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Accomplices, Aiding and 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 is the work of 18 U.S.C. § 2, which visits the same consequences on anyone who orders or intentionally 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. On other occasions, an accomplice will be charged as a co-conspirator because the facts that will support accomplice liability will ordinarily support conspirator liability and conspiracy is a separate offense.

Section 2(b) (willfully causing a crime) applies to defendants who work through either witting or unwitting intermediaries, through the guilty or the innocent. Section 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. Defendants are more likely to succeed by attacking the elements for liability, that is, arguing that they did not knowingly intend to commit the underlying offense or that no underlying offense ever occurred.

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.

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Introduction

Virtually every federal criminal statute has a hidden feature; helpers and hands-on offenders face the same punishment.[1] This is the work of 18 U.S.C. § 2, which treats hands-on offenders and their accomplices (aiders and abettors) alike. This accomplice liability is much like that which accompanies conspiracy,[2] and the rationale is the same for both: society fears the crimes of several more than the crimes of one.[3] Aiding and abetting, unlike conspiracy, is not a separate crime; instead it serves as an alternative means of incurring criminal liability for the underlying offense.[4]

Background

At English common law, felonies were punishable by death in most instances. 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.[5] A principal in the first degree was he who by his own hand committed the crime.[6] A principal in the second degree was "he who [was] present, aiding, and abetting the fact to be done."[7] 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."[8] 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."[9] The common law erected several procedural barriers for the benefit of accessories in felony cases,[10] apparently to shield them from the death penalty.[11]

When the first Congress convened, it outlawed as capital offenses piracy and related murders and robberies.[12] 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],

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[1] This report is available in an abridged version as CRS Report R43770, *Accomplices, Aiding and Abetting, and the Like: An Abbreviated Overview of 18 U.S.C. § 2*, by Charles Doyle, without the footnotes, attributions, and citations to authority that appear here.

[2] United States v. Scott, 892 F.3d 791, 799 (5th Cir. 2018) ("Typically, the same evidence will support both a conspiracy and an aiding and abetting conviction.").

[3] Iannelli v. United States, 420 U.S. 770, 778 (1975) (here and hereafter internal citations and quotation marks are generally 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.").

[4] United States v. Diaz, 941 F.3d 729, 742 (5th Cir. 2019); United States v. Williams, 941 F.3d 234, 237 (6th Cir. 2019).

[5] 4 WILLIAM BLACKSTONE, COMMENTARIES 34-37 (1769).

[6] *Id*. at 34.

[7] *Id*. (transliteration supplied).

[8] *Id*. at 36 (transliteration supplied).

[9] *Id.* at 37 (transliteration supplied).

[10] *Id.* at 39-40.

[11] Standefer v. United States, 447 U.S. 10, 15 (1980); 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW §13.1(d) (2d ed. 2003).

[12] 1 Stat. 113-14 (1790).

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."[13]

The Revised Statutes, the first official codification of federal law, carried the piracy provision forward with slight modifications.[14] 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).[15] The commission, established in 1897 to recommend a proposed United States Penal Code,[16] urged from the beginning the elimination of the common law distinctions between principals and accessories before the fact.[17] Congress acted on its recommendation in 1909.[18]

Congress carried the 1909 provision forward in its 1948 recodification. It added Section 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."[19] Three years later, it made the final adjustments to Section 2 as part of a general, housekeeping cleanup of the U.S. Code.[20]

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.[21]

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[13] *Id*. at 114. For several decades thereafter Congress would occasionally enact an accessories provision with respect to a specific crime, *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 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").

[14] 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.").

[15] 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.").

[16] 30 Stat. 58 (1897); see also, 31 Stat. 1181 (1901).

[17] *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 principals[:]. . . . 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.").

[18] 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 15, above.

[19] 18 U.S.C. § 2, *Historical and Statutory Notes.*

[20] 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).

[21] 18 U.S.C. § 2(a).

Conviction under Section 2(a) requires that a defendant embrace the crime of another and consciously do something to contribute to its success. 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 [1] that a defendant in some sort associate himself with the venture, [2] that he participate in it as in something that he wishes to bring about, [3]that he seek by his action to make it succeed,"[22] and [4] that someone commits the offense.[23] Satisfying only one of these elements is not enough. Thus, presence at the commission of a crime or close association with the perpetrator does not constitute aiding and abetting, without more.[24] Yet, a defendant's level of participation may be relatively minimal and need not advance every element of the crime.[25] As for seeking to make it succeed, the defendant must intend the commission of the underlying offense, and that intent requires that he be aware beforehand of the scope of the offense in order to permit him to disassociate himself.[26] Thus, the defendant must know that the offense is afoot before it occurs if he is to be convicted of aiding and abetting.[27]

In *Standefer v. United States*, 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

[22] Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); United States v. Tanco-Baez, 942 F.3d 7, 27 (1st Cir. 2019); United States v. Daniels, 930 F.3d 393, 403 (5th Cir. 2019); United States v. Brown, 929 F.3d 1030, 1039 (8th Cir. 2019); *see also* United States v. Sineneng-Smith, 910 F.3d 461, 482 (9th Cir. 2018) ("[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.").

[23] United States v. Freed, 921 F.3d 716, 721 (7th Cir. 2019) ("Additionally, it is axiomatic that one cannot aid and abet a crime unless a crime was actually committed."); United States v. Martinez, 921 F.3d 452, 472 (5th Cir. 2019) ('"Nonetheless, the Government must first prove that someone committed the underlying substantive offense.' Otherwise 'there was no crime … to have abetted.'"); *Sineneng-Smith*, 910 F.3d at 482.

[24] United States v. Tanco-Baez, 942 F.3d 7, 27 (1st Cir. 2019) ("Mere association with the principal, or mere presence at the scheme of a crime, even when combined with knowledge that a crime will be committed, is not sufficient to establish aiding and abetting liability."); United States v. Deiter, 890 F.3d 1203, 1214 (10th 2018); United States v. Seabrooks, 839 F.3d 1326, 1333 (11th Cir. 2016).

[25] Rosemond v. United States, 572 U.S. 65, 72-3 (2014) ("The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part—even though not every part—of as criminal venture. … [W]here 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: As almost every court of appeals has held, a defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense. In proscribing aiding and abetting, Congress used language that comprehends all assistance rendered by words, acts, encouragement, support, or presence—even if that aid relates to only one (or some) of a crime's phases or elements."); United States v. De Nieto, 922 F.3d 669, 677-78 (5th Cir. 2019) ("The statute's purview is broad, comprehending all assistance rendered by words, acts, encouragement, support, presence … even if that aid relates to only one (or some) of a crime's phases or elements."); United States v. Daniel, 887 F.3d 350, 356 (8th Cir. 2018) ("For a person to be convicted as an aider and abettor he must have facilitated any part—even though not every part—of a criminal venture."); *but see* United States v. Scott, 892 F.3d 791, 798-99 (5th Cir. 2018) ("But a defendant need not commit each element of the substantive offense, so long as he aided and abetted each element.").

[26] *Rosemond*, 572 U.S. at 77-8 ("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 … [W]e think that means knowledge at a time the accomplice can do something with it—most notably, opt to walk away.").

[27] *Id.*; *Tanco-Baez*, 942 F.3d at 27; United States v. Jackson, 913 F.3d 789, 792-93 (5th Cir. 2019); United States v. Daniel, 887 F.3d 350, 356 (8th Cir. 2018); 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").

been acquitted of the charged offense."[28] 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.[29]

As a general rule, the defendant's aiding and abetting must come before or at the time of the offense.[30] The general rule, however, does not always apply when the defendant's assistance straddles elements of the offense. At common law, robbery consisted of forceful taking the personal property of another from his person *and* carrying it away.[31] The federal bank robbery statute carries forward this notion when it outlaws "taking and carrying away" a bank's money.[32] Thus in a sense aiding another to escape, that is to "carry away" the proceeds of a robbery, might be considered aiding and abetting before the crime is over. A number of courts have concluded that one who assists a bank robber to escape may be charged with aiding and abetting.[33]

Elsewhere, assistance given after the crime has occurred is ordinarily treated as a separate, less severely punished, offense—acting as an accessory after the fact.[34] Conviction requires the government to "demonstrate (1) the commission of an underlying offense against the United States; (2) the defendant's knowledge of that offense; and (3) assistance by the defendant in order to prevent the apprehension, trial, or punishment for the offender."[35] A defendant cannot be convicted as an accessory before the fact and an accessory after the fact.[36]

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[28] Standefer v. United States, 447 U.S. 10, 13-14 (1980).

[29] United States v. Bowens, 907 F.3d 347, 351 (5th Cir. 2018); 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.").

[30] United States v. Figueroa-Caragena, 612 F.3d 69, 73-74 (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."); United States v. Hamilton, 334 F.3d 170, 180 (2d Cir. 2003); United States v. Ledezma, 26 F.3d 636, 642 (6th Cir. 1994).

[31] 4 WILLIAM 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).

[32] 18 U.S.C. § 2113(b).

[33] United States v. Lasseque, 806 F.3d 618, 623 (1st Cir. 2015); 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."). 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.").

[34] 18 U.S.C. § 3 ("Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (notwithstanding section 3571) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years.").

[35] United States v. White, 771 F.3d 225, 232-33 (4th Cir. 2014); United States v. Gianakos, 415 F.3d 912, 919 n.4 (8th Cir. 2005); United States v. De La Rosa, 171 F.3d 215, 221 (5th Cir. 1999).

[36] *Taylor*, 322 F.3d at 1212.

Exceptions

Whether by prosecutorial discretion or judicial pronouncement,[37] accomplices sometimes void the application of federal principles of secondary criminal liability which usually govern conspiracy and aiding and abetting cases.[38] It happens most often when there is a substantial culpability gap between the accomplice or co-conspirator and the primary offender. The cases frequently involve one of three types of accomplices or co-conspirators: victims, customers, or subordinates.[39]

"Victims" include "persons who pay extortion, blackmail, or ransom monies."[40] Not every victim qualifies for the exception. Some do. Some do not. Culpability makes a difference.[41] For instance, the Hobbs Act outlaws extortion by public officials.[42] Victims at the mercy of a corrupt public official might not be charged. 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.[43]

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[37] Judicial action is reflected in reported case law. The decision to forgo a prosecution ordinarily is not. Nevertheless, relative culpability that plays an important role in the charging decision. U.S. DEPT. OF JUSTICE, JUSTICE MANUAL JM 9-27.230 (2018).

[38] 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); *see also* Pinkerton v. United States, 328 U.S. 640 (1946); United States v. Smith-Kilpatrick, 942 F.3d 734, 745 (6th Cir. 2019); United States v. Mathis, 932 F.3d 242, 262 (4th Cir. 2019); United States v. Martinez, 921 F.3d 452, 472 (5th Cir. 2019). Recent commentators have been somewhat critical of these exceptions. *E.g.*, Jack C. Smith, *Grappling With* Gebardi*: Paring Back an Overgrown Exception to Conspiracy Lability*, 69 DUKE L. J. 465 (2019); Shu-en Wee, *The Gebardi "Principles,"* 117 COLUM. L. REV. 115 (2017).

[39] 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"); *See also* United States v. Pino-Perez, 870 F.2d 1230, 1231-32 (7th Cir. 1989). However they are arranged, the cases often fit within more than one category.

[40] *Southard*, 700 F.2d at 19.

[41] *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. Spitler, 800 F.2d 1267 (4th Cir. 1986); and United States v. Wright, 797 F.2d 245 (5th Cir. 1986)).

[42] 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 . . .").

[43] *E.g.*, *Spitler*, 800 F.2d at 1276-77 ("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

"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.[44] 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.[45] It later indicated that the 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."[46] Comparable logic may cover a prostitute's customer also.[47]

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.[48] Since enactment of the CSA, federal law punishes the trafficker severely for possession with intent to distribute, but it punishes the customer for simply possession, ordinarily as a misdemeanor.[49]

"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.[50] Later lower federal courts continued

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officials was not worth the minimal deterrent value of such prosecutions.").

[44] 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 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.).

[45] 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.").

[46] Sanabria v. United States, 437 U.S. 54, 71 n.26 (1978).

[47] *E.g.*, United States v. Southard, 700 F.2d1, 20 (1st Cir. 1983) ("[O]ne having intercourse with a prostitute is not liable for aiding and abetting prostitution."). Johns, however, are covered under the commercial sex trafficking provision. 18 U.S.C. § 1591 ("Whoever knowingly … patronizes … a person knowing … that means of force … will be used to cause the person to engage in commercial sex …").

[48] *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.").

[49] *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 write out of the Act, the offense of simple possession, since under such a theory every drug abuser would be liable for aiding abetting the distribution which led to his own possession.").

[50] 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

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.[51] Moreover, Occupational Safety and Health Act's (OSHA) provisions do not allow employees of an OSHA offender to be prosecuted as aiders and abettors.[52] 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.[53] There is no consensus over how subordinates of a drug kingpin may be treated.[54]

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.[55]

The words "commands, induces or procures" in Section 2(a) would seem to capture crimes committed through an intermediary. Congress enacted Section 2(b), however, to make it clear

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

[51] 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 coconspirator 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 describe 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.").

[52] The OSHA criminal statute condemns "any employer who willfully violates [an OSHA] standard, rule, or order," 29 U.S.C. 666(e). United States v. Shear, 962 F.2d 488, 490 (5th Cir. 1992) ("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 Doig, 950 F.2d 411, 412 (7th Cir. 1991).

[53] United States v. Hill, 55 F.3d 1197, 1205-206 (6th Cir. 1997) ("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.").

[54] The Second Circuit found both employees and other subordinates of a drug kingpin beyond the reach of Section 2 in 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 knowing 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.").

[55] 18 U.S.C. § 2(b).

that the section applies to defendants who work through either culpable or innocent intermediaries.[56] And the courts have construed Section 2(b) to apply whether a defendant works through culpable or innocent intermediaries.[57] When the intermediary is an innocent party, no one but the "causing" individual need be charged the underlying offense.[58] 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.[59]

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.[60] 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."[61] There has been some speculation that the word "willfully" was added to address an observation by Judge Learned Hand. Judge Hand had observed that Section 2(a) had a mental element ("knowing"), but that Section 2(b) had no comparable element.[62] In any event, it appears that the courts understand "willfully" to be part of dual form of required intent. The individual must purposefully cause

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[56] H.R. Rep. No. 80-304, at A5 (1947) (reprinted as *Historical and Statutory Notes* following 18 U.S.C. § 2) ("[The section] removes 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."). *E.g.*, United States v. Singh, 924 F.3d 1030, 1050 (9th Cir. 2019) ("Section 2(b) is intended to impose criminal liability on one who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged."); 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) (A pimp was liable under Section 2(b) for a prostitute's creation of child pornography at his direction.).

[57] *E.g.*, United States v. Lee, 602 F.3d 974, 976 (9th Cir. 2010) (reversing a district court determination that Section 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").

[58] 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.").

[59] United States v. Freed, 921 F.3d 716, 721 (7th Cir. 2019) ("[I]t is axiomatic that one cannot aid and abet a crime unless a crime was actually committed.").

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

[61] *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").

[62] 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 AM. CRIM. L. REV. 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.").

another to commit a necessary element of the offense and the individual must do so with the intent necessary for commission of the underlying offense.[63] An individual may incur liability under Section 2(b) even if he is unaware that the underlying conduct is in fact a crime, unless the underlying offenses requires guilty knowledge.[64]

Related Matters

Withdrawal Defense

Federal courts sometimes mention an aid-and-abetting withdrawal defense comparable to one available in conspiracy cases.[65] In conspiracy, withdrawal is not a defense for conspiracy itself,

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[63] *E.g.*, United States v. Gumbs, 283 F.3d 128, 135 (3d Cir. 2002) ("[I]n a prosecution under § 2(b), the government 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. Sampson, 898 F.3d 287, 304 (2d Cir. 2018) ("Under our case law, § 2(b) aiding and abetting offenses consist of both an *actus reus* and a *mens rea*. The *actus reus* is that the defendant caused another person to commit the requisite act. … The *mens rea* is that the defendant acted with the mental state necessary to commit the crime he aided and abetted."); 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 maybe 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 willful 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.").

[64] 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) ("Where the law imposes criminal liability for certain conduct, a requirement that the conduct be 'willful' generally means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, the must suppose that he is breaking the law."); 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.").

[65] 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").

Although state approaches vary considerably, most recognize some form of the withdrawal defense, *e.g.*, COLO. REV. STAT. §18-1-604(2) (2018) ("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 (2016) ("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] (2006) ("Unless otherwise expressly provided, a person is not an accomplice in a crime committed by

but it may be a defense for liability for co-conspirator offenses committed in foreseeable furtherance of the scheme after the defendant's withdrawal.[66] To establish withdrawal from a conspiracy, the defendant has the burden to show "that he took affirmative action by reporting to the authorities or by communicating his intentions to the co-conspirators."[67]

In aiding and abetting, the withdrawal defense in federal cases is at most less well established that its conspiracy counterpart. "[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."[68]

An aiding and abetting defense is more likely to take the form of an attack on one of the elements for liability. For example, an individual charged with an uncompleted offense has a perfect defense, because aiding and abetting liability requires a completed offense.[69] By the same token, an individual who unwittingly assists the commission of the crime of another faces no liability under Section 2, because an accomplice incurs liability only if he knowingly embraces the crime of another as something he wishes to succeed.[70] As for seeking to make it succeed, the defendant must intend the commission of the underlying offense, and that intent requires that he be aware beforehand of the scope of the offense in order to permit him to disassociate himself.[71] Thus, the defendant must know that the offense is afoot before it occurs if he is to be convicted of aiding and abetting.[72]

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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 & 2014-2015 Supp.).

[66] Smith v. United States, 568 U.S. 106, 111 (2013) ("Withdrawal terminates the defendant's liability for post-withdrawal acts of his co-conspirators, but he remains guilty of conspiracy"); United States v. Bergman, 852 F.3d 1046, 1051 (11th Cir. 2017) ("A conspirator who effectively withdraws is no longer a member of the conspiracy and is not bound by the subsequent accts of the conspirators."); United States v. Romans, 823 F.3d 299, 320 (5th Cir. 2016).

[67] United States v. Patton, 927 F.3d 1087, 1096 (10th Cir. 2019); United States v. Sitzmann, 893 F.3d 811, 825 (D.C. Cir. 2018); United States v. Shephard, 892 F.3d 666, 673 (4th Cir. 2018).

[68] 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).").

[69] United States v. Freed, 921 F.3d 716, 721 (7th Cir. 2019) ("Additionally, it is axiomatic that one cannot aid and abet a crime unless a crime was actually committed."); United States v. Martinez, 921 F.3d 452, 472 (5th Cir. 2019) ("Nonetheless, the Government must first prove that someone committed the underlying substantive offense. Otherwise there was no crime … to have abetted."); United States v. Sineneng-Smith, 910 F.3d 461, 482 (9th Cir. 2018).

[70] Rosemond v. United States, 572 U.S. 65, 76 (2014) ("To aid and abet a crime, a defendant must not just in some sort associated himself with the venture, but also participate in it as in something that he wishes to bring about and seek by his action to make it succeed."); United States v. Diaz, 941 F.3d 729, 741 (5th Cir. 2019) ("To be convicted under an aiding and abetting theory, the defendant must share in the principal's criminal intent …"); United States v. Rodriguez-Torres, 939 F.3d 16, 43 (1st Cir. 2019) ("It is enough to say that a person is liable for aiding and abetting if he consciously shared the principal's knowledge of the underlying crime and intended to help the principal accomplish it.").

[71] *Rosemond*, 572 U.S. at 77-8 (2014) ("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 … [W]e think that means knowledge at a time the accomplice can do something with it—most notably, opt to walk away.").

[72] *Id.*; *Tanco-Baez*, 942 F.3d at 27; United States v. Jackson, 913 F.3d 789, 792-93 (5th Cir. 2019); United States v. Daniel, 887 F.3d 350, 356 (8th Cir. 2018); 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.").

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."[73] 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;[74] the Electronic Communications Privacy Act;[75] the Stored Communications Act;[76] RICO;[77] or the Trafficking Victims Protection Act.[78]

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[73] Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 182 (1994).

[74] 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); Abecassis v. Wyatt, 7 F. Supp. 3d 668, 676-77 (S.D. Tex. 2014).

[75] Kirch v. Embarq Management Co., 702 F.3d 1245, 1246-247 (10th Cir. 2012); *In re* Carrier IQ, Inc., 78 F. Supp. 3d 1051, 1089-90 (N.D. Cal. 2015).

[76] Freeman v. DirecTV, Inc., 457 F.3d 1001, 1006 (9th Cir. 2006); Vista Marketing, LLC v. Burkett, 999 F. Supp. 2d 1294, 1296 (M.D. Fla. 2014).

[77] Pennsylvania Ass'n of Edwards Heirs v. Rightenour, 235 F.3d 839, 840 (3d Cir. 2000); *In re* Chrysler-Dodge-Jeep Ecodiesel Marketing, 295 F. Supp. 3d 927. 984-86 (N.D. Cal. 2018).

[78] Noble v. Weinstein, 335 F. Supp. 3d 504, 525 (S.D.N.Y. 2018).