

## Notes

### Dirty Harriet: The *Restatement (Third) of Torts* and the Causal Relevance of Intent\*

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#### I. Introduction to Harriet’s Case

Eight tortfeasors, acting independently but simultaneously, negligently lean on a car, which is parked at a scenic overlook in the mountains. Their combined forces result in the car rolling over the edge of the mountain and plummeting to its destruction. The force exerted by each of *A* through *G* constituted thirty-three percent of the force necessary to propel the [car] over the edge. The force exerted by the eighth tortfeasor, Harriet, because of her slight build, was only one percent of the force necessary to propel the car over the edge.<sup>1</sup>

By virtue of her contribution, is Harriet a cause-in-fact of the harm? Professor David Robertson—who created the Harriet hypothetical based on an illustration from an early draft of the *Restatement (Third) of Torts*—answers no because “no ordinary thinker could bring himself to say that she did any harm.”<sup>2</sup> But imagine if Harriet had played dirty.

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\* I am grateful to Professor David Robertson for his enthusiastic and careful feedback, to the editors of the *Texas Law Review*—especially Elizabeth Stafki and Spencer Patton—for their hard work editing this Note, and to my family and friends for their constant support.

1. David W. Robertson, *Causation in the Restatement (Third) of Torts: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1022 (2009); see also RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29 cmt. q, illus. 12 (Tentative Draft No. 2, 2002) (providing the basis for Robertson’s hypothetical).

2. Robertson, *supra* note 1, at 1024.

Dirty Harriet pulls into a scenic overlook and parks her car, which she alone knows is a lemon. She and her seven passengers get out to stretch their legs. Admiring the view, Harriet's passengers independently but simultaneously lean back on Harriet's car; delighted at her fortune, Harriet also simultaneously gives an extra nudge with the back of her foot to a tire. Harriet contributes only one percent of the force necessary to propel the car over the edge, while her passengers each contribute thirty-three percent. Harriet's car is totaled, she collects the insurance money, and sues her passengers for the market value of the make and model of the vehicle.

By virtue of her contribution, is Harriet now a cause-in-fact of the harm? If Professor Robertson is right that the answer to Harriet's case is that Harriet should go free, then a principled answer to the Dirty Harriet hypothetical should likewise allow Harriet to escape liability. However, recent case law employing the relatively new *Restatement (Third) of Torts* suggests that Harriet's state of mind may have some relevance to the causal question.<sup>3</sup> If so, the Dirty Harriet hypothetical carries implications for any tort case involving parallel tortious action, such as familiar asbestos and pollution litigation as well as certain less familiar but increasingly important statutory tort cases, including cyber-torts.

This Note proposes that, in Dirty Harriet-type cases, courts unwilling to faithfully apply the *Restatement Third's* factual causation framework should instead apply traditional concerted action doctrine. I define "Dirty Harriet-type cases" as those in which the defendant's causal contribution is individually insufficient, insubstantial, and unnecessary to the tortious outcome, but whose wrongful conduct is intentional or reckless instead of merely negligent. To make this case, Part II outlines the rules and rationales comprising the *Restatement Third's* factual causation framework, focusing particularly on its endorsement of causal set theory. Using this analysis as a baseline, Part III discusses sets of cases that deploy the *Restatement's* framework, if only in part. After exposing these cases' misunderstanding or distrust of the *Restatement's* framework, Part IV posits that the mutual agency theory underlying concerted action doctrine would permit courts to reach their desired liability determinations without sacrificing coherence in their causal attributions.

## II. The *Restatement Third* Framework

The *Restatement (Third) of Torts's* recent installment discussing liability for physical and emotional harm treats factual causation in §§ 26 through 28. In this Part, I highlight its most relevant rules, rationales, and

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3. See *infra* Part III. The *Restatement (Second) of Torts* also indicates that, at least under certain circumstances, an actor's recklessness "is a factor of importance . . . in determining whether the jury shall be permitted to find that the actor's conduct bears a sufficient causal relation to the other's harm." RESTATEMENT (SECOND) OF TORTS § 501 cmt. a (1965).

external constraints and conclude by recapitulating its essential cause-in-fact framework.

A. *Section 26—Counterfactual Causation*

Section 26 of the *Restatement Third* recognizes the orthodox tort principle that the essence of cause-in-fact rests in counterfactuals. Tort law has expressed this theory through the classic but-for, or sine qua non, test: If *X* had not done *Y*, then *Z* would not have happened, so *X* caused *Z*. Section 26 states the test as follows:

Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct.<sup>4</sup>

The burden is on the plaintiff to show by a preponderance of the evidence that the defendant's putatively wrongful conduct was a factual cause of the plaintiff's harm.<sup>5</sup> Importantly, § 26 makes no claim that factual causation exists only when harm would not have occurred absent the defendant's wrongful conduct.<sup>6</sup> While from a practical standpoint it is unassailable that the but-for test yields an acceptably clear answer to the cause-in-fact question in most cases,<sup>7</sup> counterfactual causation is an incomplete theory. For if cause-in-fact were really only about counterfactual conditionals, the theory would underrepresent our intuitive notions of causal relationships.<sup>8</sup>

B. *Section 27—Multiple Causation*

Because the but-for test is underinclusive, counterfactual theory must at least cede to a limited-purpose substitute capable of handling multiple causation. Accordingly, the *Restatement Second* adopted the "substantial factor" test long ago:

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4. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 (2010); see also *id.* § 26 cmts. c, e (explaining that wrongful conduct need only be one of the factual causes of harm and that the test requires a counterfactual inquiry).

5. *Id.* §§ 26 cmt. l, 28(a).

6. See *id.* § 26.

7. DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 117 (4th ed. 2011).

8. The implicit goal of theories of causation is to systematically explain commonly held beliefs about cause-in-fact. See, e.g., Robertson, *supra* note 1, at 1024 (disapproving of § 27's cause-in-fact finding in Harriet's case because "no ordinary thinker could bring himself to say that [Harriet] did any harm" (emphasis added)). Counterfactual theory is also arguably *overinclusive* insofar as it treats as causes certain necessary background conditions to the commission of a tort. See H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 11–12 (2d ed. 1985) (critiquing counterfactual theory by explaining that one does not say that the cause of a fire is "the presence of oxygen"). But because attempting to provide criteria that would enable courts to "distinguish causes from conditions" would "inevitably entail[] ambiguity and uncertainty," the *Restatement Third* asks us to accept these necessary background conditions as "background causes." See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. d (2010).

If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.<sup>9</sup>

This test evolved to protect plaintiffs in overdetermined harm cases where but-for causation could not be proved.<sup>10</sup> It applies most obviously to cases such as *Sanders v. American Body Armor & Equipment, Inc.*,<sup>11</sup> in which a police officer was fatally shot when two bullets struck his abdomen and chest split seconds apart.<sup>12</sup> Either bullet would have been sufficient to kill Officer Sanders.<sup>13</sup> In the suit against the manufacturer of the ineffective bulletproof vest, which was only a cause-in-fact of Sanders's chest wound, the appellate court rejected the argument that Sanders would have died anyway from the bullet to his abdomen, instead adopting the reasoning that "each cause has in fact played so important a part in producing the result that responsibility should be imposed upon it."<sup>14</sup> The two fatal bullets, the court held, were "concurrent causes of a single injury—Sanders' death."<sup>15</sup>

Some but-for purists object that factual causation ineluctably insists on necessity. Justice Kennedy, for example, has taken the position that "[a]ny standard less than but-for . . . represents a decision to impose liability without causation."<sup>16</sup> Perhaps Justice Kennedy would feel differently if he held an elected position because it is difficult to have a serious discussion about the causes of an election's outcome without an alternative to but-for causation.<sup>17</sup> I do not seem to be alone in this intuition.<sup>18</sup> To be sure though, neither is Justice Kennedy alone in his position.<sup>19</sup>

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9. RESTATEMENT (SECOND) OF TORTS § 432(2) (1965).

10. See David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEXAS L. REV. 1765, 1776 (1997) (claiming the "only fully legitimate usage" of the substantial factor vocabulary is in a limited category of combined force or overdetermined cause cases).

11. 652 So. 2d 883 (Fla. Dist. Ct. App. 1995).

12. *Id.* at 884.

13. *Id.*

14. *Id.* at 884–85 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 267 (5th ed. 1984)).

15. *Id.* at 885.

16. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting); see also *Paroline v. United States*, No. 12–8561, slip op. at 15 (U.S. Apr. 23, 2014) (Kennedy, J.) ("[A]lternative causal tests [to but-for] are a kind of legal fiction or construct. If the conduct of a wrongdoer is neither necessary nor sufficient to produce an outcome, that conduct cannot in a strict sense be said to have caused the outcome."); *infra* note 113 (discussing *Paroline* briefly).

17. For example, in the 2004 U.S. presidential election, then-President Bush and then-Senator Kerry split the vast majority of individual votes cast, with Bush ultimately winning the electoral college 286–251. *2004 Electoral College Results*, U.S. ELECTORAL COLL., [http://www.archives.gov/federal-register/electoral-college/2004/election\\_results.html](http://www.archives.gov/federal-register/electoral-college/2004/election_results.html). The votes cast in each state and in the electoral college all overdetermined their respective state and national outcomes. Assuming a but-for theory, to what person or group can we attribute responsibility for Bush's reelection? Certainly no individual Bush voter because her input was insufficient and unnecessary to produce

Over such absolutist objections, and like the *Restatement Second* before it, § 27 of the *Restatement Third* unambiguously embraces the possibility of multiple causation:

If multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm.<sup>20</sup>

The black letter of § 27 is written in the passive voice, so at least initially it appears not to answer whether courts impose liability in multiple-cause cases because causation exists or despite its absence. Fortunately, the Reporters explained their rationale for § 27.<sup>21</sup> The Reporters suggest that one “not entirely satisfactory” justification for § 27 is that a tortious defendant “should not escape liability merely because of the fortuity of another sufficient cause.”<sup>22</sup> Prosser and Keeton took this position, and maybe it is one good reason.<sup>23</sup> But the “most significant” rationale, the Reporters tell us, is something else:

[W]hile the but-for standard provided in § 26 is a helpful method for identifying causes, it is not the exclusive means for determining a factual cause. Multiple sufficient causes are also factual causes

the result. Not any red state with sixteen or fewer electors either, for even if those states had flipped, Bush still would have reached the 270 votes necessary for reelection. Only a large red state like Texas, without which Bush would have lost, would seem a good but-for candidate. I dispute, however, that simply mentally turning Texas into a blue state meets the modesty maxim required for a proper counterfactual hypothesis. See Robertson, *supra* note 10, at 1770 (“[T]he mental operation performed at this . . . step must be careful, conservative, and modest; the hypothesis must be counterfactual only to the extent necessary to ask the but-for question.”). The mental operation required to turn Texas blue would involve a million changed ballots. If that had been possible, preelection polling would have revealed it and candidate Kerry surely would have refocused time and money on Texas voters at the expense of other state electorates. It is likewise unclear whether a Democrat victory in a tightly fought, large red state like Florida would have necessarily influenced voter turnout or recounts in other swing states. Therefore, to those inclined to call Texas and Florida factual causes of Bush’s reelection, I suggest that one cannot modestly rewrite a pivotal moment in United States history.

18. See Jane Stapleton, *Unnecessary Causes*, 129 L.Q. REV. 39, 43, 44 & n.23 (2013) (citing with approval the German federal supreme court’s decision to affirm criminal liability for each of several executives who had voted unanimously to knowingly market a toxic leather spray when a mere majority vote would have sufficed to bring the product to market).

19. Then-Chief Justice Rehnquist and Justice Scalia joined Justice Kennedy’s opinion in which he stated that factual causation requires a but-for showing. *Price Waterhouse*, 490 U.S. at 279, 282; see also *infra* notes 58–59 and accompanying text (discussing Judge Posner’s apparent view that cause-in-fact requires but-for causation).

20. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 (2010).

21. See *id.* § 27 cmt. c.

22. *Id.*

23. See KEETON ET AL., *supra* note 14, at 266–67 (hypothesizing that where two tortfeasors separately inflict fatal injuries on a third person, “it is quite clear that each cause has in fact played so important a part in producing the result that *responsibility should be imposed upon it*” (emphasis added)).

because *we recognize them as such* in our *common understanding* of causation, even if the but-for standard does not. Thus, the standard for causation in this Section comports with *deep-seated intuitions* about causation and fairness in attributing responsibility.<sup>24</sup>

As I understand the Reporters, § 27 supplies causation, not a mere substitute.

### C. Comment f—Causal Sets

Comment *f* to § 27, captioned “Multiple sufficient causal sets,”<sup>25</sup> usurps the black letter of § 27. The basic innovation of comment *f* is to shift the focus from potential individual actors acting alone to plural actors acting together.<sup>26</sup> As it explains, “[i]n some cases, tortious conduct by one actor is insufficient, even with other background causes, to cause the plaintiff’s harm.”<sup>27</sup> This insufficiency is not fatal to the plaintiff’s cause-in-fact showing where, “combined with conduct by other persons, the conduct overdetermines the harm, i.e., is more than sufficient to cause the harm.”<sup>28</sup> Thus, comment *f* resolves that “[t]he fact that an actor’s conduct requires other conduct to be sufficient to cause another’s harm does not obviate the applicability” of § 27.<sup>29</sup>

Sparse precedent supports the inclusion of comment *f* into the *Restatement Third*. The Reporters’ Note to comment *f* cites only a handful of law review articles by a select group of academics and a general reference to asbestos cases as exemplars.<sup>30</sup> Most prominent among the theorists cited is Richard Wright, who has written extensively about the Necessary Element of a Sufficient Set (NESS) test for factual causation.<sup>31</sup> The NESS test posits that “a particular condition was a cause of . . . a specific consequence if and only if it was a necessary element of a set of

24. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. c (2010) (emphasis added); *see also* KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 111 (3d ed. 2007) (“[B]oth the but-for and substantial-factor tests are not definitions of the concept of causation, but merely useful proxies for the concept.”).

25. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (2010).

26. This observation is implicit in the language of comment *f*, which discusses the causal insufficiency of a singular “actor” as compared to the causal sufficiency of the combined conduct of plural “persons.” *See id.*; *accord id.* § 26 cmt. d (clarifying that “all necessary elements for an outcome are described as causes” in the *Restatement Third* and referring to causal sets, of which tortious conduct was one necessary component, as “the cause of harm”).

27. *Id.* § 27 cmt. f.

28. *Id.*

29. *Id.*

30. *Id.* § 27 reporters’ note cmt. f.

31. *See, e.g.*, Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1788–803 (1985) [hereinafter Wright, *Causation in Tort Law*]; Richard W. Wright, *Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1106–07 (2001) [hereinafter Wright, *Causal Contribution*].

antecedent actual conditions that was sufficient for the occurrence of the consequence.”<sup>32</sup> The import of this test to Wright is that it “incorporates the indispensable notion of necessity, but subordinates it to the notion of sufficiency.”<sup>33</sup> The end result is a causal set theory that, at least according to Wright, “captures the essential meaning of the concept of causation.”<sup>34</sup> If Wright is right, then NESS accurately attributes cause-in-fact to an important swath of potential tortfeasors. For example, in a “merged-fires” case wherein the defendant negligently sets a fire that combines with two other fires of unknown origin before destroying the plaintiff’s property, NESS attributes cause-in-fact to the defendant whether or not her fire alone would have produced the tortious result, regardless of the size of her contribution, and even if only two of the three fires were necessary.<sup>35</sup> Similarly, in familiar pollution cases, NESS attributes factual causation to each of seven individual polluters contributing to the fouling of a stream.<sup>36</sup> I suspect NESS would likewise attribute factual causation to individual voters in analogous voting cases.<sup>37</sup>

Skeptics argue the NESS test finds factual causation where none exists.<sup>38</sup> However that may be, it is indisputable that comment *f* approves of a causal set theory.<sup>39</sup> Furthermore, this development cannot be treated as just another in a line of limited-purpose exceptions to the general rule of but-for causality because NESS fundamentally challenges the traditional insistence on counterfactual causation in the first place.<sup>40</sup> It is probably for this reason that the Reporters thought it wise to structurally restrain § 27, and particularly comment *f*.<sup>41</sup>

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32. Wright, *Causation in Tort Law*, *supra* note 31, at 1790 (emphasis omitted).

33. *Id.* at 1788.

34. *Id.* at 1789.

35. *See id.* at 1793 (applying NESS to a merged-fires case in which “two of three fires were sufficient for the injury, but none by itself was sufficient” and concluding that “each was a cause of the injury since each was necessary for the sufficiency of a set of actual antecedent conditions that included only one of the other fires”).

36. *Id.*

37. *See* Stapleton, *supra* note 18, at 43–44 (declaring individual voters causes-in-fact of their unanimous majority decision without using the NESS test).

38. *See* Robertson, *supra* note 1, at 1021–23 (arguing that the omission from § 27 of the requirements that a defendant’s “conduct be alone *sufficient* and itself *substantial*” is a mistake).

39. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (2010); *see also* Robertson, *supra* note 1, at 1021 (calling comment *f* a “‘causal-set’ approach”).

40. *See* Wright, *Causation in Tort Law*, *supra* note 31, at 1792 (stating that NESS is a “more accurate and comprehensive” theory than counterfactual causation in the same way that theories of relativity and quantum mechanics improve upon Newtonian mechanics).

41. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. g (2010) (explaining that “de minimis” causal contributions are to be dealt with as a matter of policy as “addressed in § 36”).

*D. Section 36—The Scope of Liability Constraint*

Section 36, entitled “Trivial Contributions to Multiple Sufficient Causes,” is part of the *Restatement Third*’s chapter on proximate cause. It provides:

When an actor’s negligent conduct constitutes only a trivial contribution to a causal set that is a factual cause of harm under § 27, the harm is not within the scope of the actor’s liability.<sup>42</sup>

The Reporters leave no doubt that § 36 is intended to correct for comment *f*’s arguable overinclusiveness; § 36 addresses actors whose contribution “pales by comparison to the other contributions to that causal set.”<sup>43</sup> Comment *b* to § 36 indicates that its scope of liability exception applies “only when there are multiple sufficient causes and the [actor’s] tortious conduct . . . constitutes a trivial contribution to any sufficient causal set.”<sup>44</sup> Therefore, while the black letter of § 36 absolves only “negligent” trivial contributors, comment *b* suggests that § 36 contemplates “tortious conduct” more generally; evidently, § 36 might also absolve intentional or reckless trivial contributors.<sup>45</sup>

The Reporters fashioned § 36 as a rule of “fairness, equitable-loss distribution, and administrative cost,”<sup>46</sup> again relying heavily on asbestos precedents.<sup>47</sup> Others have challenged this rationale, however, alleging the precedents on which the Reporters relied really stood for the proposition

42. *Id.* § 36.

43. *See id.* § 36 cmt. a (explaining that while a *de minimis* contribution “still constitutes a factual cause under § 27 and Comment *f*, this Section preserves the limitation on liability that the substantial-factor requirement in the prior Restatements might have played”); *accord id.* § 27 cmts. g, i (signaling that *de minimis* contributions are to be treated under § 36).

44. *Id.* § 36 cmt. b.

45. *See id.* § 36 & cmt. b; *see also id.* §§ 1–3 (identifying three classes of tortious conduct: intentional, reckless, and negligent). Additional support for this point lies in the fact that the *Restatement Third* expressly replaced and superseded *Restatement Second* § 501, which had indicated that certain intentional and reckless tortfeasors may not escape liability for their conduct whereas actors whose equivalent conduct was merely negligent should escape liability. *See id.* intro. (providing that the first three installments of the *Restatement Third* “replace and supersede Divisions 2 and 3 of the *Restatement Second* of Torts, with only one exception”); *RESTATEMENT (SECOND) OF TORTS* § 501 cmt. a (1965) (explaining that conduct in reckless disregard of another’s safety is a factor “court[s] . . . consider in determining whether the jury shall be permitted to find that the actor’s conduct” is sufficiently related to the injury to support a finding of liability). Although the *Restatement Third* concededly does not address “specific intentional physical-harm torts or their elements” at common law, *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* intro. (2010), it nevertheless includes a general rule of liability for intentional physical harm, and there is nothing to suggest its causation framework would be inapplicable to statutory causes of action for intentional or reckless malfeasance that incorporate tort causation principles, *see id.* § 5 (providing the *Restatement Third*’s rule of liability for intentional physical harm); *infra* subparts III(A)–(B) (pointing to cases arising under statutes implicating the *Restatement Third*’s causation framework).

46. *Id.* § 36 cmt. b.

47. *Id.* § 36 reporters’ note cmt. b.



that trivial contributors were not factual causes under the old substantial-factor test.<sup>48</sup> Yet the § 36 exception should not be discounted just because it fits oddly with the *Restatement Third's* more general causation framework because we cannot reasonably expect *Restatements* to be perfectly coherent.<sup>49</sup> It makes more sense to heed the warning that *Restatements* should be read for their essential meaning.<sup>50</sup>

Accordingly, I take the *Restatement Third's* framework for factual causation to mean essentially this: An actor's conduct is a cause-in-fact of a harm if and only if it is either a but-for cause or a necessary element of at least one sufficient causal set. However, the actor escapes liability if her causal contribution is trivial. On this account, both Harriet and Dirty Harriet are causes-in-fact, yet both may escape liability under the trivial-contributor exception.

### III. Real World Dirty Harriets

Fact patterns mirroring Harriet's are more common than one might suppose, and although the *Restatement Third* is still relatively new, courts increasingly deploy it. However highly stylized Harriet's problem may seem, it has significant real-world import. Surveying the cases that cite § 27, which I assumed are those cases most likely to present Dirty Harriet-type fact sets, I observed three primary classes of potential tortfeasors that fit the mold. Therefore, in succession, I here turn to describe sets of Dirty Harriet-type cases involving contributors to terrorism, child pornography, and pollution. The first two sets of cases in particular have produced holdings both incongruous with the *Restatement Third's* factual causation framework and incompatible with each other.

#### A. Terrorist Financiers and Harborers

One critical set of cases producing a mess of factual causation opinions involves suits arising from intentional or reckless contributions to terrorism. Consider the case of *Boim v. Holy Land Foundation for Relief & Development*,<sup>51</sup> where the parents of David Boim—a Jewish teenager and dual Israeli–American citizen who was shot and killed in 1996 near

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48. Robertson, *supra* note 1, at 1024–25.

49. Indeed, the Reporters concede that certain cases involving *de minimis* causal contributors produce court decisions that “seem to depend on intuitions that are not captured in the purely conceptual general rule that each of two sufficient sets of conditions to bring about an injury is treated as a cause.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. i (2010).

50. See Robertson, *supra* note 1, at 1020 (“Despite their black-letter format, restatement sections are not statutes, and they should be read like any other treatise. Extraneous words can and should be ignored. Essential meaning can and should be gleaned from language, context, and common sense.”).

51. 549 F.3d 685 (7th Cir. 2008) (en banc).

Jerusalem, allegedly by Hamas gunmen—sued several organizations that had allegedly provided financial support to Hamas.<sup>52</sup> The Boims accused the defendants of having violated 18 U.S.C. § 2333(a),<sup>53</sup> which provides a civil cause of action to any U.S. national injured “by reason of an act of international terrorism.”<sup>54</sup> On rehearing en banc by the Seventh Circuit, the court found, through a chain of explicit statutory incorporations, that “a donation to a terrorist group that targets Americans outside the United States may violate section 2333.”<sup>55</sup> Judge Posner reasoned that “[g]iving money to Hamas, like giving a loaded gun to a child . . . , is an act dangerous to human life,” and therefore wrongful conduct within the meaning of the statute.<sup>56</sup> The court therefore found two of the three defendant organizations had violated the statute.<sup>57</sup>

Turning to the issue of factual causation, Judge Posner determined that because the statute created primary liability, “the ordinary tort requirement[] relating to . . . causation . . . must be satisfied for the plaintiff to obtain a judgment.”<sup>58</sup> However, Judge Posner treated the “‘black letter’ law that tort liability requires proof of causation” as similar to mere “legal shorthand” that should not be “treated as exceptionless.”<sup>59</sup> He concluded that the causation requirement in § 2333 cases, like in merged-fire cases, is “relaxed because otherwise there would be a wrong and an injury but no

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52. *Id.* at 687–88.

53. *Id.* at 688.

54. 18 U.S.C. § 2333(a) (2012).

55. *Boim*, 549 F.3d at 690. Judge Posner called attention first to the statutory definition for international terrorism:

The first link in the chain is the statutory definition of “international terrorism” as “activities that . . . involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States,” that “appear to be intended . . . to intimidate or coerce a civilian population” or “affect the conduct of a government by . . . assassination,” and that “transcend national boundaries in terms of the means by which they are accomplished” or “the persons they appear intended to intimidate or coerce.”

*Id.* (alteration in original) (quoting 18 U.S.C. § 2331(1)). Second, Judge Posner determined that donating money to Hamas violated a criminal statute:

[I]t violates a federal criminal statute . . . which provides that “whoever provides material support or resources . . . , knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 2332],” shall be guilty of a federal crime. So we go to 18 U.S.C. § 2332 and discover that it criminalizes the killing . . . , conspiring to kill, or inflicting bodily injury on, any American citizen outside the United States.

*Id.* (second omission and second alteration in original) (quoting 18 U.S.C. § 2339A(a)).

56. *Id.* (internal quotation marks omitted).

57. *See id.* at 701.

58. *Id.* at 692.

59. *Id.* at 695.

remedy because the court would be unable to determine which wrongdoer inflicted the injury.”<sup>60</sup>

Judge Posner found additional support for his “relaxed” causation standard in *Keel v. Hainline*,<sup>61</sup> where a junior high student, Burge, lost the use of one eye when she was struck by an eraser thrown during classroom horseplay.<sup>62</sup> Defendant Keel, who was not one of the several students actually throwing erasers at each other, was held liable with them for Burge’s injury because by retrieving erasers for the throwers he had aided and abetted their tortious acts.<sup>63</sup> “It was enough to make him liable that [Keel] had helped to create a danger,” Posner concluded, finding it immaterial “that his acts could not be found to be either a necessary or a sufficient condition of the injury.”<sup>64</sup> Like the naughty eraser-fetcher, then, a contributor to terrorism ought not escape liability according to Posner:

[C]onsider an organization solely involved in committing terrorist acts and a hundred people all of whom know the character of the organization and each of whom contributes \$1,000 to it, for a total of \$100,000. The organization has additional resources from other, unknown contributors of \$200,000 and it uses its total resources of \$300,000 to recruit, train, equip, and deploy terrorists who commit a variety of terrorist acts one of which kills an American citizen. His estate brings a suit under section 2333 against one of the knowing contributors of \$1,000. [The contributor is liable even if] no defendant’s contribution was a sufficient condition of [the] death.<sup>65</sup>

Even an individually insufficient and insignificant contribution would meet Posner’s relaxed causation standard where the contribution is made knowingly.<sup>66</sup> Furthermore, even though Hamas “provid[ed] health, educational, and other social welfare services,” the court would not allow a contributor to escape liability simply by earmarking its donation for Hamas’s humanitarian wing.<sup>67</sup> Evidently Judge Posner was convinced that Hamas’s humanitarian endeavors reinforced its terrorist projects and that its accountants would happily transfer funds between its “social services ‘account’” and its “terrorism ‘account.’”<sup>68</sup> Thus, for the purposes of the causal inquiry, Judge Posner would not permit disaggregating money

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60. *See id.* at 695–97 (agreeing with Prosser and Keeton that liability exists in multiple causation cases without cause-in-fact).

61. 331 P.2d 397 (Okla. 1958).

62. *Id.* at 398–99.

63. *Id.* at 400–01.

64. *Boim*, 549 F.3d at 697.

65. *Id.* at 698.

66. *See id.*

67. *Id.*

68. *See id.* (noting this fungibility and positing that Hamas’s humanitarian activities support its terrorist activities by making it costly for the beneficiaries of its social welfare to defect and by enhancing Hamas’s popularity, especially among Palestinian youths).

donations into separate pools for humanitarian and terrorist activities and deeming only the terrorist money pool causally connected to plaintiff's injury.<sup>69</sup> Instead, the court found categorically that "[a]nyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."<sup>70</sup>

Multiple judges dissented from Judge Posner's handling of the causation standard. Judge Rovner characterized the decision as creating false choice between requiring causation and providing plaintiffs with a remedy.<sup>71</sup> While the majority "simply deem[ed] it a given" that donations knowingly given to terrorist organizations cause terrorist activity, Judge Rovner doubted whether this was true in all cases.<sup>72</sup> Bemoaning how the majority's standard would impose liability for even a "small donation to help buy an x-ray machine for a Hamas hospital," Rovner instead would have left to the factfinder the question of whether the defendants' donations "actually cause" terrorism.<sup>73</sup> Judge Rovner, however, failed to specify the legal standard by which he would have adjudged actual causation.<sup>74</sup> Judge Diane Wood, writing separately, agreed that "[a]ssumptions and generalizations are no substitute for proof."<sup>75</sup> She objected as well to the causal theory endorsed by the en banc majority, correctly responding that § 27 is "a far cry" from dispensing with factual causation in multiple causation cases.<sup>76</sup> Judge Wood admonished the majority for omitting individual sufficiency as a prerequisite for cause-in-fact, apparently unconcerned that comment *f* likewise discards individual sufficiency in overdetermined harm cases.<sup>77</sup>

A similar mess has been made under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act (FSIA). FSIA codified a general rule that a foreign state is immune from civil suit in the United States.<sup>78</sup> However, the statute excepts state-sponsored terrorism, lifting immunity in civil damages actions against foreign states for personal injury or death "caused by . . . the provision of material support or resources" for

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69. *Id.* at 698–99.

70. *Id.* at 698.

71. *Id.* at 705 (Rovner, J., concurring in part and dissenting in part).

72. *See id.*

73. *Id.* at 710.

74. *See id.*

75. *Id.* at 719 (Wood, J., concurring in part and dissenting in part).

76. *Id.* at 722.

77. *See id.* at 723 (arguing that even *Hainline* had not gone so far as to dispense with the sufficiency analysis because there was a "readily observable causal link between the collective action" of the tortious students and the resultant eye injury of their classmate).

78. 28 U.S.C. § 1604 (2012) ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

“an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking.”<sup>79</sup> In *Kilburn v. Socialist People’s Libyan Arab Jamahiriya*,<sup>80</sup> the estate of Peter Kilburn—an American citizen who was kidnapped by Hizbollah and sold to the Arab Revolutionary Cells (ARC), a terrorist organization that subsequently tortured and killed him—brought a tort action against Libya, charging it with funding and directing ARC actions.<sup>81</sup> Judge Garland, writing for a unanimous court, affirmed the denial of Libya’s motion to dismiss the case, “concluding that the ‘terrorism exception’ of the Foreign Sovereign Immunities Act . . . strips Libya of the shield of sovereign immunity.”<sup>82</sup> The court summarily rejected Libya’s argument that causation under FSIA’s terrorism exception required a but-for showing, finding in FSIA “no textual warrant for this claim: the words ‘but for’ simply do not appear; only ‘caused by’ do.”<sup>83</sup> Relying on Supreme Court admiralty precedent in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,<sup>84</sup> Judge Garland found instead that FSIA required “only a showing of proximate cause.”<sup>85</sup>

Judge Garland’s observation regarding FSIA’s text is confounding, and upon closer inspection, the *Kilburn* court mistook *Grubart*’s proximate cause test as a sufficient condition for causation when it ought to have been read as a necessary condition. To invoke the federal courts’ admiralty jurisdiction, one must show damage to property or persons “caused by a vessel on navigable waters.”<sup>86</sup> In cases like *Grubart*—where the defendants negligently drove piles into a riverbed and thereby weakened a tunnel that flooded and caused property damage<sup>87</sup>—disputes arise over how far admiralty jurisdiction extends to injuries sustained on land, which of course are not traditionally covered under maritime law.<sup>88</sup> Thus, after the *Grubart* court expressly found that “the injuries suffered by Grubart and the other flood victims were caused by a vessel on navigable water,” it further explained that causation includes the notion of “proximate caus[e],” which

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79. *Id.* § 1605A.

80. 376 F.3d 1123 (D.C. Cir. 2004).

81. *Id.* at 1125, 1130.

82. *Id.* at 1124–25.

83. *Id.* at 1127–28 (quoting 28 U.S.C. § 1605(a)(7) (2006)).

84. 513 U.S. 527 (1995).

85. *Kilburn*, 376 F.3d at 1128 (emphasis added) (internal quotation marks omitted) (following *Grubart*’s interpretation of a similar jurisdictional causation requirement in the Extension of Admiralty Jurisdiction Act).

86. 46 U.S.C. § 30101(a) (2006).

87. *Grubart*, 513 U.S. at 529.

88. *See id.* at 531–32 (documenting that historic admiralty jurisdiction had been based on whether “the tort occurred on navigable waters” but noting the statutory revision expanded this jurisdiction to address confusion as to when admiralty jurisdiction extended to injuries that occurred on land).

imposes a limiting principle on factual causation.<sup>89</sup> This, to borrow words from Judge Wood's *Boim* dissent, is a far cry from dispensing with factual causation.<sup>90</sup> Some insight into the *Kilburn* court's decision might be divined from Judge Garland's citation to Prosser and Keeton's torts treatise, which he quoted for the proposition that an "essential element" of a tort action "is that there be some reasonable connection" between the wrongful conduct and the plaintiff's injury.<sup>91</sup> But this seems more to punt the issue of causation than to circumscribe it. Whatever Judge Garland thought proximate cause entailed, however, it is plain that the term as he used it spurned the but-for test. That is, Libya could be stripped of its sovereign immunity even if Peter Kilburn might have been purchased, tortured, and killed without Libya's help.

However, not two years later, in *Owens v. Republic of Sudan*<sup>92</sup> (*Owens I*), the District Court for the District of Columbia held that *Kilburn*'s proximate cause hurdle contained "two distinct requirements," adopting § 26 (but-for causation) and § 29 (scope of liability, or, in the *Restatement Second*'s terms, "legal cause").<sup>93</sup> Therefore, though purporting to follow *Kilburn*, the district court actually spurned it and reinserted cause-in-fact into the FSIA. *Owens I* arose out of the 1998 U.S. Embassy bombings in Tanzania and Kenya.<sup>94</sup> Victims of the tragedy sued the Republic of Sudan, claiming FSIA jurisdiction on the theory that Sudan had provided "shelter, security, [and] financial and logistical support (including the movement of weapons into and out of the country)" for al Qaeda and Hezbollah, the organizations claiming responsibility for the attacks.<sup>95</sup> The court elected not to treat the Sudan defendants as "*de minimis*" contributors but instead denied Sudan's motion to dismiss on the grounds that it would be reasonable for a factfinder to conclude that Sudan's support was a "necessary condition for the bombing, and therefore a factual cause of plaintiff's damages."<sup>96</sup> On appeal (*Owens II*),<sup>97</sup> the D.C. Circuit agreed that

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89. *Id.* at 535–37.

90. *Cf.* *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 722 (7th Cir. 2008) (en banc) (Wood, J., concurring in part and dissenting in part) ("[Section 27] is a far cry from saying that cause need not be proven if there are multiple sufficient causes . . .").

91. *See* *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1128 (D.C. Cir. 2004) (quoting *KEETON ET AL.*, *supra* note 14, at 263). Judge Garland also seems to have been moved by the fact that FSIA's causation standard merely raises a "jurisdictional" question rather than a substantive issue. *See id.* at 1129 (stressing that "§ 1605(a)(7) is solely a jurisdictional provision" and that the plaintiff's ultimate cause of action would carry "its own rules of causation"). However, this observation adds rather than removes ambiguity from *Kilburn*'s proximate cause standard.

92. (*Owens I*), 412 F. Supp. 2d 99 (D.D.C. 2006), *aff'd*, 531 F.3d 884 (D.C. Cir. 2008).

93. *Id.* at 111; *see also* RESTATEMENT (SECOND) OF TORTS § 431 (1965) (setting out the requirements to establish legal cause).

94. *Owens I*, 412 F. Supp. 2d at 102–03.

95. *Id.* at 103, 114.

96. *Id.* at 113–14.

the plaintiffs had sufficiently pled but-for causation, leading Chief Judge Sentelle to posit “[w]e need not decide whether § 1605(a)(7) requires but-for causation.”<sup>98</sup> But on remand (*Owens III*),<sup>99</sup> the court reached a judgment for the plaintiffs after finding that causation within the meaning of FSIA’s state-sponsor exception required merely a “‘reasonable connection’ between the material support provided and the ultimate act of terrorism.”<sup>100</sup>

Together, *Kilburn* and the *Owens* trilogy draw an impossible image. Each decision allegedly follows its precedent, yet collectively they retreat to the initial question of how to handle causation under the FSIA’s state-sponsored terrorism exception. Such circular jurisprudence, which gives the illusion of decisiveness, may at least be understandable in light of the serious pitfalls that attend applying opposite causal poles in civil suits against contributors to terrorism. At one extreme, a judge can elect not to require cause-in-fact, either overtly, like in *Boim*,<sup>101</sup> or covertly, like in *Kilburn*.<sup>102</sup> Either way, the court is necessarily telling Congress that it does not mean what it says when it writes causation into its terrorist tort statutes because there is no such thing as causation without cause-in-fact.<sup>103</sup> On the other hand, insisting upon individual necessity works poorly because answering the counterfactual question—what would have happened had the defendant country not provided material support to culpable terrorists—reduces the factfinder to a soothsayer.<sup>104</sup> First, a lot of time may have passed between the point at which the defendant country began providing material assistance to the group responsible for the act of terrorism.<sup>105</sup> *Owens III*, for example, found as fact that Sudan had provided al Qaeda safe harbor and financial, military, and intelligence services as early as

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97. *Owens v. Republic of Sudan (Owens II)*, 531 F.3d 884 (D.C. Cir. 2008).

98. *Id.* at 894. Indeed, the court need not have decided the issue of but-for causation because *Kilburn* had already decided it. *See supra* note 83 and accompanying text; *accord* *United States v. Monzel (Monzel I)*, 746 F. Supp. 2d 76, 87 (D.D.C. 2010) (“The Court in *Kilburn* concluded that the same showing of proximate cause, but not but-for causation, was required under the FSIA.”).

99. *Owens v. Republic of Sudan (Owens III)*, 826 F. Supp. 2d 128 (D.D.C. 2011).

100. *Id.* at 151.

101. *See supra* notes 58–66 and accompanying text (discussing Judge Posner’s relaxed causation standard for overdetermined harm cases).

102. *See supra* notes 83–85 and accompanying text (describing Judge Garland’s indeterminate “proximate cause” substitute for cause-in-fact).

103. Courts may be especially inclined to read out Congress’s words where, as with FSIA’s state-sponsor exception, causation implicates a mere jurisdictional issue rather than a liability question. *See supra* note 91.

104. Here, I reiterate my earlier position, *supra* note 17, that one does not modestly rewrite momentous history.

105. *See, e.g., Owens I*, 412 F. Supp. 2d 99, 111–12 (D.D.C. 2006) (“[The] counterfactual question becomes more difficult where—as in this case—substantial time passes between the wrongful conduct and the injurious event.”).

1991.<sup>106</sup> Second, over long periods, the multiple tortious actors in such cases do not operate in a vacuum.<sup>107</sup> After the Soviet withdrawal from Afghanistan, al Qaeda faced pressure to relocate from the Afghan mujahedeen and the Pakistani government, and it found in Sudan an “eager host.”<sup>108</sup> But while Sudan for a term of years “provided several kinds of material support to al Qaeda without which it could not have carried out the 1998 bombings,”<sup>109</sup> it was the *support* that was necessary to the plaintiffs’ injuries, not the *supporters*.<sup>110</sup> Therefore, an insistence on applying individual necessity as the standard for cause-in-fact in cases like the *Owens* trilogy tells the factfinder that it must decisively imagine whether another country would not have provided al Qaeda with similar safe harbor had Sudan rebuffed it. To be sure, all attributions of factual causation are inferential, but a counterfactual inquiry in this context may demand factfinders to cross “the line between permissible inference and prohibited speculation.”<sup>111</sup> Furthermore, while it would seem that comment *f* could offer a useful middle ground between requiring a but-for showing and dispensing with cause-in-fact entirely, besides Judge Wood,<sup>112</sup> nobody has thought to give even the black letter of § 27 meaningful attention in the terrorism context. Courts thus far simply have not agreed upon much beyond the conclusion that state and individual knowing contributors to terrorism should not escape liability.

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106. *Owens III*, 826 F. Supp. 2d 128, 139–46 (D.D.C. 2011).

107. See, e.g., *Owens I*, 412 F. Supp. 2d at 112–13 (“[T]he Sudan defendants’ actions very well may have helped bring about . . . other factors [that] contributed to the embassy bombings.”).

108. *Owens III*, 826 F. Supp. 2d at 139–40.

109. *Id.* at 150.

110. Iran likewise provided support critical to al Qaeda’s execution of the embassy bombings. *Id.* at 136–39.

111. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. b (2010).

112. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 722 (7th Cir. 2008) (Wood, J., concurring in part and dissenting in part) (invoking the language of § 27 as an already existing substitute for literal but-for causation not considered by the majority).



*B. Possessors and Distributors of Child Pornography*<sup>113</sup>

Other important Dirty Harriet-type cases involve defendants whose wrongful conduct involves reckless distribution or use of child pornography. In 1982 the Supreme Court decided *New York v. Ferber*.<sup>114</sup> The Court rejected a First Amendment challenge to a New York statute criminalizing the knowing distribution of materials depicting sexual performances by children under age sixteen.<sup>115</sup> In support of its finding that stopping child pornography constituted a compelling state interest, the Court determined that all child sexual abuse victims suffer from physiological, emotional, and mental health problems as a result of their injuries.<sup>116</sup> It found that the knowledge that anonymous individuals view and disseminate images of their abuse exacerbates victims' feelings of fear, anxiety, and powerlessness.<sup>117</sup> Furthermore, the Court, in another instance, has recognized that "[t]he pornography's continued existence causes . . . continuing harm [for] years to come,"<sup>118</sup> each new publication of the images causing harm to the child's reputation and emotional health. Not only that,

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113. This Note was published only a few days after the U.S. Supreme Court decided *Paroline v. United States*, No. 12–8561 (U.S. Apr. 23, 2014). In *Paroline*, the Court decided that a criminal defendant, Paroline, who was convicted of possessing child porn could not be held liable in restitution for the full amount of the victim's damages attributable to the victim's emotional injuries relating to her knowledge of the market in her child porn. *Id.*, slip op. at 1, 16. Although the Court recognized the applicability of aggregate causation in child porn restitution cases, citing comment *f* favorably, the majority warned that in the context of criminal restitution, "aggregate causation logic [should not be adopted] in an incautious manner." *Id.*, slip op. at 16. Additionally, the majority refused to apply concerted action doctrine because "Paroline had no contact with the overwhelming majority of the offenders for whose actions the victim would hold him accountable." *Id.* In dissent, Justice Sotomayor indicated that she would have held that Paroline factually caused all of the victim's losses and would have found concerted action satisfied despite Paroline's limited contact with other offenders. *Id.*, slip op. at 1–2 (Sotomayor, J., dissenting). The timing of the Court's decision unfortunately does not permit me to comment meaningfully on *Paroline*'s impact for child-porn restitution cases or its import for Dirty Harriet-type cases more generally. However, I note that *Paroline* raises at least two important questions. First, insofar as *Paroline* relied upon multiple causation principles, one important question will be whether the majority erred by incorporating blameworthiness assignments into its cause-in-fact analysis. See ROBERTSON ET AL., *supra* note 7, at 372–73 (explaining how courts in multiple tortfeasor cases frequently and mistakenly "treat[] percentage-fault assignments as reflecting cause-in-fact shares"). Second, insofar as the majority commented on the general applicability of concerted action to child-porn restitution cases, another important question will be what further factual showing the Court would require to satisfy concerted action.

114. 458 U.S. 747 (1982).

115. *Id.* at 750–51, 774.

116. See *id.* at 758 ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

117. See *id.* at 759 & n.10 (describing the unique harm that pornography inflicts on child victims).

118. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

the *Ferber* Court had found that demand by consumers creates incentives for the continued exploitation of children.<sup>119</sup>

Decades later, in 2009, Michael Monzel pleaded guilty to one count each of distribution and possession of child pornography, federal crimes which together earned him a lengthy prison sentence followed by ten years of supervised release.<sup>120</sup> Another federal statute enacted as part of the Violence Against Women Act made restitution mandatory to victims “harmed as a result of” child sexual abuse and exploitation for “any . . . losses suffered . . . as a proximate result of the offense.”<sup>121</sup> Based on this language, the federal courts have concluded that the government must establish a causal connection between the defendant’s criminal conduct and the victim’s alleged losses.<sup>122</sup> Three of Monzel’s victims—whose pornographic images Monzel never distributed—moved for an order of restitution for present and future physical, psychiatric, and psychological therapy and related expenses.<sup>123</sup> Following the Supreme Court’s lead in *Ferber*, the district court in *Monzel*<sup>124</sup> located harm to the victims in a source independent of their physical abuse and the initial distribution of their pornographic images.<sup>125</sup> Each notification of a new third-party possessor of the child images, the court predicted, would traumatize the victim yet again.<sup>126</sup> This observation was sufficient for the trial court simply to deem Monzel’s mere possession of the victims’ images a cause-in-fact of their harms within the meaning of § 27.<sup>127</sup>

However, upon the government’s appeal on behalf of one of the child victims, Amy, the D.C. Circuit clarified that restitution was limited to the harms Monzel’s possession of child images proximately caused.<sup>128</sup> Judge

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119. See *Ferber*, 458 U.S. at 761 (“The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials . . .”).

120. See *Monzel I*, 746 F. Supp. 2d 76, 78–79 (D.D.C. 2010). See generally 18 U.S.C. § 2252 (2012) (criminalizing, *inter alia*, the knowing possession, transportation, and distribution of child pornography).

121. See 18 U.S.C. § 2259; *Monzel I*, 746 F. Supp. 2d at 78 (describing, briefly, § 2259’s origins).

122. See *United States v. Hardy*, 707 F. Supp. 2d 597, 605–06 (W.D. Pa. 2010) (collecting cases).

123. *Monzel I*, 746 F. Supp. 2d at 78 n.2, 84.

124. *Monzel I*, 746 F. Supp. 2d 76 (D.D.C. 2010).

125. *Id.* at 86.

126. *Id.*

127. See *id.*

128. *United States v. Monzel (Monzel II)*, 641 F.3d 528, 537 (D.C. Cir. 2011). The district court left it ambiguous whether it considered Monzel a necessary condition to the victims’ harm or rather one of multiple sufficient causes within the meaning of § 27. See *Monzel I*, 746 F. Supp. 2d at 86–88. Only one of the three victims appealed from the trial court’s order of restitution, seeking \$3,263,758, a number she claimed reflected her total losses from the creation, distribution, and possession of pornographic images depicting her childhood victimization. *Monzel II*, 641 F.3d at 530–31.

Griffith acknowledged that while the district court had found Monzel's possession of pornographic images added to the victim's injuries, such possession was neither sufficient nor necessary to produce all of her injuries.<sup>129</sup> "Amy's profound suffering," Judge Griffith wrote, was largely due to her "knowledge that . . . untold numbers of people across the world are viewing and distributing images of her sexual abuse."<sup>130</sup> "Monzel's possession of a single image of Amy was [therefore] neither a necessary nor a sufficient cause of all of [Amy's] losses."<sup>131</sup>

Amy's plight underscores a common problem with defining the harm in child-porn restitution cases. Child sexual abuse has repeatedly been linked to psychological trauma, addiction, and violent relationships in adulthood, yet there is a surprising dearth of research measuring the aggravation of harm to such victims from the proliferation of the pictures and videos documenting the abuse.<sup>132</sup> *Ferber* told us that child porn generally causes its victims additional harm, which finding sufficed for constitutional purposes.<sup>133</sup> But tort law (and civil restitution statutes incorporating tort principles) is interested not with predictions of causation but attributions of causation with respect to particular harms.<sup>134</sup> Even when attributing causation is particularly difficult, tort law nonetheless rejects that merely showing "general causation" proves factual causation.<sup>135</sup> Instead, a child-porn victim must prove up a resulting harm from which a causal connection with the defendant could be reasonably inferred from the facts.<sup>136</sup> And there is ample evidence that these victims *do* in fact suffer legally cognizable harms based solely on the proliferation and possession of pornography in which they appear.<sup>137</sup>

129. See *Monzel II*, 641 F.3d at 538–39 (finding a failure of individual sufficiency and therefore rejecting the victim's request for joint and several liability for an indivisible injury).

130. *Id.* at 538.

131. *Id.*

132. Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. TIMES MAG., Jan. 24, 2013, available at <http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html>.

133. See *supra* notes 115–17 and accompanying text.

134. See Robertson, *supra* note 1, at 1010 ("In torts cases, the cause-in-fact inquiry is always an attribution question, never a predictive one . . .").

135. See *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 928 (8th Cir. 2001) (stating that a toxic tort plaintiff must show not only "that the alleged toxin is capable of causing injuries like that suffered by the plaintiff" but also "that the toxin was the cause of the plaintiff's injury"); see also *Terry v. Caputo*, 875 N.E.2d 72, 76–80 (Ohio 2007) (adopting the "two-step process" to establishing causation and further stipulating that "[w]ithout expert testimony to establish both general causation and specific causation, a claimant cannot establish a prima facie case").

136. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 28 cmt. a (2010) (detailing the plaintiff's burden of proof with regard to factual causation under the *Restatement Third*).

137. See Bazelon, *supra* note 132 (discussing the post-abuse life of several victims and the victims' attempts to sue persons that possess child pornography that includes the victims' images for restitution).

However, the *Monzel* courts failed to examine an important factual wrinkle. Victims like those in *Monzel* resoundingly affirm that mental and physical harm attaches to their *knowledge* that adult consumers worldwide have seen pornographic images of them.<sup>138</sup> Consider in this respect the First Circuit's recent handling of another restitution case, *United States v. Kearney*.<sup>139</sup> Expert and victim reports demonstrated that the victim, Vicky, suffered harms including anxiety, depression, and insomnia from the knowledge that "copious amounts" of pornographic images of her had been viewed by "multiple individuals on a continuing basis."<sup>140</sup> The expert report attested that the "[d]iscovery of the distribution of her images on the internet and viewing by persons interested in child pornography . . . contributed to a profound sense of sadness, despair and grief."<sup>141</sup> But victims often do not discover that pornographic images depicting them were published until years after the abuse was filmed or photographed, by which time the images may have been widely distributed and consumed. One characteristic victim, Nicole, was raped, abused, and photographed by her father from ages nine to thirteen.<sup>142</sup> At age sixteen Nicole revealed the abuse to her mother, mistakenly believing that the pictures had not been shown to anyone.<sup>143</sup> Nicole was not informed until age seventeen by a local detective that she was a victim of child pornography.<sup>144</sup> By that time, her pictures had been downloaded by thousands of computers and were among the most circulated child pornography on the internet.<sup>145</sup>

If a case were brought against only one of the many users or distributors of pornographic images of Nicole, its fact pattern would resemble that of Dirty Harriet's case. But the victim suffers cognizable harm distinct from the incident of sexual abuse, due instead to a critical mass of independent, wrongful, and effectively simultaneous acts of child-porn possession and circulation. The *Kearney* court recognized this point when it found that "Kearney's conduct contributed to a state of affairs in which Vicky's emotional harm was worse than would have otherwise been the case."<sup>146</sup> Referencing comment *f* and Richard Wright's scholarship, the court determined that causation "exists on the aggregate level, and there is

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138. See *supra* note 126 and accompanying text; see also *United States v. Kennedy*, 643 F.3d 1251, 1256 (9th Cir. 2011) (distinguishing harms attributable to the creation of child-porn images from harms attributable to later possession of such images).

139. 672 F.3d 81 (1st Cir. 2012).

140. *Id.* at 86.

141. *Id.* (alteration in original).

142. Bazelon, *supra* note 132.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Kearney*, 672 F.3d at 98.

no reason to find it lacking on the individual level.”<sup>147</sup> Chief Judge Lynch therefore held the causation standard met on account of the expert reports and victim impact statements, unambiguously “reject[ing] the theory that the victim of child pornography could only show causation if she focused on a specific defendant’s viewing and redistribution of her images and then attributed specific losses to that defendant’s actions.”<sup>148</sup>

### C. Polluters

Still other case applications of the *Restatement Third*’s causation framework to this point involve polluters negligently dirtying the environment. From the 1940s to 1984, operations at a 680-acre Colorado uranium and vanadium plant “left a large volume of wastes [that] contaminat[ed] air, soil and groundwater near the plant and the San Miguel River.”<sup>149</sup> Contaminants at the “Uravan” site included “radioactive products such as raffinates, raffinate crystals and mill tailings,” which contained other harmful chemicals, including heavy metals like lead and arsenic.<sup>150</sup> In 1986, the EPA added Uravan to the National Priorities List (NPL) and commenced environmental clean-up efforts.<sup>151</sup> Years later, Uravan was entirely razed.<sup>152</sup>

The Price-Anderson Act asserts federal court jurisdiction over suits “arising out of or resulting from a nuclear incident,”<sup>153</sup> further providing that state law supplies the substantive law for claims under the Act.<sup>154</sup> It therefore applied to *June v. Union Carbide*,<sup>155</sup> where former Uravan residents sought damages for their nonthyroid cancer and thyroid disease allegedly caused by the defendants’ milling operations on the theory that the plaintiffs’ exposure to radioactive milling materials caused or increased the risk of their illnesses.<sup>156</sup> Applying Colorado law, the court affirmed

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147. *Id.* at 98 & n.14. In plain fact, the *Kearney* court did not cite directly to comment *f*, but rather to the Reporters’ Note to comment *g*. *Id.* at 98. However, the portion of this Reporters’ Note excerpted by the *Kearney* court is in truth a cross reference to comment *f* causal sets, so I have elected to characterize *Kearney* as standing in part on comment *f*. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 reporters’ note cmt. g (2010) (“These cases thus reflect an application of the principles of this Section and Comment *f* to a situation in which none of the alternative causes is sufficient by itself, but together they are sufficient and perhaps necessary elements of multiple sufficient causal chains.”).

148. *Kearney*, 672 F.3d at 99–100.

149. *Uravan Uranium Project (Union Carbide)*, EPA, <http://www2.epa.gov/region8/uravan-uranium-project-union-carbide> (last updated Apr. 2, 2014).

150. *Id.*

151. *Id.*

152. See *June v. Union Carbide Corp.*, 577 F.3d 1234, 1237 (10th Cir. 2009).

153. 42 U.S.C. § 2210(n)(2) (2006).

154. *Id.* § 2014(hh).

155. 577 F.3d 1234 (10th Cir. 2009).

156. *Id.* at 1237.

summary judgment for Union Carbide.<sup>157</sup> Although the court endorsed the § 27 and comment *f* approach, it held that the plaintiffs had waived any argument that Uranium radiation was a necessary component of a causal set that probably caused their injuries by not raising it at the district court.<sup>158</sup> Additionally, the court was not persuaded that the plaintiffs' experts had raised even a triable issue of fact on causation.<sup>159</sup> With respect to the plaintiffs claiming thyroid diseases, one expert estimated that at least some of the plaintiffs' radiation exposure resulted from atomic weapons testing conducted at a Nevada Test Site (NTS) between 1959 and 1970.<sup>160</sup> Other experts testified that "at least 5% of the radiation exposure for each [thyroid] Plaintiff came from Uranium" and also that "there is greater than a 10% likelihood [that a] Plaintiff's [nonthyroid] cancer was contributed to by the additional radiation exposure from Defendants' uranium operations."<sup>161</sup> The court also noted that "none of the 16 thyroid-disease Plaintiffs was exposed to more than 105 rads total from Uranium and NTS radiation," eleven of those sixteen suffered only hypothyroidism, and the primary expert's "report states that '[little] data are available on the occurrence of hypothyroidism in persons exposed to low or moderate doses of radiation (750 rads).'"<sup>162</sup>

Radiation is ubiquitous throughout the environment in air, water, food, and soil.<sup>163</sup> It has both natural and artificial sources.<sup>164</sup> Man-made sources of radiation include nuclear power generation and X-ray machines, as well as other "medical uses of radiation diagnosis or treatment."<sup>165</sup> Yet a large proportion of the average annual background radiation dose received by people results from environmental sources, most prominently radon gas emanations from rock and soil and natural radiation from cosmic rays.<sup>166</sup> According to the World Health Organization, "[B]ackground radiation levels vary due to geological differences," such that "[e]xposure in certain areas can be more than 200 times higher than the global average."<sup>167</sup> That people will continue to suffer from radiation damage is a seemingly intractable problem.

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157. *See id.* at 1247.

158. *Id.* at 1242–43, 1247.

159. *Id.* at 1245–47.

160. *Id.* at 1246.

161. *Id.* (second alteration in original) (internal quotation marks omitted).

162. *Id.* at 1247 n.7 (alteration in original).

163. *Ionizing Radiation, Health Effects and Protective Measures*, WORLD HEALTH ORG. (Nov. 2012), <http://www.who.int/mediacentre/factsheets/fs371/en/index.html>.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

Nevertheless, tort law has long found ways around problems posed by background causes in pollution cases.<sup>168</sup> In comment *f*, the Reporters offered a potentially helpful illustration for plaintiffs dealing with a confluence of environmental and human contaminants:

Jonathan raises salmon in a pond on his property. Due to an unusual rainfall, a chemical, potentially toxic to salmon, leaks into the pond from natural deposits some distance from Jonathan's property. However, the chemical concentration in the pond remains below the threshold that causes harm to salmon. Shelley and Mia, who engage in industrial operations near Jonathan's property, each negligently allow the escape of the same chemical from their operations. Shelley's and Mia's chemical is deposited in Jonathan's pond at the same time; each is sufficient with the existing contamination to raise the chemical concentration of the pond to a level that kills all of the salmon. Each of Shelley's and Mia's negligence is a factual cause of Jonathan's loss of salmon.<sup>169</sup>

For causal set theory, the illustration is intended to show that causal sets may contain common elements.<sup>170</sup> For potential polluters, including producers of artificial radiation, the illustration signals that background radiation should be included in set construction. In jurisdictions adopting the § 27 and comment *f* approach, then, a polluter who contributes a merely nominal amount could be considered a cause-in-fact of a plaintiff's harm if the plaintiff could prove her harm was not solely attributable to background causes.

Thus far, plaintiffs have not pleaded their cases in this way. In the only other pollution case applying § 27, and on substantially similar facts and claims as *June*, the Tenth Circuit again affirmed summary judgment in favor of a uranium milling facility in *Wilcox v. Homestake Mining Co.*<sup>171</sup> The plaintiffs alleged they suffered from liver, thyroid, and bladder cancers due to radiation exposure from the defendants' mill.<sup>172</sup> Despite expert

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168. See, e.g., *Warren v. Parkhurst*, 92 N.Y.S. 725 (Sup. Ct. 1904) (holding that equity grants relief against individual mill owners who each discharged into a stream nominal amounts of refuse which cumulatively harmed a downstream plaintiff), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906); see also Wright, *Causation in Tort Law*, *supra* note 31, at 1792 (“[I]n . . . pollution cases [like *Parkhurst*], the courts have allowed the plaintiff to recover from each defendant who contributed to the pollution that caused the injury, even though none of the defendants' individual contributions was either necessary or sufficient by itself for the occurrence of the injury.”).

169. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f, illus. 4 (2010).

170. See *id.* § 27 cmt. f (introducing illustration four with the proposition that “common elements in each of the sufficient causal sets do[] not prevent each of the sets from being a factual cause”).

171. 619 F.3d 1165 (10th Cir. 2010). The only significant factual difference with *June* is that in *Wilcox* there is no mention of any third causal candidate such as the NTS. See *id.* at 1169–70.

172. *Id.* at 1166, 1169–70.

testimony to the effect that “a medical expert could consider radiation exposures from the Homestake mill to be a substantial contribution” and further expert testimony that “exposure to ionizing radiations as a consequence of Defendants’ operations was a substantial factor contributing to each plaintiff developing cancer,” the court found the plaintiffs’ evidence “simply insufficient” for a causal set showing.<sup>173</sup> Therefore, the plaintiffs in both *June* and *Wilcox* lost at least partly for failure to prove that their injuries were not produced solely by natural causes. Had they made such a showing, the Tenth Circuit likely would have attributed cause-in-fact status to defendants contributing only trivial amounts of the radiological pollution to which the plaintiffs were exposed.<sup>174</sup> If this is in fact the case, unless the Tenth Circuit also adopts § 36’s scope of liability constraint, it risks imposing tort liability on exactly the type of negligent trivial contributor the *Restatement Third’s* Reporters hoped to absolve.

#### IV. Mutual Agency—The Causal Relevance of Intent

Regardless of whether Harriet’s conduct is merely negligent or something dirtier, the *Restatement Third’s* causal set framework gives courts authority to attribute factual causation to Harriet for individually insufficient, insubstantial, and unnecessary causal conduct.<sup>175</sup> But its method for attribution is merely aggregative, asking only whether Harriet’s conduct “overdetermines” harm when “combined” together with the conduct of others.<sup>176</sup> It seems unlikely that intelligent judges using the *Restatement Third’s* framework would struggle so mightily to attribute causation if cause-in-fact determinations were simply a matter of addition; the contributions of multiple actors either would or would not add up to a tort. Instead, the Dirty Harriet-type cases suggest that not all courts buy into comment *f*’s causal set theory, despite that these same courts sometimes impose liability on trivial, unnecessary causal contributors. Perhaps these courts simply err by failing to wholeheartedly endorse the *Restatement Third’s* position. Another plausible explanation, however, is that the Dirty Harriet-type cases locate causal relevance in a trivial contributor’s intent. To support this hypothesis, I introduce traditional concerted action doctrine, followed by an application of its principles to Dirty Harriet-type cases.

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173. See *id.* at 1169–70 (citing *June* and characterizing the plaintiffs’ causal set burden as an obligation to show that the defendants’ mill “alone or as a necessary part of a combination of different factors” was a but-for cause of the plaintiffs’ cancers).

174. See *June v. Union Carbide Corp.*, 577 F.3d 1234, 1242, 1245 (10th Cir. 2009) (explaining and choosing to apply § 27 and comment *f* in the absence of Colorado law to the contrary).

175. See *supra* notes 26–29 and accompanying text.

176. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 27 cmt. f (2010).



A. *Liability for Concerted Action*

One curious omission from the *Restatement Third's* causation framework is the Reporters' failure to include a theory of concerted action.<sup>177</sup> The *Restatement (Third) of Torts: Apportionment of Liability* addresses the application of comparative fault regimes to concerted action cases, but it concededly "does not address the rules regarding when concerted activity exists."<sup>178</sup> Importantly, however, none of the three installments thus far promulgated by the American Law Institute (ALI) displaces traditional rules of concerted action.<sup>179</sup> The *Restatement (Second) of Torts* § 876 stated its concerted action rules as follows:

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

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

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.<sup>180</sup>

Concerted action is therefore properly understood as a "unitization" theory, similar to but conceptually distinct from vicarious liability, such that multiple defendants who are not necessarily subject to full vicarious liability for one another's conduct may still be treated as one causal unit.<sup>181</sup>

The subsections of § 876 are themselves conceptually distinct. Subsection (a) relates to concerted action by *agreement*, sometimes referred

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177. One might have expected the *Restatement Third* to take up concerted action in its causation framework because concerted action is understood as a substitute for standard but-for causation in applicable cases. See ROBERTSON ET AL., *supra* note 7, at 127 (characterizing concerted action as a "limited-purpose substitute[] for the standard but-for approach" (emphasis omitted)).

178. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. § 15 cmt. a (2000).

179. The ALI has promulgated three installments of the *Restatement of Torts: Products Liability* (1998), *Apportionment of Liability* (2000), and *Liability for Physical and Emotional Harm* (2010). RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM intro. (2010). The Reporters for the latest installment indicate that, "[t]aken together, these three installments replace and supersede Divisions 2 and 3 of the Restatement Second of Torts." *Id.* The *Restatement Second's* treatment of concerted action, however, appeared in its Division 11 covering "Miscellaneous Rules." See RESTATEMENT (SECOND) OF TORTS § 876 (1979).

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

181. See Robertson, *supra* note 1, at 1011–12.

to as “conspiracy.”<sup>182</sup> “The agreement need not be expressed in words and may be implied” from the defendants’ conduct,<sup>183</sup> however mere “extensive parallel [tortious] conduct” is itself insufficient to establish an agreement, tacit or otherwise.<sup>184</sup> For instance, in the case of two motorists dangerously speeding abreast of one another down a public highway, one attempting to pass and the other blocking the pass, each driver is subject to liability to a third motorist struck and injured by one of the speeding vehicles.<sup>185</sup> Similarly, tacit-agreement-based concerted action may justify holding all participants in a drag race “equally liable for any injury resulting from such a race.”<sup>186</sup> The theory has been used to uphold civil liability against the live-in companion of a burglar who murdered a homeowner in the course of the burglary where the live-in companion neither planned nor knew of the killing but partook in the “illegal enterprise to acquire stolen property,” making the murder a “reasonably foreseeable consequence of the scheme.”<sup>187</sup> In one century-old case, *Warren v. Parkhurst*,<sup>188</sup> the court located a possible tacit agreement between twenty-six upstream-riparian mill owners who each discharged “merely nominal” amounts of pollution into a creek, thereby damaging the plaintiff’s downstream riparian property.<sup>189</sup> The court did not doubt that each mill owner would be liable “[i]f the [mill owners] had by agreement or concerted action united in fouling th[e] stream” and that a court of equity might exercise its discretion on the merits to “infer a unity of action, design, and understanding” so to find that “each defendant is deliberately acting with the others” in harming the plaintiff’s property.<sup>190</sup>

Subsections (b) and (c) correspond to concerted action via *substantial assistance*, sometimes referred to as “aiding and abetting.”<sup>191</sup> The authors of the *Restatement Second* explained that “[a]dvice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is

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182. See RESTATEMENT (SECOND) OF TORTS § 876 cmt. a (1979) (“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 *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983) (distinguishing “conspiracy” as “concerted action by agreement” from “aiding-abetting” as “concerted action by substantial assistance” (emphasis omitted)).

183. RESTATEMENT (SECOND) OF TORTS § 876 cmt. a (1979).

184. See, e.g., *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1074 (N.Y. 1989) (rejecting the application of the theory of concerted action in a suit against DES manufacturers).

185. RESTATEMENT (SECOND) OF TORTS § 876 cmt. a, illus. 2 (1979).

186. See *Clausen v. Carroll*, 684 N.E.2d 167, 171 (Ill. App. Ct. 1997).

187. *Halberstam*, 705 F.2d at 475, 478.

188. 92 N.Y.S. 725 (Sup. Ct. 1904), *aff’d*, 93 N.Y.S. 1009 (App. Div. 1905), *aff’d*, 78 N.E. 579 (N.Y. 1906).

189. *Id.* at 725, 727.

190. *Id.* at 727.

191. See RESTATEMENT (SECOND) OF TORTS § 876(b), (c) (1979); see also *Halberstam*, 705 F.2d at 477–78 (explaining that the aiding and abetting basis of liability corresponds to subsection (b) of § 876).

known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance.”<sup>192</sup> In practice, liability for aiding and abetting usually turns on how much encouragement is substantial,<sup>193</sup> and a defendant’s assistance “may be so slight that he is not liable for the act of the other.”<sup>194</sup> In assessing the substantiality of a defendant’s assistance, a court may consider “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.”<sup>195</sup> Under subsection (c) specifically, in a “large undertaking to which . . . many persons contribute, the contribution to the enterprise of one individual may be so small as not to constitute substantial assistance.”<sup>196</sup> Despite these limitations, courts applying a substantial-assistance, concerted action theory have held, for example, that a passenger in the driver’s vehicle may be jointly liable to a third party where the passenger verbally encourages the driver to exceed the posted speed limit and the driver thereby fatally injures a third party.<sup>197</sup> *Hainline*, discussed in the context of Judge Posner’s majority decision for the court in *Boim*, is another example; by procuring and supplying erasers for the other children to throw, Keel substantially encouraged the wrongful activity that resulted in injury to Hainline.<sup>198</sup>

#### B. Applying Concerted Action to Dirty Harriet Cases

For courts adopting the *Restatement Third’s* causation framework, § 36’s scope of liability answer to § 27 and comment *f*’s overinclusiveness problem could work to exculpate *de minimis* intentional tortfeasors in the same breath as *de minimis* negligent tortfeasors. The *Restatement Second*, however, had recognized that an actor’s reckless or intentional wrongdoing influences the causal question.<sup>199</sup> A court’s piecemeal adoption, unwitting misapplication, or willful brushoff of the *Restatement Third’s* causation framework might still be worse. Judge Posner’s *Boim* majority and Judge Garland’s *Kilburn* decision each cited the *Restatement Third* only en route

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

193. See *Halberstam*, 705 F.2d at 478.

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

195. *Id.*

196. *Id.* § 876 cmt. e.

197. *Sanke v. Bechina*, 576 N.E.2d 1212, 1213 (Ill. App. Ct. 1991).

198. See *supra* notes 61–64 and accompanying text.

199. Compare RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 36 cmt. b (2010) (stating that the § 36 exception applies to multiple causation cases where “the tortious conduct at issue constitutes a trivial contribution”), with RESTATEMENT (SECOND) OF TORTS § 501(2) & cmt. a (1965) (indicating that an actor’s reckless disregard of another’s safety “is a factor of importance . . . in determining whether the jury shall be permitted to find that the actor’s conduct bears a sufficient causal relation to the other’s harm”), and *id.* § 433 cmt. c (“The extent to which the intentional or reckless character of the other’s conduct is material in determining whether it is a cause of another’s harm is dealt with in § 501(2).”).

to substituting its cause-in-fact framework with relaxed standards inviting normative decision making.<sup>200</sup> On the other hand, the courts' insistence on individual necessity in *Owens I* and *II*, where Sudan's provision of safe harbor for terrorists lasted many years, would require a factfinder to reimagine a decade of history, necessarily inviting an immodest and unprincipled causal attribution.<sup>201</sup> Or, taking perhaps the worst course, a court may do like the district court in *Monzel* and invoke § 27 only to ignore its meaning entirely, electing instead to presume causation based on population-wide predictive data instead of requiring its proof with respect to each defendant individually.<sup>202</sup>

It should be immediately apparent, however, that concerted action is tailor-made for the Dirty Harriet-type cases. In the case of a mere money donation to a terrorist organization, such as that laying at the heart of the plaintiffs' 18 U.S.C. § 2333(a) suit in *Boim*, concerted action based on tacit agreement could do useful work. Judge Posner perhaps wrongly determined that, under the statute, giving money to Hamas is wrongful conduct under any circumstance.<sup>203</sup> Rather than drolly assuming the defendants' dangerous donation funded the shooting of David Boim because the terrorist-donee would necessarily have transferred funds between its "social services 'account'" and its "terrorism 'account,'"<sup>204</sup> concerted action would permit a causal inquiry that makes the donator's intent pivotal.<sup>205</sup> The *Boim* defendants would be akin to the companion of a burglar who murdered a homeowner in course of the burglary, if the *Boim* defendants similarly intended to participate in a tortious enterprise that made the murder a "foreseeable consequence" of the scheme.<sup>206</sup> Such a unitizing theory would have at least allowed the dissenting judges the opportunity they desired to consider whether the defendants intended their

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200. See *supra* subpart III(A); see also Robertson, *supra* note 1, at 1023 (agreeing with the argument that factual causation is properly a nonnormative inquiry (quoting Michael D. Green, *The Intersection of Factual Causation and Damages*, 55 DEPAUL L. REV. 671, 688 n.55 (2006))).

201. See *supra* subpart III(A); see also Robertson, *supra* note 10, at 1770 (stressing that the factfinder's "mental operation" performed during the counterfactual inquiry "must be careful, conservative, and modest").

202. See *supra* note 126 and accompanying text.

203. See *supra* notes 55–56 and accompanying text.

204. See *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (en banc) (assuming Hamas conflated its so-called social services and terrorist "accounts").

205. Cf. *Clausen v. Carroll*, 684 N.E.2d 167, 171–74 (Ill. App. Ct. 1997) (finding that all drag race participants may be held liable for injury caused by only one of them if they were engaged in joint tortious activity).

206. Compare *Boim*, 549 F.3d at 687–705 (finding liability for organizations donating money to terrorist groups that target Americans outside of the United States), with *Halberstam v. Welch*, 705 F.2d 472, 477–87 (D.C. Cir. 1983) (finding liability for the defendant-coconspirator of a burglar who, without the knowledge of the defendant, killed a third party during the course of a burglary).

donations to be used for humanitarian or terrorist purposes.<sup>207</sup> If a factfinder could attribute to the *Boim* defendants an ill, terroristic motive, then it would be reasonable for the court to uphold a factual causation finding on the basis of a tortious act (the donation) and a common design (for terrorist purposes).<sup>208</sup>

In a *Kilburn*- or *Owens*-like suit against foreign, sovereign, material supporters of terrorism falling under FSIA's state-sponsor exception, the causation showing required to strip the defendant-nation of its foreign sovereign immunity could readily be demonstrated as concerted action via substantial assistance.<sup>209</sup> If true, the allegations in *Owens I* that the Sudanese government provided al Qaeda and Hizbollah with shelter, security, and financial and logistical support including the movement of weapons through the country would be more than sufficient to meet § 876's test of substantiality.<sup>210</sup> The causal inquiry would turn again on whether the Sudanese government knew that al Qaeda and Hizbollah's "conduct constitute[d] a breach of duty"<sup>211</sup> to the plaintiffs, which it hardly could have failed to recognize.

Suits under 18 U.S.C. § 2259 for restitution to child pornography victims harmed "as a result of" continued exploitation by distribution or possession of their images could arguably fit under either a tacit agreement or substantial assistance form of concerted action. Where the defendant actively distributes the child-victim's images, the case against it could proceed analogously to the suit in *Hainline*; just like fetching erasers to be used as projectiles by a group of schoolroom tortfeasors suffices for factual causation, so too could fetching child pornographic images for the use of adult tortfeasors suffice to prove factual causation.<sup>212</sup> Though the concerted action case is harder to make where the defendant merely possesses the child-victim's images, a court willing to stretch tacit agreements as far as the court in *Parkhurst* might still infer a common design.<sup>213</sup> However, it is important to note that in *Parkhurst* the plaintiff sued *all* of the mill owners

207. See *supra* notes 73–77 and accompanying text.

208. See RESTATEMENT (SECOND) OF TORTS § 876(a) (1979).

209. See *id.* § 876(b); see also 28 U.S.C. § 1605A (2012) (lifting immunity in civil damages actions against foreign states for personal injury "caused by . . . the provision of material support or resources" for "an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking").

210. See *Owens I*, 412 F. Supp. 2d 99, 103 (D.D.C. 2006) (setting out the plaintiffs' complaint).

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

212. Compare *Monzel I*, 746 F. Supp. 2d 76, 78–79 (D.D.C. 2010) (sketching a case for liability against a defendant who distributed child pornography), with *Keel v. Hainline*, 331 P.2d 397, 400 (Okla. 1958) (sketching the case for liability against a defendant who merely retrieved erasers to be thrown by other students).

213. See *Warren v. Parkhurst*, 92 N.Y.S. 725, 727–28 (Sup. Ct. 1904) (permitting recovery against sawmill owners jointly on the basis of an implied tacit agreement for each mill's independent pollution of a stream), *aff'd*, 93 N.Y.S. 1009 (App. Div. 1905), *aff'd*, 78 N.E. 579 (N.Y. 1906).

who putatively damaged his riparian interest in the creek,<sup>214</sup> so a § 2259 suit against a mere possessor of child pornography might not successfully invoke a *Parkhurst* theory of deemed concerted action unless the suit was brought against several such possessors of the victim's images.

Importantly, no concerted action theory could plausibly be used to hold liable the defendant in either *June* or *Wilcox* because both cases involved hazardous conduct by only one entity.<sup>215</sup> In fact, because concerted action is a unitization-based rather than an aggregation-based substitute for traditional but-for causation, it is arguably less susceptible to abuse than the causal set theory endorsed by § 27 and comment *f* and adopted by the Tenth Circuit.<sup>216</sup> That is, in a suit based in tortious pollution, concerted action would at least force the plaintiff to identify multiple potential tortfeasors rather than asserting a claim against just one potential tortfeasor and attempting to use vague expert testimony to cover up weak cause-in-fact proof.<sup>217</sup>

## V. Conclusion

Comparing Professor Robertson's Harriet hypothetical to my Dirty Harriet variant, I suggest that Harriet's intent may be relevant to evaluating her causal input. Whether or not her intent should have any causal relevance, courts may be more willing to attribute cause-in-fact to the insignificant, insubstantial, and unnecessary input of a potential tortfeasor whose conduct is particularly malicious. However, courts deciding Dirty Harriet-type cases have not fully or faithfully adopted the *Restatement Third's* causation framework, possibly because they do not yet believe comment *f's* causal set theory. Instead judges invoke the *Restatement Third's* causation framework inaccurately to insist upon individual necessity or as a smokescreen to cover up normative attributions of ordinarily descriptive cause-in-fact. Moreover, even if courts did faithfully apply the *Restatement's* causation framework, they might exculpate Harriet and Dirty Harriet alike under § 36's trivial-contributor exception.

Courts could avoid these pitfalls by viewing Dirty Harriet-type cases through the lens of concerted action. That is not to say courts should replace the *Restatement Third's* framework entirely, but merely that they could use concerted action as a unitization framework supplementing the *Restatement's* aggregation framework. Asking whether Dirty Harriet's

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214. *See id.* at 725.

215. *See supra* notes 156–57, 171 and accompanying text.

216. *See* Robertson, *supra* note 1, at 1021–22 (arguing against the notion that § 27 would be an improvement on *Warren's* treatment of multiple-polluter cases).

217. *See, e.g., Wilcox v. Homstake Mining Co.*, 619 F.3d 1165, 1169–70 (10th Cir. 2010) (shrouding its cause-in-fact evidence in ambiguous expert testimony couched in “substantial factor” terms); *June v. Union Carbide Corp.*, 577 F.3d 1234, 1245–47 (10th Cir. 2009) (same).

individually insufficient, insubstantial, and unnecessary contribution was part of a culpable concerted unit would allow judges and factfinders more flexibility to consider whether Dirty Harriet's mental state justifies liability above that imposed for Harriet's equivalent negligent conduct. Framing Dirty Harriet problems in this fashion would ultimately lend coherence to the courts' liability determinations without sacrificing the *Restatement Third's* causation framework.

—*John Morris*