-law crimes.

57. RESTATEMENT (SECOND) OF TORTS § 876 (1979). For example, suppose A and B participate in a riot in which B, although throwing no rocks himself, encourages A to throw

what exact test courts should use to determine liability. Obviously, Section 876 requires a wrongful act by the principal for liability to attach at all.⁵⁸ Thus, the confusion primarily surrounds the proper interpretation of subsection (b).

Before analyzing the proper interpretation and application of Section 876(b), a thorough examination of the comment to subsection (b) provides useful background and guidance. The comment establishes that aiding and abetting a breach of duty “has the same effect upon the liability of the advisor as participation or physical assistance . . . the one [who aids and abets] . . . is himself a tortfeasor and is responsible for the consequences of the other’s act.”⁵⁹ The comment to Section 876(b) also explains that liability for aiding and abetting does not require physical assistance or participation but that advice or encouragement—standing alone—may also suffice.⁶⁰ Encouragement or advice to act provides moral support to the primary tortfeasor;⁶¹ consequently, the Restatement believes that such moral support, just like physical assistance or participation, constitutes a basis for imposing liability on the encourager if he knows that the act encouraged is wrongful.⁶² The determination of aiding and abetting defendant’s liability does not depend upon the principal tortfeasor’s knowledge of the tortious nature of his act.⁶³

The ultimate determination of liability also turns upon whether the assistance or encouragement was a “substantial factor” in causing the wrongful act.⁶⁴ The comment to subsection (b) provides a list of five factors to be considered when analyzing whether the defendant’s participation was a substantial factor in the resulting wrongful act: (1) “the nature of the act encouraged,” (2) “the amount of assistance given by the defendant,” (3) “his presence or absence at the

rocks. Suppose further that one of the rocks strikes C, a bystander. B is then subject to civil liability to C for aiding and abetting. *Id.* cmt. d, illus. 4.

58. The text of Restatement Section 876 provides a general rule that the defendant is liable under Section 876 only if a third party’s tortious conduct resulted in harm to the plaintiff. *Id.* Thus, the Restatement requires the following foundational requirements for liability under Section 876: the third party’s conduct (1) was in fact tortious and (2) did result in harm to the plaintiff. *Id.*

59. *Id.* § 876(b) cmt. d. Thus, a defendant liable under Section 876(b) is jointly and severally liable with the primary tortfeasor for the plaintiff’s injuries. See, e.g., *Am. Family Mut. Ins. Co. v. Grim*, 440 P.2d 621, 625 (Kan. 1968) (“One who aids, abets and encourages others in the commission of an unlawful act is guilty as a principal, and all are jointly and severally liable in a civil action for any damages that may have resulted from their act.”).

60. *Id.* § 876 cmt. b.

61. *Id.* § 876.

62. *Id.* § 876 cmt b.

63. *Id.*

64. *Id.* § 876 cmt. d.

time of the tort," (4) "his relation to the other," and (5) "his state of mind."⁶⁵

Finally, the comment to subsection (b) provides guidance regarding the scope of a defendant's liability under Section 876(b) for other acts committed by the primary wrongdoer. "Other acts" refers to legal wrongs committed by the primary wrongdoer that were not specifically encouraged or assisted by the aiding and abetting defendant.⁶⁶ The Restatement bases the scope of such a defendant's liability essentially upon a proximate cause analysis that hinges on whether the other acts were reasonably foreseeable by the defendant.⁶⁷ In short, the defendant's Section 876(b) liability extends to the particular wrong that he encouraged, as well as to other wrongs that were reasonably foreseeable results of the encouraged wrong.

In sum, the Restatement provides the following basic requirements for civil aiding and abetting liability: (1) that a tortious act be committed by the primary tortfeasor; (2) that the defendant know that the primary tortfeasor's conduct constitutes a breach of some duty; (3) that the defendant provide substantial assistance or encouragement to the breach of that duty; and (4) that the defendant's assistance or encouragement constitute a proximate cause of the resulting tort or torts.⁶⁸

B. Aiding and Abetting Distinguished from Other Forms of Concerted Action Liability

In order to understand fully civil aiding and abetting liability, one must recognize and appreciate the distinctions between civil aiding and abetting liability and the various other forms of civil liability that exist for concerted tortious action. Judge Wald of the D.C. Circuit Court of Appeals has observed that the text of Restatement Section 876 lends little guidance to distinguishing the theories contained therein.⁶⁹ In fact, the subtle distinctions between

65. *Id.* § 876 cmt. b. These factors have been widely used by the courts as guidance to the substantiality inquiry. *E.g.*, *Halberstam v. Welch*, 705 F.2d 472, 478 (D.C. Cir. 1983). (explaining that the Restatement summarizes these elements in comment b.)

66. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979).

67. *See id.* ("In determining liability, the factors are the same as those used in determining the existence of *legal causation* when there has been negligence (see § 442) or recklessness. (See § 501).") (emphasis added); *Halberstam*, 705 F.2d at 484 ("[A] person who assists a tortious act may be liable for other reasonably foreseeable acts done in connection with it.").

68. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

69. *Halberstam*, 705 F.2d at 476 ("Various theories of civil liability are untidily grouped under the general heading of concerted tortious action."); RESTATEMENT (SECOND) OF TORTS § 876.

the various theories confuse the courts on occasion.⁷⁰ Even though a particular set of facts may render a defendant liable under more than one theory, the distinctions are important because cases arise where the defendant only would be liable, if at all, under just one of the various theories of concerted action liability.⁷¹ Other prominent bases of concerted action liability include conspiracy, joint enterprise, and Section 876(c).⁷²

1. Conspiracy

Civil conspiracy is commonly confused with civil aiding and abetting, but there are several key distinctions between the two theories. Civil conspiracy includes the following factors:

- (1) an agreement between two or more persons; (2) to participate in an unlawful act, or a lawful act in an unlawful manner; (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement; (4) which overt act was done pursuant to and in furtherance of the common scheme.⁷³

Courts and commentators frequently blur the distinction between conspiracy and aiding and abetting.⁷⁴ The requirement of agreement in the civil conspiracy analysis represents the crucial distinction from civil aiding and abetting, which requires no agreement to constitute the tort.⁷⁵ Courts sometimes rely on evidence of assistance to infer an agreement, which is then labeled a “civil conspiracy.”⁷⁶

The focus on substantial assistance in civil aiding and abetting is another distinction between the two theories because, for conspiracy liability, a defendant need only provide the assistance inherent within

70. See *Halberstam*, 705 F.2d at 478 (“Courts and commentators have frequently blurred the distinction between the two theories of concerted liability.”).

71. *Id.*

72. I refer to the third member of this list as “Section 876(c),” RESTATEMENT (SECOND) OF TORTS § 876(c) (1979), to avoid unnecessary confusion because liability under this subsection has been generally dubbed “concerted action” liability, which is the term that I use to refer to all of the various forms of liability for persons who act in concert.

73. *Halberstam*, 705 F.2d at 477; see also RESTATEMENT (SECOND) OF TORTS § 876(a) (1979) (“For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him”); *id.* § 876 cmt. b (stating that the term “conspiracy” is often used to refer to “common design or plan”).

74. *Halberstam*, 705 F.2d at 478.

75. *Id.* at 478. The criminal law, of course, shares the distinction as well. Compare MODEL PENAL CODE § 2.06(3)(a)(ii) (1962) (criminal liability for complicity or conduct of another), with *id.* § 5.03(1) (criminal conspiracy).

76. *Halberstam*, 705 F.2d at 477. Judge Wald noted that such an inferred agreement has not always been justified given the underlying facts of the particular case. *Id.*

the agreement itself.⁷⁷ To illustrate, if one presumes all the elements of civil conspiracy listed above are satisfied, a defendant may be found guilty of civil conspiracy without proof of “substantial assistance” because making the agreement is all the defendant must do to assist the primary wrongdoer’s action. The requirement of a mere agreement allows for much greater temporal or physical distance between the conspirator and the underlying wrong than would be permitted if substantial assistance were required.⁷⁸ As a result, civil liability may attach to a conspirator for a more attenuated relationship with the underlying wrongdoing than for an aider and abettor. Furthermore, in most cases, multiple defendants cannot, as a matter of law, be held liable for civil conspiracy for their negligence;⁷⁹ however, a defendant certainly may substantially assist or encourage the negligence of another so as to allow liability for civil aiding and abetting of another’s

77. *Id.* (emphasis in original):

There is a qualitative difference between proving an *agreement to participate* in a tortious line of conduct, and proving *knowing action* that substantially aids tortious conduct. In some situations, the trier of fact cannot reasonably infer an agreement from substantial assistance or encouragement. A court must then ensure that all the elements of the separate basis of aiding-abetting have been satisfied.”)

78. *Id.* at 485.

79. Courts have stated that “it is difficult to conceive of how a conspiracy could establish vicarious liability where the primary wrong is negligence.” *Id.* at 478. Other courts have held that allegations of mere negligence by multiple defendants do not state a cause of action for civil conspiracy as a matter of law. See, e.g., *Juhl v. Arrington*, 936 S.W.2d 640, 644 (Tex. 1996) (emphasis added) (internal citations omitted):

“[C]ivil conspiracy requires *specific intent*” to agree “to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.” *Because negligence by definition is not an intentional wrong, one cannot agree or conspire to be negligent.* Therefore [under] § 876(a) we would require allegations of specific intent, or perhaps at least gross negligence, to state a cause of action. Because [the plaintiff’s] pleadings allege only that defendants were negligent, civil conspiracy and § 876(a) are not theories upon which he could have relied to support summary judgment.

See also, e.g., *Wright v. Brooke Group Ltd.* 114 F. Supp. 2d 797, 837 (N. D. Iowa 2000) (holding that under Iowa law “because conspiracy requires an agreement to commit a wrong, there can hardly be a conspiracy to be negligent—that is, to intend to act negligently”); accord *Allstate Indem. Co. v. Lewis*, 985 F. Supp. 1341 (M. D. Ala. 1997). The reasoning behind this rule is that the specific intent required to form a conspiracy would reasonably prescribe a conclusion that “[l]ogic dictates that parties cannot conspire or agree to commit negligence.” *In re Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litig.*, 175 F. Supp. 2d 593, 633 (S.D.N.Y. 2001) (citations omitted). *But see J.T.T. v. Chon Tri*, 111 S.W.3d 680, 684 (Tex. Ct. App. 2003) (emphasis added) (internal citation omitted):

It is because the requirement of specific intent to inflict injury is absent from negligence that parties cannot engage in a conspiracy to be negligent. *But this rule of law does not entail that parties cannot conspire to cause injury by their negligence, for, in such a case, the gist of the conspiracy is not negligence, but the injury the conspirators specifically intend to cause.*

Given *J.T.T.*, a plaintiff could perhaps state a claim of civil conspiracy if the facts show that two or more defendants explicitly or implicitly agreed to make a shoddy product so that they could get rich.

negligence.⁸⁰ Finally, the theory of liability affects who is liable for what, i.e., who may be rendered vicariously liable for another's wrongs.⁸¹ While an aider and abettor is liable for the wrongs of the primary wrongdoer, the primary wrongdoer would not be liable for wrongs committed by the aider and abettor, absent a finding of conspiracy.⁸² In sum, while the civil theories of conspiracy and aiding and abetting often overlap, several notable distinctions warrant diligence by the courts to respect the autonomy of the two theories.⁸³

2. Joint Enterprise

In addition to civil aiding and abetting and civil conspiracy, another important theory of vicarious tort liability is the joint enterprise doctrine. Joint enterprise represents a form of liability akin to a partnership or joint venture.⁸⁴ To find that a joint enterprise exists, courts generally require a showing of both (1) a common object and purpose of the undertaking, and (2) an equal right to direct and govern the movements and conduct of each other in respect to the common object and purpose of the undertaking.⁸⁵ Both requirements must be satisfied for a joint enterprise to exist.⁸⁶ If a joint enterprise exists, then each member constitutes an agent for the others, leading to vicarious liability.⁸⁷

The distinctions between joint enterprise liability and aiding and abetting liability are numerous. First, aiding and abetting requires substantial assistance by the defendant, whereas joint enterprise merely requires an agency-like relationship.⁸⁸ Second, joint

80. RESTATEMENT (SECOND) OF TORTS § 876(b) cmt. (1979); *Halberstam*, 705 F.2d at 478.

81. *Halberstam*, 705 F.2d at 478.

82. *Id.*

83. *See id.* (“[W]e find it important to keep the distinctions clearly in mind as we review the facts in this novel case to see if tort liability is warranted on either or both concerted action theories. *For the distinctions can make a difference.*”) (emphasis added).

84. DOBBS, *supra* note 26, § 340, at 933.

85. *E.g.*, *Yant v. Woods*, 120 S.W.3d 574, 576 (Ark. 2003); *see also* DOBBS, *supra* note 26, § 340, at 933 (“The joint enterprise is found to exist when two or more persons tacitly or expressly undertake an activity together—usually an automobile trip—with common purpose, community of interest and an equal right to a voice in the control.”).

86. *Yant*, 120 S.W.3d at 576.

87. DOBBS, *supra* note 26, § 340, at 933.

88. Professor Dobbs provides the following illustration: “If the enterprise is an automobile trip, the passenger, who ordinarily has no responsibility for the safe operation of the vehicle, may thus be liable to an injured third person if the driver negligently causes harm.” DOBBS, *supra* note 26, § 340, at 933. Thus, independent contractors sharing a car on their way home from work out of town may be held liable for the negligence of the one who is driving, regardless of whether the passengers substantially assisted the driver's negligence. *Cf. Yant*, 120 S.W.3d at 576 (holding that plaintiff, a passenger asleep in backseat of vehicle who was injured by the

enterprise has no knowledge requirement to hold the secondary actor liable for the primary wrongdoer's conduct, whereas aiding and abetting requires at a minimum that the defendant "knows that the other's conduct constitutes a breach of duty."⁸⁹ Third, joint enterprise requires the participants to have an equal right to control one another in the course of the enterprise, and while such an ability of control may arguably be the case in a given aiding and abetting situation, it is not a predicate to aiding and abetting liability.⁹⁰ Fourth, and perhaps most importantly, civil liability for aiding and abetting seems to be in a trend of expansion,⁹¹ whereas "[t]he joint-enterprise doctrine has been criticized of late as an anachronism."⁹²

3. Restatement (Second) of Torts Section 876(c)

One more form of vicarious tort liability deserves mention: Restatement (Second) of Torts Section 876 provides: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." The classic example of a scenario meeting these criteria is the famous case *Summers v. Tice*,⁹³ in which the evidence showed that two defendants

driver's negligent overturn of the vehicle, unable to recover against the driver as a matter of law because the two were held to be engaged in a joint enterprise).

89. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979). Potential heightened knowledge requirements for civil aiding and abetting liability are discussed subsequently. See *infra* Part V.B.

90. See, e.g., *Am. Family Mut. Ins. Co. v. Grim*, 440 P.2d 621, 626 (1968) (holding all four young boys who broke into church for sodas liable when only two of the boys negligently burned the church down).

91. See generally *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (finding that certain funding can constitute aid and abetting of terrorism); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (denying a motion for summary judgment as to whether U.S. oil companies aided and abetted the Myanmar government in persecuting its citizens), *opinion vacated and rehearing en banc granted*, 395 F.3d 978 (9th Cir. 2003); *Rice v. Paladin Enter., Inc.*, 128 F.3d 233 (4th Cir. 1997) (holding that the First Amendment does not bar civil liability for aiding and abetting criminal conduct).

92. *Yant*, 120 S.W.3d at 580 (Brown and Imber, JJ., dissenting). Justice Brown quoted Prosser's statement that "[t]he courts should be expected to continue to narrow the scope of the doctrine to ameliorate its rigors." *Id.* *Yant* illustrates the joint enterprise doctrine as an absolute shield to liability between members of the enterprise, akin to contributory negligence, as opposed to the joint enterprise doctrine as a form of vicarious liability. *Id.* at 576 (majority opinion) ("The effect of the doctrine's application is that the driver's negligence or misconduct is imputed to the passenger to bar the passenger's recovery."). The elements of the doctrine are the same in either context. For a case using the joint enterprise doctrine as a form of vicarious liability, see *Reed v. McGiboney*, 422 S.W.2d 115 (Ark. 1967).

93. *Summers v. Tice*, 199 P.2d 1 (Cal. 1948). While *Summers* arguably meets the criteria for Section 876(c) liability, *Summers* likely did not turn upon substantial assistance, as the case

“at the same time or one immediately after the other, shot at a quail and in so doing shot toward the plaintiff who was uphill from them, and that they knew his location.”⁹⁴ The plaintiff was unable to prove whose shot had actually injured him.⁹⁵ Since the conduct of each defendant was negligent with regard to the plaintiff, the court held both defendants jointly and severally liable, despite the fact that one of them did not even injure the plaintiff.⁹⁶

Given that both defendants breached a duty to the plaintiff by knowingly firing in his direction, one reasonably could contend that the facts of *Summers v. Tice* would establish liability under Section 876(c), provided that the defendants by their conduct were found to have substantially encouraged each other to shoot negligently.⁹⁷ By contrast, civil liability for aiding and abetting would not require the

seems to pertain more particularly to burden shifting from the plaintiff to the defendants in cases in which (1) there are multiple sufficient causes and (2) the actual source of the injury, i.e., which defendant actually caused the injury, is unknown. See *infra* note 96. The court in *Summers* did refer to Section 876(b) and (c); however, both the purpose of this reference by the court and the impact of Section 876 on the outcome of the case are highly ambiguous. 199 P.2d 1.

94. *Id.* at 2.

95. *Id.* at 2-5.

96. *Id.* at 4 (“[P]laintiff has made out a case when he has produced evidence that gives rise to an inference of negligence which was the proximate cause of the injury.”). The court further noted:

If defendants are independent tortfeasors and thus each liable for the damages caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment.

Id. at 5.

97. Suppose, for example, that Hunter X and Hunter Y both take aim to fire a negligent shot toward the plaintiff. Suppose further that both Hunter X and Hunter Y notice the other taking aim when they respectively take aim themselves. Suppose that both hunters fire, and the plaintiff is injured. However, unlike *Summers*, it is known that Hunter X's shot injured the plaintiff and that Hunter Y's shot killed quail and in no way physically harmed the plaintiff. Under Section 876(c), could Hunter X be held to have been *substantially* assisted in taking the negligent shot by seeing Hunter Y likewise take aim? While the common parlance of “substantially” likely would lead most to conclude that this would not be substantial assistance or encouragement, Illustration 6 provides that this degree of assistance or encouragement would be a sufficient basis for liability under Section 876(b). RESTATEMENT (SECOND) OF TORTS § 876 illus. 6 (1979). Since liability under Section 876(b) requires “substantial assistance or encouragement,” one may reasonably infer that Hunter Y's actions may likewise be sufficient to establish “substantial assistance” to Hunter X's decision to take the injurious shot. *Id.* § 876. On the other hand, one might reasonably contend that the absence of the word “encouragement” in Section 876(c) marks the distinctive factor that would preclude liability under Section 876(c), based upon the contention that Hunter Y's actions may have been “encouragement” so as to allow liability under Section 876(b) but not “assistance” as required for liability under Section 876(c). *Id.* § 876(c).

defendant's conduct to constitute a breach a duty to the plaintiff,⁹⁸ as an alleged aider and abettor could be held liable for merely encouraging the primary actor to breach the primary actor's duty to the plaintiff, irrespective of the alleged aider and abettor's possession or breach of a duty to the plaintiff.⁹⁹ Consequently, a defendant may be liable for civil aiding and abetting, even if the defendant did not breach a duty that he owed to the plaintiff or even if the defendant owed no duty at all to the plaintiff. Another distinction between Section 876(c) and civil aiding and abetting is that subsection (c) does not require any knowledge on the part of the accomplice,¹⁰⁰ whereas aiding and abetting liability explicitly requires that the defendant knows the other's conduct constitutes a breach of duty.¹⁰¹

C. Common Law Modifications: The "Judicial Test"

Restatement Section 876(b) and the accompanying official comments merely provide a basic foundation for understanding civil aiding and abetting liability. The relevant case law provides further insight into how the test for liability has developed. As mentioned previously, a relative dearth of precedent exists on the subject,¹⁰² making the inquiry difficult and rendering the application of general legal principles important to a proper understanding of the matter.¹⁰³

98. See, e.g., *Lawyers Title Ins. Corp. v. United Am. Bank of Memphis* 21 F. Supp. 2d 785, 795-96 (W. D. Tenn. 1998) (holding that "[c]ontrary to [defendant's] arguments, Tennessee law does not impose liability for aiding and abetting based on a duty between the defendant and plaintiff. Rather, the cause of action is much broader, imposing liability if 'the defendant knew that his companions' conduct constituted a breach of duty.' That is, *under § 876(b), the defendant need not owe a duty to the plaintiff, but rather, must know that a third party owes a duty to the plaintiff.*") (emphasis added) (internal citations omitted).

99. E.g., *Rael v. Cadena*, 604 P.2d 822, 822 (N.M. 1979) (holding an uncle liable for the battery of the plaintiff, although the uncle did not actually assault or batter the plaintiff but merely encouraged his nephew to do so by shouting "Kill him!" and "Hit him more!" as his nephew battered the plaintiff).

100. See RESTATEMENT (SECOND) OF TORTS § 876 cmt. e (1979) ("Thus each of a number of trespassers who are jointly excavating a short ditch is liable for the entire harm done by the ditch, although each reasonably believes that he is not trespassing").

101. *Id.* § 876(b).

102. See *supra* notes 5-6 and accompanying text.

103. See *generally supra* notes 30-56 and accompanying text (comparing criminal and tort law).

1. Securities Law Origins/Influence

Federal securities law cases compose the largest body of precedent in the civil aiding and abetting context.¹⁰⁴ This simple fact presents several problems. First, courts and commentators alike have been reluctant to impose civil aiding and abetting liability on businesses engaging in routine transactions, which has impacted the application of Restatement Section 876(b).¹⁰⁵ This reluctance has been apparent especially in the securities law context because that law often imposes strict or quasistrict liability.¹⁰⁶ Such liability can be substantial, with damages often in the tens or even the hundreds of millions, representing a stark contrast to the damages available to a plaintiff bringing a claim for, say, a garden variety battery.

Second, the United States Supreme Court greatly surprised most observers with its decision in *Central Bank*, in which the Court rejected the substantial body of securities law precedent involving civil aiding and abetting liability and held that the relevant securities statutes do not provide a cause of action for civil aiding and abetting.¹⁰⁷ Third, securities cases involve federal law; consequently, the vast body of aiding and abetting precedent from federal securities

104. See *Halberstam v. Welch*, 705 F.2d 472, 489 (D.C. Cir. 1983) ("Precedent, except in the securities area, is largely confined to isolated acts of adolescents in rural society.").

105. *E.g.*, *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 95-96 (5th Cir. 1975):

[W]e find that a person may be held as an aider and abettor only if some other party has committed securities law violation, if the accused party had general awareness that his role was part of an overall activity that is improper, and if the accused aider-abettor knowingly and substantially assisted the violation.

106. For example, Section 11 of the Securities Act of 1933 imposes strict liability on an issuer for certain misstatements or omissions in the registration statement. 15 U.S.C. § 80a-24 (1933).

In the formulation of relief, however, concepts of fairness to those who are expected to govern their conduct under Rule 10b-5 should be considered. Protection for investors is of primary importance, but it must be kept in mind that the nation's welfare depends upon the maintenance of a viable, vigorous business community. Considered alone, the sweeping language of Rule 10b-5 creates an almost completely undefined liability. All that the rule requires for its violation is that someone "do something bad," JENNINGS & MARSH, *SECURITIES REGULATION* 961 (2d ed. 1968), in connection with a purchase or sale of securities. Without further delineation, civil liability is formless, and the area of proscribed activity could become so great that the beneficial aspects of the rule would not warrant the proscription. David S. Ruder, *Pitfalls in the Development of a Federal Law of Corporations by Implication Through Rule 10b-5*, 59 NW. U. L. REV. 185, 207-208 (1964). In recognition of this problem, courts have sought to construct workable limits to liability under section 10(b) and Rule 10b-5 which will accommodate the interests of investors, the business community, and the public generally.

Woodward, 522 F.2d at 91. "Thus, despite our firm support of Rule 10b-5's creative use in thwarting fraudulent schemes related to securities transactions, we recognize that we must also draw some limits on the scope of the Rule." *Id.*

107. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994).

law case, not only fails to bind any state courts, but also fails to apply any state tort law.

Therefore, applying securities law precedents to other forms of civil aiding and abetting claims presents obvious hazards given the special nature of securities fraud actions, the subsequent rejection of aiding and abetting liability with regard to private 10b-5 claims by the Supreme Court, and the questionable applicability of legal principles developed under the federal securities laws to common law tort claims in state courts. Notwithstanding the aforementioned dangers, courts routinely employ securities fraud cases as precedent for civil aiding and abetting cases in contexts other than the securities area, without reference to the previously enumerated doubts as to its applicability.¹⁰⁸

2. The "Judicial Test"

Influenced by pre-*Central Bank* securities law, courts have developed the following general test, hereinafter the "judicial test," for civil aiding and abetting liability:

(1) the primary actor must commit a wrongful act that causes an injury; (2) the aider and abettor must be generally aware of his role in the overall wrongful activity at the time assistance is provided; . . . (3) the aider and abettor must knowingly and substantially assist the wrongful act . . . [and (4)] the alleged substantial assistance must be the proximate cause of plaintiffs' harm.¹⁰⁹

The judicial test resembles Restatement Section 876(b) in many ways. The judicial test retains the basic requirement that the primary actor commit an underlying wrongful act that injured the plaintiff.¹¹⁰ The judicial test also retains the requirement that the defendant's assistance must be a legal cause of the plaintiff's injury.¹¹¹ Finally, the judicial test continues to hold the accomplice and the primary wrongdoer jointly and severally liable.¹¹²

However, the judicial test above differs from the Restatement formulation in three ways. Each of the three changes refashions the inquiry into the requisite knowledge of the defendant, with the first

108. *E.g.*, *Halberstam v. Welch*, 705 F.2d 472, 489 (D.C. Cir. 1983) (applying securities law principles to an action for aiding and abetting criminal conduct causing wrongful death of the plaintiffs decedent).

109. *In re Temporomandibular Joint ("TMJ") Implants Prod. Liab.*, 113 F.3d 1484, 1495 (8th Cir. 1997).

110. *See supra* note 58 and accompanying text.

111. *See supra* notes 66-67 and accompanying text.

112. *See, e.g.*, *Halberstam*, 705 F.2d at 476-77 (noting that liability for concerted tortious action, such as aiding and abetting, provides that all persons who acted in concert to commit a tort are held liable for the entire result); *see also supra* note 59 and accompanying text.

two changes being the most significant. As one considers all three changes at length, what becomes evident is that the precise nature of the knowledge inquiry is far from clear. The inquiry perhaps has been rendered more ambiguous as a result of the following judicial modifications, especially after consideration of the judicial glosses on these modifications.

First, the judicial test departs from the Restatement's verbal formulation of the knowledge requirement in the second prong of the test for liability. Rather than requiring that the accomplice "*knows* that the other's conduct constitutes a *breach of duty*,"¹¹³ the judicial test requires that the accomplice be "*generally aware of his role* in the overall illegal activity."¹¹⁴ This change adopts a more exacting standard: the defendant must be aware not only of another's wrong, but also of the way in which his conduct is contributing to the wrong.¹¹⁵ In *Woodward v. Metro Bank of Dallas*, the Fifth Circuit explained that "[o]ne could know of the existence of a 'wrong' without being aware of his role in the scheme, and it is the participation that is at issue."¹¹⁶ Courts originally elevated this knowledge requirement to prevent "over-inclusiveness" of liability in the securities area;¹¹⁷ however, this verbal change has permeated the law of civil aiding and abetting in all areas.¹¹⁸

Second, the judicial test also augments the requirements set forth in the Restatement by adding a knowledge requirement.¹¹⁹ In place of the requirement that the defendant "give[] substantial assistance or encouragement to the other to so conduct himself,"¹²⁰ the judicial test requires that the defendant "must *knowingly* and substantially assist the wrongful act."¹²¹ As with the first modification

113. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (emphasis added).

114. See *supra* note 109 and accompanying text (factors of the judicial test) (emphasis added).

115. "Role" in ordinary parlance means a "function or part performed especially in a particular operation or process." MERRIAM-WEBSTER ONLINE DICTIONARY, at <http://www.m-w.com/cgi-bin/dictionary?book=dictionary&va=role> (last visited Apr. 1, 2005).

116. 522 F.2d 84, 95 (5th Cir. 1975).

117. *Id.* at 95. Perhaps this phenomenon in securities cases finds explanation in the adage that "bad facts make bad law," as courts sought to avoid a scope of liability that would encompass routine business transactions and thereby threaten the vitality of commerce.

118. *E.g.*, *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litigation*, 113 F.3d 1484 (8th Cir. 1997) (products liability); *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) (wrongful death).

119. Compare judicial test, *supra* note 109 and accompanying text, with the approach of RESTATEMENT (SECOND) OF TORTS § 876(b), *supra* note 68 and accompanying text.

120. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

121. *Id.* (emphasis added); see *supra* note 109 and accompanying text (factors of the judicial test).

discussed above, this judicial innovation arose from the desire to prevent overinclusive liability in the federal securities law context.¹²² The Fifth Circuit explained in *Woodward* that “[a] remote party must not only be aware of his role, but he should also know when and to what degree he is furthering the fraud.”¹²³ As above, this second constraint on liability over and above the Restatement’s formulation has spread from securities cases to the law of civil aiding and abetting generally.¹²⁴

Third, *Halberstam v. Welch*, the most influential case to employ the judicial test, added a sixth factor, “duration of the assistance provided,” to the original five factors provided in the comment to Restatement Section 876(b).¹²⁵ The court explained that the longevity of the encouragement or assistance to the primary wrongdoer “almost certainly affects the quality and extent of their relationship and probably influences the amount of aid provided as well.”¹²⁶ Furthermore, the court reasoned that the duration of assistance could serve as evidence of the defendant’s *state of mind*.¹²⁷ Therefore, the additional factor also encompasses an explicit alteration of the Restatement’s version of what constitutes substantial assistance by further emphasizing the importance of the defendant’s state of mind.¹²⁸

122. See *Woodward*, 522 F.2d at 95 (“The first two Landy elements pose a danger of over-inclusiveness and seem to lose sight of the necessary connection to the securities laws. One could know of the existence of a ‘wrong’ without being aware of his role in the scheme, and it is the participation that is at issue. The scienter requirement scales upward when activity is more remote; therefore, the assistance rendered should be both substantial and knowing.”).

123. *Id.*

124. *E.g.*, *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litigation*, 113 F.3d 1484 (8th Cir. 1997) (products liability); *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) (wrongful death); *Holmes v. Young*, 885 P.2d 305 (Colo. App. 1994) (attorney breach of fiduciary duty); *Patton v. Simone*, 626 A.2d 844 (Del. Super. 1992) (personal injury).

125. *Halberstam*, 705 F.2d at 484; see also RESTATEMENT (SECOND) OF TORTS § 876 cmt. d. (1979) (listing five factors to consider when determining whether or not defendant’s assistance was substantial).

126. *Halberstam*, 705 F.2d at 484.

127. *Id.* (emphasis added) (“[A]dditionally, it may afford evidence of the defendant’s state of mind.”).

128. I say “further emphasizing” because the original list of five factors from the Restatement includes the defendant’s “state of mind.” RESTATEMENT (SECOND) OF TORTS § 876 cmt. d. (1979). Thus, *Halberstam*’s sixth factor provides an additional degree of focus upon the defendant’s state of mind, relative to the Restatement, especially given the *Halberstam* court’s explanation of why this factor was necessary. See *supra* notes 125-128 and accompanying text; see also Josephine Willis, Note, *To (B) or Not to (B): The Future of Aider and Abettor Liability in South Carolina*, 51 S.C. L. REV. 1045, 1060 (2000) (“It probably makes little difference whether the duration of assistance is treated as a separate factor or is viewed as a subset of the factors examining the defendant’s state of mind and relation to the wrongdoer.”).

In sum, the judicial test changed the focus of the second prong from defendant's knowledge of a breach of duty to knowledge of his own role in the breach of duty; changed the third prong to require that the defendant knowingly provides assistance; and changed the test for determining the substantiality of defendant's assistance to turn slightly more on the defendant's state of mind. With respect to the first and second changes, the judicial test requires that the defendant know of his role and know of his assistance, which seem to be the same thing. If a defendant knows of his role in a wrongdoer's ongoing illegal scheme, then how could one not reasonably conclude that the defendant knows he is assisting the scheme? In ordinary parlance, a "role" in an activity would be considered a position, function, responsibility, or part.¹²⁹ Thus, defendant's knowledge of his role seems almost indistinguishable from the defendant's knowledge of his assistance; however, such a conclusion would undermine the judicial test because two of its elements would essentially focus on the same inquiry, making parts of the test redundant and superfluous. This redundancy results in a great deal of uncertainty as to what is required to impose civil aiding and abetting liability. This uncertainty provides the basis for the later parts of this Note, which illustrate the highly problematic nature of the judicial test.

D. Evaluation "In Tandem": The Sliding Scale

Securities law precedents also generated an analytical methodology that departs further from the Restatement's test by altering the analysis of liability, known as the "sliding scale" analysis. The sliding scale analysis proposes that the second and third elements of the test for civil aiding and abetting liability be analyzed in tandem.¹³⁰ "In tandem" means that where there is stronger evidence of the defendant's general awareness of the alleged wrongful activity, less evidence of substantial assistance is required, and vice-versa.¹³¹

129. See *supra* note 115.

130. Willis, *supra* note 128, at 1055. Recall that the second and third elements are knowledge and assistance, respectively, and that this is the case under both the Restatement formulation and the judicial test. See *supra* note 109 and accompanying text (judicial test); *supra* note 68 and accompanying text (Restatement approach).

131. *E.g.* In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig., 113 F.3d 1484, 1495 (8th Cir. 1997) ("TMJ") ("We evaluate the second and third requirements in tandem—the stronger the evidence of Dow Chemical's general awareness of the alleged tortious activity, the less evidence of Dow Chemical's substantial assistance is required."). See also *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 188 (Minn. 1999) ("Thus, 'where there is a minimal showing of substantial assistance, a greater showing of *scienter* is required.'") (emphasis added); Willis, *supra* note 128, at 1056 ("Where assistance is not clearly established, the plaintiff must present more conclusive proof of knowledge, and vice versa."). "Scienter"

The sliding scale, or in-tandem, analysis has been proposed as a way of dealing with the difficulty of proving the knowledge and substantial assistance elements.¹³² Several courts have adopted the sliding scale analysis.¹³³ Proponents of this approach contend that the reasoning underlying sliding scale analysis comes from *Woodward v. Metro Bank of Dallas*,¹³⁴ an antifraud case under the federal securities laws.¹³⁵ However, as was the case with the judicial test, courts have extended the sliding scale analysis beyond securities cases into many other types of claims, including breach of fiduciary duty, negligence, abuse of process, wrongful death, fraud, products liability, and battery.¹³⁶

In re TMJ is one example of how some courts have applied the sliding scale analysis in the general tort context.¹³⁷ In *TMJ*, the Eighth Circuit upheld a grant of summary judgment to a parent corporation on the ground that it could not be found to have aided and abetted the tortious conduct of its subsidiary. In particular, the court ruled that the plaintiff had failed to show both that the parent was generally aware of the subsidiary's breach and that the parent company knowingly and substantially assisted the wrongful act.¹³⁸ In reaching this conclusion, the court evaluated the knowledge and knowing substantial assistance requirements in tandem,¹³⁹ explaining that strong proof of one element can offset lesser proof of the other.¹⁴⁰ The court found that there was no genuine issue of material fact as to either element because the record was devoid of any evidence establishing either element.¹⁴¹

means "knowingly," BLACK'S LAW DICTIONARY 1373 (8th ed. 2004), which makes it another word for *mens rea*.

132. Willis, *supra* note 128, at 1056. The statement "the difficulty of the knowledge and substantial assistance elements" refers to the possible inconsistency in the judicial test's formulation that was highlighted at the close of the preceding section. See discussion *supra* Part III.C.2.

133. *E.g.*, *In re TMJ*, 113 F.3d at 1495. It is important to note that a court's adoption of the sliding scale method of analysis has not necessarily depended upon that court's adoption of the judicial test; some courts have applied "in tandem" analysis to the test as formulated in Restatement Section 876(b). *E.g.*, *Witzman*, 601 N.W.2d at 188 ("Thus, where there is minimal showing of substantial assistance, a greater showing of *scienter* is required.") (emphasis added).

134. 522 F.2d 84 (5th Cir. 1975).

135. Willis, *supra* note 128, at 1056.

136. *Id.*

137. 113 F.3d at 1484.

138. *Id.* at 1495-96.

139. *Id.* at 1495.

140. *Id.*

141. *Id.*

1. The Supposed Origin of the Sliding Scale Approach

The origins of the sliding scale test purportedly lie in *Woodward v. Metro Bank of Dallas*.¹⁴² Yet, upon closer examination, *Woodward* turns out to provide no foundation for the sliding scale analysis. Subsequent cases adopting *Woodward's* reasoning do not provide any reasonable support to the sliding scale analysis, other than through misguided reliance on *Woodward*.

In *Woodward*, the Fifth Circuit affirmed the dismissal of a complaint alleging that the defendant-bank had aided and abetted violations of the 1934 Exchange Act and Rule 10b-5.¹⁴³ The plaintiff was Billie Jean Woodward, a then-recent divorcée with “painfully little business acumen.”¹⁴⁴ Starnes, a once successful and reputable businessman, approached Woodward about investing in his company, falsely telling her that the company’s financial health was glowing.¹⁴⁵ Woodward’s initial investment of \$50,000 was subsequently augmented when Starnes convinced her to cosign a note for \$200,000 and to collateralize the note from Metro Bank of Dallas with \$185,000 of marketable securities that she owned as well as a \$50,000 certificate of deposit.¹⁴⁶ Ultimately, Starnes’s company filed for bankruptcy, Metro Bank sought collection from Woodward, and Woodward sought judicial relief under the federal securities laws.¹⁴⁷ Specifically, Woodward sought to hold Metro Bank and one of its officers, a Mr. Turnbull, liable for aiding and abetting Starnes’s fraud because of their knowledge of and failure to disclose the desperate financial condition of Starnes’s company.¹⁴⁸

Woodward held that Metro Bank of Dallas and Mr. Turnbull were not liable for aiding and abetting Starnes’s fraud on Woodward. *Woodward* endorsed the judicial test over the Restatement’s test,¹⁴⁹

142. 522 F.2d 84; see *supra* notes 134-135 and accompanying text.

143. *Woodward*, 522 F.2d at 97.

144. *Id.* at 87.

145. *Id.* at 87-88.

146. *Id.* at 88. Starnes told Woodward the loan was for working capital for the company; however, the loan was actually made to Starnes personally, and used to satisfy the notices of insufficient funds on the company’s checking account. *Id.* In fact, the security pledged by Woodward collateralized the \$200,000 loan, as well as all of Starnes’s other loans to Metro Bank. *Id.* at 89.

147. *Id.*

148. *Id.*; see also *id.* at 94 (noting that the plaintiff’s claims were secondary because “[n]o one suggests either that she was investing in the bank, or that the bank was investing in [Starnes’s company]”).

149. *Id.* at 94-95 (quoting *SEC v. Coffey*, 493 F.2d 1364 (6th Cir. 1974)):

[A] person may be held as an aider and abettor only if some other party has committed a securities law violation, if the accused party had general awareness that

reasoning that the latter would "pose a danger of *over-inclusiveness* and seem to lose sight of the *necessary connection to the securities laws*."¹⁵⁰ The court justified the heightened liability requirement in the securities context by the fear that a contrary rule would work to impose liability on unsuspecting defendants, whose only "complicity" was to conduct transactions in the ordinary course of business but ultimately are found to have in some manner assisted another in perpetrating securities fraud.¹⁵¹ The court reasoned that such a result would be analogous to holding civilly liable the postman who mails a fraudulent letter, or even the company that manufactures the paper on which the violating documents are printed.¹⁵² The *Woodward* court reasoned that such a rule would be especially troubling considering the fact that "[t]ransactions occur as a whole and only later are they subjected to the scalpel of the legal dissector."¹⁵³ The court concluded that the Restatement approach would be tantamount to the imposition of strict liability on those who conduct business with violators of the securities laws.¹⁵⁴ Such a rule would essentially make banks, such as Metro Bank, insurers of those to whom the bank lends.¹⁵⁵ The court then quoted a passage Professor Ruder's oft-cited article that highlights the importance of the knowledge requirement in securities cases:

his role was part of an overall activity that is improper, and if the accused aider-abettor knowingly and substantially assisted the violation.

The *Woodward* court noted that its verbal formulation of the test for civil aiding and abetting liability under the securities laws differed from the formulation used by other courts in the securities law setting, which more resembled the Restatement formulation. *Id.* at 95 (referring specifically to "a securities law violation" rather than "an independent wrong" was desirable, as was reference to "awareness of a role in improper activity" rather than merely referring to "knowledge of the wrong's existence").

150. *Id.* at 95 (emphasis added) (reasoning that "[o]ne could know of the existence of a 'wrong' without being aware of his role in the scheme, and it is the participation that is at issue.").

151. *See id.* ("If the alleged aider and abettor conducts what appears to be a transaction in the ordinary course of his business, more evidence of his complicity is essential.").

152. *Id.*

153. *Id.* at 95; *see also* Willis, *supra* note 128, at 1055 (advocating a "middle ground standard" of "constructive knowledge" as opposed to "mere negligence").

154. *Woodward*, 522 F.2d at 96.

155. *See id.* at 96 (quoting David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597, 630-31 (1972)):

If all that is required in order to impose liability for aiding and abetting is that illegal activity under the securities laws exists and that a secondary defendant, such as a bank, gave aid to that illegal activity, the act of loaning funds to the market manipulator would clearly fall within that category and would expose the bank to liability for aiding and abetting. Imposition of such liability upon banks would virtually make them insurers regarding the conduct of insiders to whom they loan money.

If it is assumed that an illegal scheme existed and that the bank's loan or other activity provided assistance to that scheme, some remaining distinguishing factor must be found in order to prevent such automatic liability. The bank's knowledge of the illegal scheme at the time it loaned the money or agreed to loan the money provides that additional factor. Knowledge of wrongful purpose thus becomes a crucial element in aiding and abetting or conspiracy cases. 156

The much-needed distinguishing factor to impose liability for ordinary business transactions, *Woodward* concluded, is an explicit requirement of actual knowledge¹⁵⁷ of the *wrongful nature* of the activity assisted,¹⁵⁸ as opposed to merely requiring knowledge of the assistance, i.e., the routine business transaction, standing alone.¹⁵⁹ To avoid overextending the domain of aiding and abetting liability in the securities context, *Woodward* demands proof that the defendant is aware that he is playing a role within an improper course of conduct.¹⁶⁰

In its holding with respect to the third element of aiding and abetting liability, the *Woodward* court set forth the language that some have interpreted as giving rise to a sliding scale analysis:

In a case combining silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business involved. If the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without clear proof of *intent* to violate the securities laws. Conversely, if the method or transaction is atypical or lacks business justification, it may be possible to infer the knowledge necessary for aiding and abetting liability. In any case, the assistance must be substantial before liability can be imposed under 10b-5.¹⁶¹

While seeming to support the sliding scale analysis, this part of the holding actually speaks only to the third element of the judicial test for civil aiding and abetting liability;¹⁶² consequently, this part of the holding is taken out of context when used as support for what has come to be known as sliding scale analysis. *Woodward*, in short, only supports a sliding scale approach to the third element itself, not between the second and third elements in-tandem. This conclusion is

156. *Id.* (quoting same as note 155).

157. Some commentators have characterized the actual knowledge requirement as too restrictive, making imposition of liability essentially impossible. Willis, *supra* note 128, at 1054. The *Woodward* court delegitimizes such worries on the face of the opinion. 522 F.2d at 96 ("Knowledge may be shown by circumstantial evidence, or by reckless conduct, but the proof must demonstrate actual awareness of the party's role in the fraudulent scheme.")

158. *Woodward*, 522 F.2d at 95-96.

159. *Id.* at 96.

160. *Id.* at 95.

161. *Id.* at 97 (emphasis added) (footnote omitted).

162. The *Woodward* court sought to impose a sliding scale within the third element of the judicial test (the defendant knowingly and substantially assisted the primary wrongdoer), so that the more remote the assistance, the higher degree of scienter required to find liability. *Id.* at 95.

evidenced by *Woodward's* own reasoning: "The scienter requirement scales upward when activity is more remote; therefore, the *assistance rendered should be both substantial and knowing*. A remote party must not only be aware of his role, but he should also know when and to what degree he is furthering the fraud."¹⁶³

"Scienter" represents a legal term of art that is used as a synonym for *mens rea*.¹⁶⁴ Scienter, thus, does not refer to the defendant's knowledge that the primary actor's conduct is wrongful, but refers, instead, to whether or not the defendant possessed the requisite "evil mind" when he provided the substantial assistance or encouragement. The *Woodward* court noted that whether, or to what extent, silence or inaction can fulfill the requirement is the most problematic issue under the third element of aiding and abetting securities law violations.¹⁶⁵ The court held that substantiality is a function of the circumstances and that in a securities fraud case combining silence or inaction with affirmative assistance, the degree of scienter required should depend on how ordinary the assisting activity is in the business involved.¹⁶⁶ In the securities law context, "silence/inaction" refers to the alleged aider and abettor's failure to disclose the fraud to the victim or take action to prevent the fraud.¹⁶⁷ "Affirmative assistance" refers to the alleged aider and abettor's

163. *Id.* (emphasis added) (footnote omitted). The court in *Woodward* explicitly intended that its formulation of the third element of the test for civil aiding and abetting liability for violations of the federal securities laws differ, both in verbal formulation and application, from the formulation set forth in the Restatement (Second) of Torts Section 876(b). *See id.* at 95 n.23 (making note of the different Restatement standard advocated by a scholar).

164. BLACK'S LAW DICTIONARY 813 (7th ed. 1999). "Intent" is a problematic word given its ambiguity; therefore, the trend in the criminal law is to the Model Penal Code approach.

165. *Woodward*, 522 F.2d at 96. Commentators have also generated a substantial volume of discussion on the issue of silence constituting grounds for aiding and abetting liability in tort. *See, e.g.*, Patrick J. McNulty & Daniel J. Hanson, *Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine*, 29 TORT & INS. L.J. 14 *passim* (1993).

166. *Woodward*, 522 F.2d at 97 (footnotes and citations omitted):

When it is impossible to find any duty of disclosure, an alleged aider-abettor should be found liable only if scienter of the high "conscious intent" variety can be proved. Where some special duty of disclosure exists, then liability should be possible with a lesser degree of scienter. In a case combining silence/inaction with affirmative assistance, the degree of knowledge required should depend on how ordinary the assisting activity is in the business involved.

Notice that the *Woodward* court uses the terms "knowledge" and "scienter" interchangeably in the part of the opinion discussing the third element of the test for liability. *Id.* Despite the interchangeable usage of the two words, the *Woodward* court is clearly referring to scienter and using knowledge only insofar as it is synonymous with scienter because the court is discussing the third element of the test for liability, which uses "knowingly," which is a level of scienter. *Id.* Thus, the interchanging usage, while potentially confusing, should not take one off track unnecessarily.

167. *Id.* at 96-97.

commercial relationship with the primary wrongdoer.¹⁶⁸ Therefore, *Woodward* does not support the sliding scale analysis because the only sliding scale that *Woodward* sets forth is within the third element of the test for liability, i.e. increasing the requisite degree of mental culpability when the assistance is more remote or less substantial.

In reality, the approach to analyzing substantiality set forth in *Woodward* is merely a subconscious application of the Restatement's test for substantiality. A fact-specific balancing to determine substantiality, as in *Woodward*, is nothing new because it is essentially the same as the original five factor test under the Restatement approach, which analyzes the sufficiency of the assistance provided by weighing the defendant's remoteness and his state of mind.¹⁶⁹ Recall that the comment to Section 876(b) provides that with respect to the substantiality element of liability:

The assistance of or participation by the defendant *may be so slight* that he is not liable for the act of another. In determining this, the nature of the act encouraged, the *amount of assistance given* by the defendant, his *presence or absence at the time of the tort*, his *relation to the other* and his *state of mind* are all considered.¹⁷⁰

Thus, one can see how *Woodward's* analytical formulation is best analogized to the substantiality analysis under the third element of the Restatement. First, the Restatement's formulation recognizes that the assistance in some cases may be so slight that liability may not be imposed, which would seem directly applicable to situations where the defendant's assistance is, as characterized in *Woodward*, "remote." Second, the Restatement's five-factor test further takes into account the remoteness of the assistance by its express focus on the following factors: "the amount of assistance given by the defendant," the defendant's "presence or absence at the time of the tort," and the defendant's "relation to the other." Therefore, in a routine business transaction, such as the banking transactions in *Woodward*, the defendant's provision of ordinary business services in an arm's length transaction with a client likely would be insufficient, standing alone, under the Restatement's formulation, as it would fail to be substantial under the Restatement's five-factor test for substantial assistance.¹⁷¹

168. *Id.*

169. See *supra* notes 64-65 and accompanying text.

170. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d. (1979) (emphasis added).

171. By "standing alone," I mean that there is no showing of the defendant possessing an evil state of mind, and the nature of the assistance provided through the routine business transaction is not alarming. The factor focusing on the defendant's relation to the primary actor likely renders the fact that the transaction is at arm's-length and in the ordinary course of business, as opposed to transactions between familiar parties within a criminal syndicate, very important to avoidance of liability.

In short, claims analogous to those against the defendants in *Woodward* would fail under the Restatement because the remoteness of the assistance would render such assistance insubstantial under the third element of Section 876(b).

2. Why the Sliding Scale Analysis is Erroneous

Woodward, the supposed source of sliding scale analysis, turns out not to support it but instead to support independent analysis of the second and third elements of liability. In any event, sliding scale analysis should be rejected because it undermines fundamental elements of aiding and abetting liability.

The fundamental basis for aiding and abetting liability is that the defendant *both* (1) knows of the primary actor's wrongful conduct; and (2) substantially assists or encourages the primary wrongdoer to so act. By contrast, the sliding scale analysis provides that if, for example, the evidence is very strong that one knows of the underlying wrong that evidence of even a small degree of assistance would be sufficient to render the defendant liable for civil aiding and abetting. Thus, almost any degree of assistance could be enough to be considered substantial assistance under the sliding scale. But, if the assistance provided was negligible, then how can it also be deemed substantial? It is illogical to make the determination of whether the assistance was substantial turn upon the defendant's knowledge. The logical approach is to analyze the defendant's knowledge and assistance independently.

The defendant's knowledge and assistance require independent examination to maintain the proper scope of liability; otherwise the scope of liability may become so broad as to render the theory of civil aiding and abetting potentially draconian.¹⁷² First, allowing a high level of knowledge to offset a small degree of assistance might have socially undesirable results. Second, the sliding scale approach presents the danger of potentially stifling commerce through too much liability, which is the very danger that *Woodward* sought to avoid.

The sliding scale presents a hazard of socially undesirable results by frustrating the long-standing public policy that favors legal, medical, and religious services being both available and competently provided to those who need them. For example, suppose a priest has actual knowledge that a member of his parish, Tony S., is a primary leader of a large criminal syndicate. In an attempt to mend Tony's

172. "Draconian," as it is used here, means "harsh; severe." BLACK'S LAW DICTIONARY 508 (7th ed. 1999).

weary soul, the priest ministers to Tony over a number of years by hearing his confessions, providing spiritual counseling, and even attending cookouts at his house. Tony never shares any specifics of future activities with the priest, as the ministry is focused almost exclusively on reconciliation and rehabilitation.¹⁷³ The ministry helps Tony personally by, among other things, making him a better family man and a more compassionate person, especially to animals. The ministry also helps Tony professionally by slightly easing the mental anguish and guilt he sometimes feels. Even without the ministry, however, Tony would still continue in his role in the syndicate, although his mental distress would somewhat detract from his ability to lead the syndicate. The priest ministers to Tony for a number of years before Tony injures the plaintiff, but during those years of ministry, Tony never turns away from his role in the syndicate and even rises substantially in rank. The ministry that the priest provides to Tony is typical of the ministry he provides to many other members of his parish. The reader can guess where I am going with this illustration: By providing such routine assistance in the ordinary course of his business, should the priest thereby be rendered liable for aiding and abetting Tony's ongoing wrongful conduct simply because the priest had actual knowledge? Under the sliding scale analysis, the priest may indeed be liable.¹⁷⁴ On one end of the sliding scale there is incredible weight: a strong showing of actual knowledge of ongoing wrongful conduct. Thus, the other end of the scale, assistance or encouragement, perhaps could be satisfied by a minute degree of assistance, such as the priest's continuing ministry to Tony, despite his failure to change his ways. Under the Restatement, the priest likely would not be liable because his assistance would not be held substantial under the five-factor test.¹⁷⁵

173. Meaning that no form of duty to report arises from the priest's ministry to Tony, either statutory or otherwise. Cf. *Tarasoff v. The Regents of the University of California*, 551 P.2d 334, 345 (Cal. 1976) (holding that once a psychotherapist determines or reasonably should have determined that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger, notwithstanding the general rule at common law that one person owes neither a duty to control the conduct of another nor a duty to warn those endangered by such conduct).

174. Availability of liability by the priest assumes, of course, that the priest is not protected by some form of charitable immunity, which is likely the case because "[m]ost American courts or legislatures have now rejected the immunity" and "[t]he Restatement simply says no such immunity exists." DOBBS, *supra* note 26, § 282, at 763 (footnotes omitted).

175. Lack of liability could exist for several reasons. The most persuasive reason would be the priest's "state of mind," which was to do his job by ministering to Tony, as opposed to an evil mind intending to bring about the wrongful result. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979). Other reasons include the following: (1) the provision of ordinary religious services likely would not be a sufficient "amount of assistance given," (2) the priest was not present at the

By analogy, the same claims could be brought against a psychiatrist, who provides counseling and medication to Tony in an attempt to treat his repeated panic attacks, provided that she knows who he is and what he does for a living. In fact, perhaps a stronger case could be made against the mental health personnel because the panic attacks, which without warning render him temporarily physically incapacitated, likely are a bigger hindrance to Tony's leadership than his religious butterflies. The circle of liability also could be expanded to include Tony's retained legal counsel.¹⁷⁶

In the case of either the priest or the psychiatrist, the imposition of liability achieves socially undesirable results. Public policy favors persons receiving the legal, medical, and religious services that they need.¹⁷⁷ Under the sliding scale approach, the providers of such services would likely become decidedly apprehensive of learning about the recipients of their services; however, competent provision of such services often depends upon the provider being aware of the very details that providers would seek to avoid learning in order to avoid liability. Another troubling aspect of such a result is that persons with the greatest need for such services would be the people whom providers would most seek to avoid. A person in Tony's situation is the very sort of person that society wants to receive

time the wrong was committed; and (3) his relationship to Tony is more that of a priest, than of an accomplice. *Id.*

176. Placing liability upon *retained* legal counsel seems less problematic than liability upon ongoing medical and religious providers. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 13 (providing that a lawyer must consult with his client if he believes the client wants him to violate the Model Rules).

177. Evidentiary privileges protecting communications in these settings demonstrate judicial and legislative recognition of the desirability of these services being available to persons in need without such persons having to fear later legal consequences; however, with respect to legal services, there are crime-fraud exceptions to the attorney-client privilege and the rules of professional conduct governing confidentiality that are designed to prevent the use of legal services to further the commission of a crime. *Clark v. U.S.* 289 U.S. 1, 15 (U.S. 1933) (discussing crime-fraud exception to attorney-client privilege); MODEL RULES OF PROF'L CONDUCT R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3) (allowing lawyers to reveal confidential information to prevent the client from committing a fraud or crime using the lawyer's service that is reasonably certain to result in substantial financial injury); Marc I. Steinberg, *Lawyer Liability After Sarbanes-Oxley—Has the Landscape Changed?*, 3 WYO. L. REV. 371, 371-72 (2003) (footnotes omitted):

Largely due to massive corporate debacles that wreaked havoc on investors and the integrity of the U.S. securities markets, Congress enacted the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or SOA). Among its many significant provisions, Congress mandated that the Securities and Exchange Commission (SEC) promulgate a rule focusing on attorney "up the ladder" reporting with respect to a corporate client when faced with a material violation of fiduciary duty, securities law, or similar violation by a subject corporate constituent (such as a director, officer or employee). Following Congress' directive, the SEC in 2003 adopted standards of professional conduct.

religious and psychiatric counseling. At the same time, the most notorious persons, such as a publicly reputed mobster like Tony, may be unable to secure such services at all because providers may seek to avoid such persons altogether. Therefore, the sliding scale approach presents the danger of creating a socially undesirable result: interference with the public policy that strongly favors adequate availability and competent provision of legal, medical, and religious services to persons in need of such services.

Just as with the priest illustration above, under the sliding scale approach, businesses face the danger of civil liability for aiding and abetting for routine business transactions if there is sufficient evidence of the defendant's actual knowledge of the primary actor's breach of duty. Under the sliding scale analysis, a business shown to have a high level of knowledge of the primary wrongdoer's conduct could be liable for providing a very small degree of assistance or encouragement. The potential for liability is broader for businesses than it would be for the priest because the proprietors of the business may have the knowledge of their employees imputed to the business under principles of agency master-servant law, whereas the priest is only potentially liable for his own knowledge.

To illustrate, suppose that the defendant is the sole proprietor of a gas station in a mid-sized city with several other gas stations. A cashier at the gas station sells gas to Tony, and there is substantial evidence that because of Tony's notoriety, the cashier knows Tony is a primary leader in a large criminal syndicate. The evidence of knowledge is based upon the clerk's admission that he reads the entire newspaper every day, combined with the fact that the newspaper frequently features pictures of Tony and descriptions of his leadership of the criminal syndicate. Does the cashier then become liable to plaintiffs injured by wrongs that Tony could foreseeably commit while using the tank of gas? Holding a mere clerk at a gas station liable to unknown and unidentified others seems rather harsh, given that all the clerk did was sell a tank of gas, a material readily available on the market, to a person widely-known to be a mobster. As discussed above, however, the clerk likely could be held liable under a forthright application of the sliding scale analysis. Of course, if the clerk were found liable, the proprietor of the business would likely be found liable under the doctrine of *respondeat superior*. As a result, the proprietor and the clerk would thereby be the insurer of potential plaintiffs that Tony may injure in the ordinary course of his own business as he carts around town in his big SUV using the tank of gas. Such a result is troubling. In addition, such a result is contrary to *Woodward*, the claimed source of the sliding scale analysis, in which the court sought

to avoid civil aiding and abetting liability for routine business transactions. *Woodward's* concern about after the fact dissection of a transaction likely would be realized in a case such as this.¹⁷⁸ A different result would be reached under the Restatement test because the sale of a readily available good, at the usual price, and in the ordinary course of business, likely would not constitute substantial assistance.¹⁷⁹

In sum, the sliding scale initially was crafted by the courts to limit civil aiding and abetting liability of defendants whose involvement in the primary actor's wrongful conduct was remote, leveraging the usual difficulty of proving knowledge in such cases to defeat liability. The above discussion demonstrates, however, that the sliding scale, if followed to its logical conclusion, may actually expand liability so as to give rise to undesirable results.

V. THE PROPER TEST FOR CIVIL AIDING AND ABETTING LIABILITY

With the dearth of coherent precedent and the increasing importance of civil aiding and abetting, courts need a clearer test for liability.¹⁸⁰ This Part proposes such a test through synthesis and critical analysis of relevant precedent and commentaries, as well as through application of basic legal principles to fill in the many gaps that currently exists. The appropriate test will render a defendant liable for civil aiding and abetting where it is shown by a preponderance of the evidence that (1) the primary wrongdoer committed a wrongful act that harmed the plaintiff; (2) the defendant was generally aware of the primary wrongdoer's breach of duty; (3) the defendant provided the primary wrongdoer with substantial assistance or encouragement in the breach of duty; and (4) the harm that occurred was within the scope of the risk created by breaching the duty of which the defendant was aware. As a matter of law, of

178. Specifically, in attempting to prove circumstantially the clerk's knowledge of Tony's mafia affiliation, the plaintiff would have the benefit of the ability to use a line of argument based upon the contention that everyone knows Tony is a mobster, especially a person who habitually reads the newspaper from cover to cover.

179. First, the amount of assistance provided to Tony by selling him a tank of gas is minimal, especially if he bought at the market price and could readily have bought it elsewhere. Thus, the act of selling the gas provided little assistance. The assistance that having gas in the car provides in a particular legal wrong, such as extortion, is also very slight. Second, the clerk would not be present at the time of Tony's wrongful conduct. Third, the clerk likely would have no relation to Tony other than perhaps exchanging casual greetings as Tony paid for the gas. Fourth, the clerk's state of mind was not one intending to bring about a legal wrong, although it may be contended that the clerk knew with a substantial certainty that one might occur.

180. See *supra* notes 5-8 and accompanying text.

course, the defendant's provision of assistance itself must have been a breach of duty to the plaintiff; otherwise, the plaintiff lacks standing.

A. Primary Actor's Legal Harm to Plaintiff

Civil aiding and abetting unquestionably requires that the primary wrongdoer commit a wrongful act that caused an injury to a plaintiff.¹⁸¹ "Wrongful act," of course, refers to an illegal act, not simply an act that is morally reprehensible. A "wrongful act" is defined as "an act taken in violation of a *legal duty*; an act that unjustly infringes on another's rights."¹⁸² Recall that the law protects—in the broadest sense—the rights of both society and individuals through criminal and civil law, respectively.¹⁸³ Thus, a person's breach of duty may be a violation of a criminal or a civil duty, or perhaps a violation of both; moreover, the duty may arise from the common law or from a statute.¹⁸⁴

In most cases, duty turns upon traditional principles, and the existence of a duty poses no substantial inquiry.¹⁸⁵ If the primary

181. The Restatement, the judicial test, and the sliding scale all contain this requirement. Inherent within the text of the Restatement is the requirement of a duty: the aiding and abetting defendant must "know that the other's conduct constitutes a *breach of duty* . . ." RESTATEMENT (SECOND) OF TORTS § 876(b) (1979) (emphasis added). The judicial test requires the same. Specifically, courts have held that "the party whom the defendant aids must perform a *wrongful act* that causes an injury." Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983) (emphasis added).

182. BLACK'S LAW DICTIONARY 1604 (7th ed. 1999) (synonymous with "wrongful conduct"); see also *infra* note 186 (noting that legally wrongful conduct is not necessarily synonymous with immoral conduct).

183. See *supra* notes 37-42 and accompanying text.

184. There is another interesting issue with respect to duty, which lies outside the scope of this Note: whose duty must be breached? Specifically, is the relevant duty the one owed to the plaintiff by the primary wrongdoer, the aider and abettor, or are both relevant? The first possibility obviously seems relevant. For example, if the defendant yells "Kill him! . . . Hit him more!" while the primary actor batters the plaintiff, the defendant is aiding and abetting the primary actor's breach of duty to the plaintiff. Rael v. Cadena, 604 P.2d 822, 822 (N.M. Ct. App. 1979). Whether or not the defendant's assistance renders him a participant so as to breach his own duty to the plaintiff is unclear. A more difficult question is presented by the situation where the defendant owes a special duty, i.e. an affirmative duty to rescue, but the primary actor does not. For example, assume a parent has a duty to rescue his child where the rescue poses no danger to the parent. Can the parent be held liable as an aider and abettor for dissuading the primary actor, who has no duty to rescue, from rescuing the imperiled child? In other words, can a defendant aid and abet another in breaching the defendant's own duty to the plaintiff? The answer to this question is perhaps unimportant, as the plaintiff likely just would simply sue the defendant for his own negligence rather than proceeding under a claim of civil aiding and abetting.

185. See generally, John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998) (noting one has a duty of ordinary care to those with whom the law has recognized a relationship warranting such a duty). One has a general duty not to commit an intentional tort against another. Similarly, the criminal law imposes a duty upon

actor owes no duty to the plaintiff, then the plaintiff cannot establish an aiding and abetting claim against the defendant. Suppose that Paul, the primary actor, sits on the ground beside a pond, enjoying a cold beer while watching a stranger drown. Paul could save the drowning stranger without risk but would rather watch her drown. Suppose further that Don, the aider, arrives, applauds Paul for watching the woman drown, and offers Paul a comfortable chair and another beer. Given that, in most jurisdictions, Paul owes no affirmative duty to rescue a stranger, Paul has not committed a legally wrongful act.¹⁸⁶ Consequently, Don could not have aided and abetted Paul because there was no tort to aid and abet. Paul committed no legal wrong.

Requiring a completed tort against the plaintiff is one way that civil aiding and abetting liability departs from its criminal counterpart.¹⁸⁷ By providing the victim with a private right of action, tort law concerns itself primarily with empowering the victim to seek redress for a completed and legally recognized wrong done to her. Thus, for example, the fact that the primary actor behaved carelessly toward a plaintiff is not, standing alone, sufficient to impose liability upon either the primary or secondary actors, as the plaintiff has not established injury or causation. Criminal law, on the other hand, imposes punishment for inchoate crimes, such as attempt.¹⁸⁸ Because a plaintiff seeking to impose aiding and abetting liability must make out a full case within a case and because tort law does not recognize inchoate wrongs, the plaintiff must prove the commission of a

persons not to act in specified ways, e.g., "A person is guilty of arson . . . if he starts a fire or causes an explosion with the purpose of: (a) destroying a building or occupied structure of another." MODEL PENAL CODE § 220.1(1)(a) (1962).

186. RESTATEMENT (SECOND) OF TORTS § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."). The commentator goes on to state that the result of this rule is that "one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown." *Id.* cmt. c (noting further the moral reprehensibility of such a rule but the continued legal viability of the rule nonetheless).

187. *Id.* § 876(b). In the criminal context, the requirement that the underlying legal wrong actually have occurred is not necessary under many modern recodifications, which impose liability for attempts to aid. *See, e.g.*, MODEL PENAL CODE § 2.06(3)(a)(ii) (1962) ("aids or agrees or attempts to aid such other person in planning or committing" the offense); *see also* LAFAYE, *supra* note 31, § 6.7, at 624 (stating several modern codes have adopted MPC approach). This distinction between criminal and tort liability likely finds its basis in the principles discussed, *supra*, notes 46-53 and accompanying text.

188. *See supra* note 53 and accompanying text.

completed tort even to be eligible to establish another's liability for aiding and abetting.¹⁸⁹

Apart from requiring both standing to sue the primary actor and a completed tort against the plaintiff, a plaintiff also must have standing to sue for aiding and abetting. Generally, the primary actor's breach of a duty owed to the plaintiff suffices to establish standing; therefore, in most cases, standing poses no substantial barrier to aiding and abetting liability. However, standing for civil aiding and abetting liability may not exist when the duty owed to the plaintiff by the primary actor arises from a statute-based private right of action. Perhaps the best example of this is *Central Bank of Denver v. First Interstate Bank of Denver*.¹⁹⁰

In *Central Bank*, the United States Supreme Court held that a plaintiff may not maintain a claim for civil aiding and abetting under Securities Exchange Act Section 10(b).¹⁹¹ This decision shocked most observers, as every circuit court of appeals had recognized such a right of action.¹⁹² The Court reasoned that, unlike in the criminal context, Congress had not enacted a general civil aiding and abetting statute.¹⁹³ With that in mind, the Court held that "when 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."¹⁹⁴ Accepted canons of construction provide that the statutory text controls the definition of conduct covered by the statute,¹⁹⁵ and Congress, presumptively, knows how to legislate; therefore, the statute must indicate an intention to create civil aiding and abetting liability.¹⁹⁶

189. "Case within a case" is a phrase often used to describe a malpractice plaintiff's burden of proving a lack of damages but for the defendant's action. DOBBS, *supra* note 26, § 486, at 1390-91. I use the phrase in reference to the civil aiding and abetting plaintiff's burden of proving a primary wrong, which is much easier to establish because it involves proving something alleged to have occurred already as opposed to proving the probability that something would have happened but for the defendant, which is a much more speculative undertaking.

190. 511 U.S. 164 (1994); *see also* Doe v. GTE Corp., 347 F.3d 655 (7th Cir 2003) (an example where aiding and abetting liability does not exist).

191. *Cent. Bank*, 511 U.S. at 191.

192. *Id.* at 193 (Stephens, J., dissenting).

193. *Id.* at 182.

194. *Id.*

195. *Id.* at 175.

196. *Id.* at 177. Courts give particular weight to (1) use of language the court has previously found sufficient to impose civil aiding and abetting liability; (2) whether the conduct proscribed by the statute could sensibly extend to aiders and abettors; (3) how far the statute has already been stretched; and (4) whether other private causes of action within the statutory scheme create private rights of action. *Id.* at 180-85.

Over the years, circuit courts have interpreted *Central Bank* rather narrowly, limiting the holding primarily to the 1934 Securities Exchange Act context. For example, the Seventh Circuit held in *Boim v. Quranic Literacy Institute* that two specific anti-terrorism statutes allowed civil aiding and abetting liability, although the text of the statute did not use the words “aiding or abetting.”¹⁹⁷ Specifically, the *Boim* court held that Congress intended liability to extend to aiders and abettors of terrorism.¹⁹⁸ The *Boim* court distinguished *Central Bank* because the anti-terrorism statute provided an express private right of action, and therefore, the *Boim* court was not required to stack one inferred right upon another, as was required for civil aiding and abetting liability under Section 10(b).¹⁹⁹ While there is no presumption of civil aiding and abetting liability under a federal statute, courts still may imply such liability, despite a lack of explicit textual support.

The first element can be summarized as follows: the plaintiff must show that the primary actor breached a duty owed by him to the plaintiff, which resulted in a completed tort against the plaintiff, and which provides standing for the plaintiff to sue the defendant for aiding and abetting.

B. The “Factual Knowledge” Requirement

The second requirement to establish civil aiding and abetting liability is that the defendant was generally aware of the primary wrongdoer’s breach of duty at the time the defendant rendered assistance. This requirement will hereinafter be referred to as the “factual knowledge” requirement.²⁰⁰ The factual knowledge

197. *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1019-20 (7th Cir. 2002) (distinguishing *Central Bank*).

198. *Id.* The court explained its reasoning as such:

[A]lthough the words ‘aid and abet’ do not appear in the statute, Congress purposely drafted the statute to extend liability to all points along the causal chain of terrorism. It is not much of a leap to conclude that Congress intended to extend section 2333 liability beyond those persons directly perpetrating acts of violence. Indeed, the statute itself defines international terrorism so broadly—to include activities that ‘involve’ violent acts—that we must construe it carefully to meet the constitutional standards regarding vagueness and First Amendment rights of association.

199. *Id.* at 1019 (noting that courts would have had to stack inferences by creating a private right of action under § 10(b) of the 1993 Securities Act and then “extending liability to aiders and abettors in rule 10b-5 actions”).

200. I have termed this element the “factual knowledge” requirement to distinguish the inquiry from the knowledge analysis under the third prong, i.e., whether the defendant knowingly and substantially assisted the principal wrong. “Knowingly” under the third prong resembles the scienter or *mens rea* one possesses when providing assistance, whereas knowledge under the second prong represents awareness of wrongful conduct by a primary actor. Thus, the

requirement encompasses the following key concerns: (1) the degree of knowledge the defendant is required to possess of the breach of duty in order for liability to attach; and (2) the “facts” that the defendant is required to know under the factual knowledge requirement.

1. The Requisite Degree of Knowledge of the Breach of Duty

The degree of legal knowledge required to satisfy the factual knowledge requirement presents a surprisingly challenging issue and represents perhaps the most convoluted issue in the law of civil aiding and abetting. The authors of the Restatement intended that aiding and abetting liability would be predicated on the fact that the defendant “knows” of a breach of duty.²⁰¹ The judicial test’s requirement of a “general awareness” accords with the Restatement with respect to knowledge of the breach of duty.²⁰² Specifically what it means to “know” is not easily ascertainable, however, especially since knowledge is rarely relevant in tort.²⁰³ Courts have defined at least three different mental states as satisfying the “knows” requirement: actual knowledge, reckless knowledge, and constructive knowledge.²⁰⁴

Actual knowledge, as the highest possible standard, certainly satisfies the factual knowledge requirement. Moreover, ordinary

second element pertains to the defendant’s factual knowledge of the circumstances, not his intents or purposes.

201. The Restatement (Second) of Torts Section 876(b) provides a single knowledge requirement within its text: that defendant “*knows* that the other’s conduct constitutes a breach of duty.” RESTATEMENT (SECOND) OF TORTS § 876(b) (emphasis added). Moreover, the comment to Section 876(b) similarly provides that liability of the defendant requires that “the act encouraged is *known* to be tortious.” *Id.* § 876(b) cmt. d (emphasis added).

202. See *supra* notes 113-117 and accompanying text (laying out second element of judicial test).

203. Neither the text of nor the comment to Section 876(b) provide any definition of knowledge. Following general canons of construction, one would look to other sections of the Restatement for a definition, but the American Law Institute provides none, even while providing definitions of intent, recklessness, and negligence. Perhaps the blame for the failure to define knowledge should rest upon the general structure of traditional tort law, which divided torts into two categories: intentional torts and negligence. The focus here is, as would be presumed, the legal definition of knowledge; philosophy of what it means to know something or if one truly ever can know anything will be, appropriately, saved for philosophers.

204. Actual knowledge, as the term implies, means “Direct or clear knowledge, as distinguished from constructive knowledge.” BLACK’S LAW DICTIONARY 876 (7th ed. 1999). Reckless knowledge describes “a defendant’s belief that there is a risk that a prohibited circumstance exists, regardless of which the defendant goes on to take the risk.” *Id.* at 877. Constructive knowledge constitutes “[k]nowledge that one using reasonable care or diligence should have, and therefore, that is attributed by law to a given person,” i.e., facts that an ordinary person either knew or reasonably should have known under the circumstances—essentially a negligence standard. *Id.* at 876. Actual and reckless knowledge both include an element of subjective knowledge, i.e., the defendant actually must know either a certain fact or the existence of a risk, respectively; however, constructive knowledge is an objective inquiry.

parlance of "knows" would favor actual knowledge to the exclusion of the others.²⁰⁵ The real issue is whether something less than actual knowledge, such as reckless or constructive knowledge, might also satisfy the factual knowledge requirement.

Beyond the verbal formulations, several courts and commentators advocate the use of nothing less than actual knowledge in the securities law context.²⁰⁶ These authorities contend that anything less than actual knowledge "would cast too wide a net, bringing under it parties involved in nothing more than routine business transactions."²⁰⁷ The Eighth Circuit provided the following illustration:

For instance, without the knowledge element, a party who, in the normal course of business, transmits documents necessary to consummate a sale may be held liable as an aider and abettor if the transmission somehow aided a securities laws violation. Knowingly engaging in a customary business transaction which incidentally aids the violation of securities laws, without more, will not lead to liability.²⁰⁸

Professor Ruder also emphasized the importance of actual knowledge as a way of preventing liability of innocent parties conducting ordinary business:

If it is assumed that an illegal scheme existed and that the bank's loan or other activity provided assistance to that scheme, *some remaining distinguishing factor must be found in order to prevent such automatic liability.* The bank's knowledge of the illegal scheme at the time it loaned the money or agreed to loan the money provides that additional factor. Knowledge of wrongful purpose thus becomes a crucial element in aiding and abetting or conspiracy cases.²⁰⁹

The reluctance of courts to extend liability to persons conducting ordinary business transactions who lack actual knowledge of the wrongful activity is understandable, particularly where the business transactions are rather remote, such as a bank loaning money to a borrower who is perpetrating a fraud upon some third party; however, reckless knowledge may indeed satisfy the factual knowledge requirement because the insistence upon actual knowledge may not withstand scrutiny when applied to transactions between parties who are very familiar with one another.²¹⁰

205. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1993).

206. Stanley Pietrusiak, Jr., Comment, *Changing the Nature of Corporate Representation: Attorney Liability for Aiding and Abetting the Breach of Fiduciary Duty*, 28 ST. MARY'S L.J. 213, 236 n.78 (1996).

207. *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991).

208. *Id.*

209. Ruder, *supra* note 155, at 630-31 (emphasis added). This example has been very influential to courts analyzing claims of aiding and abetting securities law violations through ordinary business transactions. *E.g.*, *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 95 (5th Cir. 1975).

210. *Id.*

For example suppose Don Aider owns a local hardware store and sells his brother-in-law Paul Actor, who Don strongly suspects but does not know is a burglar, the following items: a crow bar, a set of bolt-cutters, and a blow torch. Assuming that Paul in fact commits a burglary and that the tools substantially assisted him, would imposing liability upon Don be justified for his conscious disregard of a known risk of tortious behavior by Paul? One could answer either way. On the one hand, one could contend that Don has no duty to protect unknown others from a risk posed by Paul's tortious conduct and that imposing liability on Don would be allowing liability through the back door.²¹¹ On the other hand, one could argue that Don's decision to disregard such a high risk deflates any contention that Don was an innocent party conducting ordinary business, which is the type of defendant upon whom proponents of the actual knowledge requirement base their arguments.²¹²

Constructive knowledge is likely insufficient to satisfy the factual knowledge requirement. The verbal formulation of the judicial test, which is used by most courts, indicates that mere constructive knowledge likely does not suffice for civil aiding and abetting liability. The second element of the judicial test provides that "the defendant must be *generally aware* of his role as part of an overall illegal or tortious activity at the time that he provides the assistance."²¹³ So courts have provided that "generally aware" constitutes the proper verbal formulation rather than the Restatement's use of "knows." When combined with the ordinary parlance of "knows," the judicial application of the Restatement likely eliminates constructive knowledge as a possibility, as being "aware" likely requires having

211. Under these facts, imposing civil aiding and abetting liability might be considered "back door" because Don could not be held liable in negligence, given the general rule of no duty to protect the plaintiff from harm by another.

212. LAFAVE, *supra* note 31, § 6.7, at 628 (quoting *Blackmun v. U.S.*). Specifically, imposing liability for the sale of burglary tools to persons reasonably suspected to be burglars does not give rise to interference with the legitimate marketplace because the aider and abettor is consciously disregarding a known substantial risk and no longer seems sympathetic. This is especially true considering *Halberstam's* prediction of an increasing trend of liability for concerted action liability in order to deal with these exact sorts of situations. *Halberstam v. Welch*, 705 F.2d 472, 489 (D.C. Cir. 1983).

213. *E.g., id.* at 477 (emphasis added). Judge Wald explained that this verbal mutation of the Restatement Section 876(b)'s knowledge requirement developed in the context of aiding and abetting violations of securities laws. *Id.* at 478 n.8.

actual knowledge,²¹⁴ leaving reckless knowledge as the only potential alternative to actual knowledge.²¹⁵

2. Defendant's general awareness of his role

The second issue under the factual knowledge requirement concerns what "facts" the defendant must know to meet the factual knowledge requirement. Under the Restatement formulation, the inquiry into the "facts" required to be known is fairly straightforward. The inquiry focuses on the defendant's general knowledge of the circumstances. That is to say, the defendant must know that the primary actor's conduct is a breach of duty, not that a wrong will result from the conduct. Knowledge of the result involves estimation of the causation and damages that will result from the primary actor's breach of duty; however, the defendant is only required to know that the primary actor's conduct constitutes a breach of duty and is not required to know the particular result that will occur.²¹⁶ Thus, the defendant does not have to know specifically that her lover is committing burglaries; knowledge that he is involved in a continuing criminal enterprise would suffice.²¹⁷ The defendant's knowledge of the circumstances need not be specific; general knowledge will suffice. Returning to the burglary example, the defendant did not have to

214. Merriam-Webster defines "aware" as "marked by realization, perception, or *knowledge*." (emphasis added). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 152 (1993).

215. Although the common parlance of "aware" and "knows" lends strong support to the conclusion that actual knowledge alone suffices, I contend that one cannot entirely eliminate recklessness as a possibility because the ordinary parlance of "willful," "done deliberately," supports defining that term as "knowingly." MERRIAM-WEBSTER ONLINE DICTIONARY, at <http://www.m-w.com/cgi-bin/dictionary?willful> (last visited Apr. 1, 2005). The common practice of the courts is to treat "willful" and "reckless" as synonyms.

216. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979); e.g., *Am. Family Mut. Ins. Co. v. Grim*, 440 P.2d 621, 626 (Kan. 1968); *Keel v. Hainline*, 331 P.2d 397, 401 (Okla. 1958).. *Hirshman v. Emme*, 84 N.W. 482, 483 (Minn. 1900). In *Hirshman*, the plaintiff, "an inoffensive Hebrew peddler," was traveling on the road in front of the home of defendant Julius Emme. 84 N.W. at 483. As plaintiff passed the home, a group of men, including the defendant, decided to haze the plaintiff. *Id.* "The evidence [was] practically conclusive that none of the parties intended to injure the plaintiff physically when the hazing commenced, and that [Julius] so understood it." *Id.* Notwithstanding the nonviolent result intended originally, the hazing ultimately resulted in the plaintiff receiving serious injury from being struck on the head with a club by Julius's nephew, Theodore Emme. 84 N.W. at 483. Although Julius did not intend to injure the plaintiff physically and did not strike the damaging blow, the court held Julius liable for the plaintiff's injuries. *Id.* The court reasoned that the actions and conduct of the group of men, including Julius, "encouraged, instigated, and incited Theodore Emme to strike the plaintiff" because the group's conduct "naturally tended to incite a hot-headed and somewhat intoxicated youth to go to extremes in the gentle pastime of Jew-baiting, in which ... [Julius] had taken an active part." *Id.*

217. *Halberstam*, 705 F.2d at 488.

know all of the specific facts of her lover's conduct; the court held that her general knowledge of the circumstances was sufficient to infer the proper degree of knowledge of her lover's criminal enterprise.²¹⁸ Obviously, the defendant's knowledge of the circumstances is determinative, not the defendant's knowledge that the law defines such circumstances as wrongful.²¹⁹ One could make the same arguments regarding willfully blind aiders and abettors.²²⁰

One must determine the viability of the judicial test's reformulation of the second prong: "the defendant must be generally aware of *his role* as a part of an overall illegal or tortious activity at the time that he provides the assistance."²²¹ As mentioned above, courts grafted this heightened requirement to curb the possibility of overinclusive liability in the securities area, as the Restatement's formulation required mere knowledge of a breach of duty.²²² This narrowing was necessary in the securities law context given the strictness of liability and the potential adverse effects on commerce beyond what Congress intended, as evidenced by the Supreme Court's rejection of civil aiding and abetting liability for securities laws in *Central Bank*.²²³

The defendant's awareness of his role in the wrongful activity adds relatively little to the analysis of culpability. To know of his role in the wrongful activity, the defendant must first know of the existence of the wrongful activity, as the Restatement requires. Knowledge of the wrongful activity's existence should suffice to satisfy the factual knowledge requirement. The proponents of the judicial test attempt to justify its formulation by stating: "One could know of the existence of a 'wrong' without being aware of his role in the scheme, and it is the participation that is at issue."²²⁴ This

218. *Id.* For a discussion of the key facts of the *Halberstam* case, see *infra* notes 279-283 and accompanying text.

219. In other words, one could not argue a mistake of law defense to defeat the second prong of civil aiding and abetting liability.

220. "Willful blindness" is defined as "[d]eliberate avoidance of knowledge of a crime, especially by failing to make a reasonable inquiry about suspected wrongdoing despite being aware that it is highly probable." BLACK'S LAW DICTIONARY 1594 (7th ed. 1999). See also LAFAYE, *supra* note 31, § 6.7, at 628 n.85 (discussing criminal law aiding and abetting case where liability was found because defendant was willfully blind).

221. *Halberstam*, 705 F.2d at 477 (emphasis added). Judge Wald explained the origin of this verbal mutation of the Restatement Section 876(b)'s knowledge requirement developed in the context of aiding and abetting violations of the securities laws. *Id.* at 478, n.8.

222. See *supra* notes 117-118 and accompanying text.

223. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994); see also *supra* notes 107-108.

224. *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 95 (5th Cir. 1975).

justification, however, fails to persuade because participation speaks to a completely different inquiry: substantial assistance.

Furthermore, the second prong of the judicial test becomes increasingly suspect when considered in light of the third prong of that test: the aider and abettor *knowingly* and substantially assists the wrongful activity. If one accepts the requirement of the defendant's awareness of his role for the second prong, then the use of "knowingly" as a modifier of assistance under the third prong becomes superfluous, and tends to blur the elements of the test, as evidenced by misguided courts doing "in tandem" analysis. Therefore, the judicial test properly may be viewed as a disguised version of the sliding scale analysis that was rejected out of hand above.²²⁵ If courts truly worry about casting a net so wide that it captures innocent persons, then they should focus on awareness of participation in one place, not two.²²⁶ And if the courts are to focus on awareness of participation in one area, it should be under the balancing test of the third prong, where the list of variables already includes the defendant's state of mind.²²⁷ Even if the dubious proposition that the judicial test's extension of the factual knowledge requirement to the defendant's knowledge of his role does reduce liability proves correct, the strictness of liability in the securities laws should not provide a shield to those who assist common law torts or criminal acts.

C. The Substantial Assistance or Encouragement Requirement: Redefined

Typically, the primary issue in a case of civil aiding and abetting is whether the assistance or encouragement was substantial.²²⁸ To satisfy the substantial assistance requirement, the judicial test provides that "the defendant must *knowingly* and *substantially* assist the principal violation."²²⁹ Thus, the inquiry under the judicial test does not focus simply upon the *significance* of the assistance, as with the Restatement, but also focuses upon the

225. See *supra* Part III.D.2.

226. Otherwise there is a risk that where there is a plethora of evidence regarding a defendant's actual knowledge of the primary wrongdoer's wrong that the defendant will be held liable for truly minimal assistance. The same risk is created for a defendant who provided a great deal of assistance to the primary wrongdoer but only slightly suspected the presence of the underlying wrong. In short, the judicial test doesn't effectuate its stated goal of preventing overinclusive liability. Liability would be established more fairly, if at all, by evaluating all of the elements individually.

227. RESTATEMENT (SECOND) OF TORTS § 876, cmt. d. (1979).

228. Halberstam v. Welch, 705 F.2d 472, 478 (D.C. Cir. 1983).

229. *Id.* at 477 (emphasis added).

defendant's *intent* in providing the assistance.²³⁰ As a result, the substantiality requirement becomes analogous to the criminal terms *actus reus* and *mens rea*, applied in the context of civil aiding and abetting.

1. *Actus reus*

Actus reus is a criminal term of art, defined as “[t]he wrongful deed that comprises the physical components of a crime and that generally must be coupled with *mens rea* to establish criminal liability,”²³¹ specifically “a forbidden act.”²³² In the civil context of aiding and abetting, the physical component, or act requirement, is the defendant actually providing assistance or encouragement.²³³ The substantiality of the assistance speaks to legal causation. Courts and commentators alike agree that a voluntary action of assistance or encouragement satisfies the requisite *actus reus* for civil aiding and abetting liability. The possibility of silence or inaction giving rise to aiding and abetting liability, however, makes courts and commentators queasy.²³⁴

2. *Mens rea*

Similar to *actus reus*, *mens rea* constitutes a criminal term of art, defined as “[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime,” specifically “criminal intent or recklessness.”²³⁵ The requisite *mens rea* presents perhaps the most significant issue in civil aiding and abetting liability.

Restatement Section 876(b), as well as the accompanying comment and illustrations, makes no mention of a requisite *mens rea*. In fact, the only mention of required knowledge occurs with respect to

230. *Id.* at 478.

231. BLACK'S LAW DICTIONARY 37 (7th ed. 1999).

232. *Id.* The literal translation from the Latin is “guilty act.” *Id.*

233. RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979).

234. *See, e.g.*, Woodward v. Metro Bank of Dallas, 522 F.2d 84, 96-97 (5th Cir. 1975); McNulty, *supra* note 165, at 16. This topic has generated a substantial volume of writing, from both courts and commentators, and is outside the scope of this Note; however, it is important to point out that most of this writing concerned pre-*Central Bank* worries about civil aiding and abetting in the securities law area for transactions conducted in the ordinary course of business. McNulty & Hanson, *supra* note 165, at 16. Specifically, courts and commentators debated what, if anything, gave rise to a duty of disclosure. *Id.* Of course, following *Central Bank*, many of these concerns have been put to rest. *See supra* notes 107-108 and accompanying text.

235. BLACK'S LAW DICTIONARY 999 (7th ed. 1999). The literal translation from the Latin is “guilty mind.” *Id.*

the factual knowledge requirement. The Comment on Clause (b) alludes to *mens rea* but only by listing “[defendant’s] state of mind” as the final factor in its list of five variables to be “considered” when analyzing whether “the assistance or participation by the defendant is so slight that he is not liable for the act of the other,” i.e., legal causation. Making *mens rea* a rigid requirement of civil aiding and abetting, therefore, fundamentally alters the Restatement’s formulation. That is not to say that requiring a *mens rea* constitutes an undesirable addition to the Restatement. In fact, this Section aims to show that *mens rea* is a desirable improvement to the formulation of Restatement Section 876(b) and to identify the proper level of *mens rea* to be required.

In the criminal law context, Judge Learned Hand identified aiding and abetting liability as requiring *mens rea* on the part of a defendant, writing that the defendant must “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.”²³⁶ The rationale for aiding and abetting liability in the criminal and civil contexts are considerably similar: to hold accountable those who seek to bring about wrongful conduct by assisting or encouraging its commission. Criminal law generally requires a *mens rea* of purposely for aiding and abetting liability.²³⁷ The justification provided for this criminal law requirement is the reluctance to impose criminal liability upon a defendant without a showing that his actions of assistance or encouragement were intended to assist or encourage the primary wrongdoer. This justification is persuasive and should be applied in tort law as well; however, the general distinctions between tort and criminal law justify a lower *mens rea* requirement in tort law.

In the civil context of aiding and abetting, the requisite state of mind to establish liability under the judicial test is that the defendant acted “knowingly,” meaning that the defendant knew that he was providing substantial assistance or encouragement to the primary tortfeasor to act in a tortious manner.²³⁸ There is no definition of

236. *U.S. v. Peoni* 100 F.2d 401, 402 (2d Cir. 1938).

237. *See Hicks v. U.S.*, 150 U.S. 442, 446 (1893) (Defendant’s instruction to the victim to “take off your hat, and die like a man” may have encouraged the primary actor; however, without a showing that the defendant intended his statement to have this effect, the defendant cannot be held liable).

238. *See supra* Part IV.C. This requisite mental state is what makes aiding and abetting an intentional tort, as opposed to negligence, which only requires reasonable care. If reasonable care was sufficient to establish liability, it essentially would make aiding and abetting the same as negligence. An important result of aiding and abetting being deemed an intentional tort is the unavailability of liability insurance, which in and of itself serves as a practical limitation on

“knowingly” in torts; however, the generally accepted criminal definition is:

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.²³⁹

Although both relate to the defendant’s knowledge, one must note that *mens rea*²⁴⁰ is distinct from the Factual Knowledge requirement.²⁴¹ The defendant’s knowledge that he is providing assistance or encouragement to another’s action (the *mens rea*) in no way means the defendant must also possess knowledge that the other’s act is wrongful (the Factual Knowledge requirement).²⁴² They are separate inquiries, not mutually inclusive. Knowledge of assistance and knowledge of wrongfulness lack any reasonable dependence upon one another; therefore, the two should not be considered jointly merely because of their mutual use of the word “knowledge.”

For example, Anne likely may have knowledge that she is encouraging her husband Paul to “try to get our money back” from Victor; however, it cannot be assumed that knowledge of this encouragement also means knowledge that Paul will assault Victor.²⁴³ An attempt to get the money back is the act that Anne is encouraging Paul to perform.²⁴⁴ Without a showing that Anne knew that her encouragement of the attempt to retrieve money would provoke a breach of duty to Victor, Anne cannot be liable to Victor because Anne was not “aware of any design or intent on the part of her husband to [commit the assault].”²⁴⁵ In other words, Anne lacked the requisite knowledge that Paul’s act would constitute a breach of duty.

civil aiding and abetting liability because only defendants with assets worth pursuing are likely to be sued under the civil aiding and abetting theory.

239. MODEL PENAL CODE § 2.02 (1962).

240. I.e., that the defendant knew he was providing substantial assistance.

241. I.e., the defendant’s knowledge that the primary actor’s conduct constitutes a breach of duty. See *supra* Part V.B.

242. Some commentators have, albeit erroneously, said as much. *E.g.* Willis, *supra* note 128, at 1056 n.92 (“In *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975), the court altered the test to find that general awareness sufficed but required that the assistance be knowing. *Obviously, if the assistance is knowing, the defendant knows of the breach.*”) (emphasis added).

243. See *Duke v. Feldman*, 226 A.2d 345, 348 (Md. 1967) (“She asked her husband to try to get their money back, but she did not say or intimate that he should assault appellant in order to do so.”).

244. *Id.*

245. *Id.*

D. Causation: Murky Waters Ahead

The theory of civil aiding and abetting presents interesting problems with respect to causation. Traditionally, the law has assigned the term "causation" to two different issues: cause-in-fact and proximate cause.²⁴⁶ Cause-in-fact refers to the word "causation" as it is used in common parlance: Was the defendant's negligent conduct a cause of the plaintiff's injury or not?²⁴⁷ Proximate cause, however, refers to the appropriate scope of the defendant's legal responsibility for his negligent conduct,²⁴⁸ turning heavily on morals and policy judgments and having little to do with "causation" in the ordinary meaning of the word.²⁴⁹ Keeping the two concepts separate is important for a thorough understanding of civil aiding and abetting.

1. Cause-in-Fact: What Is *Substantial* Assistance?

The substantial factor test mentioned in the Restatement is not the proper test because it is result-oriented. Rather, the proper test should evaluate whether the assistance was a substantial factor in bringing about the primary wrongdoer's conduct. To prevail on a claim of negligence, a plaintiff must prove actual harm caused by the defendant.²⁵⁰ Several intentional torts, however, do not require proof of actual harm, as such torts are "regarded as harmful in themselves."²⁵¹

According to the verbal formulation, the Restatement provides that the analysis of cause-in-fact for civil aiding and abetting relies upon the substantial factor test,²⁵² which declares that all defendants who are substantial factors in the harm are causes-in-fact.²⁵³ If more than one force is sufficient to bring about the harm to the plaintiff, then each force may be found to be a substantial factor in bringing

246. DOBBS, *supra* note 26, § 167, at 407.

247. GOLDBERG ET AL., *supra* note 30, at 209-10; DOBBS, *supra* note 26, § 167, at 407.

248. DOBBS, *supra* note 26, § 167, at 407.

249. *Id.* at 408 ("Proximate cause . . . is not about causation at all but about the significance of the defendant's conduct or the appropriate scope of liability . . .").

250. *Id.* at 47 ("[C]laims for negligence . . . always require proof of actual harm"); *Id.* § 180, at 443 ("To prevail in a negligence action, the plaintiff must bear the burden of showing that the defendant's negligent conduct was not only a cause in fact of the plaintiff's harm, but also a proximate or legal cause."); *id.* § 180, at 443.

251. *Id.* § 167, at 47 (referencing "trespassory torts," i.e., torts that impact the plaintiff's freedom, autonomy, or physical security).

252. RESTATEMENT (SECOND) OF TORTS § 876(b) cmt. (1979) ("If the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the consequences of the other's act.").

253. DOBBS, *supra* note 26, § 171, at 415.

about such harm.²⁵⁴ In terms used in the above analysis, a defendant is liable for civil aiding and abetting where the *actus reus* was a substantial factor in causing the plaintiff's harm,²⁵⁵ assuming all other elements of liability are satisfied. Thus, the trier of fact need not find that but-for the defendant's *actus reus* the plaintiff would have escaped harm.²⁵⁶ The *actus reus* must be a factor in the resulting harm.²⁵⁷

Although the foregoing explanation is easy to swallow, the confusion begins when one attempts to apply the principles of the substantial factor test to the theory of civil aiding and abetting. The common application of the substantial factor test is in cases of multiple sufficient causes, the classic example being joining fires.²⁵⁸ Under the theory of civil aiding and abetting, however, the encouragement or assistance need not have been sufficient, in and of itself, to cause the plaintiff's harm. Given that an act of verbal encouragement may suffice to hold a defendant liable for a physical battery of the plaintiff, one can see that aiding and abetting liability extends to conduct that is insufficient to cause the injury, as obviously verbal encouragement would not batter the plaintiff without the primary actor's physical action.²⁵⁹ Thus, while the comment to Restatement Section 876(b) uses the phrase "substantial factor," the traditional substantial factor test does not seem directly applicable due to its result-oriented nature.

The proper test is to evaluate whether the assistance or encouragement was a substantial factor in bringing about the primary wrongdoer's wrongful conduct. By focusing upon the substantiality of the assistance or encouragement by the defendant, courts can avoid the problem of the traditional substantial factor test because it is clear that the defendant does not have to be a sufficient cause of the injury to the plaintiff. In other words, the focus is upon whether the

254. RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) ("If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.").

255. As outlined above, the substantial assistance or encouragement by the defendant is considered the *actus reus*, and the plaintiff's harm can be any legally recognized injury. See *supra* Part V.C.1.

256. DOBBS, *supra* note 26, § 171, at 414-15.

257. As mentioned above, the law of torts requires that the defendant's action actually cause a legal harm to the plaintiff, unlike the criminal law where an *actus reus* combined with a *mens rea* can suffice to hold the defendant liable without satisfaction of a particular result, i.e., the crime of attempt. See *supra* note 250 and accompanying text.

258. DOBBS, *supra* note 26, § 171, at 415.

259. See *supra* note 99.

defendant was a substantial factor in causing the primary wrongdoer to act wrongfully, compared to focusing upon whether the defendant's conduct, standing alone, was sufficient to cause the resulting wrong to the plaintiff. This distinction is sensible in the context of aiding and abetting because the defendant is not the primary wrongdoer and the focus is upon the defendant's assistance or encouragement of the primary wrongdoer's wrongful action.

Liability of the defendant may extend beyond the injuries actually resulting from his encouragement or assistance. For example, a defendant may be liable for the entire injury to the plaintiff, even injury taking place before the defendant's encouragement or assistance. In *Little v. Tingle*, the court held the defendant-encourager liable for all the injuries resulting from the battery of the plaintiff, including the loss of an eye, regardless of whether the encouragement began before or after the eye was lost.²⁶⁰ The *Little* court explained that the defendant's encouragement made him responsible for the beating as a whole.²⁶¹

In assessing whether the assistance or encouragement was substantial, courts typically analyze the following six factors: (1) the nature of the act encouraged, (2) the amount of assistance given by the defendant, (3) his presence or absence at the time of the tort, (4) his relation to the primary tortfeasor, (5) his state of mind, and (6) the duration of the assistance provided.²⁶² The six factors have been applied as variables in the analysis, not as requirements.²⁶³ As a result, the substantiality of the assistance is very fact specific.

The oft-cited *Cobb v. Indian Springs, Inc.*²⁶⁴ provides an excellent example of encouragement alone sufficing to render a defendant liable for the primary tortfeasor's actions. In *Cobb*, the

260. 26 Ind. 168, 168-69 (Ind. 1866).

261. *Id.* at 168. Perhaps an underlying justification of such a result is the unarticulated analogy to the doctrine of ratification. See AM. JUR. 2D TORTS § 60 (2001) (footnotes omitted):

Liability in tort may be predicated upon the ratification of a wrongful act after it is done, where the act benefited, or was done in the interest of, the person adopting the act, and was ratified with full knowledge of the facts. The liability in such a case is joint and several.

See also RESTATEMENT (SECOND) OF AGENCY § 100 (1958):

[T]he liabilities resulting from ratification are the same as those resulting from authorization if, between the time when the original act was performed and when it was affirmed, there has been no change in the capacity of the principal or third person or in the legality of authorizing or performing the original act.

262. *Halberstam v. Welch*, 705 F.2d 472, 478, 483-84 (D.C. Cir. 1983). Note that the first five factors come from the comments to Restatement (Second) of Torts § 876(b). The sixth factor was added by the court in *Halberstam*, 705 F.2d at 484, but has been recognized by other courts.

263. *Halberstam*, 705 F.2d at 483.

264. 522 S.W.2d 383 (Ark. 1975).

court held that a mobile home park security guard could be held liable for his encouragement of a minor motorist's negligent driving that resulted in injuries to the plaintiff.²⁶⁵ After a discussion of how fast the young motorist's 1964 Mercury Comet could "run,"²⁶⁶ the guard told the young motorist to "take it down to the dairy bar and run it back up here to see what it will do."²⁶⁷ The guard warned the young motorist, telling him "I want you to shut it down before you come over that hill because there is a gas line or something."²⁶⁸ The motorist "came over the hill and kept on coming like there wasn't nothing in his way."²⁶⁹ Despite the warning, the young motorist lost control of his vehicle and began to swerve, hitting the security guard's station wagon upon which the plaintiff was sitting.²⁷⁰ The court held that the nature of the security guard's comments²⁷¹ and his relationship of authority to the young motorist²⁷² presented a question for the jury regarding the defendant's liability for the motorist's act.²⁷³

2. Proximate Cause: How Far Does Liability Extend?

Another important question is how far civil aiding and abetting liability extends to other acts committed by the primary wrongdoer. As discussed above, the scope of a defendant's liability under Section

265. *Id.* at 388.

266. *Id.* at 385. The facts indicate that the car had a V-8. *Id.*

267. *Id.* at 386.

268. *Id.* at 385. Apparently there was a worry that the car would need to slow down in order to avoid hitting the gas line. *Id.* at 386.

269. *Id.* at 385.

270. *Id.* at 385-86.

271. *Id.* at 387:

The first important fact is that a jury could certainly find [the guard] initiated, by his words, the sequence of events, or the act (reckless driving) which resulted in the injuries to [the plaintiff], i.e., [the young motorist] did not suggest that he would like to show everybody what his automobile could do in the way of speed; to the contrary, the suggestion came from [the guard].

Recall that "the nature of the act encouraged" by the defendant is one of the five factors listed in the comments to Restatement (Second) of Torts Section 876(b) (1979). The preceding quote from *Cobb* indicates that the nature of the act encouraged (the reckless driving) was important. 522 S.W.2d at 387-88.

272. *Id.* at 387 ("Also, the jury might well take into consideration [the guard's] position of authority which could possibly have been a factor influencing [the young motorist] to demonstrate the speed of his automobile."). Recall that the defendant's "relation to the other" is one of the five factors listed in the comments to Restatement (Second) of Torts Section 876(b) (1979). The court in *Cobb* found this relationship important, noting that "[t]his was not a case of one of his fellow students, or young friends, suggesting that he drive his car at high speed, but rather encouragement from the individual who was in charge of park security, and a person apparently, from the record held in respect by the young people." *Cobb*, 522 S.W.2d at 387-88.

273. *Id.* at 389.

876(b) extends to other wrongs committed by the primary wrongdoer that were not specifically encouraged by the defendant but that were reasonably foreseeable to the defendant as a result of his encouragement.²⁷⁴ The courts seemingly have adopted the Restatement approach. The resulting general rule is thus: one who encourages another to commit a tortious act may also be responsible for other foreseeable acts done by that other person in connection with the intended act.²⁷⁵

In *American Family Mutual Insurance Co. v. Grim*,²⁷⁶ the Supreme Court of Kansas held a young boy who entered church at night with companions to obtain soft drinks liable for fire damage resulting from the failure of two companions to extinguish torches lit by them to illuminate the premises, notwithstanding the fact that the defendant did not enter the attic where the fire began or have anything to do with use of torches. The court reasoned that the boys broke into the church for the common purpose of obtaining Cokes from the kitchen and that the need for adequate lighting during the course of the mission could reasonably be anticipated.²⁷⁷ While *Grim* provides a good illustration of the scope of aiding and abetting liability for other acts in the abstract, the use of *Grim* as authority on this point is problematic because the court perpetrated an incredible assault upon the idea of keeping the various theories of concerted action liability distinct.²⁷⁸

Halberstam v. Welch provides an excellent example of a defendant who assisted wrongful conduct and was held liable for other acts that were reasonably foreseeable in connection with the wrongful act assisted. In *Halberstam*, the D.C. Circuit Court of Appeals held a non-participant in a burglary that resulted in a murder civilly liable as an accomplice for over \$5 million in resulting damages. The primary issues in the case were:

[1] what kind of activities of a secondary defendant (Hamilton) will establish vicarious liability for tortious conduct (burglaries) by the primary wrongdoer (Welch), and [2] to

274. See *supra* note 67 and accompanying text.

275. *Am. Family Mut. Ins. Co. v. Grim*, 440 P.2d 621, 626 (Kan. 1968).

276. *Id.*

277. *Id.*

278. It has been pointed out that the holding in *Grim* rested upon a civil conspiracy theory as well. *Halberstam v. Welch*, 705 F.2d 472, 483 (D.C. Cir. 1983) ("In sum, the *Grim* court was invoking both civil conspiracy and aiding-abetting theories on the ground there was both an agreement to break in to get soft drinks and substantial aid through actual participation in the break-in."). In addition, the language used by the court in *Grim* also indicates the court's underlying application of joint enterprise principles. 440 P.2d at 625-26. Despite the confusion of theories of liability, the *Grim* case provides a good illustration of the scope of a civil aider and abettor's liability for other acts.

what extent will the secondary defendant be liable for another tortious act (murder) committed by the primary tortfeasor while pursuing the underlying tortious activity.

Judge Wald, writing for the court, held that Hamilton was civilly liable both for conspiracy and aiding and abetting, taking care to distinguish the two forms of liability. During the course of burglarizing the Halberstam home, a man named Welch fatally shot Dr. Michael Halberstam. Welch and Hamilton had been living together for the five years prior to the shooting. Judge Wald noted that the Welch and Hamilton lived a very luxurious lifestyle, owning a one million dollar home in Great Falls, Virginia, complete with two Mercedes-Benz cars and a housekeeper, as well as a second home in Minnesota.²⁷⁹ The couple's lifestyle warrants mention because when the couple met just five years earlier, Welch had little more than a Monte Carlo, the change in his pocket, and the gun in his hand.²⁸⁰ Welch's career as a burglar fueled the couple's rise from rags to riches. Hamilton claimed to have never known the truth about Welch's career; however, the record supported the district court's findings that Hamilton both knew of and substantially supported the criminal activities of Welch that resulted in the couple's wealth.²⁸¹ In so holding, Judge Wald wrote:

As to the inference of Hamilton's knowledge of Welch's criminal doings, *it defies credulity that Hamilton did not know that something illegal was afoot.* Welch's pattern of unaccompanied evening jaunts over five years, his boxes of booty, the smelting of gold and silver, the sudden influx of great wealth, the filtering of all transactions through Hamilton *except* payouts for goods, Hamilton's collusive and unsubstantiated treatment of income and deductions on her tax forms, even her protestations at trial that she knew absolutely *nothing* about Welch's wrongdoing—combine to make the district court's

279. *Halberstam*, 705 F.2d at 475-76. The couple's Great Falls home also had a basement with about fifty boxes, which contained "approximately three thousand stolen items—antiques, furs, jewelry, silverware, and various household and personal effects." *Id.* at 476. Hamilton conceded awareness of the boxes, but claimed, of course, that she had never seen their contents and that she did not go down to the basement often. *Id.* Conveniently, Hamilton provided the police with a key to Welch's locked basement study when they searched the home. *Id.*

280. Hamilton met Welch in the parking lot of her apartment complex, and at the time, Welch literally had a gun in his hand and possessed minimal assets other than his Monte Carlo and the change in his pocket. *Id.* at 475.

281. *Id.* at 486 (citations omitted) (alterations in original):

First, the district court found that Hamilton "knew full well the purpose of [Welch's] evening forays and the means" he used to acquire their wealth. Second, the district court inferred an agreement—that "[she] was a willing partner in his criminal activities." Third, the district court pointed to various acts by Hamilton (*e.g.*, typing transmittal letters for the ingot sales, handling the payments and accounts, maintaining all financial transactions solely in her name), and concluded that they were performed knowingly to assist Welch in his illicit trade: "Disposing of the loot was the principal business in which Welch and Hamilton engaged while at home. Hamilton worked as secretary and recordkeeper of their transactions . . ." [I]n its conclusions of law, the court noted Hamilton "knowingly and willingly assisted in Welch's burglary enterprise."

inference that she knew he was engaged in illegal activities acceptable, to say the least.²⁸²

As for the scope of Hamilton's civil liability as an accomplice, the court held that Hamilton's assistance to Welch's criminal enterprise properly warranted her civil liability as an accomplice to Dr. Halberstam's murder, clarifying that liability did not require her to know the specific criminal behavior (burglary) in which Welch was engaged because "it was enough that she knew he was involved in some type of personal property crime at night—whether as a fence, burglar, or armed robber made no difference—*because violence and killing is a foreseeable risk in any of these enterprises.*"²⁸³

In *Hirschman v. Emme*,²⁸⁴ the court upheld a verdict finding the defendants liable because their acts and conduct encouraged, instigated, and incited the primary wrongdoer's battery of the plaintiff.²⁸⁵ Mr. Julius Emme was charged with vicarious liability for his nephew Theodore Emme's assault of the plaintiff, Mr. Hirschman. Hirschman, "an inoffensive Hebrew peddler," was traveling along a public highway in a peddler's wagon, drawn by a single horse.²⁸⁶ Along the same highway, Julius Emme, described as "a man of mature years" and "an ex justice of the peace," was entertaining at his home, with guests who "were more or less intoxicated."²⁸⁷ Several of the younger guests rushed out to stop the plaintiff.²⁸⁸ "The young men the commenced to have 'sport with the Jew,' as some witnesses expressed it."²⁸⁹ During their sport, Julius Emme "secured a rail 10 feet long, and ran it through the hind wheels of the wagon, between the spokes, joining at the time in the laughter of his guests."²⁹⁰ As the plaintiff would remove the obstruction from one wheel, another one would be obstructed.²⁹¹ As the plaintiff removed the large wooden rail for the final time, Theodore Emme struck the unsuspecting plaintiff on the head with a club, badly and permanently injuring the plaintiff.²⁹²

282. *Id.* at 486 (initial emphasis added, other emphasis original). With respect to the payout for goods, the court was highlighting the fact that Hamilton was keeping all the business records and must have realized at some point that there was no cost of goods sold. *Id.* at 475-76.

283. *Id.* at 488 (emphasis added).

284. 83 N.W. 482 (Minn. 1900).

285. *Id.* at 483.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* (defendant Rohling painted red both the horse's forehead and the end of the wagon; another person braided the horse's tail with weeds).

290. *Id.*

291. *Id.*

292. *Id.*

Despite a showing that none of the parties intended to injure the plaintiff when the hazing commenced and that the plaintiff so understood it, the court recognized that "the fact remains that one act induced and was followed by another, until the last one culminated in the serious injury of the plaintiff."²⁹³ The court reasoned that the defendants' conduct "naturally tended to incite a hot-headed and somewhat intoxicated youth to go to extremes in the gentle pastime of Jew-baiting, in which the defendants had taken an active part."²⁹⁴ The court further reasoned:

Julius Emme was the host, the man of mature years, the sometime local magistrate; and it is not to be doubted that a word from him would have restrained the sportive but unlawful onset upon the plaintiff, nor can it be reasonably questioned that his active participation therein was one of the inducing causes of Theodore Emme's acts.²⁹⁵

VI. CONCLUSION

The court in *Halberstam* essentially said that it does not matter how the civil aiding and abetting test is formed because every variation means the same thing. This Note disagrees. As the foregoing Sections have demonstrated, it clearly does matter how the test is formulated. In this vein one might recall the famous case of *Palsgraf v. Long Island Rail Road*,²⁹⁶ where Justice Cardozo and Justice Andrews battled strenuously regarding the role of duty and proximate cause in negligence. The formulation of negligence was extremely important to both Justices and the argument has proceeded throughout opinions across the nation ever since Mrs. Palsgraf's appeal to New York's highest court. In the heated debate, Justice Andrews made a famous statement that is particularly poignant for this Note: "This is not a mere dispute as to words."²⁹⁷

Here, too, the formulation and application of the test for civil aiding and abetting liability is not a mere dispute as to words. The formulation chosen significantly affects the scope of liability. Therefore, courts should fully consider the changes that have been made to the verbal formulations, especially given the questionable reasons for making such changes.

293. *Id.*

294. *Id.*

295. *Id.*

296. 162 N.E. 99 (N.Y. 1928).

297. *Id.* at 102 (Andrews, J., dissenting).

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