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Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2

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Summary

Virtually every federal criminal statute has a hidden feature; primary offenders and even their most casual accomplices face equal punishment. This results from 18 U.S.C. 2, which visits the same consequences on anyone who orders or assists in the commission of a federal crime.

Aiding and abetting means assisting in the commission of someone else's crime. Section 2(a) demands that the defendant embrace the crime of another and consciously do something to contribute to its success. An accomplice must know the offense is afoot if he is to intentionally contribute to its success. While a completed offense is a prerequisite to conviction for aiding and abetting, the hands-on offender need be neither named nor convicted.

On occasion, an accomplice will escape liability, either by judicial construction or administrative grace. This happens most often when there is a perceived culpability gap between accomplice and primary offender. Such accomplices are usually victims, customers, or subordinates of a primary offender.

Section 2(b)(willfully causing a crime) applies to defendants who work through either witting or unwitting intermediaries, through the guilty or the innocent. Whether the intermediary is a subordinate or an undercover government agent, he may be well aware that his conduct constitutes an element of the underlying offense. On the other hand, whether the intermediary is a dupe or a facilitating governmental official, §2(b) applies even if the intermediary is unaware of the nature of his conduct. Section 2(a) requires two guilty parties, a primary offender and an accomplice. Section 2(b) permits prosecution when there is only one guilty party, a "causing" individual and an innocent agent. Both subsections, however, require a completed offense.

Federal courts sometimes mention, but rarely apply, a withdrawal defense comparable to one available in conspiracy cases. Proponents of a general withdrawal defense in §2 cases may find support in recent Supreme Court dicta. In *Rosemond*, the Court explained that an accomplice must know of the pending substantive offense in order to be shown to have embraced its commission. It did so in a manner suggesting that an accomplice might be able to withdraw and escape liability prior to the commission of the substantive offense, even if he had contributed to the crime's ultimate success.

There is no general civil aiding and abetting statute. Aiding and abetting a violation of a federal criminal law does not trigger civil liability unless Congress has said so in so many words.

This report is available in an abridged version as CRS Report R43770, *Aiding, Abetting, and the Like: An Abbreviated Overview of 18 U.S.C. 2*, by Charles Doyle.

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Introduction

Virtually every federal criminal statute has a hidden feature; helpers and hands-on offenders face the same punishment. This results from 18 U.S.C. 2, which visits the same consequences on anyone who orders or assists in the commission of a federal crime. This secondary liability is much like that which accompanies conspiracy, and the rationale is the same for both: society fears the crimes of several more than the crimes of one.¹

Background

At common law as a general rule, felonies were punishable by death. An individual might be guilty of a felony as a principal in the first degree, a principal in the second degree, an accessory before the fact, or an accessory after the fact.² A principal in the first degree was he who by his own hand committed the crime.³ A principle in the second degree was “he who [was] present, aiding, and abetting the fact to be done.”⁴ An accessory before the fact was “one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime.”⁵ An accessory after the fact was one who, “knowing a felony to have been committed, receive[d], relieve[d], comfort[ed], or assist[ed] the felon.”⁶ The common law erected several procedural barriers for the benefit of accessories in felony cases,⁷ apparently to shield them from the death penalty.⁸

When the first Congress convened, it outlawed as capital offenses piracy and related murders and robberies.⁹ At the same time, it merged the concepts of principal in the second degree (those who aided and abetted) and accessory before the fact (those who commanded and counseled) in piracy cases, condemning to death anyone who “knowingly and wittingly aid[ed] and assist[ed], procure[d], commanded[ed], counsel[ed] or advise[d] any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the seas.”¹⁰

¹ *Iannelli v. United States*, 420 U.S. 770, 778 (1975)(here and hereafter internal citations and quotation marks are omitted) (“This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement – partnership in crime – presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality”).

² 4 WILLIAM BLACKSTONE, COMMENTARIES 34-37 (1769).

³ *Id.* at 34.

⁴ *Id.* (transliteration supplied).

⁵ *Id.* at 36 (transliteration supplied).

⁶ *Id.* at 37 (transliteration supplied).

⁷ *Id.* at 39-40.

⁸ *Standefer v. United States*, 447 U.S. 10, 15 (1980)(here and elsewhere internal citations and quotation marks have been omitted); 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW §13.1(d) (2d ed. 2003).

⁹ 1 Stat. 113-14 (1790).

¹⁰ *Id.* at 114. For several decades thereafter Congress would occasionally enact an accessories provision with respect to a specific crime, see e.g., 16 Stat. 254 (1870)(accessories to false documentation in immigration cases); 16 Stat. 7 (1869)(aiding or abetting embezzlement). The common law distinction between principals and accessories in felony cases may have continued in place, however; see e.g., *United States v. Gooding*, 12 Wheat. (25 U.S.) 460, 476 (1827)(“The fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the (continued...)”).

The Revised Statutes, the first official codification of federal law, carried the piracy provision forward with slight modifications.¹¹ It remained for the 1909 codification of federal criminal law to extend coverage beyond a few individual offenses like piracy to the general coverage now found in 18 U.S.C. 2(a).¹² The commission, established in 1897 to recommend a proposed United States Penal Code,¹³ urged from the beginning the elimination of the common law distinctions between principals and accessories before the fact.¹⁴ Congress acted on its recommendation in 1909.¹⁵

Congress carried the 1909 provision forward in its 1948 recodification. It added §2(b), however, to “remove[] all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.”¹⁶ Three years later, it made the final adjustments to §2 as part of a general, housekeeping cleanup of the U.S. Code.¹⁷

Section 2(a): Aiding and Abetting

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Section 2(a), the aiding and abetting subsection, is more frequently prosecuted than §2(b), the causes subsection. Although its elements are variously described, it is often said that, “[i]n order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate

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common law or by statute. The present is the case of a misdemeanour, and the doctrine there, cannot apply to it; for in cases of misdemeanours, all those who are concerned in aiding and abetting, as in perpetrating the act, are principals”).

¹¹ REV. STAT. §5323 (1878)(“Every person who knowingly aids, abets, causes, procures, commands, or counsels another to commit any murder, robbery, or other piracy upon the seas, is an accessory before the fact to such piracies, and every such person being thereof convicted shall suffer death”).

¹² Section 332, 35 STAT. 1152 (1909)(“Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal”).

¹³ 30 Stat. 58 (1897); see also, 31 Stat. 1181 (1901).

¹⁴ *Penal Code of the United States: Report of the Commission to Revise and Codify the Criminal and Penal Laws of the United States*, S.Doc. 68, Pt.2, 57th Cong., 1st Sess. XXXI, 129 (1901)(“In accordance with the policy of recent legislation those whose relations to a crime would be that of accessories before the fact according to the common law are made principles[.]. . . Sec. 452. Whoever is concerned with the commission of any offense defined in this title, whether he directly commits the act constituting the offense, or aids and abets in its commission, and whether present or absent, and whoever directly or indirectly, counsels, commands, induces, or procures another to commit any such offense is a principal”).

¹⁵ *Standefer v. United States*, 447 U.S. 10, 19 (1980)(“The Commission’s recommendation was adopted without change. The House and Senate Committee Reports, in identical language, stated its intended effect: ‘The committee has deemed it wise to make those who are accessories before the fact at common law principal offenders. . . .’”), quoting, S. Rep. No. 60-10, at 13 (1908) and H.R. Rep. No. 60-2 (1908). The text of 1909 provision is quoted in footnote 12, above.

¹⁶ 18 U.S.C. 2, HISTORICAL AND STATUTORY NOTES, *Revision Notes and Legislative Reports, 1948 Acts*.

¹⁷ P.L. 52-248, §17b, 65 Stat. 710, 717 (1951), amending 18 U.S.C. 2(b) to read: “Whoever *willfully* causes an act to be done which if directly performed by him *or another* would be an offense against the United States, is *punishable as a principal*.” (Amending language in italics).

himself with the venture, that he participate in it as in something that he wishes to bring about, [and] that he seek by his action to make it succeed.”¹⁸

Aiding and abetting means assisting in the commission of someone else’s crime.¹⁹ Section 2(a) demands that a defendant embrace the crime of another and consciously do something to contribute to its success.²⁰ Thus, the defendant must know that the offense is afoot before it occurs if he is to be convicted of aiding and abetting.²¹

However, it is not necessary that the defendant must aid in every aspect of the substantive offense. At common law:

where several acts constitute[d] together one crime, if each [was] separately performed by a different individual[,] . . . all [were] principals as to the whole. . . . Indeed, . . . a person’s involvement in the crime could be not merely partial but minimal too: [t]he quantity [of assistance was] immaterial, so long as the accomplice did something to aid the crime. . . . That principal continues to govern aiding and abetting law under §2.”²²

Yet, neither knowledge without assistance nor assistance without intent are enough.²³ Moreover, §2(a) requires that someone else commit a federal offense, because “[a]iding and abetting is not

¹⁸ *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949); see also, *United States v. Shorty*, 741 F.3d 961, 669-70 (9th Cir. 2013) (“[T]he elements necessary for an aiding and abetting conviction are: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense”); *United States v. Rufai*, 732 F.3d 1175, 1190 (10th Cir. 2013) (“To aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, and that he seek by his action to make it succeed”); *United States v. Davis*, 717 F.3d 28, 33 (1st Cir. 2013) (“Aiding and abetting requires proof that: (1) the substantive offense was actually committed; (2) the defendant assisted in the commission of that crime or caused it to be committed; and (3) the defendant intended to assist in the commission of that crime or to caused it be committed”).

¹⁹ “Aiding and abetting” has now come to mean “assisting.”

²⁰ *Rosemond v. United States*, 134 S.Ct. 1240, 1245 (2014), quoting, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994) (“[T]hose who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime”).

²¹ *Rosemond v. United States*, 134 S.Ct. at 1249 (“So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme’s commission”); *United States v. Goldtooth*, 754 F.3d 763, 768 (9th Cir. 2014) (“To aid and abet a robbery, however, Appellants must have had foreknowledge that the robbery was to occur”); *United States v. Garcia*, 752 F.3d 382, 389 n.6 (4th Cir. 2014) (“Participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the result and intent to bring about that result”).

²² *Rosemond v. United States*, 134 S.Ct. at 1246; *United States v. Lyons*, 740 F.3d 702, 715 (1st Cir. 2014) (“An aider and abettor is punishable as a principal if, first, someone else actually committed the offense and, second, the aider and abettor became associated with the endeavor and took part in it intending to ensure its success. The central requirement of the second element is a showing that the defendant consciously shared the principal’s knowledge of the underlying criminal act and intended to help the principal. . . . A culpable aider and abettor need not perform the subject offense, be present when it is performed, or be aware of the details of its execution”).

²³ *United States v. Rufai*, 732 F.3d 1175, 1190 (10th Cir. 2013) (“Liability as an aider and abettor is based on the act of intentionally counseling, aiding, or assisting another in the commission of a crime. One need not participate in an important aspect of a crime to be liable as an aider and abettor; participation of relatively light moment is sufficient. Every mere words or gestures of encouragement constitute affirmative acts capable of rendering one liable under this theory. There is no need for actual communication between the aider and abettor and the principal or for the aider and abettor to know by whom the crime is actually perpetrated. Nevertheless, the Government must make some showing of intent to further the criminal venture. A defendant may not stumble into aiding and abetting liability by inadvertently helping another in a criminal scheme unknown to the defendant. Even presence at the scene of the crime or knowledge (continued...)”).

itself a federal offense, but merely describes the way in which a defendant's conduct resulted in the violation of a particular law."²⁴ In *Standefer*, the Supreme Court rejected the petitioner's contention that "he could not be convicted of aiding and abetting a principal, Niederberger, when that principal had been acquitted of the charged offense."²⁵ That view still prevails. A completed offense is a prerequisite to conviction for aiding and abetting, but the hands-on offender need be neither named nor convicted.²⁶

As a general rule, the defendant's aiding and abetting must come before or at the time of the offense.²⁷ Assistance given after the crime has occurred is a separate, less severely punished, offense – acting as an accessory after the fact.²⁸

Exceptions

Whether by prosecutorial discretion or judicial pronouncement,²⁹ accomplices sometimes void the application of federal principles of secondary criminal liability which usually govern conspiracy

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that a crime is being committed is insufficient. To be convicted of aiding and abetting a defendant just share in the intent to commit the underlying offense"); *United States v. Rosalez*, 711 F.3d 1194, 1205 (10th Cir. 2013) ("To aid and abet another to commit a crime . . . [t]here must be some showing of intent to further the criminal venture. Mere presence at the scene or knowledge alone that a crime is being committed is insufficient. A defendant must share in the intent to commit the underlying offense").

²⁴ *United States v. Barefoot*, 754 F.3d 226, 239 (4th Cir. 2014); *United States v. Shorty*, 741 F.3d 961, 969-70 (9th Cir. 2013); *United States v. Rufai*, 732 F.3d 1175, 1190 (10th Cir. 2013).

²⁵ *Standefer v. United States*, 447 U.S. 10, 13-4 (1980)

²⁶ *United States v. Litwok*, 678 F.3d 208, 213 n.1 (2d Cir. 2012) ("The Government never clearly identified whom Litwok aided and abetted in this fraud. [Yet,][t]o show a violation of 18 U.S.C. 2 it is not necessary to identify any principal at all, provided the proof shows that the underlying crime was committed by someone"); *United States v. Mullins*, 613 F.3d 1273, 1290 (10th Cir. 2010) ("It is not even essential that the identity of the principal be established. The prosecution only need prove that the offense has been committed"); see also, *United States v. Catalan-Roman*, 585 F.3d 453, 473 (1st Cir. 2009); *United States v. Sutcliffe*, 505 F.3d 944, 959-60 (9th Cir. 2007).

²⁷ *United States v. Figueroa-Caragena*, 612 F.3d 69, 73-4 (1st Cir. 2010) ("The basic legal premise of her argument – that she cannot be convicted of aiding and abetting a completed crime – is sound. . . . A person cannot be found guilty of aiding and abetting a crime that already has been committed"); see also, *United States v. Ledezma*, 26 F.3d 636, 642 (6th Cir. 1994). There is an escape exception to the general rule, although its precise scope is somewhat uncertain. Escape usually occurs after the offense has been committed. At common law, however, robbery consisted of forceful taking and carrying away the personal property of another from his person. 4 BLACKSTONE, COMMENTARIES 230, 241 (1769) (larceny is taking and carrying away the property of another; robbery is larceny by forcible taking property from the victim's person). The federal bank robbery statute carries forward this notion when it outlaws "taking and carrying away" a bank's money, 18 U.S.C. 2113(b). Thus in a sense aiding another to escape, that is to "carry away" the proceeds of a robbery, is aiding and abetting before the crime is over. A number of courts have concluded that one who assist a bank robber to escape may be charged with aiding and abetting, see e.g., *United States v. James*, 998 F.2d 74, 80 (2d Cir. 1993) (citing cases from other circuits for the proposition that "one who assists in the escape phase of a bank robbery is and aider and abettor of that robbery, and not an accessory after the fact"). Some have applied the exception to escapes from other robberies, see, *United States v. Davis*, 750 F.3d 1186, 1194 (10th Cir. 2014) (Hartz, J.) (concurring and citing cases for the proposition) ("We have consistently held that the escape is part of the robbery. Indeed, we refer to the 'escape phase' of the bank robbery. . . . There is no doubt that one who assists an escape should be charged under 18 U.S.C. 2 [aiding and abetting] rather than 18 U.S.C. 3 [accessory after the fact] "). At least one court understood the exception to encompass escape generally, *United States v. Taylor*, 322 F.3d 1209, 1212 (9th Cir. 2003) ("We have held, however, that the escape phase of a crime is still part of the commission of the crime. . . . Here, Taylor assisted in the escape of Waggoner, the offender. As a result, Taylor was found guilty of aiding and abetting; Taylor is an offender punishable as a principal to the murder").

²⁸ 18 U.S.C. 3.

²⁹ Judicial action is reflected in reported case law. The decision to forgo a prosecution ordinarily is not. Nevertheless, (continued...)

as well as aiding and abetting cases.³⁰ It happens most often when there is a substantial culpability gap between the accomplice or co-conspirator and the primary offender. The cases ordinarily involve one of three types of accomplices or co-conspirators: victims, customers, and subordinates.³¹

“Victims” include “persons who pay extortion, blackmail, or ransom monies.”³² Not every victim qualifies for the exception. Some do. Some do not. Culpability makes a difference.³³ For instance, the Hobbs Act outlaws extortion by public officials.³⁴ Yet, the erstwhile victim who is the moving party or a willing participant in a scheme to corrupt a public official is likely to be convicted and sentenced either for bribery or as an accomplice to extortion.³⁵

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relative culpability that plays an important role in the charging decision, U.S. ATTORNEYS’ MANUAL, §9-27.230 [B][4] (“Although the prosecutor has sufficient evidence of guilt, it is nevertheless appropriate for him/her to give consideration to the degree of the person’s culpability in connection with the offenses, both in the abstract and in comparison with any others involved in the offense. If for example, the person was a relatively minor participant in a criminal enterprise conducted by other . . . and no other circumstances require prosecution, the prosecutor might reasonably conclude that some course other than prosecution would be appropriate”).

³⁰ Conspirators, like aiders and abettors, can be held liable for crimes actually committed by others under the *Pinkerton* doctrine. The *Pinkerton* doctrine “renders all co-conspirators criminally liable for reasonably foreseeable overt acts committed by others in furtherance of the conspiracy,” *United States v. Gadson*, 763 F.3d 1189, 1214 (9th Cir. 2014), citing, *Pinkerton v. United States*, 328 U.S. 640 (1946); see also, *United States v. Newman*, 755 F.3d 545, 546 (7th Cir. 2014); *United States v. Blackman*, 746 F.3d 137, 141 (4th Cir. 2014).

³¹ The First Circuit in *Southard* offered a slightly different classification scheme: victims, specially protected individuals, and minor parties in an offense requiring group participation, *United States v. Southard*, 700 F.2d 1, 19-20 (1st Cir. 1983) (“The first exception is that the victim of a crime may not be indicted as an aider or abettor even if his conduct significantly assisted in the commission of the offense. . . . The except exception embraces criminal statutes enacted to protect a certain group of persons thought to be in need of special protection. . . . The final exception to accomplice liability upon which appellant relies occurs when the crime is so defined that participation by another is necessary to its commission”). However they are arranged, the cases often fit within more than one category.

³² *Id.* at 19.

³³ E.g., *United States v. Brock*, 501 F.3d 762, 700 (6th Cir. 2007) (“The cases all suggest that perpetrators of extortion schemes may be treated as Hobbs Act conspirators or aiders and abettors, but victims may not be”), citing in accord, *United States v. Cornier-Ortiz*, 361 F.3d 29 (1st Cir. 2004); *United States v. Spitzer*, 800 F.2d 1267 (4th Cir. 1986); and *United States v. Wright*, 797 F.2d 245 (5th Cir. 1986).

³⁴ 18 U.S.C. 1951 (“(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion . . . shall be fined under this title or imprisoned not more than twenty years, or both. (b) As used in this section . . . (2) The term ‘extortion’ means the obtaining of property from another, with his consent . . . color of official right . . .”).

³⁵ E.g., *United States v. Spitzer*, 800 F.2d 1267, 1276-277 (4th Cir. 1986) (“When an individual protected by such legislation exhibits conduct more active than mere acquiescence, however, he or she may depart the realm of a victim and may unquestionable be subject to conviction for aiding and abetting and conspiracy. . . . The degree of activity necessary for a purported victim of extortion to be a perpetrator of it, so that in reality he is not a victim but a victimizer subject to aiding and abetting and conspiracy charges, is of no little significance”).

It is perhaps with this in mind, that the corrupted foreign official is sometimes considered the victim, or at least someone beyond secondary criminal liability, under the Foreign Corrupt Practices Act, which outlaws the corruption of foreign officials on behalf of U.S. corporate entities, *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991) (“Given that Congress included virtually every possible person connected to the payments except foreign officials, it is only logical to conclude that Congress affirmatively chose to exempt this small case of persons from prosecution. Most likely Congress made this choice because U.S. businesses were perceived to be the aggressors, and the efforts expended in resolving the diplomatic, jurisdictional, and enforcement difficulties that would arise upon the prosecution of foreign officials was not worth the minimal deterrent value of such prosecutions”).

“Customers” who have escaped conviction as co-conspirators or accomplices include drinkers, bettors, johns, and drug addicts. Examples from the Supreme Court include *United States v. Farrar* and *Rewis v. United States*. In *Farrar*, the Court held a speakeasy’s customers could not be prosecuted as aiders and abettors of the establishment’s unlawful sale of liquor.³⁶ In *Rewis*, it reached the same conclusion for the customers of a gambling den. *Rewis* had been convicted of interstate travel in aid of unlawful gambling, following a jury charge that included an aiding and abetting instruction. The Court concluded that Congress had not intended mere bettors to be covered.³⁷ It later indicated that same could be said of the federal gambling business statute, 18 U.S.C. 1955, when it observed that “§1955 proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor.”³⁸ The same logic may cover a prostitute’s customer.³⁹

The federal Controlled Substances Act (CSA) reinforces the preexisting view that a drug trafficker’s customers cannot be prosecuted co-conspirators or aiders and abettors in his trafficking. Prior to the Act, federal law punished the trafficker but not his customer.⁴⁰ Since enactment of the CSA, federal law punishes the trafficker severely for possession with intent to distribute, but it punishes the customer for simple possession, ordinarily as a misdemeanor.⁴¹

“Subordinates” have more difficulty avoiding secondary liability. Nevertheless, in *Gebardi*, the Supreme Court held that a woman who agreed to be transported in interstate commerce for immoral purposes could not be charged with conspiracy to violate the Mann Act, which outlawed interstate transportation of a woman for immoral purposes.⁴² Later lower federal courts continued

³⁶ The lower court had quashed the indictment charging *Farrar* on the ground that an ordinary purchaser of liquor was not covered by the section of the Prohibition Act under which he was charged. The indictment did not charge him with aiding and abetting the seller’s violation. The court indicated, however, that if it had, still no crime could be charged because other than the sale the customer had done nothing to aid or abet the seller’s enterprise, *United States v. Farrar*, 38 F.2d 515, 517 (D.Mass. 1930). The Supreme Court affirmed without mentioning aiding and abetting, but noting that “in the absence of an express statutory provision to the contrary, the purchaser of intoxicating liquor, the sale of which was prohibited, was guilty of no offense,” *United States v. Farrar*, 281 U.S. 624, 634 (1930); see also, *United States v. Colon*, 549 F.3d 565, 571 (7th Cir. 2008) (Without more, the street buyer of a controlled substance is not guilty of aiding and abetting his seller’s drug trafficking).

³⁷ *Rewis v. United States*, 401 U.S. 808, 811 (1971) (“We agree with the Court of Appeals that it cannot be said, with certainty sufficient to justify a criminal conviction, that Congress intended that interstate travel by mere customers of a gambling establishment should violate the Travel Act”).

³⁸ *Sanabria v. United States*, 437 U.S. 54, 71 n.26 (1978).

³⁹ E.g., *United States v. Southard*, 700 F.2d 1, 20 (1st Cir. 1983) (“[O]ne having intercourse with a prostitute is not liable for aiding and abetting prostitution”).

⁴⁰ E.g., *Nigro v. United States*, 117 F.2d 624, 629 (8th Cir. 1941) (“[T]he omission of Congress to make the act of an addict in purchasing narcotics to satisfy his craving an offense is evidence of an affirmative legislative policy to leave the purchaser unpunished It would contravene that policy to hold the immunity which the Anti-Narcotic Act itself confers is taken away by the conspiracy statute. We hold that it does not”).

⁴¹ E.g., *United States v. Swiderski*, 546 F.2d 445, 451 (2d Cir. 1977) (“[U]nder current law, the agent who delivers drugs to a principal is liable as a distributor under 21 U.S.C. 841, while his principal, who receives the drug for personal use, is subject to a charge of simple possession under 21 U.S.C. 844. . . . We must reject the government’s suggestion at oral argument that in such a case the principal would nevertheless be liable as an aider and abettor of the agent’s distribution to him, since this would totally undermine the statutory scheme. Its effect would be to write out of the Act, the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his own possession”).

⁴² *Gebardi v. United States*, 287 U.S. 112, 123 (1932) (“[W]e perceive in the failure of the Mann Act to condemn the woman’s participation in those transportations, which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished. . . . On the evidence before us the woman petitioner has not violated the Mann Act, and we hold, is not guilty of a conspiracy to do so. As there is no proof that the man conspired (continued...)”).

to honor the *Gebardi* construction of the Mann Act, but limited it to cases in which the prostitute did no more than acquiesce in her interstate transportation.⁴³ Moreover, Occupational Safety and Health Act's (OSHA) provisions do not allow employees of an OSHA offender to be prosecuted as aiders and abettors.⁴⁴ On the other hand, no such benefit accrues to subordinates supervised by offenders of the federal gambling business statute, which condemns those who own or supervise an unlawful gambling enterprise which involves direction of five or more individuals.⁴⁵ There is no consensus over how subordinates of a drug kingpin may be treated.⁴⁶

Section 2(b): Causing the Offense

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Although the words “commands, induces or procures” in §2(a) would seem to capture crimes committed through an agent, as the 1948 report explained the language of §2(b) leaves no doubt. Section 2(b) applies to defendants who work through either witting or unwitting intermediaries, through the guilty or the innocent. Whether the intermediary is a subordinate or an undercover

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with anyone else to bring about the transportation, the convictions of both petitioners must be reversed”).

⁴³ *United States v. Footman*, 215 F.3d 145, 151-52 (1st Cir. 2000); *United States v. Holland*, 381 F.3d 80, 84-5 & n.5 (2d Cir. 2004) (“*Footman* upheld the defendant pimp’s conspiracy conviction on the finding that the woman in question was not a pawn but a conspirator because she had ‘acted on the defendant’s behalf as transporter of the women, arranger of the details of the business, occasional money handler, and enforcer’”). Here too however, the courts often described the qualifying categories as something of a blend, e.g., *United States v. Daniels*, 653 F.3d 399, 413 (6th Cir. 2011) (“When a crime inherently requires two to tango, but the statute is not intended to punish the victim of the crime – as is the case in prostitution or the manufacturer of pornography – federal courts regularly apply a common law exception to conspiracy or accomplice liability”).

⁴⁴ The OSHA criminal statute condemns “any employer who willfully violates [an OSHA] standard, rule, or order,” 29 U.S.C. 666(e). “The Seventh Circuit held that Congress did not intend to subject employees to aiding and abetting liability under OSHA. We are in general agreement with the Seventh Circuit’s reasoning and holding in *Doig*,” *United States v. Shear*, 962 F.2d 488, 490 (5th Cir. 1992), citing, *United States v. Doig*, 950 F.2d 411, 412 (7th Cir. 1991).

⁴⁵ *United States v. Hill*, 55 F.3d at 1205-206 (“Arden’s and Sparks’ status as employees does not protect them from aider and abettor liability”); as noted earlier, the Supreme Court observed that the federal gambling business statute “proscribes any degree of participation in an illegal gambling business, except participation as a mere bettor,” *Sanabria v. United States*, 437 U.S. 54, 71 n.26 (1978). The question of whether the same can be said of Wire Act, which outlaws the use of wire communications in relation to gambling, may be less clear, *United States v. Southard*, 700 U.S. 1, 20 n.24 (1st Cir. 1983) (“The district court held that the statute did not prohibit the activities of ‘mere bettors.’ We take no position on this ruling except to point out that the legislative history is ambiguous on this point at best”).

⁴⁶ A Second Circuit opinion found both employees and other subordinates of a drug kingpin beyond the reach of §2, *United States v. Amen*, 831 F.2d 373, 381 (2d Cir. 1987) (“While the Government concedes that employees of a CCE [a drug kingpin’s Continuing Criminal Enterprise] cannot be punished for aiding and abetting the head of the enterprise, it insists that non-employees who knowingly provide direct assistance to the head of the organization in supervising and operating the criminal enterprise can be so punished. *Paradiso* asserts, however, that because section 848 applies only to a person in charge of a CCE, one cannot incur liability for aiding and abetting such a person. We agree with *Paradiso*. Congress enacted section . . . to target ringleaders of large-scale narcotics operations. This carefully crafted prohibited aimed at a special problem was designed to reach the top brass in the drug rings, not the lieutenants and foot soldiers. When Congress assigns guilty to only one type of participant in a transaction, it intends to leave the others unpunished for the offense. Here Congress defined the offense as leadership of the enterprise, necessarily excluding those who do not lead”).

The judges of the Seventh Circuit sitting en banc did not agree. They could not overcome the substantial obstacle to recognition of any aid and abetting exception, *United States v. Pino-Perez*, 870 F.2d 1230, 1237 (7th Cir. 1989) (“[W]e think that both the aider and abettor statute and the kingpin statute mean what they say”).

government agent, he may be well aware that his conduct constitutes an element of the underlying offense.⁴⁷ On the other hand, whether the intermediary is a dupe or a facilitating governmental official, §2(b) also applies even if he is unaware of the nature of his conduct.⁴⁸

When the intermediary is an innocent party, no one but the “causing” individual need commit the underlying offense.⁴⁹ Yet there must be an underlying crime. Section 2(b) imposes no liability unless the actions of the defendant and his intermediary, taken together, constitute an offense.⁵⁰

Congress gave little indication of its purpose when it changed “causes” to “willfully causes,” in 1951. The amendment originated in Senate Judiciary Committee, after the House had passed its version of the bill.⁵¹ The Committee Report explained why it changed “is a principal” to “is punishable as a principal,” but said nothing about why it added the word “willfully.”⁵² There has been some speculation that the word “willfully” was added to address an observation by Judge Learned Hand. Judge Hand had observed that §2(a) had a mental element (“knowing”), but that §2(b) had no comparable element.⁵³ In any event and although it seems far from certain, it appears that the courts understand “willfully” to mean a dual form of “intentionally.” They believe that an individual “willfully” causes an offense when he intends the commission of conduct that constitutes a crime and then intentionally uses someone else to commit it.⁵⁴ An

⁴⁷ E.g., *United States v. Cho*, 713 F.3d 716, 720 (2d Cir. 2013)(“Cho could be found guilty under 18 U.S.C. §2(b) even if she acted through someone who was entirely innocent of the crimes charged in the indictment, even if she acted through a government agent”); *United States v. Daniels*, 653 F.3d 399, 408 n.3 (6th Cir. 2011)(Pimp was liable under §2(b) for a prostitute’s creation of child pornography at his direction).

⁴⁸ E.g., *United States v. Lee*, 602 F.3d 974, 976 (9th Cir. 2010)(reversing a district court determination that §2(b) did not apply in the case of identity fraud prosecutions under 18 U.S.C. 1028)(“[I]t is irrelevant whether the government agent who actually produced Lee’s license intended to commit identification fraud or was merely an innocent pawn. . . . Because the defendant specifically intended for the DMV to issue a fraudulent identification card and license, it does not matter whether the clerk who actually produced the license also had any intent to commit the crime”); *United States v. Armstrong*, 550 F.3d 382, 383 (5th Cir. 2008)(“. . . §2(b) does not require shared criminal intent; only the defendant charged need have criminal intent, and the individual whom defendant caused to perform the criminal act may be innocent”).

⁴⁹ *United States v. Cohen*, 260 F.3d 68, 77 (2d Cir. 2001)(“Section 2(a) requires proof that someone other than the defendant committed the underlying crime. Instead, the district court charged the jury under §2(b), which requires only that the defendant willfully cause another person to commit an act which would have been a crime had the defendant committed it himself. Section 2(b), unlike §2(a), does not require proof that someone else committed a crime”); *United States v. Ezeta*, 752 F.3d 1182, 1186 n.3 (9th Cir. 2014)(“[T]he existence of a knowing principal is immaterial to liability under 18 U.S.C. §2(b) and . . . the government need not prove that someone other than the defendant was guilty of the substantive crime”).

⁵⁰ *United States v. Kuok*, 671 F.3d 931, 941 (9th Cir. 2012)(The defendant could not be convicted for commanding an attempt to cause unlawful exportation when attempted unlawful exportation was a crime, but an attempted causing unlawful exportation was not).

⁵¹ Compare, H.R. Rep. No. 82-462, at 6, 27 (1951), with S. Rep. No. 82-1020, at 7-8, 26-7 (1951)

⁵² *Id.* at 7 (“This section is intended to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted”).

⁵³ 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL 154 n.2 (1970)(“Subsection 2(b) was added to the complicity section by the 1958 revisers. Upon the basis of criticism by Judge Learned Hand in *United States v. Chiarella*, 184 F.2d 903, 909-10 (1950), . . . the words ‘willfully’ and ‘or another’ were inserted”); see also, G. Robert Blakey & Keven P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive Accessory, Aiding, Abetting and Conspiracy Liability Under RICO*, 33 AMERICAN CRIMINAL LAW REVIEW 1410-410 (1996)(“The course of judicial decisions on the meaning of ‘willfully’ does not run straight. Ironically, Congress added ‘willfully’ to §2(b) after criticism from Judge Learned Hand that no state of mind was expressed on the face of the statute”).

⁵⁴ See e.g., *United States v. Gumbs*, 283 F.3d 128, 135 (3d Cir. 2002)(“[I]n a prosecution under §2(b), the government (continued...)”).

individual may incur liability under §2(b) even if he is unaware that the underlying conduct is in fact a crime.⁵⁵

Related Matters

Withdrawal Defense

Federal courts sometimes mention a withdrawal defense comparable to one available in conspiracy cases.⁵⁶ In conspiracy, withdrawal is not a defense for conspiracy itself but only for the crimes committed in foreseeable furtherance of the scheme after the defendant's withdrawal.⁵⁷ "To establish withdrawal from a conspiracy, the defendant has the burden to demonstrate that he took affirmative action by making a clean breast to the authorities or by communicating his withdrawal in a manner reasonably calculated to reach his coconspirators."⁵⁸

(...continued)

must show the following mens rea elements: (1) that the defendant had the mens rea required by the underlying statute; and (2) that the defendant willfully caused the innocent intermediary to commit the act prohibited by the underlying statute. See *United States v. Gabriel*, 125 F.3d 89, 101 (2d Cir. 1997) ("The most natural interpretation of section 2(b) is that a defendant with the mental state necessary to violate the underlying section is guilty of violating that section if he intentionally causes another to commit the requisite act; see also *United States v. Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999) [parallel citations omitted] ("The natural reading of §§2 and 1001 [relating to false statements] is this: the government may show mens rea simply by proof (1) that the defendant knew that the statements to be made were false (the means rea for the underlying offense – §1001) and (2) that the defendant intentionally cause such statements to be made by another (the additional mens rea for §2(b))."); see also, *United States v. Hornaday*, 392 F.3d 1306, 1313 (11th Cir. 2011) ("Section 2(b)'s language fits, and is obviously designed for, the situation in which a defendant with the requisite intent to commit a crime gets someone else to act in a way necessary to bring about the crime, even if that other person is innocent. Put another way, the defendant supplies the intent and may be another element or two while getting someone else to supply at one additional element that is necessary to commission of the crime"); *United States v. McKnight*, 799 F.2d 443, 446 (8th Cir. 1986) ("Participation is wilful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done").

⁵⁵ *United States v. Wright*, 363 F.3d 237, 242-43 (3d Cir. 2004); *United States v. Whab*, 355 F.3d 155, 161 (2d Cir. 2004) ("[T]he government is not required to prove a knowing violation of the law under section 2(b)"); *United States v. Hollis*, 971 F.2d 1441, 1451 (10th Cir. 1992); but see, *United States v. Curran*, 20 F.3d 560, 569 (3d Cir. 1994) ("The pertinent case law convinces us that a proper charge for willfulness in cases brought under sections 2(b) and 1001 . . . requires the prosecution to prove that [the] defendant . . . knew his conduct was unlawful").

⁵⁶ *United States v. Burks*, 678 F.3d 1190, 1195 (10th Cir. 2012); *United States v. George*, 658 F.3d 706, 710 (7th Cir. 2011) ("But his present argument is in fact precisely that weak, because he did not effectively withdraw by failing to participate on the day of the robbery. See [*United States v. Garrett*, 720 F.2d 705, 714 (D.C. Cir. 1983)] (explaining that withdrawal for aiding and abetting purposes mirrors withdrawal in the context of conspiracy. . . ."); *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) ("Withdrawal is traditionally a defense to crimes of complicity: conspiracy and aiding and abetting").

⁵⁷ *Smith v. United States*, 133 S.Ct. 714, 719 (2013) ("Withdrawal terminates the defendant's liability for post-withdrawal acts of his co-conspirators, but he remains guilty of conspiracy"); *United States v. Ortega*, 750 F.3d 1020, 1024 (8th Cir. 2014) ("A defendant is liable for the reasonably foreseeable actions taken by coconspirators in furtherance of the conspiracy unless he affirmatively withdraws from the conspiracy"); *United States v. Salazar*, 751 F.3d 326, 331 (5th Cir. 2014) ("To be timely, the withdrawal must precede the commission of an overt act. In essence, the government must not be able to show a completed conspiracy. For purposes of absolving liability for the conspiracy charge, withdrawal is impossible once an overt act has been committed. If the conspiracy does not even require the commission of an overt act, a defendant can never timely withdraw and can never negate liability as to the conspiracy charge").

⁵⁸ *United States v. Ortega*, 750 F.3d at 1024; *United States v. Morgan*, 748 F.3d 1024, 1037 (10th Cir. 2014); *United States v. Stewart*, 744 F.3d 17, 24 (1st Cir. 2014).

In aiding and abetting, the withdrawal defense in federal cases may be more limited.⁵⁹ Certainly, an individual faces no liability under §2(a) if the underlying offense goes uncommitted as a consequence of the withdrawal of his necessary assistance. Aiding and abetting needs a completed offense.⁶⁰ The question is more difficult in cases where the crime blooms in spite of an abettor’s abandonment. “[I]t is unsettled if a defendant can withdraw from aiding and abetting a crime. Other courts have reached varying results when considering the applicability of the withdrawal defense to the federal accomplice liability statute.”⁶¹

Proponents of a general withdrawal defense may claim support from recent dicta in *Rosemond*. Rosemond had been convicted of two crimes, distributing marijuana (21 U.S.C. 841) and discharging a firearm during a drug trafficking offense (18 U.S.C. 924(c)).⁶² The Tenth Circuit had upheld an alternative aiding and abetting instruction concerning the firearm charge.⁶³ The Supreme Court explained that an accomplice must know of the substantive offense beforehand in order to be shown to have embraced its commission. It did so in a manner suggesting an accomplice might be able to withdraw and escape liability prior to the commission of the substantive offense, even if he had contributed to the crime’s ultimate success:

For all that to be true, though, the §924(c) defendant’s knowledge of a firearm must be advance knowledge – or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate’s design to carry a gun, he can attempt to alter that plan or, if unsuccessful, *withdraw from the enterprise*; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an **armed** offense. *But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime.* And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun. As even the Government concedes, an unarmed accomplice cannot aid and abet a §924(c) violation unless he has “foreknowledge that his confederate will commit the offense with a firearm.” For the reasons just given, we think that means knowledge at a time the accomplice can do something with it—most notably, *opt to walk away*. [Of course, if a defendant continues to

⁵⁹ Although state approaches considerably, most recognize some form of the withdrawal defense, e.g., COLO. REV. STAT. §18-1-604(2) (“It shall be an affirmative defense to a charge under 18-1-603 [complicity] if, prior to the commission of the offense, the defendant terminated his effort to promote or facilitate its commission and either gave timely warning to law enforcement authorities or gave timely warning to the intended victim”); 720 ILL. COMP. STATS. ANN. §5/5-2 (“A person is not so accountable . . . if: . . . (3) before the commission of the offense, he or she terminates his or her effort to promote or facilitate that commission and does one of the following: (i) wholly deprives his or her prior efforts of effectiveness in that commission; (ii) gives timely warning to the proper law enforcement authorities; or (iii) otherwise makes proper effort to prevent the commission of the offense”); ME. REV. STAT. ANN. tit. 17-A, §57[5] (“Unless otherwise expressly provided, a person is not an accomplice in a crime committed by another person if: . . . C. the person terminates complicity prior to the commission of the crime by: (1) Informing the person’s accomplice that the person has abandoned the criminal activity; and (2) Leaving the scene of the prospective crime, if the person is present thereat”); see generally, 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, §13.3(d) (2d ed. 2003).

⁶⁰ *United States v. Barefoot*, 754 F.3d 226, 239 (4th Cir. 2014); *United States v. Shorty*, 741 F.3d 961, 969-70 (9th Cir. 2013); *United States v. Rufai*, 732 F.3d 1175, 1190 (10th Cir. 2013).

⁶¹ *United States v. Burks*, 678 F.3d 1190, 1195 (10th Cir. 2012) (“The Seventh Circuit, for example, has held that withdrawal was not a valid defense for aiding and abetting mail and securities fraud. *United States v. Read*, 658 F.2d 1225, 1239-40 (7th Cir. 1980). . . . The Second Circuit has also held that withdrawal is not a valid defense to aiding and abetting, at least for some crimes. See *United States v. Arocena*, 778 F.2d 943, 948 n.3 (2d Cir. 1985). . . . In contrast, the Ninth Circuit has assumed – albeit in dicta – that a defendant can withdraw from being an accomplice. *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992)”).

⁶² *United States v. Rosemond*, 695 F.3d 1151, 1153 (10th Cir. 2012), vac’d and rem’d, 134 S.Ct. 1240 (214).

⁶³ *Id.* at 1154-156.

participate in a crime after a gun was displayed or used by a confederate, the jury can permissibly infer from his failure to object or withdraw that he had such knowledge . . .]. 134 S.Ct. 1249-250 (pertinent parts of footnote 9 of the opinion in brackets)(emphasis added in italics; emphasis of the Court in bold).

* * *

The Government, for its part, thinks we take too strict a view of when a defendant charged with abetting a §924(c) violation must acquire that knowledge. As noted above, the Government recognizes that the accused accomplice must have “foreknowledge” of a gun’s presence. But the Government views that standard as met whenever the accomplice, having learned of the firearm, continues any act of assisting the drug transaction. According to the Government, the jury should convict such a defendant even if he became aware of the gun only *after he realistically could have opted out of the crime*.

But that approach, we think, would diminish too far the requirement that a defendant in a §924(c) prosecution must intend to further an **armed** drug deal. Assume, for example, that an accomplice agrees to participate in a drug sale on the express condition that no one brings a gun to the place of exchange. But just as the parties are making the trade, the accomplice notices that one of his confederates has a (poorly) concealed firearm in his jacket. The Government would convict the accomplice of aiding and abetting a §924(c) offense if he assists in completing the deal without incident, *rather than running away or otherwise aborting the sale*. But behaving as the Government suggests might increase the risk of gun violence—to the accomplice himself, other participants, or bystanders; and conversely, finishing the sale might be the best or only way to avoid that danger. In such a circumstance, a jury is entitled to find that the defendant intended only a drug sale—that he never intended to facilitate, and so does not bear responsibility for, a drug deal carried out with a gun. A defendant manifests that greater intent, and incurs the greater liability of §924(c), when he chooses to participate in a drug transaction knowing it will involve a firearm; but he makes no such choice when that knowledge comes too late for him to be reasonably able to act upon it. [Contrary to the dissent’s view, nothing in this holding changes the way the defenses of duress and necessity operate. . . . Our holding is grounded in the distinctive intent standard for aiding and abetting someone else’s act. . . . For the reasons just given, we think that intent standard cannot be satisfied if a defendant charged with aiding and abetting a §924(c) offense learns of a gun only after he can realistically walk away . . .]. 134 S.Ct. 1251 (pertinent parts of footnote 10 of the opinion in brackets)(emphasis added in italics; emphasis of the Court in bold).

Civil Liability

“Congress has not enacted a general civil aiding and abetting statute. . . . Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.”⁶⁴ With this in mind, the courts have concluded, for example, that aiders and abettors incur no civil liability as a consequence of their violations of the Anti-Terrorism Act;⁶⁵ the Electronic Communications Privacy Act;⁶⁶ the Stored Communications Act;⁶⁷ or RICO.⁶⁸

⁶⁴ *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994).

⁶⁵ *Rothstein v. UBS AG*, 708 F.3d 82, 97-8 (2d Cir. 2013); *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 689-90 (7th Cir. 2008)(en banc).

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⁶⁶ *Kirch v. Embarq Management Co.*, 702 F.3d 1245, 1246-247 (10th Cir. 2012).

⁶⁷ *Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1006 (9th Cir. 2006).

⁶⁸ *Pennsylvania Ass'n of Edwards Heirs v. Righenour*, 235 F.3d 839, 840 (3d Cir. 2000).