CONSPIRACY—AIDING—ABETTING—CIVIL LIABILITY—CIVIL CONSPIRACY AND AIDING-ABETTING: DISCUSSING THE STRUCTURE OF THE THEORIES AND RELATED PRINCIPLES OF LEGAL CAUSATION—*Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

I. INTRODUCTION

Dr. Michael Halberstam, a prominent Washington, D.C. physician[1] and author,[2] received multiple gunshot wounds when he surprised a burglar in his home on the evening of December 5, 1980.[3] The doctor, described by his friends as a man of remarkable energy and intensity, then attempted to drive himself to a nearby hospital with his wife at his side.[4] Mortally wounded, he spotted his attacker running on the street and succeeded in hitting and immobilizing the man with his car.[5] One block from the hospital Dr. Halberstam lost consciousness and his car collided into a tree.[6] Although his wife managed to transport him to the hospital, he was pronounced dead a few hours later.[7] The police eventually apprehended the disabled murderer and identified him as a fugitive wanted by the FBI, Bernard C. Welch, Jr.,[8] who had masterminded a string of burglaries which

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[1] Dr. Michael Halberstam received his undergraduate education at Harvard and later graduated from Boston University Medical School. He had lived in the Washington area for 18 years and was 48 years of age at the time of his death. N.Y. Times, Dec. 7, 1980, at A52, cols. 4-6.

As a physician, Dr. Halberstam maintained a private practice in medicine and cardiology. Halberstam v. Welch, No. 81-0903, slip op. at 8 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983). He served an estimated 1,200 patients in the Washington, D.C. area. *Id.* In addition to his private practice Dr. Halberstam served as "a diplomate of the American Board of Internal Medicine, a clinical professor of medicine at George Washington University Medical School, senior medical editor of Modern Medicine magazine, and a member of the Institute of Medicine." N.Y. Times, Dec. 7, 1980, at A52, col. 6.

[2] Michael Halberstam had completed two nonfiction books, *The Pills of Your Life* and *A Coronary Event*, and a novel, *The Wanting of Levine*. He was in the midst of writing a second novel at the time of his death. In addition, Dr. Halberstam had contributed medical articles to various periodicals. N.Y. Times, Dec. 6, 1980, at A24, col. 4; N.Y. Times, Dec. 7, 1980, at A52, col. 4; Halberstam v. Welch, No. 81-0903, slip op. at 8 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[3] N.Y. Times, Dec. 7, 1980, at A52, col. 1. The *Times* reported that Welch had fired five shots, two of which struck Dr. Halberstam in the chest. He died while undergoing surgery for those wounds. *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* Mr. Welch had escaped from the Clinton Correctional Facility at Dannemora, N.Y. while serving a 10-year sentence for burglary. Prior to his incarceration at the Clinton facility, Welch had served time for burglary and rape. *Id.*

terrorized the Washington community for over five years.[9] His criminal campaign, which netted more than $1,000,000 per year in its final stages,[10] ended with the death of one of the community's finest men.[11]

Slightly more than five years before the killing of Dr. Halberstam, Bernard C. Welch, Jr. first approached Linda S. Hamilton in a Virginia parking lot and asked her for a date.[12] Although Miss Hamilton testified that at some point during that evening she became aware that Welch was armed, she further testified that this was the only occasion on which she ever saw him carry a gun.[13] Within a few weeks the couple began living together in Hamilton's apartment.[14]

At the time of their meeting, Linda Hamilton was employed by the National Academy of Sciences as a secretary-compositor.[15] Although Welch was unemployed then, as well as throughout the succeeding five years, he told Hamilton that he had investments in a variety of real estate ventures, as well as in coins and jewelry.[16] His personal possessions, however, consisted only of a new Monte Carlo automobile, clothing, a watch, pocket money, and a few gold coins.[17] Hamilton and Welch continued to live together until the date of Welch's arrest,[18] gradually upgrading their lifestyle by means of Welch's increasing wealth.[19] By 1978 he had an annual income exceeding $1,000,000.[20] In 1976 Welch and Hamilton began renting a house in Falls Church, Virginia.[21] Two years later they purchased a home in Minnesota for $102,000 and placed title to the property in Linda Hamilton's name.[22] Subsequently, the couple built a home in

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[9] *See id.*

[10] Halberstam v. Welch, 705 F.2d 472, 475 (D.C. Cir. 1983).

[11] *See id.*

[12] *Id.* at 474-75.

[13] *Id.* at 475. It would seem that Hamilton's knowledge as to whether Welch usually was armed should have had a bearing on the issue of foreseeability. *See infra* notes 254-62 and accompanying text.

[14] Halberstam v. Welch, 705 F.2d 472, 475 (D.C. Cir. 1983).

[15] *Id.* Linda S. Hamilton, 25 years old and a high school graduate, previously was employed by the Department of Defense and the Corporation for Public Broadcasting. Halberstam v. Welch, No. 81-0903, slip op. at 2 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[16] Halberstam v. Welch, No. 81-0903, slip op. at 2 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[17] Halberstam v. Welch, 705 F.2d 472, 475 (D.C. Cir. 1983).

[18] *Id.*

[19] Complementing an expensive home were two 1980 Mercedes Benz automobiles and a station wagon. The couple also hired a housekeeper. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* Hamilton's father contributed $10,000 toward the purchase price, Hamilton contributed $20,000, Welch contributed $55,000 in cash, and a $17,000 mortgage was obtained to cover

Great Falls, Virginia valued at $1,000,000.[23] They lived in Great Falls until the murder of Dr. Halberstam.[24]

In furtherance of his business, Welch installed a smelting furnace in the garage of his Great Falls home where he melted gold and silver into bars.[25] His daily routine consisted of planning and managing his investments at home.[26] Frequently, during the week, he would leave the house at approximately 5:00 p.m. and return within four or five hours.[27] Since Hamilton assumed that Welch was meeting with business associates and tending to his investments, his activities did not seem particularly unusual to her.[28] She acted as his secretary and bookkeeper,[29] typing letters of correspondence and preparing invoices for buyers of gold and silver.[30] She also kept records pertaining to the sale of antiques,[31] and various other transactions with galleries and dealers.[32] All checks and payments were deposited in bank accounts in her name.[33] For tax purposes Hamilton reported significant gross earnings in 1978 and 1979.[34] She took deductions for "cost of goods sold," although it was not clear that she knew whether any consideration had in fact been paid for these goods.[35]

After apprehending Welch, but prior to executing a search warrant, the police went to the Great Falls house.[36] Hamilton was cooperative and voluntarily permitted the officers to enter and to search.[37]

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the balance. Halberstam v. Welch, No. 81-0903, slip op. at 3 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[23] Halberstam v. Welch, 705 F.2d 472, 475 (D.C. Cir. 1983).

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* Hamilton never accompanied Welch on any of his evening business engagements, nor did she have detailed discussions with him concerning his whereabouts. In fact, she testified that she remembered only a single instance when she attended a meeting with Welch. This meeting took place in Minnesota at a coin dealer's shop. *Id.*

[29] *Id.*

[30] Halberstam v. Welch, No. 81-0903, slip op. at 4 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[31] Halberstam v. Welch, 705 F.2d 472, 475 (D.C. Cir. 1983).

[32] Halberstam v. Welch, No. 81-0903, slip op. at 5 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[33] *Id.* at 4.

[34] Halberstam v. Welch, 705 F.2d 472, 475 (D.C. Cir. 1983). Hamilton's tax returns for 1978 and 1979 indicated gross earnings of $647,569.21 and $491,762.16, respectively. *Id.*

[35] *Id.* at 475-76. The corresponding deductions for "cost of goods sold and/or operations" in 1978 and 1979 were for $498,770.87 and $360,000, respectively. *Id.*

[36] *Id.* at 476 n.4.

[37] *Id.*

Forty-six boxes of contraband were later recovered from the basement.[38] When confronted, Hamilton contended that she rarely went into the basement and had never seen any of the nearly 3,000 stolen items within those boxes.[39] Throughout the entire legal ordeal, Linda Hamilton maintained that she had no knowledge whatsoever that Welch was a professional burglar.[40]

Dr. Halberstam's widow, Elliott Jones Halberstam, brought suit in the United States District Court for the District of Columbia[41] alleging, *inter alia*,[42] that Hamilton was civilly liable for the death of Dr. Halberstam.[43] In a nonjury trial, the district court agreed that Hamilton was liable for the murder of Dr. Halberstam as a "joint venturer"[44] and as a "co-conspirator."[45] The court set damages at $5,715,188.05.[46]

Hamilton appealed to the United States Court of Appeals for the District of Columbia Circuit.[47] In *Halberstam v. Welch*,[48] Circuit

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[38] Halberstam v. Welch, No. 81-0903, slip op. at 5 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[39] Halberstam v. Welch, 705 F.2d 472, 476 (D.C. Cir. 1983).

[40] *See* Halberstam v. Welch, No. 81-0903, slip op. at 6 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983). Three police officers testified in Hamilton's defense. Halberstam v. Welch, 705 F.2d 472, 476 n.4 (D.C. Cir. 1983). In their judgment, Hamilton did not have knowledge of Welch's activity as a burglar. Their opinions were based on Hamilton's conduct during the investigation which followed Halberstam's death. *Id.*

[41] Halberstam v. Welch, 705 F.2d 472, 474 (D.C. Cir. 1983) (subject-matter jurisdiction based upon diversity of citizenship).

[42] A civil action also was brought against Welch. He defaulted and judgment was entered against him on May 19, 1981. Halberstam v. Welch, No. 81-0903, slip op. at 2 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[43] *See id.* at 1-2. The action was brought seeking damages on behalf of the estate of Michael Halberstam, and individually on behalf of Elliott Halberstam, Charles Halberstam, and Eben Halberstam. Charles and Eben, ages 20 and 19 respectively, were sons of Dr. Halberstam from a previous marriage. *Id.* at 9, 11; N.Y. Times, Dec. 7, 1980, at A52, col. 6.

[44] Halberstam v. Welch, No. 81-0903, slip op. at 6 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983). For a discussion of the fluidity of the concept of a joint venture, see Payton v. Abbott Labs, 512 F. Supp. 1031, 1035-36 (D. Mass. 1981).

[45] Halberstam v. Welch, No. 81-0903, slip op. at 6 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[46] *Id.* at 16. The total damage figure of $5,715,188.05 was to be apportioned as follows: $123,488.05 for Elliott Jones Halberstam; $41,200.00 for Charles Halberstam; $50,500.00 for Eben Halberstam; $500,000.00 to the Estate of Michael Halberstam as compensation for pain and suffering during the 15 minutes that Michael Halberstam retained consciousness; and $5,000,000.00 in punitive damages awarded to the Estate of Michael Halberstam pursuant to the District of Columbia survival statute, 12 D.C. CODE ANN. § 12-101 (1981). *Id.*

[47] Halberstam v. Welch, 705 F.2d 472, 474 (D.C. Cir. 1983). Hamilton appealed the issue of her liability only; she allowed the district court's calculation of the damage figure to stand unchallenged. *Id.* at 474 n.2.

[48] 705 F.2d 472 (D.C. Cir. 1983).

Judge Wald held Hamilton vicariously liable under the theories of civil conspiracy and aiding-abetting.[49] Accordingly, the judgment of the district court was affirmed.[50]

II. Development of the Theories

A. *Conspiracy*

Conspiracy began as a specific substantive crime in early English common law to correct abuses of the criminal procedure system.[51] Although criminal conspiracy was first constricted to this narrow use, in the seventeenth century the theory's scope of applicability was extended to encompass all types of crime.[52] This extension was premised upon the belief that " '[t]he confederation of several persons to effect any injurious object creat[ed] such a new and additional power to cause injury . . .' " as to require a criminal sanction.[53] Despite its restrictive origins, the doctrine of criminal conspiracy developed rapidly[54] and became significant as an implement to control labor organizations.[55] Its civil counterpart, however, developed more slowly.[56] Eventually, in the late nineteenth century, the courts expanded the theory of civil conspiracy so as to effectuate the settling of trade and labor disputes during the Industrial Revolution.[57]

In modern American law, the theory of civil conspiracy is reflected by the principles embodied within subsection (a) of the *Restatement (Second) of Torts* section 876.[58] Clause (a) states that one may be subject to liability for the act of another if he acts "in concert

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[49] *Id.* at 485.

[50] *Id.* at 489.

[51] *See generally Criminal Conspiracy*, 35 Harv. L. Rev. 393, 394-96 (1922) (explaining emergence of conspiracy offense through statutes to correct "abuses of ancient criminal procedure").

[52] *Id.* at 396-400.

[53] Burdick, *Conspiracy as a Crime and as a Tort*, 7 Colum. L. Rev. 229, 231 (1907) (quoting Seventh Report of the Commissioners on Criminal Law in England (1843)).

[54] T. Lewis, Winfield on Tort—A Textbook of the Law of Tort § 127, at 523-24 (6th ed. 1954); Note, *Civil Action for "True Conspiracy,"* 33 Tul. L. Rev. 410, 411 (1959).

[55] Note, *Civil Conspiracy: A Substantive Tort?*, 59 B.U.L. Rev. 921, 923-24 (1979).

[56] T. Lewis, *supra* note 54, § 127, at 524.

[57] *Id.; see also* Note, *supra* note 55.

[58] *See* Pharo v. Smith, 621 F.2d 656, 669 (5th Cir. 1980) (acknowledging that clause (a) of *Restatement* "embraces" civil conspiracy).

The *Restatement* provides in pertinent part:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

with the other or pursuant to a common design with him."[59] Within the meaning of the *Restatement*, when two or more persons act in concert, their conduct is necessarily linked to a previously existing agreement.[60] In early cases, courts incorporated the concept of concerted action within their definitions of conspiracy.[61] The United States Supreme Court stated that "[c]oncert of action is a conspiracy if its object is unlawful or if the means used are unlawful."[62] "Concert of action" is a broad phrase frequently used in connection with the imposition of vicarious liability for "joint torts."[63] Civil conspiracy is a more specific concept contained within the scope of the concert of action theory.[64]

As a "poorly defined [tort] . . . highly susceptible to judicial expansion,"[65] civil conspiracy never emerged as a clear-cut doctrine.[66] Much of the confusion surrounding the theory is a by-product of the debate over whether civil conspiracy is a substantive tort in itself.[67] Some authorities maintain that the tortious act which causes damage

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(a) does a tortious act in concert with the other or pursuant to a design with him, 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. . . .

RESTATEMENT (SECOND) OF TORTS § 876 (1979) [hereinafter cited as RESTATEMENT].

[59] RESTATEMENT, *supra* note 58.

[60] *See id.*, comment on clause (a) ("Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result."); *see also* Payton v. Abbott Labs, 512 F. Supp. 1031, 1035 (D. Mass. 1981).

[61] *See, e.g.*, Truax v. Corrigan, 257 U.S. 312, 327 (1921) (where object or means utilized are unlawful, concert of action is conspiracy); National Fireproofing Co. v. Mason Builders' Ass'n, 169 F. 259, 264 (2d Cir. 1909) (civil conspiracy is "combination of two or more persons to accomplish by *concerted action* an unlawful or oppressive object; or a lawful object by unlawful or oppressive means" (emphasis added)).

[62] Truax v. Corrigan, 257 U.S. 312, 327 (1921) (citing Pettibone v. United States, 148 U.S. 197, 203 (1893)).

[63] *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 46 (4th ed. 1971); Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399 (1939) (recognizing distinction between procedural joinder and substantive liability and analyzing imposition of liability); Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937) (arising from failure to consider separately procedural joinder of defendants from substantive liability of defendants for certain result).

[64] *See* RESTATEMENT, *supra* note 58, comment on clause (a). *Compare* Payton v. Abbott Labs, 512 F. Supp. 1031, 1035 (D. Mass. 1981) (stating elements of concert of action theory) *with* Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1012 (D.S.C. 1981) (stating elements of civil conspiracy).

[65] United Mine Workers v. Gibbs, 383 U.S. 715, 732 (1966).

[66] *See generally* Williamson, *The Resulting Confusion from the Varied Development of Civil Conspiracy*, 23 GA. B.J. 548 (1961).

[67] Note, *supra* note 55, at 921. *See generally* Hughes, *The Tort of Conspiracy*, 15 MOD. L. REV. 209 (1952); Williamson, *supra* note 66.

is the essence of a civil conspiracy[68] and that the injured party has a cause of action against the actor with or without proof of a conspiracy.[69] According to this argument, civil conspiracy is not a substantive tort, but simply a means of establishing joint liability for a wrong which is actually a tort in itself.[70] The authorities holding that civil conspiracy exists as an independent tort, however, consider the combination and agreement between two or more persons to be the essence of the action.[71] To confuse matters even further, adherents to the former view frequently recognize an exception to the rule that no action for conspiracy will lie unless it is based on an underlying tort.[72] This exception furnishes a cause of action when a combination of persons exercises a "peculiar power of coercion" over the plaintiff.[73]

Recently, courts have attempted to clarify the theory by expressly listing the essential elements that a plaintiff must establish before recovering in an action for civil conspiracy.[74] According to the District

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[68] Note, *supra* note 54, at 412 ("[T]he weight of authority makes the gist of the action the tortious activity which causes damage and not the act of conspiracy."); Note, *Civil Conspiracy and Interference with Contractual Relations*, 8 LOY. L.A.L. REV. 302, 306-07 (1975) ("[I]t is almost universally accepted that the essence of an action for civil conspiracy is not the combination but the acts and damage resulting therefrom."); *see, e.g.*, Board of Educ. v. Hoek, 38 N.J. 213, 238, 183 A.2d 633, 646 (1962), *quoted in* Lopez v. Swyer, 62 N.J. 267, 276, 300 A.2d 563, 568 (1973).

[69] *See, e.g.*, Board of Educ. v. Hoek, 38 N.J. 213, 238, 183 A.2d 633, 646 (1962), *quoted in* Lopez v. Swyer, 62 N.J. 267, 276, 300 A.2d 563, 568 (1973). *See generally* T. COOLEY, A TREATISE ON THE LAW OF TORTS 142-44 (2d ed. 1888); Note, *Splitting Real Estate Broker's Commissions*, 12 FORDHAM L. REV. 277, 279 (1943) ("In civil suits . . . the general rule [is] that a conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would have given a right of action.").

[70] Board of Educ. v. Hoek, 38 N.J. 213, 238, 183 A.2d 633, 646 (1962); *see* W. PROSSER, *supra* note 63, § 46, at 293 ("The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff." (footnote omitted)).

[71] Williamson, *supra* note 66, at 549-50; *see, e.g.*, Cooper v. O'Connor, 99 F.2d 135, 142 (D.C. Cir.) ("The essence of conspiracy is an agreement—together with an overt act—to do an unlawful act, or a lawful act in an unlawful manner."), *cert. denied*, 305 U.S. 643 (1938).

[72] Williamson, *supra* note 66, at 550. This exception often is referred to as the "force of numbers" exception. Note, *supra* note 55, at 937-40.

[73] Williamson, *supra* note 66, at 550; Note, *supra* note 55, at 937-40; DesLauries v. Shea, 300 Mass. 30, 33, 13 N.E.2d 932, 935 (1938) ("no independent tort for conspiracy unless . . . 'mere force of numbers acting in unison or other exceptional circumstances . . .' " (quoting Caverno v. Fellows, 286 Mass. 440, 444, 190 N.E. 739, 740 (1934))). The *DesLauries* court stated that "to prove an independent tort for conspiracy upon the basis of 'mere force of numbers acting in unison,' it must be shown that there was some *'peculiar power of coercion* . . . possessed by the defendants in combination. . . .' " *Id.* (quoting Cummings v. Harrington, 278 Mass. 527, 530, 180 N.E. 519, 520 (1932) (emphasis added)).

[74] *See, e.g.*, *Halberstam*, 705 F.2d at 477; Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1012 (D.S.C. 1981).

of Columbia Circuit, a contemporary list of the elements of civil conspiracy includes:

> (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.[75]

It is frequently stated that the purpose or object of a civil conspiracy must be " 'to commit an unlawful act, or to commit a lawful act by unlawful means.' "[76] In this context it is clear that "unlawful" does not mean criminal; thus, an act which is not a crime but which is morally wrongful may be considered unlawful for the purposes of civil conspiracy.[77] In addition, the coercive power of several persons acting together may change the character of an otherwise lawful act.[78]

Civil conspiracy also requires that an overt act performed in pursuance of a conspiracy cause actual damage to the plaintiff.[79] If certain individuals have agreed to an unlawful plot, yet no injury has occurred, a complainant has no cause of action for civil conspiracy.[80]

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[75] *Halberstam*, 705 F.2d at 477; *accord* Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1012 (D.S.C. 1981).

[76] Hampton v. Hanrahan, 600 F.2d 600, 620 (7th Cir. 1979) (quoting Rotermund v. United States Steel Corp., 474 F.2d 1139 (8th Cir. 1973) (citation omitted)), *rev'd in part on other grounds*, 446 U.S. 754 (1980); *see Criminal Conspiracy*, *supra* note 51, at 405 (crediting Lord Denman with origination of phrase).

[77] *See* Bull v. Logetronics, Inc., 323 F. Supp. 115 (E.D. Va. 1971):

> Although a civil conspiracy may consist of concerted action to accomplish 'an unlawful or oppressive object, or a lawful object by unlawful or oppressive means' the use of the word 'unlawful' does not necessarily connote criminal. 'Unlawful, means without authority of law; that which is not justified or warranted by law. It does not necessarily mean contrary to some statute or to the common law, but means 'unauthorized by law;' it does not necessarily mean contrary to law, but means not authorized by law or the infringement of the moral law and not necessarily of the civil law.

Id. at 134 (citations omitted).

[78] For example, one anesthesiologist may rightfully refuse to work with a particular surgeon. If all of the anesthesiologists in a hospital, however, agree to do likewise, with the distinct purpose of driving that surgeon out of the medical profession, then the act becomes unlawful. Margolin v. Morton F. Plant Hosp. Ass'n, 342 So. 2d 1090 (Fla. Dist. Ct. App. 1977). *Compare id. with* Snipes v. West Flagler Kennel Club, Inc., 105 So. 2d 164 (Fla. 1958) (racetrack owners conspiring to destroy plaintiff financially by refusing to allow plaintiff to race greyhounds on their tracks). Similarly, if a group of employers agree to deny employment to several individuals, thus depriving them of their livelihood, such conduct is unlawful. Churruca v. Miami Jai-Alai, Inc., 353 So. 2d 547 (Fla. 1977).

[79] Sullivan v. Massachusetts Mut. Life Ins. Co., 611 F.2d 261, 266 (9th Cir. 1979); *see infra* note 80.

[80] Blackwelder v. Millman, 522 F.2d 766, 775 (4th Cir. 1975).

This feature distinguishes civil from criminal conspiracy. At common law an individual was guilty of criminal conspiracy as soon as he entered into an agreement to accomplish an unlawful object.[81] Although several jurisdictions have statutorily added the requirement that an overt act be committed in pursuance of the conspiracy before a criminal conviction can be sustained,[82] damage is generally not required in criminal conspiracy.[83] Nevertheless, it remains a prerequisite to a finding of civil liability.[84]

The agreement in any conspiracy may be implied rather than express:[85] a "tacit understanding" is sufficient.[86] Like all agreements, a conspiratorial agreement has no physical presence but exists only in the minds of the conspirators. Therefore, in the absence of a confession, it usually is necessary to prove the existence of such an agreement through reasonable inferences drawn from circumstantial evidence.[87]

When the injurious act is not committed by the alleged conspirators together, at the same time and place, the presence of an agreement may be more difficult to infer.[88] A case exemplifying the use of inferential reasoning is *Peterson v. Cruickshank*,[89] in which Cruickshank was accused of conspiring with Peterson's psychiatrist, Dr.

> "[I]t is not essential to criminal liability for conspiracy that the object of the conspiracy should have been accomplished. Civil liability rests on different grounds, however, and, unless actual damage has resulted from something done by one or more of the conspirators in furtherance of the object of the conspiracy, no civil action lies against anyone. . . ."

Id. (quoting 15A C.J.S. *Conspiracy* § 6 (1967)); Krum v. Sheppard, 255 F. Supp. 994, 998 (W.D. Mich. 1966) ("[T]he cause of action does not result from the conspiracy, but from the wrongful acts causing damage which were done in furtherance of the conspiracy."), *aff'd*, 407 F.2d 490 (6th Cir. 1967).

[81] *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 945-46 (1959).

[82] *Id.*; *see, e.g.*, MODEL PENAL CODE § 5.03(5) (1962).

[83] *See* MODEL PENAL CODE § 5.03 (1962).

[84] *See supra* notes 81-82 and accompanying text; Pacific Tel. & Tel. Co. v. MCI Telecommunications Corp., 649 F.2d 1315, 1319 (9th Cir. 1981) ("Unlike its criminal counterpart, a civil conspiracy . . . requires [an] independently wrongful act and resulting damages.").

[85] W. PROSSER, *supra* note 63, at 292.

[86] *Id.* Prosser illustrates the idea of a tacit understanding by an example in which "two automobile drivers suddenly and without consultation decide to race their cars on the public highway." *Id.* (footnote omitted).

[87] *See Halberstam*, 705 F.2d at 481; Fisher v. Shamburg, 624 F.2d 156, 162 (10th Cir. 1980) ("Direct evidence of a conspiracy is rarely available, and the existence of a conspiracy must usually be inferred from the circumstances."). For instance, if two minors are in the process of burglarizing a commercial building, while an accomplice waits outside in a pickup truck with the engine running, it may be reasonable to infer from these circumstances that the three agreed to burglarize the establishment. Davidson v. Simmons, 203 Neb. 804, 280 N.W.2d 645 (1979).

[88] *See, e.g.*, Peterson v. Cruickshank, 144 Cal. App. 2d 148, 300 P.2d 915 (Ct. App. 1956).

[89] *Id.*

Francis, to falsely imprison Peterson in a sanitarium.[90] In determining whether to uphold the jury's finding of liability, the court reexamined the evidence:[91] violent arguments along with the dissolution of a romantic relationship provided Cruickshank with a motive;[92] Cruickshank and Francis had conversed on two separate occasions while Peterson was confined;[93] after the second conversation another staff member had induced Peterson to consent to shock treatments;[94] and Cruickshank had paid all the bills for Peterson's maintenance and treatment.[95] The court concluded that the evidence was sufficient to support an implied finding that Cruickshank had conspired to detain Peterson in the sanitarium against her will.[96]

Once a conspiracy is proven, each member of the conspiracy is liable for any act done by any other member, so long as that act is done pursuant to or in furtherance of the common design.[97] A conspirator's lack of knowledge regarding exact details of the common plan does not preclude the imposition of liability:[98] It is sufficient if he is aware of the general scope of the agreement.[99] In addition, a conspirator need not have knowledge that a particular act is being committed;[100] he may be held liable for an independent act by any conspirator in pursuance of the common design.[101]

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[90] *Id.* at 150, 300 P.2d at 917-18.

[91] *Id.* at 150-62, 300 P.2d at 918-25. Peterson did not contend that the defendants in fact had conspired. *Id.* at 166-67, 300 P.2d at 928. The complaint alleged that the defendants were guilty of false imprisonment on the theory that they were joint tortfeasors. Instructions were given to the jury on joint tort liability and conspiracy. In this appeal, the court addressed the question of whether the evidence was sufficient to support the *implied* finding of the jury that Cruickshank had conspired or encouraged and participated in the false imprisonment. *Id.* (emphasis added).

[92] *Id.* at 151-53, 166, 300 P.2d at 918-19, 927.

[93] *Id.* at 165, 300 P.2d at 927.

[94] *Id.* at 160, 300 P.2d at 924.

[95] *Id.* at 161, 300 P.2d at 924-25.

[96] *Id.* at 166-67, 300 P.2d at 928; *see supra* note 91.

[97] *Halberstam*, 705 F.2d at 481; *Cruickshank*, 144 Cal. App. 2d at 168, 300 P.2d at 929 ("It is well settled that a conspirator is liable for all the acts done in furtherance of a common scheme or plan even though he is not a direct actor."); *cf.* Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961) (quoting Nomand v. Universal Film Exch., Inc., 72 F. Supp. 469, 475 (D. Mass. 1947) (defining limits of conspirator's responsibility for acts of co-conspirator), *aff'd*, 172 F.2d 37 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949)), *cert. denied*, 366 U.S. 930 (1961).

[98] Hampton v. Hanrahan, 600 F.2d 600, 621 (7th Cir. 1979) (citing Hoffman-La Roche, Inc. v. Greenberg, 447 F.2d 872, 875 (7th Cir. 1971)), *rev'd in part on other grounds*, 446 U.S. 754 (1980).

[99] *Id.*

[100] *Halberstam*, 705 F.2d at 481; El Ranco, Inc. v. First Nat'l Bank, 406 F.2d 1205 (9th Cir. 1968), *cert. denied*, 396 U.S. 875 (1969).

[101] El Ranco, Inc. v. First Nat'l Bank, 406 F.2d 1205 (9th Cir. 1968), *cert. denied*, 396 U.S. 875 (1969). For example, if two minors, armed with pistols, conspire to burglarize a school

B. *Aiding-Abetting*

In contrast to conspiracy, the theory of aiding-abetting can be operative in the absence of an agreement between tortfeasors.[102] Aiding-abetting is comprised of three elements: (1) "the party whom the defendant aids must perform a wrongful act that causes an injury;"[103] (2) "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;"[104] and (3) "the defendant must knowingly and substantially assist the principal violation."[105]

The concept of "substantial assistance" is the most significant element and the most difficult to define.[106] The *Restatement (Second) of Torts* lists five factors to be considered when determining whether the degree of the defendant's participation is substantial:[107] "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. . . ."[108]

Aiding-abetting cases may be divided into two separate classes.[109] "Pure" aiding-abetting cases may be distinguished from those cases in which an aiding-abetting theory was utilized, although a civil conspiracy theory seems equally applicable.[110] The *Restatement (Second) of Torts* section 876(b) specifically indicates that encouragement may qualify as a means of assistance.[111] In a recent case of the "pure" variety, a person who verbally encouraged another to batter a plaintiff by shouting "Kill him!" and "Hit him more!," was found liable to

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building, and one of them independently shoots an investigating officer, the other minor is equally liable for the officer's injury. Tabb v. Norred, 277 So. 2d 223 (La. Ct. App. 1973), *cert. denied*, 279 So. 2d 694 (La. 1973).

[102] *See Halberstam*, 705 F.2d at 477.

[103] *Id.*

[104] *Id.*; Woodward v. Metro Bank, 522 F.2d 84, 95 (5th Cir. 1975); *cf.* Landy v. Federal Deposit Ins. Corp., 486 F.2d 139, 162-63 (3d Cir. 1973) (transforming *Restatement of Torts* § 876(b) into three elements required for liability), *cert. denied*, 416 U.S. 960 (1974).

[105] *Halberstam*, 705 F.2d at 477.

[106] *See generally id.* at 483-84.

[107] RESTATEMENT, *supra* note 58, comment on clause (b).

[108] *Id.*

[109] *Halberstam*, 705 F.2d at 481.

[110] *Id.*; *see, e.g.*, Russell v. Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959). The sale of a professional model's picture to a party, who later alters the picture and libels the model, was considered substantial assistance. *Id.* Civil conspiracy never was mentioned, although the inference of an agreement between the defendants was a distinct possibility.

[111] *See supra* note 58; *see, e.g.*, Rael v. Cadena, 93 N.M. 684, 604 P.2d 822 (Ct. App. 1979) (verbal encouragement held to constitute substantial assistance in battery).

that plaintiff.[112] It was not necessary for the plaintiff to show that the encouragement actually had caused the battery.[113] Suggestive words of less imminent force also may qualify as substantial assistance if they are spoken by a person in a position of authority.[114]

Physical acts of assistance also may form the basis of legal responsibility.[115] In *Keel v. Hainline*,[116] the plaintiff, a female student, lost the use of an eye when she was struck by a wooden blackboard eraser.[117] Defendant Keel's activity was apparently limited to retrieving erasers and handing them to classmates who were throwing them at one another during classroom "horseplay."[118] The *Keel* court found that the defendant had "aided and abetted" the wrongful acts of his classmates by "procuring and supplying . . . the articles to be thrown."[119] Accordingly, Keel was held liable for the plaintiff's injury.[120]

Although a person's presence at the scene of a tort is a factor to be considered in the determination of substantial assistance,[121] mere presence alone usually is not enough to impose liability.[122] The generally accepted rule is that "silent approbation or pleasure in an assault and battery inflicted by another does not make a person, who has not encouraged or aided the perpetrator, liable in damages therefor."[123]

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[112] Rael v. Cadena, 93 N.M. 684, 604 P.2d 822 (Ct. App. 1979).

[113] *Id.*

[114] *See, e.g.*, Cobb v. Indian Springs, Inc., 258 Ark. 9, 522 S.W.2d 383 (1975). A security guard's position of authority was considered a factor which influenced a youngster to take his new automobile for a high speed test run. *Id.* at 17, 522 S.W.2d at 387-88. The court used a "but for" causal analysis to determine the substantiality of the security guard's assistance in an injury which resulted from the test run. *See id.*

[115] *Halberstam*, 705 F.2d at 482.

[116] 331 P.2d 397 (Okla. 1958).

[117] *Id.* at 399.

[118] *Id.* at 400.

[119] *Id.*

[120] *Id.* at 401.

[121] *See supra* note 110 and text accompanying note 111.

[122] W. PROSSER, *supra* note 63, at 292; *see, e.g.*, Duke v. Feldman, 245 Md. 454, 459, 226 A.2d 345, 348 (1967).

[123] Duke v. Feldman, 245 Md. 454, 457-58, 226 A.2d 345, 347 (1967) (citing 6 AM. JUR. 2D *Assault and Battery* § 128 (1964)).

In certain areas, however, there has been much debate on whether silence and inaction can amount to substantial assistance. As the *Halberstam* court noted, aiding-abetting frequently is employed in securities law to establish secondary liability for principal violations of rule 10b-5 of the Securities Exchange Act of 1934. *Halberstam*, 705 F.2d at 485.

The question of whether silence and the omission to act can amount to substantial assistance in a securities fraud has led to differing opinions among the circuit courts. *See, e.g.*, Woodward

On the other hand, a defendant may aid and abet a wrongful act even though he is absent at the time of the tort.[124] Moreover, substantial assistance does not imply concurrence with the act assisted.[125] Temporal disjunction of the aider-abettor's conduct with the underlying act of the principal tortfeasor does not preclude the conclusion that substantial assistance was rendered.[126]

Once the elements of aiding-abetting have been established, liability may extend beyond the damage caused by the primary wrong which the aider-abettor substantially assisted.[127] He may be held liable for an additional act committed by the principal wrongdoer which is done in connection with the act assisted,[128] as long as that additional act is reasonably foreseeable.[129]

III. THE *HALBERSTAM* ANALYSIS

In reviewing the district court's decision, the *Halberstam* court[130] examined the lower court's findings of fact and factual inferences under the "clearly erroneous" standard.[131] In particular the court of

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v. Metro Bank, 522 F.2d 84, 97 (5th Cir. 1975) (adopting hybrid test: if no duty to act, aider-abettor liable for silence and inaction only if "conscious intent" to assist in principal violation; if duty exists, some lesser degree of scienter will suffice); SEC v. Coffey, 493 F.2d 1304, 1317 (6th Cir. 1974) (suggesting rule requiring "silence of the accused aider and abettor [to be] consciously intended to aid the securities law violation"), *cert. denied*, 420 U.S. 908 (1975); Strong v. France, 474 F.2d 747, 752 (9th Cir. 1973) (holding silence and inaction could give rise to liability only when duty to act had arisen); Landy v. Federal Deposit Ins. Corp., 486 F.2d 139, 161-62 (3d Cir. 1973) (rejecting contention that mere inaction could amount to substantial assistance), *cert. denied*, 416 U.S. 960 (1974). *See generally* Woodward v. Metro Bank, 522 F.2d 84, 96-97 (5th Cir. 1975) (discussing varying judicial standards used to measure culpability by silence).

[124] *See, e.g.*, Russell v. Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1954).

[125] *See Halberstam*, 705 F.2d at 482.

[126] *See id.*; Russell v. Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1954); *see supra* note 110.

[127] *See Halberstam*, 705 F.2d at 483 (quoting American Family Mut. Ins. Co. v. Grim, 201 Kan. 340, 346, 440 P.2d 621, 626 (1968)).

[128] *Id.*; *accord* RESTATEMENT, *supra* note 58, comment on clause (b) ("[A]lthough a person who encourages another to commit a tortious act may be responsibile for other acts by the other, . . . ordinarily he is not liabile for other acts that, although done in connection with the intended tortious act, were not foreseeable by him."); *see, e.g.*, American Family Mut. Ins. Co. v. Grim, 201 Kan. 340, 440 P.2d 621 (1968) (minor assisting illegal entry into church held liable for accomplices' burning of building).

[129] *Halberstam*, 705 F.2d at 483. *Compare, e.g., infra* note 257, illustration 10 (foreseeable additional act by principal wrongdoer) *with infra* note 257, illustration 11 (unforeseeable additional act by principal wrongdoer).

[130] The *Halberstam* court consisted of a three judge panel including Circuit Judges Wald, Bork, and Scalia. The opinion for the court was filed by Circuit Judge Wald. *Halberstam*, 705 F.2d at 474.

[131] *See* FED. R. CIV. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of

appeals reexamined three inferences which it considered "essential to establishing the elements of civil conspiracy and aiding-abetting in [the] case":[132] Hamilton's knowledge, the presence of an agreement, and knowing assistance.[133] With respect to Hamilton's knowledge, the court found that, given certain undisputed facts,[134] "it defie[d] credulity that Hamilton did not know that something illegal was afoot."[135] Thus, in the analysis of the court of appeals, the district court's inference that Hamilton knew of Welch's criminal activities was permissible.[136]

Second, the court found that Hamilton and Welch had "pursu[ed] the same object by different but related means."[137] The inference that an agreement existed was supported by Hamilton's involvement as recordkeeper and secretary of the criminal enterprise.[138] Moreover, Hamilton's "unquestioning accession of wealth during this period [was] certainly consistent with such an agreement."[139] The court placed special emphasis on the long duration of the relationship between Hamilton and Welch, and termed this element "crucial to the inference of agreement."[140]

The *Halberstam* court completed its factual review by concluding that the district court's inference that Hamilton had knowingly assisted Welch in his illegal activity also withstood scrutiny under the

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the witnesses."); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (finding "clearly erroneous" only when appellate court left with "definite and firm conviction" that mistake committed). " '[The clearly erroneous rule] is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.' " *Halberstam*, 705 F.2d at 486 n.16 (quoting FED. R. CIV. P. 52 (a) advisory committee note).

[132] *Halberstam*, 705 F.2d at 486.

[133] *Id.*

[134] *See id.* These undisputed facts included:

> 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 . . . her tax forms, [and] her protestations at trial that she knew absolutely *nothing* about Welch's wrongdoing.

Id. (emphasis in original).

[135] *Id.*

[136] *Id.*

[137] *Id.* at 487. Their activities were termed "symbiotic." *Id.*

[138] The district court stated that Hamilton's "role as the banker, bookkeeper, recordkeeper and secretary [was] ample to sustain an inference of her agreement to join in the conspiracy." Halberstam v. Welch, No. 81-0903, slip op. at 6 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

[139] *Halberstam*, 705 F.2d at 487.

[140] *See id.* ("Hamilton's knowledge and aid over five years makes some kind of accord extremely likely. . . .").

clearly erroneous standard.[141] In the court's view, Hamilton's clerical and financial management services were extremely valuable to Welch, and her acquiescence in putting title to many of the properties in her own name helped to "launder the loot and divert attention from Welch."[142] In addition to finding that the facts supported the inferences below, the court deferred to the district court's consideration of Hamilton's demeanor and behavior under oath.[143]

Continuing its analysis, the court determined that the foregoing factual inferences supported the conclusion that Hamilton was a co-conspirator.[144] The requisite agreement to do an unlawful act was satisfied by the inference of an agreement between Hamilton and Welch "to acquire stolen property."[145] The damage requirement clearly was fulfilled by the murder of Dr. Halberstam.[146] The only remaining question was whether the murder was an overt act done pursuant to and in furtherance of the common scheme.[147] Since Welch shot Halberstam during a burglary in an attempt to escape apprehension, the court concluded that such conduct was "certainly not outside the scope of [the] conspiracy."[148] In so finding, the court noted that it was not necessary for Hamilton to have known about the murder ahead of time.[149] In fact, the court found that the murder of Halberstam was a "reasonably foreseeable consequence" of the illegal plan.[150]

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[141] *See id.* The district court did not utilize an aiding-abetting theory because such a theory was not expressly recognized in District of Columbia tort law. *See infra* notes 152-55 and accompanying text. The inference of knowing assistance to which the circuit court referred was made in the context of a civil conspiracy discussion. *See* Halberstam v. Welch, No. 81-0903, slip op. at 6 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983). The District Court inferred that "Hamilton had guilty knowledge and knowingly and willingly assisted in Welch's burglary enterprise from which she greatly benefited." *Id.*

[142] *Halberstam*, 705 F.2d at 487. Specifically, the court held the inference valid in light of Hamilton's "typing transmittal letters for the ingot sales, handling the payments and accounts, maintaining all financial transactions solely in her name." *Id.* at 486.

[143] *Id.*

[144] *Id.* at 487. For a list of the elements of civil conspiracy, see *supra* text accompanying note 75.

[145] *Halberstam*, 705 F.2d at 487.

[146] *Id.*

[147] *Id.* Liability could be imposed if "the purpose of the act was to advance the overall object of the conspiracy." *Id.*

[148] *Id.* The court stated that "the use of violence to escape apprehension was certainly not outside the scope of a conspiracy to obtain stolen goods through regular nighttime forays and then to dispose of them." *Id.* (citing Davidson v. Simmons, 203 Neb. 804, 280 N.W.2d 645 (1979)).

[149] *See Halberstam*, 705 F.2d at 487.

[150] *Id.* At the conclusion of their civil conspiracy analysis, the circuit court stated the following: "In sum, the district court's finding that Hamilton agreed to participate in an unlawful

Thus, all elements being present, the circuit court agreed that Hamilton was liable for the death of Halberstam under a civil conspiracy theory.[151]

Although the circuit court noted that aiding-abetting was not recognized as a separate theory under District of Columbia tort law,[152] it reasoned that the acceptance of civil conspiracy in the District suggested that the underlying rationale of aiding-abetting also would meet with approval.[153] The district court had concluded that Hamilton was liable as a "joint venturer."[154] The circuit court believed, however, that the elements employed by the lower court to determine liability manifested an implicit reliance on an aiding-abetting theory.[155] Therefore, the court went on to evaluate the imposition of liability on the theory that Hamilton had aided and abetted Welch.[156]

Welch's killing of Halberstam provided a principal wrongdoer, a wrongful act, and a resulting injury.[157] Thus, the first requirement of the aiding-abetting theory was fulfilled.[158] With the acceptance of the inferences that Hamilton knew that Welch was involved in an illicit enterprise and that she had knowingly supported him, the circuit court affirmed the finding that Hamilton had a general awareness of her role in continuing an illegal activity.[159] Thus, in the opinion of the court of appeals, the only remaining inquiry was whether Hamilton's assistance was "substantial."[160]

The *Halberstam* court did not view the question as whether Hamilton substantially assisted in the murder of Dr. Halberstam.[161]

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course of action and that *Welch's murder of Halberstam was a reasonably foreseeable consequence* of the scheme are a sufficient basis for imposing tort liability on Hamilton according to the law on civil conspiracy." *Id.* (emphasis added). The court failed to explain, however, the relevance of foreseeability to the theory of civil conspiracy. *See id.*; *see also infra* notes 211-14 and accompanying text.

[151] *Halberstam*, 705 F.2d at 487.

[152] *Id.* at 479.

[153] *See id.* The court stated that the existence of a civil conspiracy action in the district manifested an acceptance of the general principle that one who supports a wrong may be liable for the tortious injury. As supporting a wrong through an agreement may create liability, supporting a wrong through knowing substantial assistance should have the same effect. *See id.*

[154] Halberstam v. Welch, No. 81-0903, slip op. at 6 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983); *Halberstam*, 705 F.2d at 487; *see supra* note 44 and accompanying text.

[155] *See Halberstam*, 705 F.2d at 487.

[156] *Id.* at 487-89.

[157] *See id.* at 488.

[158] *See supra* text accompanying notes 103-05. "[T]he party whom the defendant aids must perform a wrongful act that causes an injury." *Halberstam*, 705 F.2d at 477.

[159] *Halberstam*, 705 F.2d at 488; *see supra* note 104 and accompanying text.

[160] *Halberstam*, 705 F.2d at 488.

[161] *See id.* at 487-89.

Rather, they framed the issue as whether Hamilton substantially assisted in the burglary enterprise.[162] To aid in its analysis of this issue, the court relied on the five factors enunciated in the *Restatement*.[163]

The court characterized the first factor, the *nature of the act*,[164] as a "five-year-long burglary campaign against private homes."[165] The nature of this enterprise made it heavily dependent on transforming the stolen goods into usable cash.[166] According to the court, Hamilton's assistance was "indisputably important" because she had donated her time, talents, and her name to aid in this goal.[167] The court also stated, in a footnote, that a proportionality test could be used under the " 'nature of the act' criterion."[168] Under this test, even though the actual amount of the defendant's assistance remains the same, a court may consider that same assistance more "substantial" as the seriousness of the underlying act increases.[169] The *Halberstam* court failed, however, to state whether this test played any part in their decision.[170]

Rather than isolating the *amount of assistance*[171] in any single burglary, the court considered the total worth of Hamilton's activities over the entire five year period.[172] As a result, her activities emerged as "an essential part of the pattern."[173] Although the court acknowledged that Hamilton was not *present*[174] during any of the burglaries, presence in itself was held not to be dispositive.[175] The court further recognized that Hamilton's normal supportive duties as Welch's

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[162] *Id.*

[163] *Id.* at 488; *see supra* text accompanying notes 107-08.

[164] *Halberstam*, 705 F.2d at 488.

[165] *Id.*

[166] *Id.*

[167] *Id.* Hamilton donated her name by allowing payments for stolen merchandise to be directed to her, by accumulating cash in her bank accounts, and by falsifying her tax returns. The court recognized that these acts could be construed neutrally if taken alone, but emphasized that the evaluation had to be made in the context of a "five-year-long burglary campaign against private homes." *Id.*

[168] *Id.* at 484 n.13.

[169] *See id.; see also infra* text accompanying notes 249-50.

[170] *See Halberstam*, 705 F.2d at 487-89.

[171] The *amount of assistance* is the second factor to consider in determining substantiality as recommended by the *Restatement*. *See supra* notes 107-08 and accompanying text.

[172] *See Halberstam*, 705 F.2d at 488.

[173] *Id.*

[174] The defendant's *presence or absence* at the time of the tort is the third factor to consider in determining the substantiality of assistance as recommended by the *Restatement*. *See supra* notes 107-08 and accompanying text.

[175] *See supra* notes 121-23 and accompanying text.

housemate should not be held against her[176] and, therefore, accorded minor significance to her *relation*[177] to Welch.[178] Her *state of mind*,[179] however, was held to be of special significance.[180] According to the court, Hamilton's knowing and willing assistance manifested a "long-term intention" to participate in and benefit from a highly illegal activity.[181]

Finally, a sixth factor was introduced by the *Halberstam* court. The *duration of the assistance* was adopted as an additional consideration to be used in determining when an aider-abettor's assistance is substantial.[182] The court acknowledged that this factor "strongly influenced" them to find substantiality in Hamilton's conduct.[183] In defining the scope of her liability, the court found that the killing of Halberstam was a natural and foreseeable result of the burglary enterprise.[184] Observing that specific knowledge of the burglaries on Hamilton's part was not necessary, the court concluded that it was sufficient that she knew Welch was involved in property crimes at night.[185] The court stated that both violence and death were foreseeable risks whenever one commits such crimes.[186]

The circuit court noted that a co-conspirator's liability extends to acts done by the primary wrongdoer in pursuance of a common design,[187] whereas an aider-abettor is liable for reasonably foreseeable consequences of the acts he assists.[188] After raising this distinction, however, the court found it unnecessary to evaluate the differences between these two tests.[189] According to the court, Hamilton's liability was an appropriate result under both tests.[190]

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[176] *Halberstam*, 705 F.2d at 488.

[177] The defendant's *relation* to the primary tortfeasor is the fourth factor to consider in determining whether the defendant's assistance was substantial according to the *Restatement*. *See supra* notes 107-08 and accompanying text.

[178] *Id.*

[179] The defendant's *state of mind* is the fifth and final factor given by the *Restatement* to aid in determining substantiality. *Id.*

[180] *Halberstam*, 705 F.2d at 488.

[181] *Id.*

[182] *Id.* at 484. The court considered this supplement to the *Restatement's* list an important indicator of substantial assistance. *Id.; see infra* notes 251-53 and accompanying text.

[183] *Halberstam*, 705 F.2d at 488.

[184] *See id.*

[185] *Id.*

[186] *Id.*

[187] *See supra* notes 97-101 and accompanying text.

[188] *See supra* notes 127-29 and accompanying text.

[189] *Halberstam*, 705 F.2d at 484-85.

[190] *Id.*

In conclusion, the District of Columbia Circuit Court of Appeals recognized that the elements set forth for both civil conspiracy and aiding-abetting were not "immutable components," but would undoubtedly be adapted to accommodate future factual situations.[191] Although precedent was scant,[192] the court believed 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 [could] not be casually dismissed."[193] This novel case was viewed by the court as a "beginning probe into tort theories as they apply to newly emerging notions of economic justice for victims of crime."[194]

IV. Analysis

A. *The Factual Conclusions*

Civil conspiracy involves an intentional tort;[195] similarly, aiding-abetting is an intentional tort by definition.[196] Under either theory the plaintiff must prove the defendant's comprehension of the tortious object.[197] Since this cognitive element relates to the subjective state of the defendant's mind, it will most often be necessary for the plaintiff to present circumstantial evidence from which this subjective state may be inferred.[198]

The inference that Hamilton knew the criminal nature of Welch's activities was the cornerstone of the *Halberstam* decision,[199]

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[191] *See id.* at 489.

[192] Precedent in this area mainly is confined to securities law and the "isolated acts of adolescents in rural society." *Id.*; *see, e.g.*, *supra* note 123 (aiding-abetting in securities law); Tabb v. Norred, 277 So. 2d 223 (La. Ct. App. 1973) (two minors burglarizing a school); Davidson v. Simmons, 203 Neb. 804, 280 N.W.2d 645 (1979) (boy getaway driver held liable for burglar's battery of investigating officer).

[193] *Halberstam*, 705 F.2d at 489.

[194] *Id.*

[195] Note, *supra* note 55, at 930. The intent in civil conspiracy originates in the agreement to do something unlawful. *See id.* Upon entering the agreement, the conspirator exhibits that "intent to bring about a result which will invade the interests of another in a way that the law will not sanction." *See* W. Prosser, *supra* note 63, at 31 (defining "intent" for purposes of tort law).

[196] Intent in aiding-abetting is assured by the requirements that the aider-abettor have knowledge of his role in a tortious activity and knowingly assist that activity. *See supra* text accompanying notes 104-05. It should be noted, however, that an aider-abettor may assist negligent conduct. *See* Restatement, *supra* note 58, comment on clause (b).

[197] *See infra* note 199 and accompanying text.

[198] The only exception to this statement arises when a defendant provides direct evidence by confessing his thought processes. *See supra* note 87 (referring to proof of agreement in civil conspiracy).

[199] In the absence of knowledge, both theories collapse as viable bases for the imposition of liability. With respect to civil conspiracy, there can be no agreement without a degree of

but what led the trial judge to characterize this conclusion as "inescapable?"[200] Arguably, every piece of evidence can be reconciled with the following proposition: Hamilton had no knowledge of Welch's activity; she believed he was a legitimately self-employed businessman who worked his own hours, bought and sold a variety of goods, and frequently stored them in his home; she trusted him; she was passive and submissive in nature, and assisted in secretarial tasks at Welch's direction.[201] Although the inferences made by the district court passed

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knowledge of the object which the conspirators commonly seek. In aiding-abetting, knowledge is an essential element of the theory. *See supra* text accompanying note 104.

[200] Halberstam v. Welch, No. 81-0903, slip op. at 5 (D.D.C. Mar. 24, 1982), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983).

> From the foregoing findings of fact and from the demeanor and behavior of Hamilton under oath, the conclusion is *inescapable* that she knew full well the purpose of [Welch's] evening forays and the means by which she and Welch had risen from "rags to riches" in a relatively short period of time.

Id.

"Inescapable" is defined as "incapable of being avoided, ignored, or denied . . . following of strict logical necessity or moral compulsion." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1156 (1963). The conclusion does not follow from strict logical necessity. *See infra* note 201 and accompanying text.

[201] The *Halberstam* court implicitly held that the proposition that Hamilton had no knowledge of Welch's criminal activity "defies credulity." *See Halberstam*, 705 F.2d at 486. The court followed this statement with an enumeration of all the factors supporting the inference of Hamilton's knowledge. *Id.* All of these factors can be reconciled with the absence of knowledge and none are logically inconsistent: (1) Welch's early evening outings arguably can be explained as business meetings. *See supra* text accompanying note 27. (2) The boxes of goods certainly are not inconsistent with the type of business in which Welch claimed he was engaged. *See supra* text accompanying note 16. (3) The smelting of gold and silver into bars is a perfectly legal activity from which no culpable knowledge of illegal activity may necessarily be inferred. *See* 31 U.S.C. §§ 325, 328 (1976). (4) The sudden influx of wealth will occur in any highly successful business venture, regardless of whether that venture is legal or illegal. Certainly the influx of wealth would more likely cause a wife to connect that wealth with her husband's commercial success, rather than arouse a suspicion of illegal activity. (5) The fact that Welch used Hamilton's name for monetary transactions would be culpable only if Hamilton's knowledge of illegal activity was already established. Without prior knowledge, this fact could do little more than raise suspicion in a very abstract manner. (6) The fact that Hamilton's tax forms were fraudulent was used to support the conclusion that she knew that something illegal was transpiring. *Halberstam*, 705 F.2d at 486. This inference logically depends upon whether Hamilton completed the tax forms knowing that the figures were fabricated. If she merely signed the forms or completed them in reliance on Welch's instructions, then any inference of wrongdoing is untenable. A valid use of the tax forms as an inculpatory device depends upon the assumption that Hamilton knowingly took the deductions for "costs of goods sold" while aware that the goods actually had not been purchased. (7) Hamilton's frequent protestations that she knew absolutely nothing about Welch's burglaries were also held against her. *Id.;* Halberstam v. Welch, No. 81-0903, slip op. at 6 (D.D.C. Mar. 24, 1983), *aff'd*, 705 F.2d 472 (D.C. Cir. 1983). The district court stated: "Her consistent denial of knowledge of the criminal enterprise, when viewed in light of all of the evidence, show[ed] an awareness of culpability and need to deny." *Id.* "The lady doth protest too much, methinks." W. SHAKESPEARE, HAMLET, Act III, Scene 2 (Rinehart & Co., 7th printing, 1957).

scrutiny under the clearly erroneous standard,[202] they were far from "inescapable."[203] The pejorative characterization of basic facts[204] by the circuit court did little to hide the fault in their inferential analysis.[205]

B. *Civil Conspiracy: Legal Causation and Foreseeability*

According to the contemporary theory of civil conspiracy, any party to an unlawful agreement may be held civilly liable for an injury which, although physically accomplished by a fellow conspirator, was nevertheless in furtherance of the common plan.[206] Thus, the extent of vicarious liability may be stretched to cover any act which arguably could prolong, promote, or aid in the procurance of the object or the accomplishment of the goal sought by the conspirators.[207] By this logic, Hamilton was said to be civilly liable for the murder of Dr. Halberstam.[208] Teleologically, the murder was an attempt by Welch to escape apprehension,[209] and escape would have allowed Welch to continue or *prolong* the "illegal enterprise to acquire stolen property."[210]

An illustration of the practical extent of liability in a civil conspiracy is provided by the following example in which A and B

The existence of Hamilton's knowledge was not as clear as the trial judge indicated. Three police officers testified that they believed that Hamilton had no knowledge of Welch's activity. *See Halberstam*, 705 F.2d at 476 n.4. They based their opinion on observations of Hamilton's behavior during the investigation. There was testimony as to Welch's skill as a "con artist." In addition, Welch apparently duped another woman whom he had lived with before meeting Hamilton. *Id.* Although the court offered the possible explanation that the police "did not realize the full extent of Hamilton's involvement with Welch's operations" and that they "might have had difficulty charging Hamilton because of jurisdictional restrictions," the failure of the state to bring criminal charges against Hamilton indicates that the prosecutor may have doubted that scienter could have been proven beyond a reasonable doubt. *See id.* (implying that criminal charges were not initiated).

[202] The absence of knowledge on the part of Hamilton was a real possibility. *See supra* note 201 and accompanying text. The clearly erroneous standard, however, requires the "firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), *quoted in Halberstam*, 705 F.2d at 487. A possibility, or even a slim probability, that the district court was wrong would not be enough to overturn their factual findings. *See* C. WRIGHT, THE LAW OF FEDERAL COURTS 646 (4th ed. 1983).

[203] *See supra* notes 201-02 and accompanying text.

[204] *See supra* note 134.

[205] *See supra* note 201.

[206] *See supra* text accompanying notes 97-101.

[207] *See Halberstam*, 705 F.2d at 487 ("[A] conspirator can be liable . . . so long as the purpose of the act was to advance the overall object of the conspiracy.").

[208] *See id.*

[209] *See id.*

[210] *Id.*

conspire to steal C's briefcase. Both A and B realize that C constantly watches his briefcase. Before the schemers have the opportunity to fulfill their objective, B decides that it will be much easier to steal the briefcase if he eliminates C altogether; thus, B kills C. Although B's act was unknown to and unforeseen by A, under a literal construction of the above theory, it is clear that A is liable for the death of C since that event has furthered the object of the conspiracy. This simple application exposes an interesting aspect of civil conspiracy that has been largely ignored by courts and commentators: The extent of liability is not limited by foreseeability.[211]

The *Halberstam* court recognized this subtle enigma when they briefly acknowledged the difference in language between the tests for the extent of liability in aiding-abetting and civil conspiracy.[212] After noting that an aider-abettor's liability is restricted to reasonably foreseeable consequences, whereas a co-conspirator is liable for anything in pursuance of the common plan, the court stated, "we are not sure that [this] is a distinction that makes a practical difference."[213] They concluded, "[w]e need not look further into this matter here, however, because we find below that Hamilton is liable for Halberstam's death under the language of both tests."[214]

Upon further inquiry, however, it becomes apparent that the distinction *can* make a "practical difference."[215] As in the ABC examples above, an act which objectively furthers a common plan can result in unforeseeable consequences.[216] The two conceptual categories are not mutually inclusive. Thus, a person becoming a party to an unlawful agreement may be found liable for consequences of that agreement which he did not contemplate and could not reasonably foresee. The extension of tort liability to damages which result from any act in pursuance of the common design of a conspiracy is nothing more than an arbitrary test based on traditional rhetoric. It is inconsistent with the doctrine limiting the defendant's liability to the fore-

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[211] For a list of the elements necessary to impose liability under civil conspiracy, see *supra* text accompanying note 75.

[212] *See Halberstam*, 705 F.2d at 484.

[213] *Id.*

[214] *Id.* at 485.

[215] In the ABC example, liability for the death of C would be imposed on A under the "in pursuance" test, but not under the "reasonably foreseeable" test (assuming the killing of C was a reasonably unforeseeable act by B). *See supra* text accompanying note 211.

[216] *See supra* note 215.

seeable risks of his tortious conduct.[217] Concomitantly, it establishes a separate theory of proximate cause[218] which allows a plaintiff to successfully attack a defendant who could not otherwise be held legally responsible.[219]

The overinclusiveness of the "in pursuance" standard allows a tenuous relationship between the defendant's conduct and the plaintiff's injury to serve as the basis for civil conspiracy liability. This tenuity is exacerbated by a prevailing judicial neglect of basic principles of legal causation in the application of civil conspiracy. This neglect is manifested by a virtually universal failure to recognize the existence of section 875 of the *Restatement (Second) of Torts*. Section 875, the general rule on contributing tortfeasors,[220] governs section 876 which is cited repeatedly in justification for holding one defendant liable for the act of another.[221] In addition, section 875 requires that the tortious conduct of a defendant be a *legal cause* of the harm to the injured party.[222] This general rule is to be construed as "consistent with . . . the rules of causation applicable to negligence cases."[223] Thus, a person's conduct must be a *substantial factor* in causing harm to the plaintiff before liability will be imposed.[224] Proper application of this principle to the theory of civil conspiracy requires that a defendant's conduct be a substantial factor in bringing about the plaintiff's harm before he will be held liable for an act done by a co-conspirator.

In effect, the civil conspiracy theory expounded by the *Halberstam* court creates an irrebuttable presumption that any conspirator

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[217] This doctrine originally was advanced to limit the extent of liability for a negligent defendant. *See* W. PROSSER, *supra* note 63, at 251 (crediting Baron Pollock with origination of concept). For a discussion on foreseeability as a limitation on negligent conduct, see Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961); Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1 (1953).

[218] *See* McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 157 (1925) (setting out three classes of proximate cause).

[219] *See* T. COOLEY, *supra* note 69, at 144.

> When the mischief is accomplished, the conspiracy becomes important . . . for the party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it. The significance of the conspiracy consists, therefore, in this: That it gives the person injured a remedy against parties not otherwise connected with the wrong.

Id.

[220] *See* RESTATEMENT (SECOND) OF TORTS § 875 (1979).

[221] *See, e.g.*, *Halberstam*, 705 F.2d at 477; Pharo v. Smith, 621 F.2d 656, 669 (5th Cir. 1980); Rael v. Cadena, 93 N.M. 684, 604 P.2d 822 (Ct. App. 1979); Russell v. Marboro Books, 18 Misc. 2d 166, 187, 183 N.Y.S.2d 8, 32 (Sup. Ct. 1959).

[222] RESTATEMENT (SECOND) OF TORTS § 875 (1979).

[223] *Id.*, comment c.

[224] *See id.*

has legally caused an injury which results from the act of a fellow conspirator, provided that act was done pursuant to and in furtherance of the common scheme.[225] Restated, the assumption is that an agreement between two or more persons is invariably both a cause in fact and a proximate cause when one of those persons acts and harms a third person.[226] Under certain circumstances such a presumption may be no more than fiction.[227]

The *Halberstam* court implicitly found that Hamilton's conduct was a proximate or legal cause of Dr. Halberstam's death.[228] This presupposes that her conduct was also a cause in fact of the murder.[229] Even the overinclusive "but for" test would be strained to discover a causal link between Hamilton's secretarial work and the shooting of Halberstam.[230] Certainly Hamilton's conduct was not a *sine qua non* of Welch's burglary enterprise.[231] Although she may have increased the size of the operation, she hardly was instrumental in causing Welch to engage in a burglary operation.[232]

Civil conspiracy ignores causation in fact as a necessary element of the plaintiff's case and extends liability to unforeseeable acts of a co-

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[225] Since proving causation is universally a part of the plaintiff's case, when liability is imposed it is implicit that the plaintiff has met this burden. Since liability may be imposed when a plaintiff satisfies the elements of civil conspiracy, causation must be subsumed within those elements. Thus, if those elements are in fact satisfied, legal causation is irrebuttably presumed. Legal causation, in this sense, includes factual causation and proximate causation.

[226] *See supra* note 225. Specifically, the element of agreement must contain the causal nexus because it is the only element which connects all the conspirators to the plaintiff's injury.

[227] This is most likely to be true when the defendant has done nothing substantial in pursuance of the conspiracy and a co-conspirator independently formulates a plan, carries it through, and injures the plaintiff. According to the *Halberstam* court, it is not necessary for the defendant to have performed an overt act; it is sufficient if there was "an unlawful overt act performed by [any] one of the parties to the agreement." *Halberstam*, 705 F.2d at 477; *see supra* text accompanying note 75.

[228] *See supra* note 225.

[229] Proximate cause is essentially a question of law in which it is determined whether the defendant is to be held legally responsible for an injury which he, in fact, has caused. W. PROSSER, *supra* note 63, at 244; McLaughlin, *supra* note 218, at 155. Therefore, the question of whether the defendant's conduct was a cause in fact of the plaintiff's injury is necessarily a pre-proximate cause issue. Terry, *Proximate Consequences in the Law of Torts*, 28 HARV. L. REV. 10, 16 (1914) ("It must appear that the cause has actually produced the consequence, or will actually produce it, before the question of the proximateness of that consequence can be raised at all."); *cf.* McLaughlin, *supra* note 218, at 156.

[230] Use of the "but for" test to establish factual causation in the *Halberstam* case involves the question: But for Linda Hamilton's conduct, would the murder of Dr. Halberstam have occurred?

[231] Aside from the fact that Welch was a convicted burglar who had escaped from prison, the most convincing argument in favor of this assertion is that Welch already had begun to burglarize the community before Hamilton began her secretarial tasks.

[232] *See supra* note 231.

conspirator. By simply drawing the inference that it was more likely than not that the defendant was a party to an unlawful agreement, and that another conspirator acted in pursuance of the common scheme, liability may ensue. This result allows compensatory and punitive damages to be levied against a defendant who was not a cause in fact of the plaintiff's injury.

When two or more persons agree to seek a particular goal, the existence of an agreement does not preclude one of those persons from independently embarking on a course of conduct which might have an objectively favorable impact on the achievement of the previously established goal. Moreover, the agreement does not automatically become a cause in fact of every such independent act. Before one person is held liable for the act of another, the plaintiff should be required to show that the nonacting party legally caused the other person to act and to injure the plaintiff. The present structure of the civil conspiracy theory allows for a natural circumvention of this causal issue by limiting the court's inquiry to certain defined elements. For these reasons the theory of civil conspiracy should be either substantially altered to comply with principles of legal causation[233] or discarded altogether.[234]

C. *Aiding-Abetting*

Unlike civil conspiracy, the theory of aiding-abetting has an inherent safeguard against abrogation of causal principles. That safeguard is the requirement that the aider-abettor *substantially assist* the principal actor before the aider-abettor is vicariously liable as a contributing tortfeasor.[235] The substantial assistance requirement operates to ensure that the defendant satisfies the "substantial factor" test in causing the plaintiff's injury.[236] In addition, the extent of the aider-abettor's liability is limited to the reasonably foreseeable consequences of the act he assists.[237]

Despite the soundness of the theory, problems may arise in its application. For example, ultimate liability may turn upon how one

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[233] *See infra* text accompanying notes 264-67.

[234] *Cf.* Hughes, *supra* note 67, at 209; Williamson, *supra* note 66.

[235] *See supra* text accompanying note 105.

[236] *See* RESTATEMENT, *supra* note 58, comment on clause (b)("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.").

[237] *See supra* notes 127-29 and accompanying text.

defines the "act" that the defendant allegedly assisted.[238] In *Halberstam*, the court deemed it appropriate to focus the inquiry on whether Hamilton had substantially assisted in the burglary enterprise.[239] The court then considered the murder as a foreseeable consequence of the burglary enterprise.[240] Rather than a consequence, however, the murder can be considered an act in itself. Why did the court refuse to focus directly on whether Hamilton had aided and abetted the murder of Dr. Halberstam? The answer becomes immediately obvious. Since Hamilton had no knowledge of the killing, she could not fulfill the element of knowing assistance.[241] Hence, she could not be held liable. Even the five substantiality factors in the *Restatement* change their persuasive character in favor of nonliability when one asks if Hamilton substantially assisted in the murder.[242]

Although the element of substantial assistance was intended to ensure that the plaintiff prove causation, the vulnerability of the phrase to subjective interpretation opens the door to judicial manipulation of the concept. The *Restatement* enumerates five presumably illustrative[243] factors to aid in determining whether the defendant's assistance was too slight to warrant liability. Each factor can be construed differently; no single factor is dispositive. The *Halberstam* court added a factor of its own, the *duration of the assistance*, and gave it maximum weight to find substantiality.[244] Simply put, what is substantial to one court may not be to another.

One factor which gives some idea as to what type of aid would be substantial is the *nature of the act* criterion.[245] At first glance, it seems that secretarial work and "fencing" assistance would be of limited

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[238] If A assists B in act X, and B also accomplishes act Y, two possible approaches exist to determine if A is liable for act Y: The inquiry may be (1) did A substantially assist in act Y?; or (2) did A substantially assist in act X, and was act Y a reasonably foreseeable act in connection with act X?

[239] *See supra* notes 161-62 and accompanying text.

[240] *Halberstam*, 705 F.2d at 488.

[241] *See supra* text accompanying note 105.

[242] (1) The *nature of the act* becomes a murder. Thus, Hamilton's secretarial work, etc., seems more insignificant; (2) the *amount of assistance* in the actual killing was nonexistent; (3) Hamilton was not *present* at the time of the tort; (4) the *relation* of Hamilton to Welch remains the same; and (5) Hamilton's *state of mind* would be exculpatory because she did not know of the murder.

[243] The *Halberstam* court implicitly presumes that the factors are illustrative rather than exhaustive since they add an additional factor of their own. *See supra* notes 182-83 and accompanying text.

[244] *Id.*

[245] *Halberstam*, 705 F.2d at 484.

significance in the actual commission of a burglary. This conduct seems even less substantial in conjunction with a murder. When the act is defined as a burglary enterprise, however, that assistance becomes important in maintaining the scope of the operation.[246] The *Halberstam* court considered Hamilton's conduct extremely important, seeming to imply that the very existence of the operation depended on her involvement.[247]

The court also mentioned that a "proportionality test" might be used in conjunction with the nature of the act criterion.[248] Under this test a static amount of assistance becomes more substantial as the seriousness of the underlying act increases.[249] Such a test is logically absurd. When the underlying act becomes more serious, the objective materiality of a specific act of assistance does not increase proportionally. The substantiality of a particular act depends upon the quantitative and qualitative relationship between that act and the total cumulation of all causal factors which combine to produce the plaintiff's injury.[250] The severity of the injury itself is immaterial to an objective determination of substantiality. The proportionality test reduces causation to a mere variable wholly dependent on a given court's view of the seriousness of the wrong. As a breeder of inconsistency, this test should be discarded.

The *Halberstam* court justified their addition of the *duration of the assistance* factor by claiming that "[t]he length of time . . . almost certainly effects [sic] the quality and extent of [the] relationship [between the aider-abettor and the principal actor] and probably influences the amount of aid provided as well; additionally, it may afford evidence of the defendant's state of mind."[251] It seems clear that the court added the *duration of the assistance* factor to reemphasize that Hamilton had lived with Welch for five years. Implicitly, the suggestion is that five years of assistance is certainly substantial. The five year time period, however, is technically incorrect, since Hamilton did not know Welch was a burglar when they first met. The inference of knowledge suggests that she discovered that fact at some unknown

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[246] *See supra* notes 164-67 and accompanying text.

[247] *See id.*

[248] *Halberstam*, 705 F.2d at 484 n.13.

[249] *Id.*

[250] *But cf.* Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 554 (1962) (" 'substantial' cannot be defined, further analyzed or broken down into lesser terms . . .").

[251] *Halberstam*, 705 F.2d at 484.

time during their period of cohabitation. Thus, she could not have "knowingly assisted" during the entire five years. In any event, the time factor already had been given weight in calculating the amount of aid[252] and in characterizing Hamilton's state of mind as a "deliberate long-term intention to participate in an ongoing illicit enterprise."[253] Thus, adding the *duration of the assistance* as a sixth factor was totally unnecessary.

Once substantial assistance has been determined, the causal nexus between the aider-abettor's behavior and the principal tortfeasor's act is sufficiently established.[254] The aider-abettor's liability will extend to other reasonably foreseeable acts done in connection with the tortious act he assisted,[255] but foreseeability is a difficult concept to define.[256] The question presented in *Halberstam* was whether the murder was a foreseeable act in connection with the burglary enterprise,[257] yet the court conveniently avoided the entire issue of foreseeability with the blanket statement: "[I]t was enough that [Hamilton] knew [Welch] was involved in some type of personal property crime at night—whether as a fence, burglar, or armed rob-

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[252] *Id.* at 488 ("[A]lthough the *amount of assistance* Hamilton gave Welch may not have been overwhelming as to any given burglary in the five-year life of this criminal operation, it added up over time to an essential part of the pattern." (emphasis in original)).

[253] *Id.*

[254] This causal nexus comprises both factual and proximate causation.

[255] *See supra* notes 127-29 and accompanying text. This result is analogous to the situation in which a negligent defendant creates a risk of harm and another party does an additional wrongful act in connection with the risk created. That defendant similarly is responsible for the negligent or intentional intervening act of another party, so long as the intervening act was foreseeable. *See* W. PROSSER, *supra* note 63, at 272-75; McLaughlin, *supra* note 218, at 175-76.

[256] *See* W. PROSSER, *supra* note 63, at 267 (foreseeability "so completely lacks all clarity and precision that it amounts to nothing more than a convenient formula").

[257] *Halberstam*, 705 F.2d at 483; RESTATEMENT, *supra* note 58. The *Halberstam* court gave two illustrations from the *Restatement* in an attempt to clarify the idea of a foreseeable act:

> A and B conspire to burglarize C's safe. B, who is the active burglar, after entering the house and without A's knowledge of his intention to do so, burns the house in order to conceal the burglary. A is subject to liability to C, not only for the conversion of the contents of the safe but also for the destruction of the house.

Id., illustration 10. An example of an unforeseeable act by B:

> A supplies B with wire cutters to enable B to enter the land of C to recapture chattels belonging to B, who, as A knows, is not privileged to do this. In the course of the trespass upon C's land, B intentionally sets fire to C's house. A is not liable for the destruction of the house.

Id., illustration 11. *Compare* the ABC example at *supra* text accompanying note 211. If there is any distinction between the two examples, it is indeed vague, and offers no analytical guidance for the future.

ber made no difference—because violence and killing is a foreseeable risk in any of these enterprises."[258]

At one extreme virtually all events are in some sense foreseeable[259] because even the smallest probabilities are capable of recognition.[260] The addition of "reasonableness," however, tends to moderate this view. One source has defined foreseeable consequences as those " 'which a prudent and experienced person, fully acquainted with the circumstances which in fact existed . . . would at the time of the . . . act have thought reasonably possible. . . .' "[261] By ignoring all the existing circumstances, the *Halberstam* court abandoned "reasonableness" in their foreseeability analysis.[262] The court should have considered Hamilton's knowledge of Welch's capabilities, his intentions, his personality; whether she knew he was armed; and whether the foreseeability of a murder was affected by the passage of time. In sum, all the existing circumstances should be considered in making a foreseeability determination. Considering the limitless combinations of circumstances which might arise, it seems highly unlikely that a murder is automatically and indisputably a reasonably foreseeable act in connection with any property crime at night.

D. *Conclusion*

Generally, it is fundamental that the plaintiff bears the burden of proof as to causation in a tort action.[263] This burden is reduced

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[258] *Halberstam*, 705 F.2d at 488.

[259] *See* W. PROSSER, *supra* note 63, at 267.

[260] *Id.*

[261] *Id.* at 268 n.63 (quoting Butts v. Anthis, 181 Okla. 276, 73 P.2d 843 (1937)).

[262] Much confusion surrounds the foreseeability limitation. One legitimate criticism of the foreseeability standard is that, ultimately, foreseeability depends on the specificity used in describing the event. *See* Morris, *Proximate Cause in Minnesota*, 34 MINN. L. REV. 185, 192-94 (1950); Morris, *On the Teaching of Legal Cause*, 39 COLUM. L. REV. 1087, 1102 (1939). Other courts have stretched the concept much farther than *Halberstam*. *See, e.g.*, Jackson v. Utica Light & Power Co., 64 Cal. App. 2d 885, 149 P.2d 748 (Dist. Ct. App. 1944) (foreseeable that defendant's high voltage power lines would be subjected to strain, break, and fall upon telephone wires contacting power shovel and electrocuting plaintiff); *In re* Guardian Casualty Co., 253 A.D. 360, 2 N.Y.S.2d 232 (App. Div. 1938) (collision between taxicab and automobile held to be proximate cause of death occurring 20 minutes later when woman was struck by dislodged stone which fell when taxicab was being removed from building); Byrnes v. Stephens, 349 S.W.2d 611 (Tex. Civ. App. 1961) (foreseeable that drunk driver would hit appellant's negligently parked truck pushing it forward and crushing appellee between truck and parked car); Hines v. Morrow, 236 S.W. 183 (Tex. Civ. App. 1921) (when assisting in towing car out of mud on defendant's negligently maintained road, plaintiff gets wooden leg stuck in hole and simultaneously entangles good leg in tow rope so that good leg is injured requiring amputation).

[263] *See* W. PROSSER, *supra* note 63, at 236.

substantially by the theory of civil conspiracy, and by the *Halberstam* application of aiding-abetting. The principles of causation place reasonable limits upon responsibility. When these principles are ignored, consistency in the law deteriorates, precedent becomes useless, and each court may conform the law to its own subjective sense of justice.

The first inquiry in applying either theory should be whether the defendant's conduct was a cause in fact of the plaintiff's harm. The "but for" test thus remains useful as a means of excluding conduct which was not a necessary antecedent of the plaintiff's injury.[264] The substantial factor test adopted by the *Restatement* also may provide a helpful approach: Was the defendant's conduct a substantial factor in bringing about harm to the plaintiff?[265]

After causation in fact has been established, the legal question of proximate cause can be approached.[266] In aiding-abetting, the subjective influences on determinations of substantial assistance cannot be eliminated completely, but perhaps more objectivity will result if the contributing factors are viewed with the understanding that the test is essentially one of legal causation.

The substantial assistance test should be applied to civil conspiracies as well as to aiding-abetting. One can ask whether a conspirator substantially assisted or encouraged an act of a co-conspirator; hence, the agreement becomes one factor to be considered in determining substantial assistance. If the party did not "substantially assist," then he should not be held liable. The mere fact that it is more likely than not that an unlawful agreement existed should not change this result. Altering the theory of civil conspiracy by the addition of the substantial assistance test is one way to preserve the principles of legal causation.

It should be emphasized that aiding-abetting and civil conspiracy will apply concurrently to many situations.[267] The extension of liability in the two theories, therefore, should be consistent. In order to achieve this consistency, civil conspiracy liability should be limited to

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[264] *See* H. HART & A. HONORÉ, CAUSATION IN THE LAW 85 (1959); McLaughlin, *supra* note 218, at 153 ("By causation in fact, we here mean causation *sine qua non*, that is, if the harm would not have happened but for the act, the act in fact caused the damage.").

[265] *See supra* notes 220-24 and accompanying text.

[266] *See supra* note 229.

[267] *See, e.g.*, *Halberstam*, 705 F.2d at 472; American Family Mut. Ins. Co. v. Grim, 201 Kan. 340, 440 P.2d 621 (1968) (four minors illegally enter church; two boys, unknown to other two, use torches for lighting; church sustains fire damage); Russell v. Marboro Books, 18 Misc. 2d 166, 183 N.Y.S.2d 8 (Sup. Ct. 1959) (one party sells professional model's picture to another party who alters picture and libels model); *Keel*, 331 P.2d at 397 (plaintiff injured by blackboard eraser thrown during classroom horseplay).

consequences which are reasonably foreseeable within the common scheme of the underlying agreement.

Many policy considerations enter into the determination of proximate causation. Deterrence, punishment, and compensation are all legitimate goals. Economic compensation for victims of crime is certainly a goal which may justify placing the loss upon one who intentionally breaches a duty rather than on an innocent plaintiff,[268] but punitive damages are directed toward punishment[269] and deterrence.[270] When the substantial factor test is ignored and foreseeability does not limit the defendant's responsibility for the acts of another, the causal link between the defendant's conduct and the plaintiff's harm is so tenuous that a preponderence of the evidence cannot justify punishment or deterrence.[271] In cases of conspiracy, the goals of deterrence and punishment are better left to criminal law, where the problems of causal tenuity are better handled by proofs beyond a reasonable doubt.

Markham R. Leventhal

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[268] *See* W. PROSSER, *supra* note 63, at 263; *see also Halberstam*, 705 F.2d at 489.

[269] W. PROSSER, *supra* note 63, at 9; Walther & Plein, *Punitive Damages: A Critical Analysis:* Kink v. Combs, 49 MARQ. L. REV. 369, 371 (1965).

[270] W. PROSSER, *supra* note 63, at 9, 11; Walther & Plein, *supra* note 269, at 372-73.

[271] For a discussion on the functional relationships between various causal concepts and the possible goals of tort law, see Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975).