



COMPLICITY: ELEMENTS OF THE CRIME

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I. Introduction.

This paper has been written in part in response to the survey questionnaire on complicity issued by the Fafo Institute for Applied International Studies on September 15, 2006 and in part in order to supply authority for certain statements regarding U.S. law that will appear in the forthcoming law review article to appear in the *George Washington International Law Review*.

In the U.S., complicity (aiding and abetting) is a mode of participation in a crime, not an offense in itself. When A (the accessory or accomplice) assists P (the principal or perpetrator) to commit a crime, both A and B can be charged with the same crime.¹ A faces the same punishment as P, even though A may not have been at the scene of the crime and may have contributed relatively little to the commission of the crime.²

Complicity statutes in the U.S. often use very broad language. For example, the federal complicity statute, 18 USCS § 2 (2008), states, *in toto*:

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

¹ Robert Weisberg, *The Model Penal Code Revisited: Reappraising Complicity* 4 *Buff. Crim. L. R.* 217, at 224 (2000) (discussing the elements of complicity and the considerations that led to the adoption of the complicity provisions of the Model Penal Code).

² Various state legislatures, e.g. New York, have adopted statutes governing aiding and abetting of certain specific crimes such as escape from prison, where aiding and abetting the particular substantive offense is a separate crime that is punished differently from the underlying crime. *Id.*, at 221.

(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.

When a statute is as brief as this, it is up to the courts to interpret its meaning on a case by case basis. With each state having its own separate judiciary, and with the federal judiciary divided into separate judicial circuits, variations in the doctrine of complicity have arisen.

II. Question Six-One; the Test for *Mens Rea*.

For a period of time, the federal courts applied two principal competing tests for the *mens rea* (mental state) of the accomplice; some courts applied the “true purpose/intent” test, while others applied a “knowledge” test.

The “true purpose/intent” test was enunciated in a leading case by Judge Learned Hand, his landmark 1938 decision *U.S. v. Peoni*.³ Under that test, it must be shown that the accomplice, in giving aid to the principal, “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.”⁴

³ 100 F.2d 401 (2d Cir. 1938).

⁴ *Id.*, at 402. *Peoni* involved a defendant who had sold counterfeit bills to A, who in turn sold them to B, who was arrested while trying to pass them. The prosecution argued that Peoni knew that the bills would ultimately be passed by someone, and therefore he was complicit in the act of attempting to pass the bills. Judge Hand ruled otherwise. For more recent expressions of the concepts enunciated in *Peoni*, see the decisions of two circuit courts of appeals:

In *U.S. v. Cloud*, 872 F.2d 846 (9th Cir. 1989), the court stated (at 850):

Conviction as an aider and abettor requires proof beyond a reasonable doubt that the defendant willingly associated himself with a criminal venture and participated therein as something he wished to bring about. Aiding and abetting means to assist the perpetrator of a crime. An abettor's criminal intent may be inferred from the attendant facts and circumstances and need not be established by direct evidence. (citations omitted)

In *U.S. v. Taylor*, 54 F.3d 967 (1st. Cir. 1990), the court stated (at 975):

Criminal intent is an important element of aiding and abetting and the supposed lack of any such intent lies at the heart of appellant's challenge. Proof of this element demands a showing that the defendant consciously shared the principal's knowledge of the underlying criminal act, and intended to help the principal. We hasten to add, however, that this showing may be made wholly on the basis of circumstantial evidence. (citations omitted)

The competing “knowledge” test was enunciated by Judge Parker in *Backun v. U.S.*,⁵ where the court stated:

To say that the sale of goods is a normally lawful transaction is beside the point. The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator of a felony by the plea that he has merely made a sale of merchandise. One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale.⁶

Under the “knowledge” test, the prosecution must prove only that accomplice knew at the time he rendered assistance to the principle that the principal intended to commit a crime and that such assistance would facilitate the commission of the crime.

The division among the federal circuits was finally resolved by the Supreme Court in 1947 in *U.S. v. Nye & Nissen*.⁷ Although the case involved the test for participation in a conspiracy, the Court quoted *Peoni* with approval,⁸ and its decision is accepted as the adoption of the “true purpose/intent” test for aiding and abetting.⁹

⁵ 112 F. 2d 635 (4th Cir. 1940). The defendant Backun sold silverware that he knew to have been stolen to Zucker in New York, who ultimately transported it to North Carolina where he was arrested and charged with interstate transportation of stolen property. The prosecution successfully argued that Backun knew that Zucker planned to take the silverware out of New York and sell it and therefore was complicit in Zucker’s crime of interstate transportation.

⁶ Id., at 637.

⁷ 336 U.S. 613 (1947).

⁸ Id., at 619.

⁹ Baruch Weiss, What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law, 70 *Fordham L. Rev.* 1341 (March, 2002) (tracing the developing of the test for *mens rea* in the federal courts).

Today, all federal courts and the overwhelming majority of state courts follow the “true purpose/intent” test for the *mens rea*.¹⁰ The “true purpose/ intent” test was also adopted by the American Law Institute in Section 2.06(3) of the Model Penal Code.¹¹ More than a dozen states have explicitly incorporated § 2.06(3) as the definition of complicity.¹² Only a few states apply the “knowledge” test. The “true purpose/intent” test is clearly the dominant test applicable in the U.S.¹³

The use of a “true purpose/intent” test requires that the jury determine that the defendant intended to participate in the crime and that he/she willed that the crime occur. Without an admission by the defendant, it is difficult to ascertain exactly what thoughts occurred in the defendant’s mind. Once all the evidence has been presented by the prosecution and the defense, the prosecution will argue that facts and circumstances of the case indicate that the defendant knew that the principal intended to commit the crime, acted to assist the principle in committing the crime, and did so with the intention that the crime be carried out. A judge may not instruct a jury that a showing of knowledge by itself creates a conclusive presumption that the defendant intended that the crime be committed, if there is a reasonable interpretation that could lead to a contrary conclusion.¹⁴ However, a

¹⁰ California, for example, has adopted standardized jury instructions that require both knowledge and intent. CALJIC 3.01.

¹¹ The Model Penal Code § 2.06(3) states: “A person is an accomplice of another person in the commission of an offense if:

- (a) with the purpose of promoting or facilitating the commission of the offense, he
 - (i) solicits such other person to commit it, or
 - (ii) aids or agrees or attempts to aid such other person in planning or committing it, or
 - (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or
- (b) his conduct is expressly declared by law to establish his complicity.”

¹² Weisberg, *supra*, at 234.

¹³ One author, while conceding that the “true purpose/intent” test is the dominant test, describes the state of the law “as in a state of chaos,” owing to the existence of nuanced interpretations of that test among various federal circuits and even by the Supreme Court itself that have yet to be reconciled by either the relevant legislative bodies or the Supreme Court. Weiss, *supra* at 1347.

¹⁴ *Sandstrom v. Montana*, 442 U.S. 510 (1979) (deciding that a jury instruction in a capital murder case that stated that a showing of knowledge was conclusive evidence of intent violated the Sixth Amendment right to a fair trial); *The People v. Yarber*, 90 Cal. App. 3d 895, 917 (Ca. Ct. App., 1st Cir. 1979) (finding error in the use of California Jury Instruction 3.01 (1974 Revision) that stated: “Aiding And Abetting Defined. A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose

jury in criminal cases generally is permitted to use a showing that the defendant had knowledge as one factor in determining the defendant's actual state of mind.¹⁵

The sale of commodities to someone knowing that he intends to use them illegally is not in itself sufficient to establish that the seller shared in a conspiracy to commit the crimes. In *U.S. v. Falcone*,¹⁶ the Supreme Court overturned convictions of sellers of yeast, sugar and cans for conspiracy to produce illegal alcohol during Prohibition. Although there was evidence that the defendants knew that the goods would be used for bootlegging purposes, there was no evidence that the sellers knew of a conspiracy to commit bootlegging and agreed to be a part of the conspiracy. Although this case involved the crime of conspiracy, the case has been cited in complicity cases to support the concept that the mere knowing sale of goods to criminals, without a further showing of intent to join in the crime, is not sufficient for a conviction on a complicity count.

The question of whether the presence of certain factors will be sufficient to create a presumption of intent has perplexed legal scholars and courts. One intermediate appellate court in California came up with a list of factors constituting circumstantial evidence that could enable a jury to find shared intent based on knowledge. The case *People v. Lauria*,¹⁷ is frequently cited in the academic literature discussing the shared intent test and the challenges it presents.¹⁸ Its

of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime.").

¹⁵ See supra, note 4.

¹⁶ 311 U.S. 205 (1940).

¹⁷ 251 Cal. App. 2d 471 (Cal. Ct. App. 1967).

¹⁸ See, Weisberg, supra, at 244, where the author states:

People v. Lauria is one of those real cases that seems to have been designed to supply a scholarly hypothetical. Simply enough, Lauria supplied a telephone answering service to any and all customers, one of whom, as he well knew, was using it to run a prostitution business. Did Lauria's indifferent knowledge make him a conspirator?

The wonderful thing about the Lauria opinion is that it both takes on and critically rejects the challenge of using conventional mens rea doctrine to solve this moral and legal conundrum. Because the conspiracy charge required "agreement," the opinion starts out with the equivalent of requiring true purpose in the complicity sense, but it lays out all the unavoidable problems of seeking to define in subtle abstractions a standard for these cases: Does requiring intent mean requiring affirmative "subjective" proof? If intent can be inferred from circumstances, does that procedural move turn purpose into knowledge? Can the jury - and the citizenry - tolerate exonerating a knowing and indifferent helper when the crime is a very dangerous one? Ultimately, Lauria lays out some very

attempt to build a bridge between knowledge and intent seems not to have caught on in the courts, possibly because the U.S. jury system does not demand a detailed explanation by the jurors as to how they arrive at their conclusions as to the defendant's state of mind. It would seem that there is sufficient flexibility in the system to obviate the need for a more refined approach.

Recklessness, i.e. providing assistance where it is *foreseeable* that the perpetrator would commit a crime, is not complicity.¹⁹ Various authors of legal articles have suggested that knowledge that a crime might occur, combined with the acceptance of that result by proceeding to offer assistance, is as culpable as intentionally assisting in a crime.²⁰

per-se like rules for what might otherwise be a hopelessly vague standard. The defendant is guilty of conspiracy (and by implication, the principal's offense via complicity) if he:

- (1) knows of the crime and
- (2) either
 - (a) he "intends to participate" (has the purpose that the crime occur), or
 - (b) the crime is very harmful, or
 - (c) he has a "stake" in the crime, meaning:
 - (1) that charges criminals above market price (shares in proceeds);
 - (2) derives the bulk of his profits from supplying with the aim of supplying criminals);
 - (3) there is no legitimate purpose for the type of goods supplied; or
 - (4) there is no legitimate purpose for the volume of goods supplied.

The best way to view Lauria, then, is not as really defining intent as opposed to mere knowledge - that requires too much conceptual formalism or notions of constructive intent. Rather, the list really encompasses those types of facts where, for a variety of criminological reasons, it seems morally and politically appropriate to hold this party liable for conspiracy. This is most obvious with respect to the last criterion - the seriousness of the target crime. The issue here is nothing so abstract as the difference between knowledge and purpose. It is, instead, a matter of finessing the abstractions and virtually legislating pragmatically applicable rules.

¹⁹ Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*. 73 *Calif. L. Rev.* 323, at 357 (March 1985) (an exhaustive analysis of the doctrinal and historical basis of U.S. complicity law); Weisberg, *supra* at 224.

¹⁹Kadish, at 349.

²⁰ See, e.g. Weisberg, *supra* at 249. Weisberg discusses the views of a number of legal scholars on this topic. He also addresses the issue of "willful ignorance," i.e. an actor that deliberately refuses to provide himself with information, thereby exhibiting a disregard for the potential consequences of his acts. This has been termed the "ostrich instruction" that was approved in *U.S. v. Jewell*, 532 F.2d 697 (9th Cir. 1976). Regarding the "ostrich instruction," Weisberg observed: "The most powerful criticism of the

In situations where providing assistance without the requisite mens rea nonetheless appears to violate a social norm, legislators have enacted special legislation creating specific crimes, e.g. aiding an escape from prison, selling alcohol to minors, selling guns to convicts, etc. The State of New York has enacted a special “facilitation” law that finesses some of the finer points of complicity law to enable prosecutors and courts to deal straightforwardly with various acts that might otherwise slip through the net of formal “complicity.”²¹ The federal firearms statute, dealing with sales of guns to ineligible buyers, such as minors and convicted felons, is another.²²

III. Question Six-Two: The Test for Actus Reas.

- a. The act of assistance may take many forms, provided that it in some manner made the crime more likely or contributed to the result.²³ Physical assistance can take many forms, such as providing the means of committing the crime, driving the getaway car, keeping a lookout.
- b. However, assistance can also take on non-physical forms, such as participating in the planning of a crime or furnishing information (e.g. the layout of a house to be burgled). Finally, encouraging or inducing another to commit a crime is also aiding and abetting.
- c. Assistance rendered in the form of an omission to act may be considered to be aiding and abetting, provided that there was a legal duty to act, e.g. where a caretaker leaves a door unlocked in order to assist in a burglary, or a custodian or a minor allows a sex predator to have access to the ward. This has been expressly embodied in the Model Penal Code. Section 2.06(3) embodies this concept: “having a legal duty to prevent

ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent.” Weisberg, *supra* at 257.

²¹ NYS Section 115.00 et seq. The NY law provides four categories or degrees of facilitation, all of which require that a defendant renders aid to another whom he believes is it “probable” will commit a crime.

²² 18 U.S.C. section 922(b), which makes it a crime for a licensed firearms dealer to sell or deliver any firearm or ammunition to any ineligible person. Ineligible buyers include, among other categories, (1) minors; (2) persons whose purchase would violate applicable state law; (3) nonresidents of the state where the dealer operates; and (4) persons indicted for or convicted of felonies.

²³ Kadish, *supra*, at 343.

the commission of the offense fails to make proper effort to prevent [it].”²⁴

- d. Not stepping in to prevent a crime or to stop a crime in process or to inform the authorities is not aiding and abetting, unless there is a legal duty to do so, e.g. that of a watchman or police officer.²⁵
- e. There is no threshold level for an act of assistance. It could be relatively slight.²⁶ The level of assistance provided need not have been indispensable to the commission, i.e. but for the assistance the crime would not have been committed, but it must have been something that might have caused the crime to be committed in a different way had the assistance not been provided.²⁷
- f. Assistance rendered after a crime has been committed is not considered to be aiding and abetting unless rendered as part of a plan or agreement that pre-existed the commission of a crime. Assistance to a perpetrator following a crime is generally considered to be accessoryship after the fact, a different form of liability.

III. Question Six-Three: Crimes and Perpetrators.

- a. A crime must have been committed before one can be held complicit, even though that crime is only an attempt.²⁸ The crime need not be the very crime that the accomplice intended to assist, so long as it is among the crimes that were within the accomplice’s contemplation²⁹ or “a probable consequence of the acts intended.”³⁰
- b. The perpetrator need not even have been arrested for the crime in order to an accomplice to be tried and convicted for complicity in a crime.³¹

²⁴ Model Penal Code, Section 2.06(3).

²⁵ Weisberg, supra at 225.

²⁶ Weiss, supra, at 1347.

²⁷ Kadish, at 357, Weisberg, supra at 224.

²⁸ Kadish, supra at 338, 356, Weisberg, supra at 225.

²⁹ Kadish, supra, at 350.

³⁰ Id, at 352.

³¹ Weisberg, supra at 225. See Model Penal Code § 2.06(7): “An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.”

IV. Treatment of Non-International War Crimes in the U.S.

The U.S. adopted an amendment to its war crimes statute in 2006 that incorporates all of the provisions of Common Article 3 of the 1949 Geneva Conventions³² pertaining to armed conflict of a non-international character.³³

³² Each of the 1949 Geneva Conventions has an identically-worded Article 3 (hence the use of the term “Common Article 3”) which states as follows: “Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
- (2) To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (3) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

³³18 USCS 2441(d) (adopted as part of the Military Commissions Act, P.L. 109-366. 366; 120 Stat. 2600 (October 17, 2006). Section 2441(d) states: “the term “grave breach of common Article 3” means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows: (A) Torture . . . (B) Cruel or inhuman treatment. . . (C) Performing biological experiments. . . (D) Murder. . . (E) Mutilation or maiming. . . (F) Intentionally causing serious bodily injury. . . (G) Rape. . . (H) Sexual assault or abuse. . . [and] (I) Taking hostages.”

Subparagraph (d)(5) adds the following language intended to save any offense not listed under Subsection (d), as follows: “(5) Definition of grave breaches. The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.” Query whether the Congress was motivated in part by a desire to have authority to prosecute United States nationals for these crimes, and thus avoid having them become subject to ICC jurisdiction.

V. Joint Criminal Liability in the U.S.

Under the so-called “*Pinkerton* rule” enunciated by the U.S. Supreme Court in 1946,³⁴ every member of a conspiracy³⁵ to commit a crime is liable for all of the offenses committed by members of the conspiracy that fall within the common design or purpose, i.e. were “reasonably foreseeable.”³⁶ The *Pinkerton* case involved two brothers (one of whom was in jail at the time his sibling committed the substantive crimes in question) who were charged with violating laws under Prohibition as well as conspiracy to violate those laws. The Court held the brother who was in jail was equally guilty of the substantive crimes, since the crimes were carried out as part of an ongoing conspiracy. A recent law review article summarized the rule as follows:

The *Pinkerton* rule sets out a theory of vicarious liability whereby reasonably foreseeable overt acts of one co-conspirator committed in furtherance of the conspiracy are attributable to the other conspirators. Defendant is liable for overt acts committed by his co-conspirators both prior to and during the defendant's participation. However, this proposition only applies to acts related directly to the conspiracy. Defendant cannot be held criminally liable for substantive offenses committed by others involved in the conspiracy before defendant joined or after he withdrew. The *Pinkerton* doctrine also does not apply to substantive offenses committed by co-conspirators in the course of the conspiracy when defendant is only slightly connected to the conspiracy.³⁷

³⁴ *U.S. v. Pinkerton*, 328 U.S. 640 (1946).

³⁵ Conspiracy is a separate crime under federal law. 18 USCS § 371 (2008). The prosecution must show in a conspiracy case that an agreement existed between at least two persons to commit a crime and that at least one of the conspirators did some act to carry out the conspiracy, although the crime contemplated by the agreement need not have been carried out. If the crime is committed, then each conspirator, by definition, is an accomplice to that crime. See, Anne Langer and Jonathan Parnes, Federal Criminal Conspiracy, 45 *Am. Crim. L. Rev.* 499, at 499 (Spring 2008) (discussing the elements of the offense of conspiracy and the Supreme Court’s articulation of the *Pinkerton* rule.) .

³⁶ *Id.*, at 525.

³⁷ *Id.*, at 509.