EFiled: Sep 16 2024 02:50PM EDT
Filing ID 74332551
Case Number 281,2024

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| | ) | No. 281,2024 |
| | ) | |
| IN RE: COLUMBIA PIPELINE GROUP, MERGER LITIGATION | ) | Court Below: Court of Chancery of the State of Delaware |
| | ) | |
| | ) | Consol. C.A. No. 2018-0484-JTL |

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT TC ENERGY CORPORATION**

The Chamber of Commerce of the United States of America (the "Chamber") respectfully moves for leave to participate in this action as *amicus curiae* in support of Appellant TC Energy Corporation ("TransCanada") and to file the proposed amicus curiae brief attached as **Exhibit A**. For the Court's convenience, a compendium of secondary sources cited in the brief is attached as **Exhibit B**.

## ARGUMENT

### I. Identity of Amicus Curiae and Its Interest in the Litigation

1. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly

files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

2. A significant number of the Chamber's members are incorporated in Delaware. The Chamber has often been granted leave to participate as *amicus curiae* by the Supreme Court of Delaware, including in cases concerning corporate governance and shareholder rights. *See, e.g., Kellner v. AIM Immunotech, Inc.*, C.A. No. 3,2024 (Del. July 11, 2024); *Salzberg v. Sciabacucchi*, No. 346,2019 (Del. March 18, 2020).[1]

[1] This Court has granted the Chamber leave to file *amicus* briefs on at least 13 prior occasions. *See Kellner v. AIM Immunotech, Inc.*, Docket No. 3,2024 (Del. Mar. 18, 2024); *Cantor Fitzgerald LP v. Braid Ainslie, et al.*, Docket No. 162,2023 (Del. May 10, 2023); *Employers Insurance Company of Wausau, et al. v. First State Orthopaedics, P.A.*, Docket No. 27,2023 (Del. Jan. 25, 2023); *State of Delaware, ex rel. Kathleen Jennings, Attorney General of the State of Delaware v. Monsanto Company, et al.*, Docket No. 279,2022 (Del. Aug. 09, 2022); *In Re Versum Materials, Inc. Stockholder Litigation*, Docket No. 266,2020 (Del. Aug. 14, 2020); *Matthew B. Salzberg, et al. v. Matthew Sciabacucchi*, Docket No. 346,2019 (Del. Aug. 05, 2019); *California State Teachers' Retirement System v. Alvarez, Aida M.*, Docket No. 295,2016 (Del. June 10, 2016); *International Paper Co v. Mary Anne Hudson*, Docket No. 508,2015 (Del. Sept. 17, 2015); *Genuine Parts Company v. Ralph Allan Cepec and Sandra Faye Cepec*, Docket No. 528,2015 (Del. Sept. 30, 2015); *Stayton v. Delaware Health Corporation et al.*, Docket No. 601,2014 (Del. Oct. 23, 2014); *Pyott, David v. Louisiana Municipal Police Employees Retirement System*, Docket No. 380,2012 (Del. July 10, 2012); *Riedel, Lillian vs ICI Americas Inc.*, Docket No. 156,2008 (Del. Mar. 25, 2008); *Pfeffer, Beverly et al vs Redstone et al.*, Docket No. 115,2008 (Del. Feb. 28, 2008).

## II. Reasons to Permit *Amicus Curiae* Brief

3. *Amicus* briefs may "assist the Court by 'supplementing the efforts of counsel . . . in a case of general public interest'" and "draw attention to 'broader legal or policy implications that might otherwise escape its consideration in the narrow context of a specific case.'" *La. Mun. Police Emps. Ret. Sys. v. Hershey Co.*, 2013 WL 1776668, at *1 (Del. Ch. Apr. 16, 2013) (quoting *Giammalvo v. Sunshine Min. Co.*, 644 A.2d 407, 409 (Del. 1994)) (ellipsis in original); *see also, e.g., Jimenez v. Palacios,* 250 A.3d 814, 826 (Del. Ch. 2019), as revised (Aug. 12, 2019); *In re Trulia, Inc. Stockholder Litig.,* 129 A.3d 884, 890 (Del. Ch. 2016).

4. The Chamber and its members who engage in corporate transactions have a significant interest in this case. The Court of Chancery's decision on appeal leaves third-party buyers in corporate transactions with uncertainty about when they may be subject to liability for aiding and abetting a seller's breach of fiduciary duties to its own shareholders. The result will be to have a chilling effect on corporate transactions and to make them less efficient. The Chamber's proposed *amicus* brief discusses the impact of these issues from a policy perspective.

## III. Parties' Positions

5. TransCanada consents to the filing of the attached *amicus* brief.

6. Appellees' counsel have represented that Appellees take no position on this motion.

## CONCLUSION

For the foregoing reasons, the Chamber respectfully requests that the Court grant it leave to file the attached *amicus curiae* brief.

Dated: September 16, 2024

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION**

1. This motion complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This motion complies with the type-volume limitation of Supreme Court Rule 30(d) because it contains 708 words, which were counted by Microsoft Word 2016.

*[Signature block on following page]*

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# EXHIBIT A

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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# *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT TC ENERGY CORPORATION

Dated: September 16, 2024

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## TABLE OF AUTHORITIES

### Cases

**Other Authorities**

Amicus Curiae the Chamber of Commerce of the United States of America (the "Chamber") files this brief in support of Appellant TC Energy Corporation ("TransCanada"). The Court of Chancery's June 30, 2023 Opinion goes beyond existing precedent by imposing significant monetary liability on a third-party buyer for aiding and abetting fiduciary breaches of which it had no actual knowledge. Its holding is legally incorrect, and disregarding Delaware's high standard for such liability will have a chilling effect on third-party buyers in future corporate transactions. This Court should reverse.

## STATEMENT OF INTEREST

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the executive branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

A significant number of the Chamber's members are incorporated in Delaware. The Chamber has often been granted leave to participate as amicus curiae by the Supreme Court of Delaware, including in cases concerning corporate governance and shareholder rights. *See, e.g., Kellner v. AIM Immunotech, Inc.*, C.A. No. 3,2024 (Del. July 11, 2024); *Salzberg v. Sciabacucchi*, No. 346,2019 (Del. March 18, 2020).

## SUMMARY OF THE ARGUMENT

Under well-established Delaware law, the buyer in a corporate acquisition generally cannot be held liable to the seller's shareholders for breach of a fiduciary duty. The reason is simple and well-justified: The buyer's fiduciary duty is to its own shareholders, whose interests will generally conflict with the sellers' shareholders. Absent exceptional circumstances, the shareholders of the buyer and the seller are represented by their own, separate fiduciaries, who are accountable to them and charged with obtaining the best possible deal for them. That arrangement promotes efficiency by encouraging vigorous negotiation and avoids conflicts of interest.

Aiding and abetting liability is an exception which, although recognized by courts in Delaware and elsewhere, has been strictly circumscribed. Under this Court's precedent, a buyer is liable for aiding and abetting a seller's breach of fiduciary duty only where the buyer knowingly participates in that breach. For a claim based on the sale process, that requires a finding that the buyer created or exploited the seller's conflict of interest or conspired in the fiduciary breach. A corollary is that arm's-length negotiation—even tough negotiation—is privileged and cannot give rise to liability of the buyer to the seller's shareholders. That rule makes sense, because it preserves the alignment of interests described above. To do otherwise would undermine a buyer's fiduciary duty to its own shareholders.

The Court of Chancery's decision did not purport to change that law, but it effectively expanded the circumstances that give rise to aiding and abetting liability. The Court of Chancery's opinion also expands the circumstances under which a buyer may be liable for a seller's inadequate disclosures to its shareholders. If left to stand, the Court of Chancery's decision will have a chilling effect on future acquisitions and will incentivize expensive and unnecessary diligence on the part of buyers, who will understandably be torn between potential liability to either their counterparty's shareholders or their own.

The Chamber writes separately because of the importance of this issue to the Delaware and national business communities. Delaware is the corporate home of businesses across the United States, including most of the country's largest corporations. Even non-Delaware corporations are affected by the state's corporate law because jurisdictions across the United States routinely and justifiably look to Delaware as a model for their corporate law decision-making. As such, the detrimental and expensive consequences of the Court of Chancery's decision on future mergers and acquisitions is of significant importance to the Chamber's membership.

## ARGUMENT

### I. Under existing Delaware law, the standard for imposing aiding and abetting liability on a third-party buyer is high, and should remain so.

A third-party buyer may be liable for aiding and abetting a seller's breach of fiduciary duty only in exceptional circumstances.

In general, a third-party buyer does not face liability for aiding and abetting a seller's breach of fiduciary duty concerning the sale process because "arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute aiding and abetting." *In re Columbia Pipeline Grp. Merger Litig.*, 299 A.3d 393, 472 (Del. Ch. 2023) (quoting *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010)); *see also Malpiede v. Townson*, 780 A.2d 1075, 1097 (Del. 2001). Accordingly, "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for aiding and abetting." *Columbia Pipeline*, 299 A.3d at 472 (quoting *Malpiede*, 780 A.2d at 1097); *see also, e.g., Tomczak v. Morton Thiokol, Inc.*, 1990 WL 42607, at *16 (Del. Ch. April 5, 1990) (granting summary judgment and noting that "[a]lthough [the buyer's] purchases certainly had the effect of putting economic pressure on [the seller], what [the buyer] essentially did was to simply pursue arm's length negotiations with [the seller] through their respective investment bankers in an effort to obtain [the target] at the best price that it could."). As a result, "[a] third-party bidder

who negotiates at arm's length . . . 'rarely faces a viable claim for aiding and abetting.'" *Columbia Pipeline*, 299 A.3d at 472 (quoting *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 837 (Del. Ch. 2011)).

The exceptional nature of the Court of Chancery's decision is evident from the fact that, in describing the standard for knowing participation, the Court cited not a single case imposing monetary liability against a third-party buyer for aiding and abetting a breach of fiduciary duty related to the sale process. *See id.* at 470-76. In justifying its decision to impose such liability in this case, the Court of Chancery looked to this Court's "seminal" decisions in *Revlon* and *Mills Acquisition*, but in neither case was the buyer actually subjected to liability for aiding and abetting a breach of fiduciary duty. *See id.* at 472-74 (discussing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) and *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989) and noting that in both cases, "the Delaware Supreme Court did not expressly state that [the buyer] was culpable for aiding and abetting").

Looking next to other precedent, the Court again found only Court of Chancery decisions that either did not make a finding of aiding and abetting liability or merely held that the plaintiff had stated a claim for aiding and abetting liability at the motion to dismiss stage or was likely to prevail on such a claim for the purposes of granting injunctive relief. *See id.* at 474-75 (citing *Del Monte*, 25 A.3d at 813; *In*

*re Mindbody, Inc., S'holder Litig.*, 2023 WL 2518149 (Del. Ch. Mar. 15, 2023); *Firefighters' Pension Sys. of Kans. City, Mo. Tr. v. Presidio, Inc.*, 251 A.3d 212 (Del. Ch. 2021); and *Chester Cnty. Empls.' Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093 (Del. Ch. June 21, 2019)). But it does not follow that aiding and abetting liability exists whenever injunctive relief may be appropriate. That is particularly true given the chilling effects that are likely to result from the imposition of significant monetary damages for aiding and abetting. *See, e.g., Terrydale Liquidating Tr. v. Barness*, 611 F. Supp. 1006, 1027 (S.D.N.Y. 1984) (emphasizing importance of actual knowledge requirement under applicable law, given that the plaintiffs sought "not merely the return of the . . . assets" at issue "but affirmative monetary relief").

Moreover, as TransCanada ably explains in its opening brief, the decisions relied upon by the Court of Chancery are distinguishable on their facts. (*See* TransCanada's Opening Br. at 41-44). The lack of existing case law imposing liability on third-party buyers for aiding and abetting a sale process fiduciary breach not only reflects the deliberate difficulty of proving such a claim under existing law, but also illustrates the exceptional nature of the Court of Chancery's decision here.

The standard for holding a buyer liable for a seller's inadequate disclosures is also high, and properly so. The Court of Chancery has recognized that "an aiding and abetting claim based on a third-party's alleged failure somehow to *prevent* a board from providing misleading disclosures to stockholders rests on thin ice." *In re*

*Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *15 (Del. Ch. Dec. 10, 2018) (emphasis in original). It is not enough that the buyer "knew certain facts and knew that the Board was not disclosing those facts to stockholders" where the buyer does not "knowingly *facilitate[]* alleged disclosure deficiencies or otherwise 'knowingly participate[]' in that aspect of the alleged breach of fiduciary [duty]." *Id.* (emphasis in original).

In finding aiding and abetting liability for the seller's insufficient disclosures, the Court of Chancery relied exclusively on its previous decision in *Mindbody*. *See Columbia Pipeline*, 299 A.3d at 487-88 (citing *Mindbody*, 2023 WL 2518149, at *44). However, unlike this case, the buyer in *Mindbody* had actual knowledge that significant information was omitted and took steps to prevent its disclosure. Here, by contrast, the Court of Chancery imposed liability on TransCanada for the seller's non-disclosure of information of which TransCanada had no actual knowledge and for non-disclosures that were judgment calls of the seller. In so doing, it expanded potential aiding and abetting liability well beyond existing precedent.

## II. The Court of Chancery's holding will create significant practical problems for future mergers and acquisitions.

### A. The Court of Chancery's holding imposes a duty on third-party buyers that is in significant tension with the buyer's duty to its own shareholders.

The Court of Chancery's reasoning foists a lose-lose choice upon third-party buyers. "Under our law, both the bidder's board and the target's board have a duty to seek the best deal terms for their own corporations when they enter a merger agreement." *Morgan*, 2010 WL 2803746, at *8. Accordingly, a buyer is "not obligated to offer an inflated price for [a target] when it could acquire the company for less through honest bargaining." *Id.* at *7; *see also Terrydale*, 611 F. Supp. at 1029 (granting partial summary judgment to buyer and noting that it "had a duty to its own shareholders to aggressively pursue economically favorable transactions, rather than shield or warn [the seller's] shareholders of the consequences of their own trustees' decisions."); *Stanley Ferber & Assocs. v. Northeast Bancorp, Inc.*, 1993 WL 489334, at *6 (Conn. Super. Ct. Nov. 16, 1993).

From a buyer's perspective, the Court of Chancery's decision requires it to weigh its obligation to obtain the best price for its shareholders against the risk of liability to the seller's shareholders (to whom it owes no fiduciary duty). This case exemplifies that risk – the Court of Chancery awarded damages for aiding and abetting that totaled nearly $400 million for the sale process claim and "nominal" dam-

ages of nearly $200 million for the disclosure claim.[1] Moreover, the Court of Chancery held that TransCanada's proportionate share of the liability was significant, allocating it 50% of the liability for the sale process claim and 42% of the liability for the disclosure claim. *See In re Columbia Pipeline Group, Inc. Merger Litig.*, 316 A.3d 359, 366-67 (Del. Ch. 2024).

If a prospective buyer decides to take protective measures during negotiations to avoid the risk of litigation from the seller's shareholders, the buyer would then risk breaching its duty to its *own* shareholders to obtain the best possible price for the assets it is acquiring. As one example, the Court of Chancery suggested that TransCanada could have avoided liability simply by "stand[ing] by the $26 Deal . . ." *Columbia Pipeline*, 299 A.3d at 480. As TransCanada explains, there was actually no deal at $26/share. (*See* TransCanada's Opening Br. at 31-34). Moreover, agreeing to pay a higher price may insulate a buyer from liability to the seller's shareholders, but it exposes it to liability to its own shareholders. These risks to buyers are compounded by the fact that aiding and abetting liability may not be covered under standard insurance policies. *See, e.g.,* Sarah L. Swan, *Aiding and Abetting Matters*, 12 J. Tort L. 255, 280-81 (2019) ("Aiding and abetting has a complicated relationship with insurance, in that it is not entirely clear if and when insurance is

[1] The damages measures were held to be concurrent rather than cumulative. *Columbia Pipeline*, 299 A.3d at 499-500.

available for aiding and abetting."); Nathan Isaac Combs, *Civil Aiding and Abetting Liability*, Note, 58 Vand. L. Rev. 241, 290 n.238 (2005) ("An important result of aiding and abetting being deemed an intentional tort is the unavailability of liability insurance . . ."). As a result, the Court of Chancery's decision in this case leaves prospective corporate buyers in an impossible position. By attempting to avoid the type of liability recognized in this case, buyers may create liability to their own shareholders.

### B. The Court of Chancery's holding leaves third-party buyers uncertain about the protective measures they need to take in sale negotiations.

The Court of Chancery's decision leaves third-party buyers uncertain about when they may be risking liability to a seller's shareholders for aiding and abetting the seller's fiduciary breach. As the Court of Chancery recognized, "[k]nowing participation requires both knowledge that the fiduciary is breaching a duty and culpable participation by the aider and abettor." *Columbia Pipeline*, 299 A.3d at 406-07. However, many of the red flags that the Court of Chancery cited as evidence of such knowledge and participation in this case are consistent not only with knowing participation in a fiduciary breach but also with arm's-length negotiation.

For instance, with respect to knowledge, the Court of Chancery noted that the seller's representatives "were behaving eccentrically, even bizarrely, for sell-side

negotiators." *Id.* at 407. However, what the Court of Chancery characterized as "eccentric" behavior was also explainable by the seller representatives' lack of experience in the M&A space. Indeed, the seller's CFO was a "neophyte dealmaker on his first and only assignment" with "no poker face." *Id.* at 405. The Court of Chancery's opinion suggests that a buyer risks liability when dealing with a less sophisticated counterparty. However, it is not enough to "believe[] . . . that" a counterparty was "exercising poor business judgment" to have the knowledge necessary for aiding and abetting liability. *See Terrydale*, 611 F. Supp. at 1028. The Court of Chancery's decision leaves uncertainty about how unsophisticated or irrational the counterparty must be to infer that its actions result from a fiduciary breach as opposed to poor business judgment. It also leaves questions about how a buyer should protect the seller's shareholders from an unskilled negotiator while also serving its own shareholders' interests in obtaining the best price.

The Court of Chancery also found that TransCanada had constructive knowledge that the individual defendants were personally conflicted because the acquisition would facilitate their retirements. *Columbia Pipeline*, 299 A.3d at 476. However, individuals on the other side of the table in an M&A acquisition often have some personal interest in the transaction. For instance, they may anticipate future employment with a merged entity. It may also be the case that, as here, a sell-side negotiator stands to receive some sort of financial benefit from a transaction,

such as a "golden parachute." That is neither uncommon nor necessarily improper. *See, e.g., Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 352 n.3 (Del. 1988) ("[S]ome commentators have argued that golden parachutes actually benefit shareholders because they reduce the personal incentive of target managers to systematically reject takeover bids."); *In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 710 (Del. Ch. 2001) (golden parachutes "grease the skids for sales transactions beneficial to stockholders."); *Flannery v. Genomic Health, Inc.*, 2021 WL 3615540, at *28 (Del. Ch. Aug. 16, 2021) (holding that an executive's compensation benefit did not implicate their fiduciary duties).

Accordingly, the fact that a sell-side negotiator may have a personal interest in the outcome of a transaction is not enough to put a buyer on notice that ineffective negotiation is motivated by a fiduciary breach. *See, e.g., Morgan*, 2010 WL 2803746, at *7 (dismissing complaint where the plaintiff "has pled no facts that allow [the court] to infer that the [sellers'] board was *so radioactively conflicted* that any contact with that board to do a deal—even arm's-length negotiating—was aiding and abetting wrongdoing.") (emphasis added).

The Court of Chancery's decision also creates uncertainty about how hard a buyer may negotiate against a less skilled counterparty. With respect to participation, the Court of Chancery recognized that although "TransCanada did not create or ex-

acerbate the conflict of interest that Skaggs and Smith faced" it nevertheless "exploit[ed] their conflicts of interest." *Columbia Pipeline*, 299 A.3d at 407. Among other things, the Court of Chancery noted that TransCanada's negotiator capitalized on his previous professional friendship with the seller's negotiator, directed communications, "ke[pt] everything on track", and "induc[ed]" his counterparty "to commit errors and give away points." *Id.* However, buyers should not be afraid to employ shrewd tactics in an arm's-length negotiation in order to obtain the best price for their own shareholders, nor are they required to stoop to the skill of a less-experienced negotiator.

The Court of Chancery gave significant weight to aspects of the negotiations in this case that it found went beyond arm's-length negotiation, including its findings that TransCanada reneged on a supposed deal at a particular price and threatened the seller with public disclosure; exploitation of the seller-negotiator's inexperience; and its violation of a standstill agreement with the seller. *See id.* at 477-78. TransCanada's opening brief explains at length why the Court of Chancery's findings were wrong as a factual matter. (*See* TransCanada's Opening Br. at 30-39). Beyond that, they exemplify the uncertainty that the Court of Chancery's opinion creates. Consider, for example, the Court of Chancery's conclusion that TransCanada's violation of a standstill agreement supports aiding and abetting liability: A breach of contract is not the same thing as a fiduciary breach, and the fact that a seller may allow a

standstill violation does not necessarily mean that it is violating its own fiduciary duties. As the Court of Chancery noted, the seller's "Board was free to waive the restriction or ratify a breach after the fact", *id.* at 466, and a seller's decision to do so may be a legitimate negotiating strategy.

Of course, as the Court of Chancery explained, "[t]he totality of the circumstances matters." *Id.* at 407. But its reasoning nevertheless leaves corporate buyers in the difficult position of speculating *ex ante* about whether their counterparty's conduct in a particular case is sufficiently unusual that they must take protective measures or pull punches, which may conflict with their duties to their own shareholders. That speculation has a cost because it risks making even efficient corporate transactions less likely to occur or to occur under unnecessarily onerous conditions.

### C. The Court of Chancery's holding also subjects buyers to significant risk and uncertainty in reviewing proxy materials.

The Court of Chancery's decision also imposes significant risks on buyers in their review of the seller's proxy statements, which will be inefficient and impracticable for buyers to mitigate. As described above, existing precedent imposes liability on buyers for aiding and abetting a seller's disclosure-related fiduciary breach only where the buyer knowingly participates in that breach – for instance, where the buyer actually knew that significant information had been omitted and took measures to prevent its disclosure, *see Mindbody*, 2023 WL 2518149, at *44, or where the buyer "provided knowingly false information," *see Xura*, 2018 WL 6498677, at *15 n.149.

Here, however, TransCanada engaged in no such knowing participation. The Court of Chancery made no finding that TransCanada provided any false information to the seller. Instead, it held TransCanada liable for the seller's omission of information of which TransCanada lacked actual knowledge and for judgment calls that properly resided with the seller. Moreover, TransCanada's contractual obligations were limited to providing accurate information with respect to TransCanada and reviewing the proxy materials—not drafting them. *See Columbia Pipeline*, 299 A.3d at 447.

The Court of Chancery's reasoning imposes significant new responsibility on a buyer that goes beyond any contractual obligation to provide accurate information for inclusion in a proxy statement and instead effectively requires the buyer to ensure the accuracy of the document for the benefit of the seller's shareholders. Not only is that inconsistent with the fiduciary obligations of the respective parties, it imposes significant risk on the buyer and will require the buyer to undertake significant expense to mitigate that risk.

### D. The Court of Chancery's decision is inconsistent with Delaware law's promotion of efficient corporate transactions.

The privilege for arm's-length negotiating "helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism." *Morgan*, 2010 WL 2803746, at *8. Moreover, the "requirement that the third party knowingly *participate* in the alleged breach . . . is there for a reason."

*Id*. (emphasis in original). It "protects acquirors, and by extension their investors, from the high costs of discovery" where the acquiror engaged in no "nefarious activity." *Id.* The "rule also aids target stockholders by ensuring that potential acquirors are not deterred from making bids by the potential for suffering litigation costs and risks on top of the considerable risk that already accompanies buying another entity . . ." *Id.*

The Court of Chancery's decision creates uncertainty about when the privilege for arm's-length bargaining will apply. Its effect will be to chill future transactions or, at the very least, make them less efficient and more expensive. The Court of Chancery recognized that potential impact in *Morgan*, where it rejected an aiding and abetting claim against a third-party buyer in a transaction that provided benefits to the seller's preferred stockholders at the expense of its common stockholders. The court noted that "[i]f our law makes it a presumptive wrong for a bidder to deal with a board dominated by preferred stockholder representatives, *then value-maximizing transactions will be deterred*." *Id.* at *7 (emphasis added). Likewise, in the securities fraud context, the United States Supreme Court has recognized the inefficiencies that follow from excessive aiding and abetting liability. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188 (1994). ("Secondary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets.")

The risks of proceeding with a transaction are heightened from the perspective of a third-party buyer because it necessarily has less information about a seller's potential breach of fiduciary duty than the seller itself. Indeed, "[t]ransactions which may appear reasonable at the time they are entered into may, upon more considered and deliberate reflection, prove to be objectively unreasonable." *Terrydale*, 611 F. Supp. at 1030. A buyer may seek to remedy its information deficit through various means, but those are likely to be inefficient because they shift to the buyer (and, ultimately, its shareholders) the cost of monitoring the seller's performance of its fiduciary duties to its shareholders. For instance, a buyer may insist on contractual information rights as part of due diligence. But the seller may not agree to provide that information, and even if it does, that is likely to significantly increase transactional costs. If a buyer has enough interest in a transaction, it may insist on a special committee process. However, despite the benefits that a special committee can bring, it also adds additional costs.

Delaware statutory law and precedent have long recognized the importance of predictability and efficiency in corporate transactions. For instance, "[t]he [Delaware General Corporation Law's] many provisions facilitating M&A transactions reflects the underlying assumption that social welfare can be improved by M&A transactions reached by parties bargaining at arm's-length." *Morgan*, 2010 WL 2803746, at *8. As described above, the Court of Chancery's reasoning stands in

tension with those principles by effectively imposing duties on third-party buyers that are unpredictable, inefficient, and create tension with those buyers' duties to their own shareholders.

## CONCLUSION

For the reasons above and in TransCanada's Opening Brief, this Court should reverse.

Dated: September 16, 2024

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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| | ) | |
| | ) | No. 281,2024 |
| | ) | |
| IN RE: COLUMBIA PIPELINE GROUP, MERGER LITIGATION | ) | Court Below: Court of Chancery of the State of Delaware |
| | ) | |
| | ) | Consol. C.A. No. 2018-0484-JTL |

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# EXHIBIT B

**58 Vand. L. Rev. 241**

**Vanderbilt Law Review**
January, 2005

**Note**
Nathan Isaac Combs [a1]



# CIVIL AIDING AND ABETTING LIABILITY



## *242 I. 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.

***243** 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.

***244** 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 ***245** 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 ***246** 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 ***247** 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 ***248** 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 ***249** 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 Torts[27] 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 ***250** 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; ***251** 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, ***252** 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 ***253** 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 ***254** 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 ***255** 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 ***256** 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 ***257** 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 ***258** 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 ***259** 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 ***260** 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 ***261** "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 the 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 ***262** 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]

***263** 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 ***264** 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 ***265** 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 ***266** 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]

***267** 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] ***268** 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]

#### ***269** 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] ***270** 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:

> ***271** 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 knowledge [157] 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 ***272** 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 ***273** 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] ***274** 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 ***275** 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]

***276** 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 ***277** 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 ***278** 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 difficultly 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 ***279** 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 ***280** 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 ***281** 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]

***282** 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 ***283** 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 ***284** 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]

  

***285** 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 ***286** 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 ***287** 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 ***288** 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 ***289** 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 ***290** 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 ***291** "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 possesses 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.

## ***292 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 ***293** 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 ***294** 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 ***295** 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 comments [271] and his relationship of authority to the young motorist [272] 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 ***296** Section 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 ***297** 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 ***298** 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] ***299** 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.

## Footnotes

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).

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).

  

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 books 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.

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. 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.

30 .John C.P. Goldberg et al., Tort Law: Responsibilities and Redress 31 (2004).

31 .Wayne R. LaFave, 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 .LaFave, 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.

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).

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.

  

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.

  

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 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.

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.

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.

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.

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 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 terrorisim); 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 Mynamar 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. McGibboney, 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 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 tort feasors 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).

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).

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).

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 plaintiff's 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.

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).

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.").

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" 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.

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 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.

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.

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.

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.

172 "Draconian," as it is used here, means "harsh; severe." Black's Law Dictionary 508 (7th ed. 1999).

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 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.

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.

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

  

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 LaFave, 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.

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.

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 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.

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.

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.

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.

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 LaFave, 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).

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).

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.

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 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.

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.

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.

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).

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.

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.

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."

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.

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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**Article**
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# AIDING AND ABETTING MATTERS

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**Abstract:** Aiding and abetting is a popular and well-known basis of criminal liability. Yet its civil counterpart, civil aiding and abetting, exists in relative obscurity. Like criminal aiding and abetting, civil aiding and abetting is of ancient origin, but it has only achieved contemporary popularity in particular niche areas like business torts and human rights statutes. In some states, it currently exists in a strange legal limbo, with perhaps some specific forms of civil aiding and abetting recognized (like aiding and abetting fraud), but with its status as a general fount of tort liability uncertain.

This Article argues that the disregard for civil aiding and abetting is an error, as civil aiding and abetting can play an important role in remedying contemporary harms. Specifically, civil aiding and abetting can bridge gaps left by duty rules in negligence. This gap-filling function will be further enhanced if courts continue the nascent trend of accepting that in certain circumstances, a failure to act can be a form of substantial assistance. As our cultural understandings of complicity broaden, aiding and abetting can serve as an important tool for allocating responsibility and achieving just compensation. Although it is often mistakenly eclipsed by other forms of joint liability, civil aiding and abetting has significant independent value.

**Keywords:** aiding and abetting, tort law, criminal liability, civil aiding and abetting, understanding of complicity

## I Introduction

Aiding and abetting is a well-known and well-used source of criminal liability. *Civil* aiding and abetting, on the other hand, is neither of those things. Only a few tort casebooks even mention its existence, and outside the bounded areas of business torts and human rights statutes, civil aiding and abetting occupies a rather hazy netherworld of liability. [1] This Article argues for the

invigoration of ***256** civil aiding and abetting. Civil aiding and abetting can be an important tool for remedying contemporary harms, particularly because it can fill gaps created by duty rules in negligence. This gap-filling function will be further enhanced if courts continue to accept that in certain circumstances, a failure to act can constitute substantial assistance.

Although civil aiding and abetting is not a popular source of tortious liability, it is an old one. [2] Unfortunately, long histories and clear histories are two different things, and the history of civil aiding and abetting is primarily one of doctrinal confusion. [3] The question of which mental state should be required has caused constant consternation, as has the relationship between aiding and abetting and other forms of joint liability (like civil conspiracy). [4] Perhaps in part because of this confused background, some states still do not recognize aiding and abetting a tort as a general source of liability. [5]

For the approximately thirty states that do recognize at least some form of civil aiding and abetting, many have adopted the version put forth in Section 867(b) of the Restatement (Second) of Torts. [6] It states:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability is he [ ... ] knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. [7]

Or, as the California Civil Jury Instructions succinctly puts it, a defendant is "responsible as an aider or abettor if [she] knew that a tort was being/going to be committed by [the other defendant and] gave substantial assistance or encouragement and [that] conduct was a substantial factor in causing harm to the plaintiff." [8]

A five-factor test governs when assistance or encouragement is "substantial." [9] The five factors are "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at time of tort, his ***257** relation to the other [tortfeasor] and his state of mind." [10] Ultimately, though, "the question of liability is a normative one," concerning "whether a person is sufficiently involved in the primary wrong [ ... ] such that it is appropriate to hold him or her liable for the primary wrong of the primary wrongdoer." [11]

The answer to this normative question depends in large part on cultural understandings of complicity and collusion more broadly. [12] In 2017, "complicit" was the word of the year, reflecting a wide-spread interest in the myriad ways one person may be culpable for their role in another's wrongdoing. [13] Over time, understandings of complicity have thickened. For example, some institutions now try to avoid the appearance of complicity by divesting out of controversial

  

industries like private prisons and fossil fuels, [14] and individuals try to avoid complicity with the wrongful actions of corporate entities and others by engaging in "ethical consumption" or participating in campaigns like #grabyourwallet (encouraging consumers to not spend money at businesses associated with particular political figures). [15]

Social science has also developed more robust understandings of complicity and the impact of one person's presence and action on another. Masculinities studies, for instance, has offered insight into the significant role of spectators in episodes of wrongdoing. [16] Psychology has revealed how the silence of authority figures can buttress wrongdoing. [17] And sociologists and legal theorists have begun to untangle the complicated ways in which legal conceptions of complicity connect to cultural ones. [18]

***258** These new understandings have begun to inform the doctrine of civil aiding and abetting. Courts have started to embrace and expand the idea that a failure to act can, in some circumstances, constitute substantial aid for the purposes of aiding and abetting liability. And the groundwork has been laid for a more robust focus on the relational aspects often informing aiding and abetting. Even aside from these developments, aiding and abetting has independent value, but with them it can be an even more effective mechanism to hold parties accountable for their contributions to wrongdoing.

To show aiding and abetting's value in the contemporary tort universe, this Article first offers a brief history of civil aiding and abetting, including its importance in the contexts of business torts and human rights. Next, Part II describes how negligence has created a gap where wrongs would go unredressed if civil aiding and abetting were unavailable. Part III then focuses on when a failure to act can constitute substantial assistance for the purposes of aiding and abetting. Finally, Part IV considers the questions of damages and parity that flow from the imposition of civil aiding and abetting liability.

## II A brief history of civil aiding and abetting

Somewhat surprisingly, civil aiding and abetting is actually older than well-trodden tort concepts like joint and several liability, products liability, and the duty of professional loyalty. [19] Yet it has not developed the kind of doctrinal coherence that exists in those areas. [20] Instead, confusion and conflation abound. In American jurisprudence, the theory of civil aiding and abetting liability is "very underdeveloped," and "courts apply different tests and often obfuscate their analyses." [21] Texas has no less than five distinct tests for particularized forms of civil aiding and abetting, including one for assisting a breach of fiduciary duty, and one for assisting "highly dangerous, deviant, or anti-social group activity," though it has not adopted civil aiding and abetting as a general form of participation in an underlying common law tort. [22]

  

## *259 A History

The lack of a robust underlying theory guiding the development of civil aiding and abetting may in part be because the principle underlying it is deceptively simple: helping someone commit a wrong is wrong. [23] This was apparent even in the sixth century, as the Romans went about codifying their criminal law. [24] However, aiding and abetting was not seen as a separate civil construct until the 1600s. [25] At that time, it became conflated with what we now identify as civil conspiracy. [26]

Almost five hundred years later, civil aiding and abetting continues to be commonly conflated with conspiracy. [27] Both, of course, are ways of committing a joint tort. [28] The distinction between them is that civil conspiracy involves joint activity through *agreement*, while aiding and abetting, involves joint activity through *substantial assistance*. [29] Because both sources of liability are rooted in the idea of joint activity, they are often alleged together, and courts sometimes fail to keep the strands analytically separate. [30] For instance, in the classic hypothetical in which a "group of highwaymen collaborated to accost a victim," each member of the group could fairly be held responsible for all the ensuing ***260** harm and "for anything the others did," even though "one might have battered the plaintiff, while another imprisoned him, and a third stole his silver buttons." [31] In this scenario, both conspiracy and aiding and abetting would be plausible bases of liability. Conspiracy asks whether there was an agreement to commit a wrong; aiding and abetting asks whether each party knowingly and substantially assisted in its commission. As a conceptual or theoretical matter, "the distinction [between the two] is well-settled," and "reflected in sections 876 (a) and (b) of the Restatement (Second) of Torts," but courts nevertheless have frequently failed to keep the two bases of liability separate in their analyses. [32]

In the case law that confuses civil conspiracy with civil aiding and abetting, it is usually aiding and abetting which gets overshadowed by its conspiracy counterpart. [33] This has obscured the independent importance of civil aiding and abetting as a cause of action. Accordingly, between the 1930s and 1980s, aiding and abetting has had only a modest showing as an independent source of common law tortious liability. [34] Although it was recognized in the 1939 Restatement of Torts, [35] until the 1980s the cases involving aiding and abetting mainly came up in the context of securities law or the "isolated acts of adolescents in rural society." [36]

The 1983 watershed case of *Halberstam v. Welch* confirmed that civil aiding and abetting was a viable basis of liability beyond those limited areas. [37] In *Halberstam*, the romantic companion of a career burglar was held liable for ***261** aiding and abetting when he killed a burglary victim. The court in *Halberstam* held that despite civil aiding and abetting's convoluted history and previous limited applications, it was a valid source of liability. [38]

  

The next watershed moment for civil aiding and abetting came in 1994, in *Central Bank of Denver v. First Interstate Bank of Denver*, when the Supreme Court held that, contrary to decades of past practice, section 10(b) of the Securities Exchange Act did not in fact allow for aiding and abetting claims. [39] In its reasoning, the Supreme Court stated that the role of the Restatement's version of aiding and abetting in state law had thus far been "at best uncertain," and that there was no presumption Congress had intended to include aiding and abetting in the statute. [40]

While the *Central Bank* decision eliminated an important source of securities liability, in the time since it was issued, aiding and abetting has gained ground in areas like "breach of fiduciary duty, commercial fraud, and state law securities liability." [41] As of 2005, at least thirty states have civil aiding and abetting liability in at least some form (often in relation to fraud or fiduciary duties). [42] Even Ohio, for example, which does not recognize a general form of civil aiding and abetting liability, [43] nevertheless allows liability for aiding and abetting defamation. [44] Between these more particularized applications of civil aiding ***262** and abetting, and the adoption of section 876 civil aiding and abetting liability generally, many commentators believe there is a general "trend toward increased recognition." [45]

### B Statutory aiding and abetting

As the discussion of section 10(b) of the Securities Exchange Act suggests, the common law is not the only place where civil aiding and abetting can be found. Many human rights statutes explicitly include aiding and abetting as a source of liability. Interestingly, where aiding and abetting is not explicitly included, courts have used the long common law history of civil aiding and abetting in differing ways. [46] Sometimes, courts have used "the antiquity of aiding and abetting" as a justification for finding that the statute must have intended to include aiding and abetting liability. [47] Other times, courts have found that that same history points in the completely opposite direction: against such a significant historical background, "a statute that fails to specify aiding-abetting liability cannot be deemed implicitly to provide for it." [48] At any rate, civil aiding and abetting has played a large role in human rights statutes, particularly in the Alien Tort Statute and state human right statutes.

Aiding and abetting is a frequently invoked basis for liability under the Alien Tort Statute, [49] a federal human rights statute with significant global importance. [50] When the *Central Bank* decision was issued, one of its many impacts was to throw into doubt whether aiding and abetting remained a viable ***263** source of liability under the Alien Tort Statute. [51] However, "courts have unanimously indicated that international law supports aiding and abetting liability under the ATS." [52] In keeping with the confusion often surrounding civil aiding and abetting, though, the exact test for aiding and abetting under the Alien Tort Statute remains unclear. [53]

  

Like in this federal human rights statute, aiding and abetting also plays a significant role in state human and civil rights statutes. [54] Many state human rights statutes expressly prohibit aiding and abetting another person's violation of the statute, [55] and many states use the Restatement's section 876 standard of substantial assistance and knowledge when interpreting their statutes. In *Matthew v. Eichorn Motors*, the Minnesota court considered the legal standard for aiding and abetting sexual harassment under the Minnesota Human Rights Act. [56] The court noted that many other states, like Alaska, [57] New ***264** Jersey, [58] California, [59] and Tennessee, [60] used the Restatement standard of substantial assistance and knowledge, and concluded that this was the appropriate legal standard governing aiding-and-abetting claims under the Minnesota Human Rights Act as well. [61] The court acknowledged that claims under human rights statutes were "not, strictly speaking, tort claims," but found the Restatement's legal standard to be "consistent with both the ordinary meaning of aiding and abetting in a civil context and the remedial purposes of the MHRA." [62]

## *265 III Filling the duty gap

As the historical confusion between civil aiding and abetting and conspiracy illuminates, civil aiding and abetting is embedded in a nest of "alternative avenues of redress" against secondary wrongdoers, including vicarious liability and primary liability." [63] But civil aiding and abetting has its own independent and unique value. Vicarious liability has strict doctrinal hurdles and tends not to be applied evenly across the board. [64] And conspiracy, while a close ally to aiding and abetting in certain factual scenarios, is in fact a virtual non-starter in others. [65]

Primary liability, particularly in negligence, has also offered redress to many who suffer harms caused in part by background actors. [66] Landlords have been held liable when they fail to implement basic security measures and their tenants are attacked; [67] family members have been held liable when they gift their younger members with vehicles despite a lack of a driver's license and substance abuse issues; [68] and employers have been held liable when they fail to inform a new employer about an employee's past predatory behavior. [69]

However, duty has proved to be a sometimes insurmountable hurdle for many plaintiffs. No-duty findings have been made for a whole host of policy reasons, including on grounds that the civil courts are the wrong venue for a remedy, or imposing a duty would create a landslide of litigation, or liability would result in undesirable social consequences, or because other social values offset the value of liability. [70] Plaintiffs thus often find themselves shut out of a remedy in negligence law on the grounds of no-duty. [71]

One of the main benefits of civil aiding and abetting is that it is not rooted in duty. [72] As the court in *Wells Fargo Bank v. Ariz. Laborers, Teamsters* articulated, ***266** "aiding and abetting liability

  

does not require the existence of, nor does it create, a pre-existing duty of care." [73] Instead, "aiding and abetting is based on proof of a scienter ... the defendants must know that the conduct they are aiding and abetting is a tort." [74] Thus, in *Shelter Mut. Ins. Co. v. White*, misbehaving passengers in a vehicle had no legal duty to the occupants of another vehicle, but they were nevertheless obligated to "avoid[] providing substantial assistance or encouragement for [the driver's] negligent driving." [75]

The case of *Solis. v. S.V.Z.* exemplifies the kind of situation where there is no liability under a negligence theory, but there could nevertheless be liability under aiding and abetting. [76] In *Solis*, a 16-year-old girl was in what she believed to be a romantic relationship with her 26-year-old-male supervisor. When her mother appeared at the restaurant one night looking for her daughter, and was distraught to find her not there, the manager, who knew the daughter was currently out with the supervisor, lied and told the mother that "a female coworker had already taken [the plaintiff] home." He then called the supervisor "and advised him to take [the plaintiff] home because her mother was actively searching for her." In so doing, the manager arguably contributed to the assault and statutory rape of the daughter. [77]

The plaintiff alleged that the manager was liable in negligence, and had a duty under the Texas Family Code to report the sexual assault. [78] The manager, on the other hand, argued that the Texas Family Code did not impose a duty that could form the basis of tort liability, and that "a failure to report would not give rise to a civil cause of action." [79] The court agreed, and, finding no other source of a duty, found that the manager could not be liable in negligence. [80]

The court also considered whether the manager could be liable on an aiding and abetting theory. The court noted that the Texas Supreme Court "ha[d] not expressly decided whether Texas recognizes a cause of action for aiding and ***267** abetting," and declined to apply an aiding and abetting theory in the absence of such a precedent. [81] Accordingly, the manager was not liable under an aiding and abetting theory of liability either. However, if the Texas court had recognized civil aiding and abetting, the manager would very likely have been liable. A jury had found that the manager knew of the tortious sexual relationship, and the telephone call to alert the supervisor to the mother's search fits securely within the "substantial assistance" requirement. [82]

## IV Failures to act

But even though liability for civil aiding and abetting is separate and distinct from the idea of duty, concepts of duty still swirl around it. [83] In particular, scholars and commentators often advance arguments that aiding and abetting *should* depend on a duty. [84] Many of the arguments trying to pull duty into the aiding and abetting analysis focus on when silence or a failure to act should constitute aiding and abetting. For instance, in the context of business and security wrongs, "[a]n entire body of case law has developed on the subject of aiding and abetting by silence or inaction

  

and the circumstances under which a person may be held liable for failing to disclose or to stop another's ***268** misconduct." [85] However, the cases are inconsistent and often at odds with each other. [86] A smattering of courts hold that silent aiding and abetting liability is possible only if "the secondary actor owes a duty to the victim." [87]

In *Fiol v. Doellstedt*, the California Court of Appeal also tethered together duty and aiding and abetting when a majority of the court held that there could be no aiding and abetting for a supervisor who failed to take action to address sexual harassment, in part because "a supervisory employee owes no duty to his or her subordinates to prevent sexual harassment in the workplace." [88] The dissenting judge, on the other hand, found that because California's Fair Employment and Housing Act imposed a mandatory duty to act to address sexual harassment, the supervisor's inaction was "tantamount to approving, conditioning, assisting in, or encouraging the doing of the wrongful act," and thus constituted aiding and abetting. [89] The judge noted that the regulations themselves held up duty as the defining line between a culpable failure to act and a non-culpable one. [90] Specifically, the Fair Employment and Housing Act regulations stated that "it is not unlawful to fail to prevent or even fail to report harassment 'unless it is the normal business duty of the person or individual to prevent or report such acts.'" [91]

Making aiding and abetting liability for failing to act depend on the existence of an underlying duty reflects the "deep-seated antipathy" to liability for nonfeasance that is often described as a core part of tort law. [92] This antipathy arises from "the highly individualistic nature of the common law" and "the reluctance of courts to force people to be good Samaritans." [93]

***269** Exemplifying and underpinning this universe of aversion to liability for nonfeasance are the infamous no-duty-to-rescue cases. *Osterlind v. Hill* [94] and *Yania v. Bergen* [95] are two common examples. In *Osterlind*, two men drinking on the 4th of July rented a canoe, and drowned when it overturned. The court imposed no duty of aid on the boat rental business. [96] In *Yania*, another man drowned, this time in a strip mining hole, after he had jumped in at the landower's taunting instigation. [97] The court imposed no duty of aid on the landowner.

As Professor Peter Lake has pointed out, these no-duty-to-rescue cases were actually highly influenced by gender considerations. In his article, *Boys, Bad Men, and Bad Caselaw: Re-Examining the Historical Foundations of No-Duty-to-Rescue Rules*, Lake argues that the history of no duty to rescue is actually a history of denying remedies to "misbehaving boys" who typically sustained injuries as a result of unwise decisions. [98] As he writes,

> [t]he majority of the historical no-duty-to-aid cases arose when boys (although not very young boys) did bad things (such as trespassing), or when men behaved in foolish ways

  

> (such as by canoeing on an icy lake after drinking heavily), or when men did foolish things at work. [99]

In this way, "a particular subset of males and their behavior [ ... ] largely created 'rescue' doctrine." Courts were loathe to impose liability on others for the consequences of these misbehaviors: "When grown men [or often even adolescent ones] act foolishly, childishly, drunkenly, or unlawfully, and then ask to be rescued from peril, courts often have been unsympathetic." [100]

A similar gendered history is reflected in the civil aiding and abetting cases. Of the few civil aiding and abetting cases that arose before the 1980s outside of the securities context, most involved the kinds of misbehaving males seen in the no-duty-to-rescue cases. From the 1930s to the 1980s, outside of the securities context, the case law largely arose from the acts of misbehaving boys in rural society. [101] Examples include *American Family Mutual Ins. Co. v. Grim* (involving ***270** a 13 year old boy who was liable when he and his friend broke into a church and his friends accidentally set it on fire); [102] *Keel v. Hainline*, (involving boys who blinded a female student by throwing chalkboard erasers in a classroom); [103] and *Cobb v. Indian Springs* (involving a security guard's liability to a pedestrian after he urged a teenage boy to demonstrate how fast his car could go) evince this. [104] Thus, just as gender "has been remarkably important" to the doctrinal development of the no-duty-to-rescue rule, [105] so to is gender clear in the development of aiding and abetting.

In fact, these cases perhaps hint at an early recognition of a social dynamic that would later gain traction as masculinities studies developed: there is sometimes a particular type of complicity at play when groups of men or boys are present. "Masculinities are relational," and the presence of other men can thus sometimes have heightened significance. [106] What have been called the homo-social bonds between men and boys influence both their behaviors and the power of each to influence the other. [107] Groups of peers can "create a treacherous place" for men and boys, as they experience "pressure and threat from the other members of their own group to [ ... ] prove their masculinity." [108] This gives rise to group dynamics which can encourage and facilitate risk-taking and wrongdoing. [109]

***271** In addition to surfacing the role of gender in the group or interpersonal dynamics often at play in aiding and abetting cases, the gendered history of no-duty-to-rescue rules also has another implication for civil aiding and abetting. The gendered no-duty-to-rescue rules led to a strong presumption against affirmative duties more generally, which continues to influence the doctrinal development of aiding and abetting. The historical no-duty-to-rescue cases eventually came to encompass many situations in which the policy considerations strongly suggested that liability should actually ensue. In other words, the no-duty-to-rescue rule grew past its function of limiting the recovery of those who behave badly, and came instead "to deny protection for many individuals

  

who behaved in socially productive or responsible manners." [110] Indeed, the no-duty-to-rescue rule now sometimes functions to shield aiders and abettors from liability.

Specifically, the no-duty-to-rescue rule has contributed to the prevalent doctrine that a bare failure to prevent a harm will not usually constitute aiding and abetting. Many cases have asserted and followed the rule that "mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting." [111] For instance, returning to *Matthews v. Eichorn* where the court held that a state human rights statute employed the Restatement (Second) standard for aiding and abetting, the court stated that in applying that standard, "state and federal courts generally have held that a defendant's failure to act does not constitute "substantial assistance." [112] The California court in *Fiol* is also noted as "categorically holding that "[m]ere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting." [113]

Nevertheless, some courts *have* recognized that knowledge and a failure to act can, in some circumstances, "rise[] to the level of providing substantial assistance." [114] Two cases involving police officers illustrate such circumstances. ***272** In *Schiller v. Strangis*, the court found that a police officer was liable for aiding and abetting false imprisonment, and that his silence had substantially encouraged a tortious physical assault committed by his partner. [115] In *McMahon v. Venezuela* the court found that a police officer who "served as the 'lookout," "did nothing to stop [his partner]," and held the complainant's dog in the front seat while his partner sexually assaulted the complainant, had also provided substantial assistance. [116]

The difference between inaction which does nothing to assist and inaction which serves as substantial assistance is clear if we contrast the case of *McMahon v. Venezuela* with a recent high-profile case of campus sexual assault. At Vanderbilt University in 2015, a male college student who was asleep in his top bunk awoke when his roommate and some other acquaintances began sexually assaulting an intoxicated woman in their room. [117] The roommate lay still and gave no indication he was aware of what was happening, and the assaulters did not know that he was awake. [118] Leaving aside the moral responsibilities that he may have had, under the legal framework of aiding and abetting, the roommate had knowledge that a wrong was occurring, was present at the occurrence, and obviously failed to act, but he quite obviously did not assist, let alone substantially assist, the harm. [119]

As the case of the formerly sleeping college roommate indicates, it is quite possible to be present, and know that a tort is being committed, and yet have that presence do nothing to assist that wrong. But there are also scenarios in which inaction *does* provide substantial assistance. One such scenario happens when the alleged aider and abettor is in a position of authority over the primary wrongdoer. Another happens when what is called "inaction" is in fact the affirmative act of spectating.

  

### *273 1 Failure to act and positions of authority

The relationship between the primary tortfeasor and the alleged aider and abettor is one of the enumerated five factors that should be weighed when determining whether there has been "substantial assistance." [120] However, courts have often paid inadequate attention to the importance of this variable, and been reluctant to characterize a supervisor's failure to act or respond to an employee's wrongful act as aiding and abetting. In *Austin v. Escondido Union School District*, the court found that a supervisor who had knowledge and been specifically informed that another employee was battering children, but "did not remove [the employee] from his position or otherwise protect [the children], did not, through such inaction, provide substantial assistance to the wrong. [121] Similarly, in *Campbell v. Feld Entm't Inc.*, the court found that a "failure to stop employees from engaging in intentional torts" did not create liability for aiding and abetting. [122] The court in *E.F. v. Delano Joint Unified High School District* also found that awareness of sexual harassment and a failure to act was insufficient to ground a claim of aiding and abetting that harassment. [123]

But other courts, in other contexts, have interpreted a supervisor's failure to investigate as akin to implicit approval or support of the wrongful activity. In *Chapin v. University of MA*, the District Judge found that even though there was no state precedential court ruling on whether a supervisor's failure to investigate sexual harassment could constitute aiding and abetting under the relevant human rights statute, the state human rights agency had found that a "failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior." [124] Moreover, the Third Circuit and other jurisdictions including Pennsylvania and New York have held that a supervisor's failure "to take action to prevent harassment of which they are aware" can constitute aiding and abetting. [125]

The court in *Chapin v. University of MA* also noted the broader impact of a supervisor's failure to act: it signals not only to the aider and abettor, but to others, that "employees may engage in sexual harassment or discrimination ***274** with impunity." [126] When someone is committing a wrong in a situation where they would normally expect that wrong to be denounced by someone in an authoritative position, and the wrong is not so denounced, the actions of the authoritative person contribute to the tort's continuance. The actions should thus (assuming that the other requirements for liability are met) be sufficient grounds for aiding and abetting liability. Ultimately, "[a] supervisor's failure to correct a harasser's behavior not only deprives the victim of a workplace free from discrimination, but may also cause a harasser to believe that harassment is tolerated and could, in fact, encourage the behavior." [127]

Courts have previously endorsed a relational analysis in determining whether aiding and abetting liability exists. For instance, in *Cobb v. Indian Springs, Inc.*, the court held that a security guard who encouraged a youth to test how fast his new car could travel was liable for aiding and abetting when that youth hit another person, and the security guard's position of authority was an important

  

part of the analysis. [128] The court in *Cobb* noted that "the jury might well take into consideration the security guard's position of authority which possibly could have been a factor influencing [the youth] to demonstrate the speed of his automobile." [129]

### *275 2 Failure to act and spectating

Another instance in which failure to act can constitute aiding and abetting concerns the issue of spectating. As the Vanderbilt University situation involving the roommate makes clear, "mere presence" will typically not meet the requirement of knowing and substantial assistance, and there are good reasons for this rule. [130] One who, through no fault of their own, finds themselves at a scene of wrongdoing may simply be paralyzed and unable to respond helpfully to it. They may even themselves be harmed by witnessing the wrong. [131]

However, there is a meaningful distinction between a secondary party who merely finds themselves unfortunately present when another is engaged in wrongdoing, and a secondary party who actively serves as a spectator. The no-duty-to-rescue rule means that a secondary party (who is not in a position of authority) is not usually legally required to stop someone from engaging in wrongful activity. But there is a lot of space between not stopping someone, and knowingly and substantially assisting them in that wrongful activity. A passenger does not have to stop a drunk driver from driving, but they also cannot cheer them on as they get in the car. [132]

Cheering clearly can constitute aiding and abetting. The court in *Rael v. Cadena* noted that "[a]lthough liability cannot be predicated upon mere presence [ ... ] verbal encouragement at the scene gives rise to liability." [133] In that case, shouting "kill him" and "hit him more" during an assault was "substantial assistance" and "sufficient to create joint liability for battery." [134] Similarly, in *Brown v. Perkins*, an 1861 case, the court held that "defendants could be held liable as principals for aiding and abetting by their presence at the trespass and encouragement and excitement of the wrongful conduct." [135] The court noted that encouragement was not limited to words:

> Any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means ***276** countenances or approves the same, is in law deemed to be an aider and abettor, and liable as a principal. [136]

As the court in *Brown v. Perkins* acknowledged over a hundred years ago, there are many ways other than audibly cheering that a spectator can signal their approval and substantially assist the wrongdoing. Notably, the law frequently recognizes that in certain circumstances, the presence of appreciative others is a large contributor to the existence of the wrong. For instance, many courts and state statutes have targeted the important and "motivating role of spectators" in relation to

  

wrongs like drag racing and dogfighting. [137] In an effort to eliminate these wrongs, almost all states have enacted statutes prohibiting being knowingly and intentionally present at a dogfight, and a number of state and local governments have similar laws regarding drag racing. [138]

The impact of active spectating on certain events is not limited to the drag racing and dog fighting contexts. In many instances involving assaults or sexual assaults, the presence of spectators similarly contributes to the occurrence and duration of the wrong. One scenario occurred recently in New York City. During an early morning commute from New Jersey, as Jose Robles tried to get a cab outside of New York City's Port Authority Bus Terminal, he was attacked from behind and brutally assaulted. [139] As the attacker hit and kicked him, a number of bystanders begin filming the assault. Robles noted "People were watching and they were having a good time filming," which encouraged the assaulter to continue his attack. [140] Eventually the victim managed to make a 911 call on his own cell phone, and to flee inside the building, where he encountered police officers who assisted him. [141]

The appreciative spectator of an ongoing assault arguably can meet the test for civil aiding and abetting, as such communicated enjoyment can constitute substantial assistance. A key issue, though, is how and whether the law can distinguish a merely present bystander from a spectator. [142] The Supreme Court of Pennsylvania directly confronted this issue in *Commonwealth v. Craven*, ***277** involving a criminal conviction for "attendance at an animal fight 'as a spectator.'" [143] The defendants argued that this amounted to criminalizing mere presence, and impermissibly did not require a culpable mental state. The Pennsylvania Supreme Court disagreed, holding instead that the term "spectator" necessarily encompassed a particular mental state. After reviewing the relevant Webster's Dictionary entries, the court differentiated being a spectator and being merely present, finding that "a spectator is 'one that looks on or beholds,' whereas 'presence' is 'the state of being in one place and not elsewhere.'" In other words, presence may be pure "happenstance," whereas spectating involved a "conscious choice." [144]

Additionally, in *Commonwealth v. Holstein*, the court considered whether spectating could constitute "participation" in a drag race. [145] A defendant spectator of a drag race had been convicted under a statute that prohibited participation "in any manner." [146] The defendant argued that merely intentionally attending a drag race could not constitute participation. The court disagreed, and held that "knowingly attend[ing] an illegal drag racing event as a conscious and voluntary spectator" was a form of participation and was thus prohibited under the statute." [147]

These cases suggest an important potential application of civil aiding and abetting: to situations involving group sexual assault. [148] The role of spectators in group sexual assault is clear in many high-profile incidents. [149] For instance, in a trial arising out of a gang rape at a local bar in New

  

Bedford, Massachusetts, "prosecutors alleged in their opening statement that "several men at the bar 'were cheering like at a baseball game"' while watching the rape." [150] Similarly, in 2009, a high school student in Richmond, California was gang raped in front of a crowd of approximately 20 people who recorded the event and appeared to mock it. [151] Social science literature has recognized the significance of the group dynamics in these kinds of wrongs, as the assault functions as a means for "both ***278** the rapists and spectators to interact with one another," and "the audience is a key motivating factor in the crime." [152]

Some scholars and commentators have advocated for increased criminal prosecutions of these "voyeurs" or spectators of assaults. [153] One impediment, however, is that a common test for criminal aiding and abetting requires that the aider and abettor intend the underlying wrong. [154] Since civil aiding and abetting typically only requires knowledge, not intent, civil aiding and abetting does not contain this significant hurdle. [155]

## ***279 V The parity problem and joint and several liability**

Liability for failure to act or for affirmatively acting to aid under civil aiding and abetting next gives rise to the question of exactly how much of the harm aiders and abettors should be held responsible for. [156] This issue is particularly salient in criminal aiding and abetting, where "[c]omplicity doctrine treats the accomplice in terms of guilt, and potentially punishment, as if she were the perpetrator, even when her culpability is often less than that of the perpetrator." [157] Thus, a secondary actor whose role in a crime is significantly less than that of a primary actor is nevertheless often subject to the same criminal punishment as the primary actor. [158]

Since civil aiding and abetting results in damages, not criminal punishment, the stakes surrounding civil liability are lower. Moreover, questions of joint liability are not new nor limited to civil aiding and abetting: tort law has long considered how to apportion liability among multiple tortfeasors whose contributions to a harm are unequal. Different states have come to different conclusions about whether tortfeasors who play only a small role in an injury should nevertheless pay for it in its entirety.

Traditionally, civil aiders and abettors were liable to plaintiffs "equally with the wrongdoer." [159] The basis for this was the belief that providing aid to the torts of others is morally blameworthy, and one who aids in this way is in fact "as morally blameworthy as the actor and should receive the same punishment." [160] Many jurisdictions continue to adhere to this idea, and employ joint and several liability for aiding and abetting. For instance, Minnesota courts "have long relied on the well-recognized rule that all who actively participate in any manner in ***280** the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done are jointly and severally liable for the resulting injury," regardless of their specific level of input. [161]

  

The Restatement (Third) advocates for retaining "joint and several liability when defendants are "acting in concert," a category that includes aiding and abetting. [162] The Restatement (Second) also contains a fulsome discussion of the retention of joint and several liability "when the secondary issue of apportioning liability between defendants may negate the tortfeasor's primary liability." [163] For instance, "if a court attempted to apportion liability between a negligent employee and her vicariously liable employer," then "a larger apportionment to the primary wrongdoer would eliminate the whole point of vicarious liability." [164] Apportionment would also negate the point of liability in cases involving the failure to protect a plaintiff from the actions of a third party:

> If, for example, the jury finds a landowner negligent because the landowner's failure to repair a doorlock left the plaintiff vulnerable to physical attack in the lobby, it would negate the landowner's liability to allow a jury to apportion liability between the landowner and the assailant. [165]

These considerations will often weigh in favor of retaining joint and several liability for aiding and abetting, and indeed some jurisdictions have found that even after the passage of comparative fault legislation, these considerations are still paramount. The Iowa Supreme Court, for example, has held that aiding and abetting continues to give rise to joint and several liability, even after the passage of comparative fault legislation in that state. [166]

Finally, no exploration of virtually any issue in tort would be complete without consideration of the role of insurance. [167] Aiding and abetting has a complicated relationship with insurance, in that it is not entirely clear if and ***281** when insurance is available for aiding and abetting. In arguably the most famous of the civil aiding and abetting cases, *Rice v. Paladin*, in which a publisher was sued for publishing an instructional manual about how perform assassinations, and someone was assassinated in accordance with those instructions, the publisher's insurance company negotiated and paid the settlement, suggesting there was some form of coverage at risk. [168]

Part of the complicated relationship between aiding and abetting and insurance flows from the fact that aiding and abetting is not actually an independent cause of action: it is a mode of liability or a way to be liable. [169] In other words, a defendant is not actually liable for the wrong of aiding and abetting, they are liable for the underlying tort that they aided and abetted. Under the usual theory of concerted action, when the allegation is that the defendant has aided and abetted negligence, the underlying wrong committed is arguably actually the tort of negligence. [170] Since most insurance polices are designed to cover negligence, under this theory aiding and abetting negligence would be covered.

  

However, some courts have held that because aiding and abetting requires knowledge, it is actually closer to an intentional tort. [171] This characterization would set "a practical limitation on civil aiding and abetting liability" because it would foreclose the possibility of insurance under many policies. [172] Nevertheless, it is important to note that some insurance policies are now designed to explicitly cover claims of aiding and abetting, perhaps indeed indicating that this source of liability is increasing. [173]

## *282 VI Conclusion

Civil aiding and abetting is an important tool in achieving the goals of "fuller compensation for victims" and "deterrence of participation in wrongful activities." [174] While its use outside of the business tort and human rights contexts has been thus far rather limited, recent social science developments and increased interest in the many paths to complicity suggest that civil aiding and abetting may yet have more to offer plaintiffs. Civil aiding and abetting can fill gaps left by no-duty rules in negligence, and this role will be further enhanced if courts continue to adopt nuanced views of failures to act.

## Footnotes

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1 See, e. g. JOHN C.P. GOLBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 292, 646-7 (4th ed. 2016) mentioning aiding and abetting in two notes. WARD FARNWORTH & MARK. F. GRADY, TORTS: CASES AND QUESTIONS 8 (2nd ed. 2009) describe an aiding and abetting case, Keel v. Hainline, 331 P.2d 397 (okla. 1958) in a note. Aiding and abetting does not appear to be addressed in RICHARD A. & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS (11th ed. 2016).

2 Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135, 1137 (May 2006).

3 Josephine T. Willis, *Note: To (B) or Not to (B): The Future of Aider and Abettor Liability in South Carolina*, 51 S.C.L. REV. 1045, 1046 (2000).

4 Thomas J. Leach, *Civil Conspiracy: What's the Use?* 54 U. MIAMI L. REV. 1, 13 (1999).

  

5 See, e. g. Solis v. S.V.Z., 566 S.W.3d 82 (Tex. App. 2018).

6 Mason, *supra* note 2, at 1137.

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

8 JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2016).

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

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

11 JOACHIM DIETRICH & PAULINE RIDGE, ACCESSORIES IN PRIVATE LAW 4 (2016).

12 See Kyle Graham, *Why Torts Die*, 35 FLA. ST U. L. REV. 359, 361 (2007), explaining how cultural atmosphere influences the vitality of a given tort.

13 Bill Chappell, *'Complicit' is the Word of the Year in 2017, Dictionary.com Says*, NPR (November 27, 2017).

14 See Emma Whitford, *NYC's Pension Fund Becomes First in Country to Divest from Private Prisons*, GOTHAMIST (June 8, 2017) and Jamie Margolin, *For My Future College, Fossil Fuel Divestment Is a Must-Have So the Climate Crisis Doesn't Make My Education Useless*, TEENVOGUE (June 21, 2019).

15 See Laura Portwood-Stacer, *Anti-Consumption as Tactical Resistance: Anarchists, Subculture, and Activist Strategy*, 12 J. OF CONSUMER CULTURE 87 (2012) and Eric Westervelt, *#Grabyourwaller's Anti-Trump Boycott Looks to Expand Its Reach*, NPR (April 16, 2017).

16 See, e. g. Katherine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563 (1997); Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment 'Because of Sex*,' 79 COLO. L. REV. 1151, 1163-64 (2008).

17 C.P. Smith & J.J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH. 575 (2014).

  

18 See Amy Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in Hobby Lobby's Wake*, 82 U. CHI. L. REV. 101 (2015).

19 Mason, *supra* note 2, at 1137.

20 *Id.*

21 N.I. Combs, *Note: Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241, 249 and 246 (2005).

22 Nelson S. Ebaugh, *Why You Should Understand the Five Tests of Civil Aiding and Abetting in Texas*, 78 TEX. BAR J. 362 (2015).

23 Willis, *supra* note 3, at 1045.

24 Mason, *supra* note 2, at 1141. In the United States, criminal aiding and abetting had a big moment in 1909, when Congress "enacted what is now 18. U.S.C. § 2, a general aiding and abetting statute applicable to all federal criminal offenses. Under the statute, all those who knowingly provide aid to persons committing federal crimes, with the intent of facilitating the crime, are themselves committing a crime." Mason, *supra* note 2, at 1141. This statute drastically simplified the common law forms of criminal aiding and abetting, in which "the inquiry concerning the liability of accessories to crime was plagued by 'intricate' distinctions." For instance, "[p]ersons might be charged with a felony as (i) principals in the first degree who actually perpetrated the offense; (ii) principals in the second degree who were actually or constructively present at the scene of the crime and aiding and abetted its commission; (iii) accessories before the fact who aiding and abetted the crime, although not present when it was committed; or, (iv) accessories after the fact who rendered assistance after the crime was complete." *Id.* Rule 65 of the Federal Rules of Civil Procedure also contemplates the power of aiding and abetting, when it provides that injunctions will bind non-parties to the lawsuit if those non-parties are aware of the injunction and "are in active concert or participation" with the parties or their agents. Fed. R. Civ. P. 65.

25 Mason, *supra* note 2, at 1141.

26 *Id.*

27 *Id.*

  

28 Eugene J. Schiltz, *Civil Liability for Aiding and Abetting: Should Lawyers be Privileged to Assist Their Clients' Wrongdoing*? 29 Pace L. Rev. 75, 80 (2008).

29 *Id.*

30 *Id.*

31 Id, quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46 (4th ed. 1971). This hypothetical is also referenced in Halberstam, 705 F.2d at 476-7.

32 Schiltz, *supra* note 28, at 80. See also Halberstam, 705 F. 2d at 478 (noting that "courts and commentators have frequently blurred the distinction between the two theories of concerted liability").

33 See Halberstam, 705 F. 2d at 478 (noting that "[m]ost commonly, "courts have relied on evidence of assistance to the main tortfeasor to infer an agreement, and then attached the label 'civil conspiracy' to the resulting amalgam").

34 *Id.*

35 Restatement of Torts § 876 (1939): "For harm resulting to a third person from the tortious conduct of another, a person is liable if he (a) orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue, or (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 or (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."

36 Halberstam, 705 F.2d 472.

37 *Id.* In Halberstam, the live-in romantic companion of a professional burglar was held liable when he murdered a man during a burglary, though she was not present at the burglary and was unaware of the incident.

38 *Id.*

39 511 U.S. 164, 191 (1994). In the years between the Halberstam and Central Bank decisions, civil aiding and abetting also arose in the context of what came to be known as the "DES"

  

cases. In these cases, mothers whose daughters ended up suffering from a particularly virulent form of cancer as the result of a prescribed pregnancy medication, diethylstilberstrol, sued the pharmaceutical companies who had manufactured and marketed the drug. Some plaintiffs alleged "concert of action theories" related to the corporate defendants, including aiding and abetting. See E. Dana Neacsu, *Concert of Action by Substantial Assistance: Whatever Happened to Unconscious Aiding and Abetting?*, 16 TOURO L. REV. 25 (1999).

40 Central Bank, 511 U.S. at 182.

41 Mason, *supra* note 2, at 1137. State securities law exists outside of section 10(b) of the federal Securities Exchange Act.

42 *Id.*

43 DeVries Dairy, LLC v. White Eagle Cooperative Association, Inc., 132 Ohio St 3d 516 (2012).

44 See Cooke v. United Dairy Farmers, 2005 WL 736246, holding that a defendant could be liable for publishing defamatory material if the defendant "requests, procures, or *aids or abets* another to publicize defamatory matter." This became a form of liability at issue in a recent high-profile case against Oberlin College. In spring of 2019, a jury awarded a small bakery near Oberlin College $11 million in compensatory damages and $33 million in punitive damages, after the bakery alleged that the college had aided and abetted students engaged in libel, interference with business relations, and intentional infliction of emotional distress. In November 2016, "a black Oberlin student tried to buy alcohol with a fake ID. The student then fled with two bottles of wine. The Gibsons followed the student out of the store, where Allyn Gibson was assaulted by the student and two other students. All three students were black. Afterwards, dozens of Oberlin College students protested outside the store for two days, claiming the Gibsons routinely targeted blacks. Some college administrators added fuel to the racially-tinged claims by passing out fliers claiming years of racism by the Gibson family." Phil Trexler, *Gibson's Bakery Lawyers After $44 million Verdict: Jury Did What Oberlin College Wouldn't*, WKCY3.COM (June 18, 2019).

45 Mason, *supra* note 2, at 1137.

46 *Id.*

47 *Id.*

  

48 *Id.*

49 28 U.S.C. § 1350 (Supp. IV 2000). The Alien Tort Statute, a part of the federal Judiciary Act statute of 1789, is remarkably short, declaring only "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

50 See Anthony J. Sebok, *Taking Tort Law Seriously in the Alien Tort Statute*, 33 BROOK. J. INT'L L. 871 (2008).

51 See, e. g. Boim v. Quranic Lit. Institute and Holy Land Foundation for Relief and Development, 291 F.3d 1000, 1027 (7th Cir. 2002).

52 Srish Khakurel*, The Circuit Split on Mens Rea for Aiding and Abetting Liability under the Alien Tort Statute*, 59 B.C.L. REV. 2953 (2018).

53 *Id.* Some courts apply an internationally recognized mens rea standard of purpose, meaning that the defendant must have intended to bring about the underlying wrong. Other courts have held that the appropriate standard is that of the federal common law, knowledge, as set out in the Restatement (Second) of Torts and the case of Halberstam v. Welch. This debate has not diminished aiding and abetting as an extremely important source of liability under the Alien Tort Statute. *Id.*

54 Civil aiding and abetting also plays a role in other federal human right statutes, including the Elementary and Secondary Education Act of 1965. Section 8546, entitled "Prohibition on Aiding and Abetting Sexual Abuse," prohibits a school employee from assisting another employee in "obtaining a new job, apart from the routine transmission of administrative and personnel files, if the individual or agency knows, or has probable cause to believe, that such school employee, contractor, or agent engaged in sexual misconduct regarding a minor or student in violation of the law." 20 U.S.C. § 7926. A recent case also argued that Facebook had aided and abetted age discrimination in violation of the federal Age Discrimination in Employment Act when it showed certain job advertisements only to people under the age of 40. See *More Trouble for Facebook: Are Targeted Content Options 'Aiding and Abetting' Age Discrimination in Job Ads?* BAKERDONELSON (April 25, 2018).

55 This prohibition creates individual liability. "At the state level, New Jersey, New York, Massachusetts, Connecticut, Ohio, Oregon, Pennsylvania, and Washington are among the states that allow plaintiffs to bring claims against individuals under the theory that they 'aided and abetted' discrimination or harassment." See *Can You Be Held Personally Liable in*

  

*an Employment Lawsuit? The Answer Lies Down a Rabbit Hole*, FISHERPHILLIPS.COM (July 2, 2018).

56 800 N.W.2d 823 (2011).

57 The court cites to Elison v. Plumbers & Steam Fitters Union Local 375, 118 P.3d 1070, 1077 (Alaska 2005) ("applying Restatement (Second) of Torts when construing a provision that it is 'unlawful for a person to aid, abet, incite, compel, or coerce the doing of a[n unlawful discriminatory] act.'")

58 The court cites to Tarr v. Ciasulli, 181 N.J. 70 (2004) ( "applying Restatement (Second) of Torts when construing provision that it is unlawful for any person 'to aid, abet, incite, compel or coerce the doing of any of the acts forbidden' under the New Jersey Law Against Discrimination"). *Id.*

59 The court cites to Fiol v. Doellstedt, 50 Cal. App. 4th 1318 (1996) ("applying common law standard, as reflected in Restatement (Second) of Torts, when construing provision that that it is an unlawful employment practice 'for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden' by the Fair Employment and Housing Act").

60 The court cites to Carr v. United Parcel Serv., 955 S.W.2d 832, 836 (Tenn. 1997). ("applying Restatement (Second) of Torts when construing provision that it is a discriminatory practice for a person to '[a]id, abet, incite, compel or command a person to engage in any of the acts or practices declared discriminatory' by the Tennessee Human Rights Act").

61 Matthew v. Eichorn Motors, 800 N.W.2d 823 (2011).

62 *Id.* The cross-over between state human rights statutes and the civil aiding and abetting tort doctrine is even more pronounced by the reality that tort claims are sometimes preempted by these human right statutes. See e. g. Hoffman-La Roche Inc., Zeltwanger, 144 S.W. 3d 438 (Tx. 2004) ("when the gravamen of the plaintiff's complaint is for sexual harassment, the plaintiff must proceed solely under a statutory claim unless there are additional facts, unrelated to sexual harassment, to support an independent tort claim") and Nischan v. Stratosphere Quality, LLC, 865 F.3d 922, 934 (7th Cir. 2017) (holding that the Illinois Human Rights Act "preempts tort claims that are 'inextricably linked' to allegations of sexual harassment"). See also Jill Jensen-Welch, *Suing the Bastard Boss: Personal Liability of Supervisors for Workplace Sexual Harassment*, DEFENCE COUNSEL J. (2002). It is notable that civil aiding and abetting has proliferated both in the context of human rights and in the context of equity. Liability for "knowing participation" in a breach of trust "was so firmly established that, almost a century ago, Professor Austin Wakeman Scott was able

  

to begin an article in the Harvard Law Review with the pronouncement that '[a]nyone who participates with a trustee in a breach of trust may be held liable in a court of equity to the cestui que trust.' Indeed, the common law has historically been so protective of trust beneficiaries that the liability of those who participate in a breach of trust approaches strict liability." Schlitz, *supra* note 28, at 84. In addition to this robust protection for trusts, a similar cause of action rooted in equity, breach of fiduciary duty, also includes aiding and abetting liability. And "intentional interference with contract, which is a form of aiding and abetting liability, is 'one of the most pervasive causes of action in American business litigation" today." Graham, *supra* note 12 at 378.

63 Dietrich & Ridge, *supra* note 11, at 101.

64 See, e. g. Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133 (2013), describing how courts apply the test for vicarious liability much more restrictively in the context of sexual assault.

65 For example, in a famous civil aiding and abetting case, Rice v. Paladin, 940F. Supp. 836 (D. Md. 1996), where a publisher was held liable when an assassination instruction manual they published led to a death, the facts would not have allowed for a claim of conspiracy.

66 See Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435 (1999).

67 *Id.* See, e. g. Kline v. 1500 Massachusetts Avenue Cop., 439 F.2d 477 (D.C. Cir. 1970).

68 Vince v. Wilson, 561 A.2d 103 (Vt. 1989).

69 Randi W. v. Muroc Joint Unified School District, 929 P.2d 582 (Cal. 1997).

70 These and other factors are listed in Stephen D. Sugarman, *Why No Duty?,* 61 DEPAUL L. REV. 669 (2012).

71 *Id.*

72 This is true even when the liability is for aiding and abetting another's negligence.

73 201 Ariz. 474 (2002).

  

74 *Id.*

75 Shetler Mut. Ins. Co. v. White, 930 S.W. 2d 1 (1996). See also Sanke v. Bechina, 576 N.E.2d at 121, where the court distinguished between a passenger's duty to control a driver (which does not exist), and an argument that the passenger "is himself a contributing tortfeasor."

76 566 S.W.3d 82 (Tex. App. 2018).

77 *Id.*

78 Section 261.109 of the Texas Family Code imposed a duty to report sexual assaults of a minor to a law enforcement agency. *Id.*

79 *Id.*

80 The court relied on Perry v. S.N., 973 S.W.2d 301 (Tex. 1998), where the court held that "[i]t is not appropriate to adopt Family Code section 261.109(a) as establishing a duty and standard of conduct in tort." Solis v. S.V.Z., 566 S.W.3d 82 (Tex. App. 2018).

81 *Id.*, quoting First United Pentecostal Church of Beaumont v. Parker, 514 S.W.3d 214, 224 (Tex. 2017). The court noted that "when deciding to recognize a new cause of action, courts 'must perform something akin to a cost-benefit analysis to ensure that this expansion of liability is justified.'" In Texas, the "non-dispositive factors" considered include "(1) the foreseeability, likelihood, and magnitude of the risk of injury; (2) the existence and adequacy of other protections against the risk; (3) the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the persons in question; and (4) the consequences of imposing the new duty, including whether Texas's public policies are served or disserved, whether the new duty may upset legislative balancing-of-interests, and the extent to which the new duty provides clear standards of conduct so as to deter undesirable conduct without impeding desirable conduct or unduly restricting freedoms."

*Id.*, citing Kinsel v. Lindsey, 526 S.W.3d 411, 423 n.6 (Tex. 2017). Note that the court's language here is also imprecise: aiding and abetting virtually never is a cause of action. Instead, it is a mode of liability.

82 *Id.*

  

83 In California, civil conspiracy turns on an existing duty owed to the plaintiff. See Mason, *supra* note 12, citing Applied Equipment Corp. v. Litton Saudi Arabia Ltd., 869 P 2d 454, 459-60 (Cal. 1994).

84 Patrick McNulty & Daniel J. Hanson*, Liability for Aiding and Abetting by Silence or Inaction: An Unfounded Doctrine,* 29 TORT & INS. L. J. 14 (1993).

85 *Id.*

86 *Id.*

87 This minority view is supported by at least some scholars. The authors of a law review article concerning civil aiding and abetting liability in the securities and business context propose that aiding and abetting liability should indeed rest on notions of duty. In their view, "[i]f there is no duty to speak up or 'blow the whistle' on a securities law violator or one engaged in fraud, there should be no liability for failing to do so. In contrast, if there is a such a duty, there should be liability when the duty is knowingly breached and the breach causes damages." In fact, the authors propose that "the tort of aiding and abetting by silence should be abandoned in cases involving securities violations and economic loss, and that a rule based on breach of duty of disclosure should be substituted in its place." *Id.*

88 50 Cal.App. 4th 1318 (1996).

89 *Id.*

90 *Id.*

91 *Id.*

92 McNulty, *supra* note 84, at 21.

93 Willis, *supra* note 3, at 1058.

94 160 N.E. 301 (Mass. 1928).

95 155 A.2d 343 (Pa. 1959).

  

96 160 N.E. 301 (Mass. 1928).

97 155 A.2d 343 (Pa. 1959).

98 43 N.Y.L. SCH. L. REV. 385 (1999)

99 *Id.*

100 *Id.*

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

102 201 Kan. 340 (1968)

103 331 P.2d 397 (Okl. 1958)

104 258 Ark. 9 (1975)

105 Lake, *supra* note 94, at 387.

106 Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J. L. & GENDER 431 (2010). This richer understanding helps elucidate the dynamics at play in a case like Phelps v. Bross, 73 S.W.3d 651 (Mo. App. 2002), where one man drugged a young woman and sexually assaulted her at the other's home, in his presence.

107 See Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J. L. GENDER & SOC. 201, 233 (2008); Michael S. Kimmel,

*Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity, in* THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY 25, 33 (Michael S. Kimmel ed., 2005); Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, in FEMINISM AND MASCULINITIES 57, 61-62 (Peter Murphy ed., 2004); David Leverenz, *Manhood, Humiliation, and Public Life: Some Stories*, 71 SOUTHWEST REV. 442 (1986).

  

108 Madhurima Dasgupta, *Impact of Peer Group in the Development and Construction of Masculinity*, 4 INT'L J. OF INTERDISCIPLINARY AND MULTIDISCIPLINARY STUD. 192, 192 (2017).

109 *Id.*

110 Lake, *supra* note 94, at 387.

111 Austin B. Escondido Union School District, 149 Cal. App. 4th 860, 879 (2007), citing Fiol v. Doellstedt, 50 Cal. App. 4th 1318, 1326 (1996).

112 The court cites to Failla v. City of Passaic, 146 F.3d at 158 ("granting new trial on aiding-and-abetting claim because jury was asked only whether defendant was aware of the discrimination"); Carr v. United Parcel Service, 955 S.W.2d at 836 ("Failure to act or mere presence during the commission of a tort is insufficient for tort accomplice liability."); and Bjerke v. Johnson, 742 N.W.2d 660, 665 (Minn.2007) ("Generally, no duty is imposed on an individual to protect another from harm.").

113 58 Cal.Rptr.2d at 312.

114 Matthews v. Eichorn, 800 N.W.2d 823 (2011). See also Halberstam v. Welch, 705 F.2d 472, stating that "several courts have struggled over the question of whether silence and inaction alone can qualify as 'substantial assistance."' The court noted that, in the securities context, "the range of judicial responses to claims based on silence and inaction in the face of knowledge of fraud extends from unqualified acceptance to outright rejection; in between are holdings that silence or inaction may create liability where there is a duty to disclose, or where it is proved that the silence was consciously intended to aid the securities violation." The court also noted "that in at least one nonsecurities case [Schiller v. Strangis], a court has concluded that silence encouraged the commission of tortious acts."

115 540 F. Supp. 605, 623 (D. Mass. 1982).

116 *Id.*

117 See Anita Wadhwani et al. *Bro Code Inaction in Vandy Rape Case Sparks Anger*, TENNESSEAN (Jan. 25. 2015).

  

118 Id. See also the discussion of this case in Sarah L. Swan, *Bystander Interventions*, 2015 WISC. L. REV. 975 (2015).

119 For a discussion of the moral duties of intervention, see Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447 (2008).

120 RESTATEMENT (SECOND) OF TORTS, *supra* note 7.

121 149 Cal. App. 4th 860, 879 (2007).

122 Campbell v. Feld Entm't Inc., 2014 WL 1366581 (N.D. Cal. April 7, 2014).

123 E.F. v. Delano Joint Unified High School District, 2016 WL 584699.

124 977 F.Supp. 72 (1997)

125 Danika L. McClelland, *Note: No Liability for the Non-Harassing Supervisor?: Fiol v. Doellsted*, 33 U.S.F.L. REV. 487 (1999*); Aiding and Abetting Claims Allowed Against Supervisor Who Knew About Harassment*, 3 No. 9 ANDREWS SEXUAL HARASSMENT LITIGATION REPORTER 3 (1997).

126 977 F.Supp. 72 (1997). The "deliberate indifference" standard used in constitutional torts and civil rights statutes also offers insight into the appropriate line between culpable and non-culpable inaction. For instance, "[w]here a policymaking official exhibits deliberate indifference to constitutional deprivations caused by subordinates, such that the official's inaction constitutes a deliberate choice, that acquiescence may be properly thought of as a city policy or custom that is actionable under 1983." Ligon v. City of New York, 959 F.Supp.2d 668 (2013). "Deliberate indifference' requires 'proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* "Deliberate indifference may be inferred where 'the need for more or better supervision to protect against constitutional violations was obvious,' but the policymaker 'failed to make meaningful efforts to address the risk of harm to plaintiffs.' In Texas, the test for aiding and abetting a securities violation under the Texas Securities Act usually requires that an alleged aider and abettor had a "general awareness" of their role in the violation and "acted with reckless disregard for the truth of the representations of the primary violator." In full, the test requires "(1) that a primary violation of the securities laws occurred; (2) that the alleged aider had general awareness of its role in this violation; (3) that the alleged aider rendered substantial assistance in this violation; and (4) that the alleged aider either (a) intended to deceive plaintiff or

  

(b) acted with reckless disregard for the truth of the representations made by the primary violator." This test can "be satisfied by demonstrating the aider's 'conscious indifference' to the primary violation." Ebaugh, *supra* note 22, at 363.

127 McClelland, *supra* note 115, at 505.

128 522 S.W.2d 383, 387 (Ark. 1975).

129 *Id.* Notably, "[t]he defendant's relation to the primary wrongdoer may also be evidence that could overcome a lack of actual knowledge. For example, in *Halberstam v. Welch*, the defendant's relation to the primary wrongdoer furthered the inference that she knew of the wrongdoings of her live-in companion. However, this factor has more often been used to show that the defendant's conduct constituted substantial assistance because he held a position of authority in relation to the primary wrongdoer. In these cases, the aiding and abetting typically takes the form of active encouragement." Willis, *supra* note 3.

130 Amelia Uelman, *Crime Spectators and the Tort of Objectification*, 12 U. MASS. L. REV. 68 (2017).

131 Swan, *supra* note 118, at 1015.

132 Reilly v. Anderson, 727 N.W.2d 102 (2006).

133 Rael v. Cadena, 93 N.M. 684 (1979)

134 McNulty, *supra* note 84.

135 83 Mass. (1 Allen) 89, 98 (1861), discussed in Willis, *supra* note 3 at 1045.

136 Brown 83 Mass. at 98.

137 Kimberley K. Allen, *Guilt by (More Than) Association: The Case for Spectator Liability in Gang Rapes*, 99 GEO. L. J. 837 (2011). In fact, Texas courts have limited 876(b) to "antisocial or dangerous behavior 'such as drag racing, group assault, reckless driving, and assisting a driver in becoming intoxicated." Ebaugh*, supra* note 2, at 363.

138 Allen, *supra* note 137, at 839.

  

139 Uelman, *supra* note 130 at 75-6.

140 *Id.*

141 *Id.*

142 See Allen, *supra* note 137, discussing these two cases.

143 *Id.*

144 *Id.*

145 *Id.*

146 75 PA.CONS.STAT. § 3367.

147 Allen, *supra* note 137.

148 *Id.*

149 *Id.*

150 *Id.* No spectators were criminally charged. Despite public pressure to charge the spectators, the prosecutor determined that "[m]ere presence during a crime is not enough .... You must have participated." *Id.*

151 There are numerous similar instances. See Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 S. CAL. L. REV. 1317 (2019).

152 Allen, *supra* note 137.

153 See, e. g. Allen, *supra* note 137.

154 See. e. g. Arredondo v. State, 270 S.W.3d 676 (Tex. Ct. App. 2008). Cases that have found criminal accomplice liability for sexual assault include State v. Davis, 388 S.E.2d 508 (1989); State v. Goodwin, 118 N.H. 862 (1978); Commonwealth v. Henderson, 249 Pa. Super 472

  

(1977); Diaz v. State, 444 N.E.2d 340 (Ind. App. 1983); Sutton v. Commonwealth, 228 Va. 654 (1985); State v. McBeen, 644 S.W.2d 425 (Tenn. Crim. App. 1982). See discussion in JENS OHLIN, CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE 137 (2nd ed. 2018).

155 See, e. g. Reilly v. Anderson, 727 N.W.2d 102 (Iowa 2006), holding "aiding and abetting, for purposes of tort liability, does not require a conscious desire that the tortious act occur." A minority of states do require intent for civil aiding and abetting liability. See, e. g. Winslow v. Brown, 371 N.W.2d 417 (1985), adopting the criminal aiding and abetting formulation in the civil realm as well. The court stated "We consider the criminal law test of aiding and abetting preferable to the Restatement formulation. It is a test with which lawyers and courts are familiar and it promotes consistency of language in describing similar concepts. We therefore conclude that a person is liable in a civil action for aiding and abetting if: (1) The person undertakes conduct that as a matter of objective fact aids another in the commission of an unlawful act; and (2) the person consciously desires or intends that his conduct will yield such assistance." *Id.* Further, although aiding and abetting should not hinge on duty, statutorily imposed or otherwise, new duties to report sexual assault may increase the likelihood of civil aiding and abetting liability for spectators. Florida, for instance, now statutorily "impos[es] a duty to assist victims of sexual assault." Ohlin, *supra* note 151 at 138. The statute provides that "a person who observes the commission of the crime of sexual battery and who: (1) has reasonable grounds to believe that he or she has observed the commission of a sexual battery; (2) has the present ability to seek assistance for the victim or victims by immediately reporting such offense to a law enforcement officer; (3) fails to seek such assistance; (4) would not be exposed to any threat of physical violence for seeking such assistance; (5) is not the husband, wife, parent, grandparent, child, grandchild, brother, or sister of the offender or victim, by consanguinity or affinity; and (6) is not the victim of such sexual battery is guilty of a misdemeanor of the first degree, punishable as provided in 775.082 or 775.083." F.S.A. § 794.027. The fact that such duties are proliferating indicates a deeper understanding of the role of secondary actors in the occurrence of harms. This understanding is likely to permeate through multiple legal contexts, informing not just increased duties, but more willingness to accept the role of secondary parties in the civil aiding and abetting context as well.

156 There are also issues surrounding the natural and probable consequences rule. See Evan Goldstick, *Accidental Vitiation: The Natural and Probable Consequence of Rosemund v. United States on the Natural and Probable Consequence Doctrine*, 85 FORD. L. REV. 1281 (2016).

157 Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as Lesser Offense?* 5 OHIO ST J. CRIM. L. 427, 428 (2008)

  

158 Because of the inherent unfairness of inflicting the same punishment on two people with significantly different levels of culpability, New York has adopted the crime of criminal facilitation as a lesser alternative to aiding and abetting. The statute provides that "A person is guilty of criminal facilitation in the fourth degree when, believing it probable that he is rendering aid ... to a person who intends to commit a crime, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit a felony." N.Y. PENAL LAW § 115.05.

159 McNulty, *supra* note 84, at 15.

160 *Id.*

161 Witzman v. Lehrman, Lerhman & Flom et al., 601 N.W. 2d 179, 185-6 (Minn. 1999).

162 The Restatement also recommends that joint and several liability should be deployed in situations of intentional torts. See RESTATEMENT (THIRD) OF TORTS § 15.

163 See DAN B. DOBBS, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY (2d ed, 1993).

164 *Id.*

165 *Id.*

166 Reilly v. Anderson, 727 N.W.2d 102 (Iowa 2006).

167 See, e. g. Gary T. Schwartz*, The Ethics and Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 364 (1990). As he notes, "it is unsound to discuss any objective that might be imputed to the tort system without considering both the incidence of liability insurance and the relationship of that objective to liability insurance in its various forms."

168 See MATTHEW FELLION & KATHERINE INGLIS, CENSORED: A LITERARY HISTORY OF SUBVERSION AND CONTROL 346 (2017).

169 It could be possible, though, to make aiding and abetting an independent tort, much like states like New York have created criminal facilitation as an independent, lesser wrong than aiding and abetting. See infra, fn 156.

  

170 While some courts have rejected aiding and abetting negligence as a source of liability, the Restatement (Second) permits aiding and abetting negligence, and courts have upheld its validity in cases like Miele v. Am. Tobacco Co., 2 A.D. 3d 799 (N.Y. App. Div. 2d Dep't 2003).

171 Daniel E. Tranen, *Lawyer's Face Risks From Aiding and Abetting and Civil Conspiracy Claims*, AON ATTORNEYS ADVANTAGE (2018).

172 Nathan Isaac Combs, *Note: Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241 (2005). See also Tranen, *supra* note 169, noting that "because most in-concert liability claims involve an element of knowledge by the attorney, insurance companies may view these causes of action to be intentional torts."

173 Huntersure LLC, *How Attorneys Can Be Liable to Third Parties,* HUNTERSURELLC (April 11, 2019).

174 Willis*, supra* note 3, at 1062.

12 JTORTL 255

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Case Number 281,2024

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| | ) | |
| | ) | No. 281,2024 |
| | ) | |
| IN RE: COLUMBIA PIPELINE GROUP, MERGER LITIGATION | ) | Court Below: Court of Chancery of the State of Delaware |
| | ) | |
| | ) | Consol. C.A. No. 2018-0484-JTL |

**[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT TC ENERGY CORPORATION**

The Court, having read and considered the Motion for Leave to File *Amicus Curiae* Brief (the "Application") filed by the United States Chamber of Commerce of the United States of America and all other pertinent filings submitted, and finding good cause therefore, hereby **ORDERS** that Movant's Motion is **GRANTED**. The *Amicus Curiae* Brief, submitted concurrently with the Motion, is hereby deemed filed.

**IT IS SO ORDERED** this ____ day of _____, 2024.

_____
Justice, Delaware Supreme Court

EFiled: Sep 16 2024 02:50PM EDT
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## CERTIFICATE OF SERVICE

I, Richard L. Renck, Esquire, do hereby certify that on this 16th day of September, 2024, I caused to be served a copy of the foregoing Motion for Leave to File *AMICUS CURIAE* Brief of The Chamber Of Commerce of The United States of America in Support of Appellant TC Energy Corporation and its supporting documents, upon the following counsel of record via File & Serve*Xpress*:

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*[SIGNATURE PAGE FOLLOWS.]*

Dated: September 16, 2024

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