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What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law

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WHAT WERE THEY THINKING?: THE MENTAL STATES OF THE AIDER AND ABETTOR AND THE CAUSER UNDER FEDERAL LAW

Baruch Weiss*

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INTRODUCTION

The owner of a web hosting company that carries websites for thousands of legitimate customers discovers that one of the sites is disseminating child pornography. Utterly indifferent, he continues to

1. All research for this Article is current through December 31, 2001.
carry the site, treating it no differently than the legitimate sites. By carrying the site, he clearly facilitates its business, but under federal law, is he guilty of aiding and abetting a child pornography offense? Is it enough that he carries the site with awareness of its nature, or must he act with something more than knowledge—perhaps with the purpose or desire to help the website succeed?  

A cab driver transports a bank robber to the bank. The driver is aware of the robber’s plan, but does not care. All the driver wants to do is make some money. She carries the passenger, charging the robber the standard fare that she charges anyone else. Is she guilty of aiding and abetting the bank robbery? Is her knowledge of the crime enough, or must she also want the robbery to succeed?  

A secretary at a firm that bills by the hour has just been ordered by his boss to alter an invoice to inflate the hours worked by the firm. The secretary has no wish to defraud the client, but desperately needs his job, and makes the alteration. Is the secretary guilty of aiding and abetting the fraud on the customer? Is it enough that the secretary helps the scheme, knowing of its fraudulent nature, even if his act of assistance was rendered, in some sense, unwillingly, or must he also want or intend that the fraud succeed?  

What of a legitimate gun dealer who sells a gun in compliance with all applicable rules and regulations, but makes the sale knowing that the purchaser will use it to commit a murder? Again, is mere knowledge enough to make the dealer criminally liable as an aider and abettor, or must the dealer intend that the murder take place?  

In the federal case law, there is no clear answer to the “knowledge versus purposeful intent” question. The absence of a definitive answer is surprising for a number of reasons. First, the doctrine of the aider and abettor has been around for a long time. Judge Learned Hand traced the earliest judicial formulations to the common law of fourteenth century England, and the earliest federal statutory formulation to a 1790 statute dealing with murder, robbery, and piracy. The current federal aiding and abetting statute dates back to 1909.  

Second, not only is the aiding and abetting doctrine old, the “knowledge versus purposeful intent” debate that it has engendered is also old. In fact, the Supreme Court grappled with the issue as long ago as 1870. As Professor Robert Weisberg recently noted, “For decades, the American courts and legislatures have debated whether

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2. This and the following examples are all loosely based on those quoted in Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law  § 6.7, at 576-86 (2d ed. 1986) (quoting examples from the Model Penal Code § 2.06 cmt. at 316-17 (1985)).
3. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
knowledge or 'true purpose' should be the required mens rea for accomplice liability."

Third, the consequences of aiding and abetting liability are quite serious. The aider and abettor is guilty not of some lesser offense, but of the very offense committed by the actual perpetrator (commonly referred to as the "principal"). In the words of the federal statute, the aider and abettor "is punishable as a principal." Thus, our taxi driver, if she is an aider and abettor, is guilty of bank robbery and subject to the same potential penalties as the actual bank robber who went into the bank, threatened the teller, and grabbed the money.

Fourth, the absence of any resolution of the "purposeful intent versus knowledge" question is even more baffling, given the astonishingly broad scope of the aiding and abetting statute, and the consequent frequency with which this question arises. The federal aiding and abetting doctrine applies to "the entire criminal code," so

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6. Robert Weisberg, Reappraising Complicity, 4 Buff. Crim. L. Rev. 217, 236 (2000); see also United States v. Fountain, 768 F.2d 790, 797-98 (7th Cir.) (summarizing the history of the "knowledge versus purposeful intent" debate), modified on other grounds, 777 F.2d 345 (7th Cir. 1985) (per curiam); G. Robert Blakey & Kevin 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. 1345, 1387 (1996) ("Judicial interpretations of § 2(a) on the issue of state of mind reflect a substantial debate carried out in the late 1930's, 1940's and 1950's, which was also reflected in the debate that preceded the adoption of the Model Penal Code... in 1962.").

7. "[A]iding and abetting does not constitute a discrete criminal offense but only serves as a more particularized way of identifying persons involved. In fact, when a person is charged with aiding and abetting the commission of a substantive offense, the crime charged is... the substantive offense itself." United States v. Smith, 198 F.3d 377, 383 (2d Cir. 1999) (quotation marks omitted) (quoting United States v. Oates, 560 F.2d 45, 55 (2d Cir. 1977)).


9. United States v. Ramirez-Martinez, 273 F.3d 903, 911 (9th Cir. 2001); accord United States v. Simpson, 979 F.2d 1282, 1285 (8th Cir. 1992) ("applies to the entire criminal code"); United States v. Jones, 909 F.2d 533, 539 (D.C. Cir. 1990) ("applies to all federal offenses"); United States v. Pino-Perez, 870 F.2d 1230, 1233 (7th Cir. 1989) (en banc) ("[E]very time Congress has passed a new criminal statute the aider and abettor provision has automatically kicked in and made the aiders and abettors... punishable as principals."); United States v. Jones, 678 F.2d 102, 105 (9th Cir. 1982) ("applicable to the entire criminal code"); Pigford v. United States, 518 F.2d 831, 834 (4th Cir. 1975) ("applies implicitly to all federal offenses").

The only exception is if "Congress plainly says otherwise." Ramirez-Martinez, 273 F.3d at 911. According to at least some cases, Congress intended that the aiding and abetting statute not apply to certain complex federal offenses aimed only at high-level criminal operatives. In Reves v. Ernst & Young, 507 U.S. 170 (1993), the Supreme Court held that there is no civil liability for aiding and abetting a violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. § 1962 (1970). See 507 U.S. at 186. Following Reves, the Second Circuit extended the reasoning to criminal liability as well. See United States v. Viola, 35 F.3d 37, 41 (2d Cir. 1994), abrogated on other grounds, Salinas v. United States, 522 U.S. 52 (1997).

Similarly, the Second Circuit has held that there can be no aiding and abetting of a violation of 21 U.S.C. § 848 (1970), the "continuing criminal enterprise-drug kingpin" statute, United States v. Joyner, 201 F.3d 61, 69 (2d Cir. 2000); United States v.
the "knowledge versus purposeful intent" question can arise no matter what federal crime is at issue. The doctrine also applies to just about everyone. Although commonly thought of as applying to the less culpable actor—the one who simply "assists" the principal—in reality, the aiding and abetting doctrine applies to any actor other than the principal, regardless of his or her culpability. In the words of the federal aiding and abetting statute, the doctrine encompasses anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense. Once there is a principal who actually commits the offense (a hijacker, say, who crashes a plane into the World Trade Center), the criminal liability of all the remaining actors is adjudged under the doctrine. It does not matter whether the other actor is a relatively insignificant driver who, in support of the criminal plan, drives the hijackers to the airport ("aids [or] abets"), or is Osama bin Laden himself who conceives of and initiates the commission of the crime ("commands, induces or procures"), or is a terrorist friend in Afghanistan sympathetic to the criminal cause who does nothing more than make suggestions for the successful completion of the offense ("counsels"). In each instance, liability is determined under the aiding and abetting doctrine. Indeed, because of the doctrine's applicability to all offenses and to all participants (other than the principal), the aiding and abetting statute is probably invoked more frequently than any other federal criminal statute.

Finally, the lack of resolution is even more puzzling in light of the crucial role the answer to that question plays in determining liability. Once a principal commits an offense, there are two basic elements that the government must prove in a federal case to convict an aider.
and abetter: (1) that the defendant committed an act of facilitation, and (2) that he or she committed the act with a culpable mental state. Because virtually any act of assistance, no matter how insubstantial, satisfies the "act" element (indeed, even words of

13. See, e.g., Hicks v. United States, 150 U.S. 442, 449 (1893) (requiring "acts or words of encouragement" and "intention of encouraging and abetting"); United States v. Searan, 259 F.3d 434, 444 (6th Cir. 2001) ("Aiding and abetting has two components: an act on the part of a defendant which contributes to the execution of a crime and the intent to aid in its commission."); United States v. Phillips, 664 F.2d 971, 1010 (5th Cir. Unit B Dec. 1981)); United States v. Pipola, 83 F.3d 556, 562 (2d Cir. 1996) (discussing the "act and intent elements" of aiding and abetting); United States v. Smith, 546 F.2d 1275, 1284 (5th Cir. 1977) (aiding and abetting has two components: An act on the part of a defendant which contributes to the execution of a crime and the intent to aid in its commission"); United States v. Greer, 467 F.2d 1064, 1069 (7th Cir. 1972) (stating that there are "two general components of aiding and abetting—an act on the part of a defendant which contributes to the execution of a crime and the intent to aid in its commission").

14. See, e.g., United States v. Whitney, 229 F.3d 1296, 1303 (10th Cir. 2000) ("[T]he level of participation may be of relatively slight moment." (quotation marks omitted) (quoting United States v. Anderson, 189 F.3d 1201, 1207 (10th Cir. 1999))); United States v. Taylor, 226 F.3d 593, 597 (7th Cir. 2000) (it "does not take much to satisfy" facilitation requirement (quotation omitted)); United States v. Woods, 148 F.3d 843, 848 (7th Cir. 1998) ("Once knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element." (quoting United States v. Bennett, 75 F.3d 40, 45 (1st Cir. 1996)); Bazemore v. United States, 138 F.3d 947, 950 (11th Cir. 1998) (same); United States v. Garguilo, 310 F.2d 249, 253 (2d Cir. 1962) ("an act of relatively slight moment"); see also United States v. Sanders, 211 F.3d 711, 722 n.1 (2d Cir.) ("The requirement that one who aids and abets a crime must contribute to its success should not be understood too literally . . ."); cert. denied, 531 U.S. 1015 (2000). But see United States v. Kessi, 868 F.2d 1097, 1104 (9th Cir. 1989) (stating, in a criminal securities fraud case, that an aider and abettor must provide "substantial assistance" (quoting a civil securities fraud case, SEC v. Rogers, 790 F.2d 1450, 1460 (9th Cir. 1986), which was abrogated on other grounds in Pinter v. Dahl, 486 U.S. 622 (1988)).

According to many courts, the act need not even abet all the elements of the underlying offense; all it need do is abet one of them. See Woods, 148 F.3d 843 at 849-50 & n.2 ("The government need not prove assistance related to every element of the underlying offense . . ."); United States v. Peña, 949 F.2d 751, 755 (5th Cir. 1991); United States v. Sigalow, 812 F.2d 783, 785 (2d Cir. 1987); United States v. Garrett, 720 F.2d 705, 713 n.4 (D.C. Cir. 1983). Other courts, although slightly less explicit, seem to agree. See United States v. Burgos, 94 F.3d 849, 873 (4th Cir. 1996) ("[T]o be convicted of aiding and abetting, 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." (quotation marks and citations omitted)); United States v. Broadwell, 870 F.2d 594, 608-09 (11th Cir. 1989) (upholding conviction of an aider and abettor under the Travel Act, 18 U.S.C. § 1952, even though he "did not commit all acts constituting elements of the crime (such as interstate travel)").

Other courts, however, require that the aider and abettor abet each element. United States v. Lombardi, 138 F.3d 559, 561 (5th Cir. 1998) (defendant "must have aided and abetted each material element of the alleged offense"); United States v. Bancalari, 110 F.3d 1425, 1429 (9th Cir. 1997) (same); United States v. Vasquez, 953 F.2d 176, 183 (5th Cir. 1992) (same). But see Woods, 148 F.3d at 849 n.2 (noting that "[e]ven the Ninth Circuit appears to be pulling back" from the view that an aider and abettor must abet every element of the offense).
encouragement suffice\textsuperscript{15}), the mental element is really what defines the aider and abettor. It is the mental element that converts even an insignificant act of assistance into criminal liability for child pornography, bank robbery, mail fraud, murder, terrorism, money laundering, embezzlement, or whatever else the underlying federal offense may be.

This Article focuses, in large part, on the mental state of the federal aider and abettor. What mental state triggers federal aiding and abetting liability?\textsuperscript{16} What mental state suffices to convert even an insubstantial act of assistance into criminal liability equivalent to that of the principal?

To complicate the issue, it is not quite correct to speak of the mental state as if the aider and abettor possesses only one. In reality, the aider and abettor possesses two. The hypothetical questions about the liability of the owner of the website hosting company, the secretary, the taxi driver, and the gun salesman presuppose the existence of the first, most basic mental state: that the aider and abettor acted volitionally, deliberately, and intentionally rather than by mistake or accident.\textsuperscript{17} This mental state requires that the owner of the web hosting company carry the offending website deliberately, not accidentally by an inadvertent push of some key on the computer keyboard. The secretary must alter the invoice, the cab driver must drive his cab, and the gun dealer must sell the gun deliberately, not in a bizarre fit of sleepwalking.\textsuperscript{18} The act in each instance must be the

\textsuperscript{15} See Reves v. Ernst & Young, 507 U.S. 170, 178 (1993) ("aid and abet" is a "term of breadth indeed"); id. (quoting Black's Law Dictionary 68 (6th ed. 1990), which states that aiding and abetting "comprehends all assistance rendered by words, acts, encouragement, support or presence"); Hicks, 150 U.S. at 449 ("acts or words of encouragement").

\textsuperscript{16} A number of commentators have dealt generally with the issue of the mental state of the accomplice, not focusing in particular on federal law. See Model Penal Code § 2.06 & cmt. at 312-19 (1962); LaFave & Scott, supra note 2, § 6.7(b)-(f), at 579-86; Sanford H. Kadish, Complicity, Cause and Blame: A Study in the Interpretation of Doctrine, 73 Cal. L. Rev. 323, 346-55 (1985); Sanford H. Kadish, Reckless Complicity, 87 J. Crim. L. & Criminology 369 (1997); Weisberg, supra note 6, at 236-47; Candace Courteau, Comment, The Mental Element Required for Accomplice Liability: A Topic Note, 59 La. L. Rev. 325 (1998); Grace E. Mueller, Note, The Mens Rea of Accomplice Liability, 61 S. Cal. L. Rev. 2169 (1988). Other commentators have focused on the mental state of the aider and abettor in the context of a particular offense or type of offense. See Blakey & Roddy, supra note 6, at 1385-1402; Audrey Rogers, Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent, 31 Loy. L.A. L. Rev. 1351 (1998); Tyler B. Robinson, Note, A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under 924(c), 96 Mich. L. Rev. 783 (1997). Of the various commentators, Professor Blakey and Roddy, who dealt with the applicability of aiding and abetting to RICO, were the most comprehensive in examining federal case law.

\textsuperscript{17} See Carter v. United States, 530 U.S. 255, 268 (2000) (defining this sort of mental state as requiring proof that "the defendant possessed knowledge with respect to the actus reus of the crime").

\textsuperscript{18} See id. at 269.
result of a volitional choice to act or not to act. Otherwise, there can be no criminal liability. No matter how much the taxi driver may want the crime to take place, if she drives in her sleep, she is not guilty of aiding and abetting the bank robbery.

The more difficult issue, and the focus of this Article, is the nature of the second mental state: assuming that the aider and abettor commits the act of assistance deliberately, does the aider and abettor have to want this deliberate act to assist the principal, or is it enough to know that this deliberate act would assist the principal? If neither is applicable, is some other mental state necessary?

Whatever the second mental state, does it relate in any way to the mental state prescribed for the principal by the underlying criminal statute? In the example of the secretary inflating the hours worked, is the requisite mental state for aiding and abetting liability dependent at all on the mental state prescribed by the mail fraud statute, which requires of the principal an intent to defraud, or only on that prescribed by the aiding and abetting statute? Does one who aids and abets an offense requiring specific intent (a phrase that, as we shall see, is commonly used but possesses many meanings) incur liability with the same mental state as one who aids and abets an offense requiring only general intent? In other words, is the mental state of the aider and abettor the same as that of the principal (whose mental state may vary from offense to offense), or is it the same for all aiders and abettors, regardless of the mental state required of the principal?

The commonly held view is that the issue was resolved in 1938, when Judge Learned Hand held in the case of *United States v. Peoni* that the aider and abettor must not only know that his or her act will assist the principal, but also want his or her act to assist the principal. In a pithy formulation so typical of Judge Hand, he explained that the aiding and abetting statute requires that the aider and abettor “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.” Thus, in our examples, the website hosting company must desire the success of the child pornography website, the cab driver must intend that the bank be robbed, the secretary must intend to defraud, and the gun salesman must want the murder to take place before being liable as aiders and abettors. An act of facilitation with mere knowledge that the act will assist the principal is not sufficient.

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21. 100 F.2d 401, 402 (2d Cir. 1938).
22. Id.
Since Peoni, and especially after the Supreme Court in Nye & Nissen v. United States23 quoted Judge Hand’s formulation with approval,24 the prevailing wisdom among courts and commentators has been that the issue is now closed. Six years ago, for example, one scholarly article declared that the Supreme Court in Nye & Nissen “resolve[d] the debate for federal criminal jurisprudence in favor of Judge Hand’s interpretation of ‘intent.’”25 Judge Hand himself, after having been quoted with approval in Nye & Nissen, described his Peoni formulation as “authoritative.”26

Similarly, one federal court of appeals after another has paid homage to Judge Hand and his formulation. Peoni is “the seminal case” in aiding and abetting liability.27 Judge Hand’s “well-known formulation”28—that the aider and abettor “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”—“aptly characterize[s]”29 the rule of aiding and abetting liability, and has been “repeated in innumerable subsequent cases.”30 His “enunciation has been adopted by all federal appellate courts as the law of aiding and abetting,”31 and “for years [has] been almost verbatim the standard boilerplate charge on the subject.”32 Cases “speak reverentially of Judge Hand.”33 His test has been “oft quoted,”34 and typically referred to as the “classic” interpretation or formula,35 the “most well-

24. Id. at 618-19.
25. Blakey & Roddy, supra note 6, at 1389 (footnotes omitted).
27. United States v. Greer, 467 F.2d 1064, 1068 (7th Cir. 1972).
30. United States v. Ortega, 44 F.3d 505, 507 (7th Cir. 1995). It is difficult to quantify the precise number of cases that have re-affirmed the Peoni formulation. Aside from the cases citing Peoni and Nye & Nissen directly, many cases cite to second, third, and fourth generation cases, which quote the formulation, but cite to more recent cases rather than to Peoni or Nye & Nissen. All in all, the number of cases that endorse the formulation, including those cases that do so without directly citing Peoni or Nye & Nissen, must significantly exceed a thousand.
31. United States v. McNeese, 901 F.2d 585, 608 (7th Cir. 1990), overruled on other grounds, United States v. Westmoreland, 240 F.3d 618, 633 (7th Cir. 2001); see also United States v. Ledezma, 26 F.3d 636, 641 (6th Cir. 1994) (“Judge Learned Hand’s formulation has become the accepted standard . . . .”); United States v. Pino-Perez, 870 F.2d 1230, 1235 (7th Cir. 1989) (en banc) (“We and other courts have endorsed Judge Learned Hand’s definition of aiding and abetting.”).
34. United States v. Bryant, 461 F.2d 912, 919 (6th Cir. 1972); see Blakey & Roddy, supra note 6, at 1390 n.167 (collecting cases quoting Judge Hand’s test).
35. United States v. Irwin, 149 F.3d 565, 569 (7th Cir. 1998); United States v. Cruz-Paulino, 61 F.3d 986, 998 (1st Cir. 1995); United States v. Monroe, 990 F.2d
accepted formulation,"36 the "accepted standard,"37 and the "canonical definition."38 His formulation has been incorporated by numerous federal circuits into their pattern jury instructions.39 Predictably, once Nye & Nissen adopted Peoni, voices of dissent in the federal cases have been very rare.40

Nonetheless, despite the seeming uniformity in approach since Peoni, the current status of the law on the aider and abettor's mental state is far from clear. In fact, it is best described today as in a state of chaos—a chaos to which the cases seem oblivious.

Here are a few examples. In light of Peoni, is simple knowledge enough? Yes, said the Supreme Court in a pre-Peoni case in 1870;41 no, said Judge Learned Hand in Peoni in 1938;42 yes, implied the Supreme Court in 1947;43 no, said the Supreme Court in 1949;44 yes, if it is accompanied by an act that substantially facilitates the commission of the underlying offense, said the Supreme Court in 1961;45 usually, said the Second Circuit in 1962;46 only if knowledge is enough for the underlying offense, said the Second Circuit in another case in 1962;47 sometimes, said the Seventh Circuit in 1985;48 always,
implied the Seventh Circuit in 1995;\textsuperscript{49} no, said the Second Circuit in 1995\textsuperscript{50} and the Seventh Circuit in 1998.\textsuperscript{51}

Another example of the disarray: does aiding and abetting require specific intent? In 1991, the Seventh Circuit held that "[p]roof of specific intent is not a requirement."\textsuperscript{52} But in 1998, without any indication that it was making any change in the law and without any citation to its earlier precedent, the Seventh Circuit held the exact opposite: the aider and abettor "must have had the specific intent to aid in the commission of the crime."\textsuperscript{53} The Eighth Circuit moved in the opposite direction, stating at first that aiding and abetting is a specific intent offense,\textsuperscript{54} but then saying that it did not really mean specific intent when it said specific intent.\textsuperscript{55}

A third example: in 1962, the Second Circuit, en banc, held that there is no one mental state that always applies to the aider and abettor. Instead, it held that the mental state of the aider and abettor is the same as that required of the principal, whatever that mental state may be: "if a certain knowledge or intent is required to be proven in order to convict one of violating a federal criminal statute, the proof to convict one as an aider and abettor will not be different from that necessary to convict the violator."\textsuperscript{56} But in a 1995 loansharking case, without any reference to its earlier en banc opinion, the Second Circuit held that the mental state of an aider and abettor is different from that of the principal, and that aiding and abetting requires specific intent even if the underlying offense does not.\textsuperscript{57} Then, four years later in another loansharking case, the Second Circuit seemed to hold that the aider and abettor need not act with specific intent; knowledge is enough.\textsuperscript{58}

As this Article will demonstrate, the cases interpret Judge Hand in so many different ways that there is no agreement as to how his seemingly simple formulation should be applied even in the most straightforward situations. There are disagreements among the circuits, and even intra-circuit splits, with one panel often failing to recognize the entirely different approach adopted by another panel on the same court. Even more surprising, there are often internal inconsistencies within an individual case; a case will quote from two

\textsuperscript{49} United States v. Ortega, 44 F.3d 505, 508 (7th Cir. 1995).
\textsuperscript{50} United States v. Scotti, 47 F.3d 1237, 1245 (2d Cir. 1995).
\textsuperscript{51} United States v. Irwin, 149 F.3d 565, 573 (7th Cir. 1998).
\textsuperscript{52} United States v. Reiswitz, 941 F.2d 488, 494 (7th Cir. 1991).
\textsuperscript{53} United States v. Nacotee, 159 F.3d 1073, 1076 (7th Cir. 1998).
\textsuperscript{54} United States v. Hill, 464 F.2d 1287, 1289 (8th Cir. 1972); United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971).
\textsuperscript{55} United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir. 1989).
\textsuperscript{56} United States v. Jones, 308 F.2d 26, 31-32 (2d Cir. 1962) (en banc).
\textsuperscript{57} United States v. Scotti, 47 F.3d 1237, 1246-47 (2d Cir. 1995).
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previous cases without realizing that those cases are radically at odds with one another. It was with perhaps unintended understatement that a recent case observed, "[i]t is difficult to articulate a precise intent standard for an aider and abetter [sic]."

A number of factors have contributed to the plethora of views on the proper standard for the aider and abettor. One factor, presumably at work but infrequently mentioned in the cases, is the dispute over simple fairness—how easy or hard it should be to hold an aider and abettor liable. Another factor is the confusion spawned by the various meanings of legal terms, such as "willfully" and "specific intent," used by the cases in describing the aider and abettor's mental state. Another complicating factor is the mental state required of the principal. Different criminal statutes prescribe different mental states for the principal depending on the nature of the crime, yet most of the approaches to the mental state of the aider and abettor fashion a one-size-fits-all standard without any regard for those differences. Similarly, most of the approaches apply the same mental state regardless of the seriousness of the underlying offense, the degree of the aider and abettor's involvement in the underlying offense, and the nature of that involvement. Because the one-size-fits-all standard does not fit some criminal statutes or some factual situations very well at all, it pushes the cases to pronounce different "universal" standards depending on the circumstances.

What makes all the conflicting case law interpreting Peoni yet more confusing is that, contrary to the widespread understanding of that case, Peoni did not even purport to resolve the issue of the ordinary aider and abettor's mental state; instead, it expressly left that question open.

In addition to focusing on the mental state of the aider and abettor, this Article also focuses on the mental state of a different type of accomplice: the causer. One who "causes" another to commit an offense is also punishable as a principal. Because the aiding and abetting doctrine requires the existence of a criminally acting principal, the common law developed a separate doctrine to apply when the principal is an innocent intermediary.

59. See infra notes 152-56 and accompanying text (discussing United States v. Otero-Méndez, 273 F.3d 46 (1st Cir. 2001)).
60. Otero-Méndez, 273 F.3d at 52.
62. See Standefer v. United States, 447 U.S. 10, 26 (1980) (noting that the acquittal of the principal at an initial trial does not absolve the government at a subsequent trial of the aider and abettor from having to prove that the principal committed the offense); United States v. Ruffin, 613 F.2d 408, 412-13 (2d Cir. 1979); id. at 421-22 (Wyatt, J., dissenting); LaFave & Scott, supra note 2, at § 6.6(e), at 574. All citations to the Ruffin dissent in this Article are to those portions not disputed by the majority.
63. See, e.g., United States v. Mohrbacher, 182 F.3d 1041, 1050-51 (9th Cir. 1999); United States v. Nolan, 136 F.3d 265, 272 (2d Cir. 1998) (noting that liability as a
infants, or idiots, employed to administer poison," or any other case where the principal, even if an adult of sound mind, is an innocent dupe. In such a case, rather than being guilty of "aiding and abetting" the innocent principal, the defendant is guilty of "causing" the innocent principal to commit the offense. Like the aider and abettor, the causer is not guilty of some separate offense, but of the very offense committed by the principal. Like the aider and abettor, the causer "is punishable as a principal."

Although the causer is conceptually distinct from the aider and abettor, and is governed by a different statutory subsection, the similarity of the causer to the aider and abettor is readily apparent. Indeed, many of the questions regarding the mental state of the aider and abettor have been raised about the causer, and have yielded even more inconsistencies than those afflicting the aider and abettor.

A sensible approach to the mental state of these accomplices (this Article uses the word "accomplice" to refer generically to both the aider and abettor and the causer) would apply the same mental state to both. Indeed, Judge Learned Hand favored such an approach. But, a close analysis of the cases reveals that, apart from Judge Hand, hardly anyone has even thought of comparing, let alone harmonizing, the mental states for the two different, yet related, accomplices. Thus, there is no consistency between a court's approach to the aider and abettor and its approach to the causer. A court of appeals will apply one mental state to the aider and abettor, and another to the causer, without any recognition that, let alone an explanation as to why, the two very similar concepts are being treated differently.

65. See United States v. Giles, 300 U.S. 41, 49 (1937) (holding defendant responsible as principal for causing another bank employee, an "innocent intermediary," to make false entries in the bank's books).
66. See United States v. Armstrong, 909 F.2d 1238, 1243 (9th Cir. 1990).
68. See United States v. Paglia, 190 F.2d 445, 448 (2d Cir. 1951) (L. Hand, J.), overruled by United States v. Taylor, 217 F.2d 397 (2d Cir. 1954) (L. Hand, J); see also infra text accompanying notes 469-76.
69. Compare, e.g., United States v. Gabriel, 125 F.3d 89, 101 (2d Cir. 1997) (holding the causer guilty when acting with whatever mental state applicable to the principal), with United States v. Scotti, 47 F.3d 1237, 1244-46 (2d Cir. 1995) (holding the aider and abettor guilty only when acting with specific intent, even if the principal is guilty without specific intent).
In short, although the issue of the federal aider and abettor’s mental state has long been treated as resolved, chaos prevails. Similar chaos prevails in the case law of the causer.

After demonstrating how confusing the law is, this Article will propose a uniform standard that will eliminate the confusion while balancing the existing case law with congressional intent, and with the need to achieve the fairest possible results.

Part I of this Article examines the history of the aiding and abetting subsection and the causing subsection, both contained in 18 U.S.C. § 2, and the congressional effort to eliminate common-law distinctions between the principal and the aider and abettor, and between the principal and the causer. It argues that this “no distinction” rule should apply to the issue of the mental state required of the respective accomplices as well. Part II focuses on the aider and abettor, looking at the early efforts to ascertain the aider and abettor’s mental state, and then examining Judge Learned Hand’s opinion in Peoni. This part also examines the various approaches to the aider and abettor’s mental state that Peoni spawned, finding essentially six irreconcilable approaches: the purposeful intent approach, the bad purpose approach, three different types of knowledge approaches, and the derivative approach. Each approach is scrutinized as applied to a variety of crimes possessing different mental states.

Part II also demonstrates that although Peoni is still the ultimate source of almost all the law on the mental state of the aider and abettor, it was really not an aiding and abetting case at all, but a “natural and probable consequences” case that specifically left open the question of what mental state would apply to an ordinary aider and abettor.

Part III turns to the causer and examines the various approaches to the causer’s mental state, finding many similarities to the approaches to the aider and abettor, but also finding significant differences. Part IV presents a critique of the various approaches to the mental state of both the aider and abettor and the causer. Finally, Part V recommends that a modified derivative approach be applied to both the aider and abettor and the causer.


The federal aiding and abetting provision does not explicitly contain a mental state. Nonetheless, a careful examination of the provision’s history demonstrates that, in enacting it, Congress had a number of distinct goals, and any effort to import into the provision a specific mental state must remain in keeping with those goals. As will be shown below, it was Congress’s intent to eliminate the archaic, common-law distinctions between the aider and abettor and the principal, to eliminate the need to determine whether the defendant
under consideration had acted as a principal or an aider and abettor, and in general, to make it easier to convict the aider and abettor. In conformity with that legislative agenda, in numerous contexts, the courts have routinely treated the principal and the aider and abettor as equivalent—even interchangeable.

Presumably, then, the courts should have also treated the principal and the aider and abettor as interchangeable on the issue of their mental states, requiring of the aider and abettor the same culpable mental state as that required of the principal. As we shall see, that was not so; most courts, in disregard of this legislative intent, have interpreted the aiding and abetting provision in ways that have generally multiplied, rather than diminished, the distinctions between the principal and the aider and abettor.

With respect to the causing provision, 18 U.S.C. § 2(b), the situation is similar, although not identical. It seems that it was also Congress’s overall intent to eliminate distinctions between the principal and the causer. But, despite that congressional intent, the cases have also applied to the causer mental states that differ from the mental states applied to the principal. In addition, the issue of the causer’s mental state is complicated by a second factor not present in the case of the aider and abettor: Congress’s explicit inclusion of the word “willfully” in the causing provision.

A. The History

The federal aiding and abetting provision is currently the first of a two-part statute, whose second part is the causing provision. 18 U.S.C. § 2 currently provides:

§ 2. Principals

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

(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.70

Subsection (a) and subsection (b) of the statute were not enacted simultaneously. The aiding and abetting provision—§ 2(a)—was enacted first, in 1909, to revamp “[e]arly Anglo-American accomplice law[, which] was intricate and frequently illogical.”71
Prior to the enactment of the aiding and abetting statute in 1909, the common law had divided parties to a felony into four distinct categories:

(1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3) accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete.\(^{72}\)

These common-law distinctions were originally introduced to mitigate the harshness of the common law "when all felonies carried the same sanction—death."\(^{73}\) The distinctions allowed the common-law courts to punish some participants—the aiders and abettors—less severely.\(^{74}\)

In solving the death penalty problem, however, these gradations created others. Determining which common-law category applied to a defendant began to assume importance wholly apart from the issue of punishment. For example, the category determined venue (the principal had to be prosecuted where the crime took place, while the aider and abettor had to be prosecuted where his or her act of abetting took place);\(^{75}\) the phrasing of the indictment (variance was fatal);\(^{76}\) and, at times, whether the prosecution could even be initiated altogether (accessories could be tried only after the conviction of the


\(^{73}\) United States v. Ambrose, 740 F.2d 505, 508 (7th Cir. 1984), overruled on other grounds, United States v. Pino-Perez, 870 F.2d 1230 (7th Cir. 1989); see Standefer, 447 U.S. at 15; Dressler, supra note 71, at 95-96 ("Commentators have documented an early concern that the death penalty should not reach all parties to felonies. Specifically, the accessory was considered less deserving of execution." (footnote omitted)). Professor Dressler also notes that "Blackstone suggested a utilitarian explanation for the more lenient treatment of accessories," i.e., to deter wrongdoers from serving as principals. Id. at 96 (citing 4 William Blackstone, Commentaries *39-40).

\(^{74}\) Standefer, 447 U.S. at 15; Ambrose, 740 F.2d at 508.

\(^{75}\) LaFave & Scott, supra note 2, § 6.6(d)(1), at 572.

\(^{76}\) Id. at § 6.6(d)(2), at 573 (noting that it was thus "possible for an accomplice to escape altogether because of uncertainty as to whether he had been ... constructively present at the time [of] the offense").
principal). Consequently, "considerable effort was expended in defining the categories."

With the demise of the automatic death penalty for principals, and with the introduction of sentencing discretion allowing courts "to proportion the severity of the sentence to the aider and abettor's fault," the common-law distinctions became an unnecessary burden. Consequently, in 1909, Congress eliminated many of these intricate, judge-made distinctions by enacting the forerunner of what today is 18 U.S.C. § 2(a). It provided: "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."

As the Supreme Court has made clear, the statute "abolished the distinction between principals and accessories and made them all principals." Nothing better supported that conclusion than the very

77. Standefer, 447 U.S. at 15 (stating that acquittal, death, pardon, or flight of the principal precluded prosecution of the accessory before the fact, although not of the principal in the second degree); see also id. at 19-20 (quoting the identical Senate and House Reports, S. Rep. No. 60-10, pt. 1, at 13 (1908), and H.R. Rep. No. 60-2, pt. 1, at 13 (1908)); LaFave & Scott, supra note 2, at § 6.6(d)(3), at 573.
78. Standefer, 447 U.S. at 16 (citing 4 William Blackstone, Commentaries *34).
79. Ambrose, 740 F.2d at 509.
81. Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1152 (codified as amended at 18 U.S.C. § 2(a) (2000)); see Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 181 (1994), superseded by statute on other grounds, 15 U.S.C. § 78t(f) (2000). Prior to this enactment, there was no general federal aiding and abetting statute; rather, a few individual, substantive criminal statutes by their terms applied to aiders and abettors as well. See, e.g., Coffin v. United States, 162 U.S. 664, 667-68 (1896) (interpreting a provision of the predecessor to the current bank embezzlement statute, 18 U.S.C. § 656, which then made it a crime for a bank officer to embezzle money with intent to defraud, and for any person to aid or abet the embezzlement with like intent to defraud); United States v. Ruffin, 613 F.2d 408, 421 (2d Cir. 1979) (Wyatt, J., dissenting) (noting that the old bank embezzlement statute discussed in Coffin imposed liability not only on the principal, but also on "every person who with like intent aids or abets ... in violation of this section" (quotation omitted)).
83. Standefer, 447 U.S. at 19 (emphasis added) (quoting Hammer v. United States, 271 U.S. 620, 628 (1926)); see also Busic v. United States, 446 U.S. 398, 411 n.18 (1980) ("Section 2 makes [the aider and abettor] punishable as a principal," and those words mean what they say."); superseded by statute on other grounds, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1005(a), 98 Stat. 2138-39 (amending 18 U.S.C. § 924(c)); United States v. Busch, 758 F.2d 1394, 1398 (10th Cir. 1985) ("This statute was designed to abolish the historical distinction between an accessory before the fact and a principal, to the end that an aider or abettor may be charged, tried, and punished as a principal."); United States v. Jones, 308 F.2d 26, 31 (2d Cir. 1962) (en banc) (indicating that the statute's "effect is to erase whatever distinctions may have previously existed between different classes of principals and between principals and aiders and abettors."); S. Rep. No. 60-10, at 27 (1908); LaFave & Scott, supra note 2, § 6.6(e), at 574. In effect, the statute required that felonies be treated like common-law misdemeanors, where "all participants were deemed principals." Standefer, 447 U.S. at 16.

One exception to the statute's treatment of aiders and abettors as principals
language in the statute itself, which explicitly provided that the aider and abettor "is a principal." Thus, all aiders and abettors, whether present or not during the commission of the crime, were to be treated as principals. No longer would the courts have to struggle with the fine distinctions of whether, on a given set of facts, the defendant was a principal in the first degree, a principal in the second degree, or an accessory before the fact. Only the accessory after the fact remained a separate category.\footnote{84}

The second paragraph of 18 U.S.C. § 2—the causing subsection—was not enacted until 1948 to codify a different doctrine of imputed liability applicable to cases where the principal was an innocent intermediary.\footnote{85} At common law, one who caused an innocent intermediary to act, even though not present at the scene, and even if not the one actually to administer the poison, for example, was still recognized at common law as a principal in the first degree.\footnote{86} But, rather than being guilty of "aiding and abetting" the principal, the defendant was guilty of "causing" the commission of the offense, as if he or she had done so through an animal or inanimate object.

In 1948, Congress codified the common-law concept of criminal causation by adding to 18 U.S.C. § 2 the precursor to what is now §
2(b). It read: "Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such." Here, too, the relevant statutory language "is also a principal" (i.e., is a principal just like the aider and abettor is a principal) made it clear that Congress was eliminating the distinctions between the causer and the principal, and that the two were to be treated as equivalent. With respect to the aiding and abetting section, Congress made no change in 1948 other than to change its designation from "2" to "2(a)."

In 1951, Congress again amended the statute, this time replacing the phrase "is a principal" in § 2(a), and the phrase "is also a principal and punishable as such" in § 2(b), with the phrase "is punishable as a principal." Prior to the amendment, it was questionable whether an accomplice who was not a bank officer, for example, could be liable under a criminal statute whose terms apply only to "bank officers," such as a statute prohibiting bank officers from making false statements on the bank's books. The old language, in providing that the accomplice "is" a principal, made it difficult to argue that an outside accomplice "is" a bank officer. The primary change made by the amendment—from "is" a principal to "is punishable as" a principal—removed any doubt that Congress intended that an accomplice should be liable even if he or she lacks the capacity required of the principal by the underlying criminal statute.

These amendments did not, however, alter the 1909 enactment's design to eliminate the common-law distinctions between the principal and the aider and abettor, or the 1948 enactment's design to

87. The enactment was not designed to introduce a new concept into the law of accomplice liability. Ruffin, 613 F.2d at 413-14; see also id. at 422 (Wyatt, J., dissenting) ("There was . . . no intention by Section 2(b) to change what had been the law theretofore." (relying on H.R. Rep. No. 80-304, at 2448-49 (1948))).
89. United States v. Am. Investors of Pittsburgh, Inc., 879 F.2d 1087, 1094 (3d Cir. 1989) (indicating that "§ 2(b) abolishes the common law distinction" between the principal and the causer).
91. See Standefer v. United States, 447 U.S. 10, 18 n.11 (1980). Section 2 makes the aider and abettor "punishable 'as a principal,' and those words mean what they say. One consequence is that aiders and abettors may be held vicariously liable 'regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted.'" Busic v. United States, 446 U.S. 398, 411-12 n.18 (1980) (quoting S. Rep. No. 82-1020, at 7 (1951)); see also Ruffin, 613 F.2d at 413-14. To further demonstrate its intention to hold a causer liable even if he or she lacks the capacity required by the underlying statute, Congress added the words "or another" to the causing subsection, so that it now applies to whoever "causes an act to be done which if directly performed by him or another would be an offense against the United States." 18 U.S.C. § 2(b) (2000) (emphasis added); see United States v. Heyman, 794 F.2d 788, 791 (2d Cir. 1986); United States v. Tobon-Builes, 706 F.2d 1092, 1100-01 (11th Cir. 1983); Ruffin, 613 F.2d at 414-15. Thus, if "another," i.e., the bank officer, has the requisite capacity, then the causer, even if he or she lacks that capacity, falls within the statute's reach.
eliminate the distinctions between the principal and the causer." In other words, dropping the words "is a principal" should not be understood as implying that the concept of equivalence was also dropped.

In the 1951 amendments, Congress made another interesting addition to § 2(b). Whereas neither of the subsections had previously contained any term explicitly prescribing a mental state, Congress added the word "willfully," but only to § 2(b), so that the causing subsection has since applied to "[w]hoever willfully causes an act to be done." Congress left § 2(a), the aiding and abetting subsection, without a statutorily prescribed mental state.

Nothing in the legislative history of the 1951 amendments to § 2(b) indicates why Congress added the word "willfully," or what precisely Congress meant in that section by the word. As for § 2(a), from its original enactment until the present, Congress has never included in it any explicit indication of the aider and abettor's mental state.

The history of § 2 indicates that any effort to divine the required mental state of the aider and abettor and of the causer must take into account two factors: Congress's intent to eliminate the old common-law distinctions between the accomplice and the principal, and its inclusion of the word "willfully" in the causing subsection but not in the aiding and abetting subsection.

These two guiding principles, however, do not easily lend themselves to ready application. For one thing, there is some inherent tension between them. Presumably, by including the word "willfully" in the causing subsection, and by not including it in the aiding and abetting subsection, Congress's intent was to require "willfulness" for the causer, but not for the aider and abettor. But, both subsections provide that the accomplice—whether an aider and abettor or a causer—is to be treated as a principal. If an aider and abettor is to be treated as a principal, and a causer is also to be treated as a principal, then, by the transitive principle, an aider and abettor and a causer would have to be treated as equivalent. That is a somewhat perplexing result, if one need act willfully and the other not.

Even if this puzzle can be solved, the suggestion that § 2—with the addition of "willfully" to one subsection but not the other—may have

92. See Standefer, 447 U.S. at 18 n.11 ("The change was fully consistent with congressional intent to treat accessories before the fact as principals . . . .").

93. See United States v. Oates, 560 F.2d 45, 55 (2d Cir. 1977) ("There is . . . no evidence of any Congressional intent [in enacting the 1951 amendments] to change the substantive law that an aider and abettor is a principal." (quoting Swanne Soon Young Pang v. United States, 209 F.2d 245, 246 (9th Cir. 1953))).

94. 18 U.S.C. § 2(b) (emphasis added).

95. United States v. Leppo, 177 F.3d 93, 95 & n.2 (1st Cir. 1999); Jorge C. Gonzalez, Comment, Punishing the Causer As the Principal: Mens Rea and the Interstate Transportation Element of the National Stolen Property Act, 38 San Diego L. Rev. 629, 648 & n.109 (2001); see infra Part III.C.
created certain distinctions as to mental states is at odds with the clear congressional intent to eliminate distinctions in this area of the law. Congress clearly sought to eliminate all the problematic common-law distinctions between the principal and the aider and abettor, and between the principal and the causer. This elimination of distinctions speaks in favor of applying to the accomplice whatever mental state applies to the principal. If the principal is only liable upon acting with purposeful intent, then the aider and abettor or the causer should not be liable unless he or she acts with purposeful intent. If, by contrast, the principal is guilty when acting with mere knowledge, then under this principle of "no distinctions," that should also be true for both the aider and abettor and the causer. But, can that conclusion square with the presence of the word "willfully" in the causing subsection and its absence in the aiding and abetting subsection?

Before turning to the cases dealing with the issue of mental state, however, it is worthwhile to focus on the cases that reiterate in other contexts the clear congressional intent to eliminate the old distinctions between the accomplice and the principal. Time and time again, the cases say that all participants—aiders and abettors, causers, and principals—are to be treated as equivalent. As we shall see, it makes no sense to eliminate distinctions in other contexts while retaining them when it comes to the accomplice's mental state. Nonetheless, most of the cases fail to apply this "no distinction" rule to the issue of mental state, and in fact, usually create, rather than eliminate, distinctions between the accomplice and the principal.

B. The "No Distinction" Rule As Applied to Issues Other Than Mental State

In a myriad of contexts, the cases have applied the rule that both the aider and abettor and the causer are to be treated as principals. In *Hammer v. United States*, 96 decided seventeen years after the enactment of the aiding and abetting provision, the Supreme Court decided that the well-established two-witness rule applicable to perjury cases, which precludes a conviction based solely on the testimony of one witness, also applies to subornation cases. The Court based its conclusion on the doctrine that aiders and abettors are to be treated as principals. Subornation is simply the procuring of perjury, and therefore, under the aiding and abetting statute (which applies to anyone who "procurers" the commission of an offense), the suborner is the equivalent of the perjurer; consequently, the suborner is entitled to the benefit of the perjurer's rule. 97 In other words, the aiding and abetting statute's elimination of all distinctions between

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96. 271 U.S. 620 (1926).
97. Id at 628-29. Section 332 of the Criminal Code, referred to by the Court, is a reference to the aiding and abetting provision, currently codified at 18 U.S.C. § 2(a).
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the aider and abettor and the principal means that the aider and abettor is entitled to the benefits of a rule of evidence otherwise applicable exclusively to the principal.

This "no distinction" rule is applied today in many other contexts as well. The courts have recognized that indictments need not particularize whether a defendant is charged as a principal, an aider and abettor, or a causer, since "both causing and aiding and abetting are implied in every indictment."98 Similarly, juries need not decide whether the participant being considered is a principal, an aider and abettor, or a causer.99 The defendant is guilty as a principal regardless of the precise nature of his or her participation.100

Numerous cases have gratefully relied on the elimination of these distinctions when faced with facts that would have resurrected the old common-law difficulties in distinguishing between the aider and abettor and the principal. For example, in a murder case involving multiple assailants, the Fourth Circuit had no difficulty affirming the conviction despite uncertainty as to "who delivered the fatal blow."101 The court stated:

This case is thus a classic one for an aiding and abetting instruction—the commission of a criminal offense is not in doubt.

98. United States v. Armstrong, 909 F.2d 1238, 1242 (9th Cir. 1990); accord United States v. Howick, 263 F.3d 1056, 1064-65 (9th Cir. 2001) ("All indictments must be read in effect, then, as if the alternatives provided by 18 U.S.C. § 2 were embodied in each count thereof." (quotation omitted)); United States v. Footman, 215 F.3d 145, 153-54 (1st Cir. 2000) (noting that an aiding and abetting charge is implicit in every indictment, and that the jury was therefore properly instructed on aiding and abetting and on causing); United States v. Knoll, 16 F.3d 1313, 1323 (2d Cir. 1994) (noting that "[o]ther circuits have stated that all charges in an indictment implicitly carry an 18 U.S.C. § 2 charge," and that defendant could, therefore, be convicted as principal, aider and abettor, or causer); see also United States v. Palmer, 203 F.3d 55, 66 (1st Cir.) (aiding and abetting, citing cases), cert. denied, 530 U.S. 1281 (2000); United States v. Rivera, 153 F.3d 809, 813-14 (7th Cir. 1998) (aiding and abetting); United States v. Nolan, 136 F.3d 265, 271-72 (2d Cir. 1998) (causing); United States v. Becerra, 97 F.3d 669, 672 (2d Cir. 1996) (aiding and abetting); United States v. Wills, 88 F.3d 704, 720 (9th Cir. 1996) (aiding and abetting); United States v. Mullins, 22 F.3d 1365, 1368 (6th Cir. 1994) (aiding and abetting); United States v. Pungitore, 910 F.2d 1084, 1132 (3d Cir. 1990) (aiding and abetting); United States v. Broadwell, 870 F.2d 594, 607-08 (11th Cir. 1989) (aiding and abetting); United States v. Gaskins, 849 F.2d 454, 459 (9th Cir. 1988) (aiding and abetting); United States v. Michaels, 796 F.2d 1112, 1118 (9th Cir. 1986) (causing); United States v. Ruffin, 613 F.2d 408, 415-16 (2d Cir. 1979) (causing); United States v. McCambridge, 551 F.2d 865, 871 (1st Cir. 1977) (aiding and abetting).

Although the indictment need not particularize, the defendant still must have an opportunity to address the prosecutor's theory, and has a right not to be surprised by a sudden switch from an aiding and abetting theory to a principal theory. See United States v. Horton, 921 F.2d 540, 546-49 (4th Cir. 1990); Gaskins, 849 F.2d at 459-60.


100. See Horton, 921 F.2d at 545-46.

101. Id. at 544.
but the identity of the principal may be unclear, and the defendant's participation in the venture can be established by the evidence. The very purpose of 18 U.S.C. § 2 is to render equally culpable all who participate in an offense.\textsuperscript{102}

In a similar vein, courts have recognized that the elimination of the distinctions between the principal and the aider and abettor also dispenses with the need for unanimity. A jury may convict, even if some jurors determine that the defendant is a principal, and others determine that he or she is an aider and abettor.\textsuperscript{103}

Given the widespread application of this "no distinction" rule, one would have thought that it would also eliminate distinctions between the participants' mental states. Since accomplices are now considered principals, they should be held liable based on the same mental states that apply to principals. Whatever mental state that the underlying criminal statute prescribes for the principal should apply to the accomplice.

That is not to say that the "no distinction" rule has eliminated every difference among the aider and abettor, the causer, and the principal. The principal is a direct perpetrator, while the accomplices are vicarious perpetrators. The aider and abettor must act through a guilty principal, while the causer may act through an innocent intermediary. The aider and abettor, whose provision is broadly phrased to encompass anyone who "aids, abets, counsels, commands, induces or procures,"\textsuperscript{104} is liable for any act of facilitation—eventhough, in a case of transportation of stolen goods, that after "passage of 18 U.S.C. § 2" there no longer was any need to determine whether it was the driver of the truck or the engineer of the thief who was the principal); United States v. Provenzano, 334 F.2d 678, 691 (3d Cir. 1964) ("[T]he distinction between principal actors and aiders and abettors in the enterprise is somewhat illusory."); see also id. at 691-92 n.11 (quoting the portion of Nye & Nissen which quoted Judge Learned Hand's formulation in Peoni).

102. Id.; see United States v. Bryan, 483 F.2d 88, 95 (3d Cir. 1973) (en banc) (noting, in a case of transportation of stolen goods, that after "passage of 18 U.S.C. § 2" there no longer was any need to determine whether it was the driver of the truck or the engineer of the thief who was the principal); United States v. Provenzano, 334 F.2d 678, 691 (3d Cir. 1964) ("[T]he distinction between principal actors and aiders and abettors in the enterprise is somewhat illusory."); see also id. at 691-92 n.11 (quoting the portion of Nye & Nissen which quoted Judge Learned Hand's formulation in Peoni).

103. See, e.g., Horton, 921 F.2d at 545 (citing United States v. Eagle Elk, 820 F.2d 959 (8th Cir. 1987), and United States v. Peterson, 768 F.2d 64, 67 (2d Cir. 1985)); see also United States v. Harris, 8 F.3d 943, 945 (2d Cir. 1993) (holding that general unanimity instruction is sufficient, and jury need not be specifically instructed that they have to unanimously determine whether the defendant is an aider and abettor or a principal).

Presumably, this is true not only for the aider and abettor, but also the causer. Interestingly, according to at least one district court, the jury cannot convict if it splits between an aiding and abetting theory and a causing theory. See United States v. Keefler, 799 F.2d 1115, 1125 (6th Cir. 1986) (quoting the district court's instruction).


105. See supra note 14 and accompanying text. For example, in United States v. Price, 76 F.3d 526, 529-30 (3d Cir. 1996), a bank robbery case, the court found that the act facilitating the principal's use of a gun was the aider and abettor's collection of money from cash drawers after the principal had threatened bank employees with the gun. See also Dressler, supra note 71, at 102 (indicating that "the most trivial assistance is sufficient basis to render the secondary actor accountable for the actions of the primary actor," and giving examples from various state cases, which include
encouragement—while the causer is not guilty unless he or she "causes"—i.e., brings about, or is the cause-in-fact of—the offense. Nonetheless, these distinctions emanating from the language of the statute, and from the historical development of the doctrine of aiding and abetting and the doctrine of causing, are clearly the contemplated exceptions to the "no distinction" rule.

Indeed, the "no distinction" rule makes little sense unless it is extended to the issue of mental state. If the mental state for the principal is allowed to differ in any way from that for the aider and abettor or the causer, then the jury would have to first determine in each instance whether the defendant is an aider and abettor, a causer, or a principal, in order to know which mental state to apply. Requiring the jury to make those distinctions effectively resurrects the pre-1909 state of the law, and stands in direct contradiction to the "no distinction" rule.

As we shall see in the following parts, what is so striking in so many of the judicial efforts at ascertaining the mental state of the aider and abettor or the causer is the almost universal neglect of the "no distinction" rule. Even the cases that apply the principal's mental state to the aider and abettor or the causer usually fail to invoke it.

II. THE MENTAL STATE OF THE AIDER AND ABETTOR

Despite the similarities between the aider and abettor and the causer, the judicial efforts at ascertaining their mental states have usually taken two separate paths, sometimes reaching different results. The analysis turns first to the aider and abettor, looking initially at the case law prior to Peoni, then focusing on Peoni itself, and then discussing the many approaches that have developed in the years since Peoni. The analysis of the aider and abettor concludes applauding at an illegal event, holding the principal's child, and preparing food for the principal.

106. See supra note 15 and accompanying text.
that despite all the cases that have viewed *Peoni* as a simple aiding and abetting case, *Peoni* was nothing of the sort; rather, it was a "natural and probable consequences" case that explicitly left the issue of the mental state of the ordinary aider and abettor unresolved.

A. Initial Judicial Efforts at Ascertaining the Mental State of the Aider and Abettor

1. The Case Law Prior to *United States v. Peoni*

The general concept of aiding and abetting liability long predated the enactment of the federal aiding and abetting statute in 1909. In *United States v. Peoni*, Judge Learned Hand traced the earliest federal statutory formulation to a 1790 statute dealing with murder, robbery, and piracy, and the earliest judicial formulations to the common law of fourteenth century England.

The more specific issue of the aider and abettor's mental state also predated *Peoni* and the 1909 enactment. One of the strongest early federal pronouncements rejecting purposeful intent in favor of knowledge, at least for serious crimes, was voiced by the Supreme Court in a civil case in 1870, *Hanauer v. Doane*. The plaintiff, a vendor who had sold military goods during the Civil War knowing that the purchaser was supplying the Confederate Army, sought to collect on the promissory notes used to pay for the goods. The trial court had instructed the jury that the vendor was guilty of treason, and therefore, barred from collecting on the notes, only if he intended to aid the rebels, not if he merely knew that the goods he sold would ultimately aid the rebels. The jury found that the notes were valid.

The Supreme Court reversed. Selling to a purchaser with knowledge that the purchaser would turn the goods over to the rebel army was sufficient to make the vendor guilty of treason as an aider and abettor and to bar collection on the notes. Purposeful intent was not necessary:

> Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them, and intends to use them, for that purpose, and then pretend that he is not a participator in the guilt? Can he wrap himself up in his own

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109. 100 F.2d 401 (2d Cir. 1938)
110. Id. at 402.
111. 79 U.S. 342 (1870).
112. Id. at 342-43.
113. Id. at 343-44.
114. Id.
115. Id. at 344.
116. Id. at 347.
selfishness and heartless indifference and say, "What business is that of mine? Am I the keeper of another man's conscience?" No one can hesitate to say that such a man voluntarily aids in the perpetration of the offence, and morally speaking, is almost, if not quite, as guilty as the principal offender.

... He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for the purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act.\textsuperscript{117}

This is a most emphatic, carefully reasoned statement. Especially for serious offenses, it speaks strongly in favor of imposing liability even when the aider and abettor acts with mere knowledge, and specifically rejects the higher, purposeful intent standard. Yet, the case was to be ignored in future federal cases, even by those cases adopting the simple knowledge standard that it propounded.

Indeed, the Supreme Court did not cite Hanauer at all twenty-three years later in an aiding and abetting case, when it reversed a murder conviction and apparently adopted a purposeful intent approach. In Hicks v. United States,\textsuperscript{118} the purported aider and abettor, who was present at the shooting, said to the victim, "Take off your hat and die like a man."\textsuperscript{119} The Supreme Court reversed his conviction because the trial court failed to instruct the jury that the defendant could be liable only if he had uttered those words with the "intention of encouraging and abetting" the murder.\textsuperscript{120} While the words uttered by the defendant may have had the effect of encouraging the principal, the jury had to find that the defendant "intend[ed] that they . . . be understood by [the principal] as an encouragement to act."\textsuperscript{121}

It seemed, then, that purposeful intent, rather than simple knowledge, had become the standard.\textsuperscript{122} But, whichever approach was gaining sway, these common-law cases, decided before Congress enacted the aiding and abetting statute, and thereby evinced its intent to eliminate distinctions between the aider and abettor and the

\textsuperscript{117} Id.
\textsuperscript{118} 150 U.S. 442 (1893).
\textsuperscript{119} Id. at 446.
\textsuperscript{120} Id. at 449.
\textsuperscript{121} Id.
\textsuperscript{122} Although the Court in Hicks spoke of intent rather than knowledge, one must admittedly be careful about drawing too definitive a conclusion from the case. Unlike the Court in Hanauer v. Doane, which focused on the difference between intent and knowledge, the Court in Hicks focused on a jury instruction that seemed to imply that the defendant's act of assistance was sufficient for liability regardless of his mental state. Thus, Hicks may well use the language of "intent" only to stress the need for some level of culpable mental state, without considering what precise level would be appropriate.
principal, understandably felt no need to consider whether or not their results would create further distinctions. At that time, arcane distinctions between the aider and abettor and the principal were the norm.

2. Judge Learned Hand's Decision in *United States v. Peoni*

The "knowledge versus purposeful intent" controversy continued beyond the 1909 enactment of the federal aiding and abetting provision and well into the twentieth century. Initially, a number of different federal circuits came down on the "knowledge" side. (Interestingly, those circuits neglected to cite the Supreme Court's decision in *Hanauer v. Doane* in support of their position.) Ultimately, however, Judge Learned Hand's strong position on behalf of the purposeful intent position carried the day.

In *United States v. Peoni*, the defendant, Peoni, while in the Bronx, sold counterfeit bills to Regno, who, in turn, sold them to Dorsey, who was arrested while trying to pass them in Brooklyn. All were well aware of the nature of the bills. Peoni in the Bronx was charged with aiding and abetting Dorsey's possession of the bills in Brooklyn. The prosecution argued that Peoni possessed the requisite mental state for aiding and abetting liability because "Peoni put the bills in circulation and knew that Regno would be likely, not to pass them himself, but to sell them to another guilty possessor . . . ." The prosecution argued that Peoni possessed the requisite mental state for aiding and abetting liability because "Peoni put the bills in circulation and knew that Regno would be likely, not to pass them himself, but to sell them to another guilty possessor . . . ."

The Second Circuit rejected the argument that knowledge was enough and reversed the conviction. Writing for the court, Judge

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123. See, e.g., Bacon v. United States, 127 F.2d 985, 987 (10th Cir. 1942); Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940); Borgia v. United States, 78 F.2d 550, 555 (9th Cir. 1935); Vuckich v. United States, 28 F.2d 666, 669 (9th Cir. 1928). See generally United States v. Fountain, 768 F.2d 790, 797 (7th Cir.) ("Under the older cases . . . it was enough that the aider and abettor knew the principal's purpose."); *modified on other grounds*, 777 F.2d 345 (7th Cir. 1985) (per curiam); Model Penal Code § 2.06 cmt. at 315-17 (1962); LaFave & Scott, *supra* note 2, § 6.7, at 582; Blakey & Roddy, *supra* note 6, at 1387-89.

124. 100 F.2d 401 (2d Cir. 1938).

125. *Id.* at 401

126. *Id.* at 402. Apparently Peoni was not charged with uttering the bills himself because of venue problems; the prosecution was brought in Brooklyn (the Eastern District of New York), where Dorsey was arrested, rather than the Bronx (the Southern District of New York), where Peoni had originally uttered the bills.

127. *Id.* (emphasis added). The case does not reveal how Peoni knew that Regno would sell the bills to another guilty possessor instead of passing them to an innocent party. Interestingly, shortly after deciding *Peoni*, the Second Circuit—in a per curiam opinion, which included Judge Learned Hand—described the facts in *Peoni* differently: "Peoni, the accused, did not know that Regno, his buyer, was to sell the counterfeit bills to Dorsey, and had no interest in whether he did, since Regno might equally well have passed them to innocent persons himself." United States v. Bruno, 105 F.2d 921, 922 (2d Cir.) (per curiam), *rev'd on other grounds*, 308 U.S. 287 (1939).
Hand first reviewed the long history of the concept of aiding and abetting liability and its various formulations.\textsuperscript{128} He then concluded:

It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct; and that they all demand that he 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. All the words used [in the aiding and abetting statute]—even the most colorless, “abet”—carry an implication of purposive attitude towards it.\textsuperscript{129}

Judge Hand concluded that on the facts of the case in Peoni there was no evidence supporting a conclusion that Peoni had acted with a “purposive” attitude. Peoni had been charged with aiding and abetting not the possession by Regno (the purchaser), but rather the possession by Dorsey (the purchaser’s purchaser). He could be guilty of aiding and abetting such possession once removed, but only if he “wish[ed] to bring about” that more remote possession, not if he merely knew or foresaw it. “[I]t was of no moment” to Peoni “whether Regno passed them himself, and so ended the possibility of further guilty possession, or whether he sold them to a second possible passer”;\textsuperscript{130} Peoni clearly lacked the wish to bring about the remote possession, and therefore, lacked the purposeful intent necessary to be Dorsey’s aider and abettor.\textsuperscript{131}

Judge Hand also based his reasoning on the Sixth Amendment’s guarantee of a trial in the district where the crime was committed,\textsuperscript{132} pointing out the difficulty in preserving that right when an aider and abettor’s liability is extended to cover not just the purchaser, but also the purchaser’s purchaser:

\textit{[N]obody, so far as we can find, has ever held that a contract is criminal, because the seller has reason to know, not that the buyer will use the goods unlawfully, but that some one further down the line may do so. Nor is it at all desirable that the seller should be held indefinitely. The real gravamen of the charge against him is his utterance of the bills; and he ought not to be tried for that wherever the prosecution may pick up any guilty possessor—perhaps thousands of miles away. The oppression against which the Sixth Amendment is directed could be easily compassed by this device,}

\begin{itemize}
\item \textsuperscript{128} Peoni, 100 F.2d at 402.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.} at 402-03.
\item \textsuperscript{131} For the same reason, Judge Hand also reversed the conviction on the conspiracy count. \textit{Id.} at 403.
\item \textsuperscript{132} “In all criminal prosecutions, the accused shall enjoy the right to a... trial, by an impartial jury of the State and district wherein the crime shall have been committed...” U.S. Const. amend. VI.
\end{itemize}
because if the seller be a real accessory he may be removed to the place of the crime.\textsuperscript{133}

Only under the more culpable, purposeful intent standard, reasoned Judge Hand, would it be fair to hold the aider and abettor liable in the venue where the guilty possession took place, which may well have been thousands of miles away.

In discussing his two rationales—that the language of the statute, reinforced by its history, conveys the "implication of purposive attitude," and that sensitivity to the Sixth Amendment favors limiting aiding and abetting liability to the purposeful actor—Judge Hand made no mention of the legislative purpose behind the enactment of the federal aiding and abetting statute, namely, the elimination of the common-law differences between the aider and abettor and the principal. Had that been part of his analysis, he would have had to examine the mental state of the principal under the relevant counterfeiting statute, and would have had to impose the purposeful intent mental state on the aider and abettor only if that was the mental state required of the principal.

Indeed, Judge Hand never, despite the numerous opportunities presented in the aiding and abetting cases that came before him, considered whether imposing the mental state of purposeful intent on the aider and abettor was consistent with the elimination of all distinctions between the aider and abettor and the principal. Rather, he simply repeated the purposeful intent concept in a number of slightly different ways whenever he could. Two years after \textit{Peoni}, in a conspiracy case, (he was of the view that conspirators and abettors were roughly equivalent when it came to mental state\textsuperscript{134}) he phrased it this way:

\begin{quote}
It is not enough that \textit{[the accused conspirator]} does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome.\textsuperscript{135}
\end{quote}

In 1950, he stressed again that liability for aiding, abetting, and procuring requires something more than simply taking steps "which

\textsuperscript{133} \textit{Peoni}, 100 F.2d at 403.

\textsuperscript{134} \textit{See United States v. Falcone}, 109 F.2d 579, 581 (2d Cir.) (L. Hand, J.) ("[T]he question is whether the seller of goods, in themselves innocent, becomes a conspirator with—or, \textit{what is in substance the same thing, an abettor of}—the buyer because he knows that the buyer means to use the goods to commit a crime." (emphasis added)), \textit{aff'd}, 311 U.S. 205 (1940); \textit{infra} note 271.

\textsuperscript{135} \textit{Falcone}, 109 F.2d at 581; \textit{see also United States v. Di Re}, 159 F.2d 818, 819 (2d Cir. 1947) (L. Hand, J.) ("[W]e have uniformly held that the prosecution must prove the accused to have associated himself with the principals in the sense that he has a stake in the success of the venture."). \textit{aff'd}, 332 U.S. 581 (1948).
the actor *knows* to be likely so to result.\(^\text{136}\) In 1951, he phrased it this way:

\[
\text{[Knowledge] will not suffice to establish a criminal liability, because an accessory must make the venture his own; the crime must be a fulfillment in some degree of an enterprise which he has adopted as his; his act must be in realization of his purpose.}\(^\text{137}\)
\]

The different formulations all amount to the same conclusion: knowledge is insufficient. What is necessary is intent, desire, purposefulness, or a wish to bring about the outcome, regardless of the mental state prescribed by the underlying criminal statute for the principal.

Judge Hand’s purposeful intent stance did not immediately find universal acceptance in the federal courts. For example, five years later, the Supreme Court used the phrase “contributed consciously” to describe the aider and abettor’s mental state\(^\text{138}\)—a phrase which seems purposely ambiguous so as to avoid the “knowledge versus purposeful intent” controversy. Then, in 1947, the Supreme Court in *Bozza v. United States*\(^\text{139}\) apparently rejected the purposeful intent standard in favor of the knowledge approach that it had articulated so eloquently in its old Civil War treason case of *Hanauer v. Doane* (but without citing it). In *Bozza*, the Court upheld a conviction for aiding and abetting the crime of conducting the “business of distiller... with intent wilfully to defraud the... United States of the tax on... spirits so distilled.”\(^\text{140}\) Although the defendant had clearly abetted the running of the distillery, he claimed that he did so without “knowledge that the distillery business was carried on with an intent to defraud the Government of its taxes.”\(^\text{141}\) The Court rejected that contention, concluding that he did possess such knowledge, and strongly implying that such knowledge, rather than purposeful intent, was all that was necessary:

Men in the jury box, like men on the street, can conclude that a person who actively helps to operate a secret distillery *knows* that he is helping to violate Government revenue laws. That is a well known object of an illicit distillery. Doubtless few who ever worked in such a place, or even heard about one, would fail to understand the cry: “The Revenuers are coming!”\(^\text{142}\)


\(^{137}\) United States v. Paglia, 190 F.2d 445, 448 (2d Cir. 1951).


\(^{139}\) 330 U.S. 160 (1947).

\(^{140}\) Id. at 162 (quoting the then current version of 26 U.S.C. § 2833(a)).

\(^{141}\) Id. at 164 (emphasis added).

\(^{142}\) Id. at 165 (emphasis added).
Interestingly, Bozza, in holding that knowledge was sufficient, did not seem to be the least bit concerned that the underlying offense was a specific intent offense that explicitly required an "intent willfully to defraud" the United States. In effect, Bozza held the aider and abettor guilty on a less culpable mental state than that required of the principal.

Justice Douglas, dissenting, contended that purposeful intent, rather than mere knowledge, was necessary for aiding and abetting liability. But, like the majority, he did not tie his conclusion in any way to the mental state required of the principal by the distillery statute. Rather, he quoted Judge Hand's Peoni formulation, and argued that what was necessary was evidence that the defendant "promoted" not only the distilling, but also the fraud, or stated differently, that the defendant "furthered the unlawful scheme, or in fact had some interest in the project." Soon thereafter, Justice Douglas got his way when he authored the majority opinion for the Supreme Court in Nye & Nissen v. United States, where the defendant was convicted of aiding and abetting the making of misrepresentations as to the weights, grades, and prices of dairy products sold to the War Shipping Administration during World War II. Without much discussion, the Court upheld the conviction, citing 18 U.S.C. § 2, and quoting Judge Hand's Peoni standard: "In order 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, that he seek by his action to make it succeed.'" Like Judge Hand in Peoni, Justice Douglas in Nye & Nissen applied the purposeful intent standard without examining the mental state of the principal, and without determining whether adoption of that standard was consistent with Congress's desire to eliminate the distinctions between the aider and abettor and the principal.

While Nye & Nissen's adoption of Peoni should have ended the matter, a review of the subsequent case law demonstrates that it did nothing of the sort.

B. What Does Peoni Really Mean? The Current Approaches to the Mental State of the Aider and Abettor

1. Overview

Purposeful intent rather than knowledge—the Peoni standard seems simple enough. But, after Peoni, and its adoption by the

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143. Id. at 168 n.1 (Douglas, J., dissenting).
144. Id. at 167-68 (Douglas, J., dissenting).
146. Id. at 619 (quoting Peoni).
Supreme Court in *Nye & Nissen*, does aiding and abetting liability *always* require purposeful intent? Yes, said Professor G. Robert Blakey and Kevin P. Roddy in an article surveying the federal cases. They came to the commonly-held conclusion: “The federal courts of appeals now uniformly use ‘intent’ as the necessary state of mind for accomplice liability.”

In reality, the federal case law is far from “uniform” in its use of the “intent” standard. It is more accurately described as hopelessly muddled and divided, despite the sixty years that have elapsed since Judge Hand’s decision in *Peoni*, and despite the seeming clarity of his pronouncements. Although the cases uniformly adopt Judge Hand’s standard in *Peoni*, they disagree as to what the *Peoni* standard is. Indeed, the federal courts ostensibly following *Peoni* (or following cases, such as *Nye & Nissen*, which adopt it) have employed at least six different approaches to the question of an aider and abettor’s mental state.

An examination of the six approaches to the mental state of the aider and abettor requires, as a preliminary matter, an understanding of the various mental states that may apply to the principal. Different crimes require different mental states. Citing the Model Penal Code, the Supreme Court has identified four levels of mens rea or mental state, listed as follows in descending order of culpability: purpose, knowledge, recklessness, and negligence. In addition to these four, there are at least three others: some crimes—usually those containing the word “willfully”—also require the additional mental element that the defendant be generally aware that his or her conduct violates the law; a few unusual crimes require not only that the defendant have a general awareness that his or her conduct violates the law, but also a

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147. Blakey & Roddy, *supra* note 6, at 1389-90; see *supra* text accompanying note 25. Despite their conclusion that the federal cases now uniformly utilize the *Peoni* approach, Professor Blakey and Roddy acknowledged that “occasionally ‘knowledge’ language (or knowledge-like results) can be found in the opinions.” Blakey & Roddy, *supra* note 6, at 1390.


149. *See* Bryan v. United States, 524 U.S. 184, 191 (1998) (indicating that the use of the word “willfully” in a criminal statute, “[a]s a general matter,” requires that the defendant act with a “bad purpose” (i.e., a general awareness that his or her conduct violates the law); United States v. Hopkins, 53 F.3d 533, 539 (2d Cir. 1995) (“The term ‘willfulness’ has generally, albeit not uniformly, been interpreted as referring to knowledge that the conduct in question was wrongful or unlawful.”). *But see* United States v. Georgopoulos, 149 F.3d 169, 171 (2d Cir. 1998) (per curiam) (limiting *Bryan*, and refusing to extend its interpretation of “willfully” to 29 U.S.C. § 186(b), which prohibits payments to union officials). For a discussion of the word “willfully” as used in federal criminal statutes, see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 Duke L.J. 341 (1998).
specific awareness of the provision that he or she is violating;\textsuperscript{150} by contrast, some crimes—strict liability offenses—require no culpable mental state at all.\textsuperscript{151}

Keeping these criminal mental states in mind, we can turn to the questions that have divided the courts after \textit{Peoni}, and that have led to the disparate approaches to the mental state of the aider and abettor.

1. Does \textit{Peoni} \textit{always} require purposeful intent?
2. If not, when does purposeful intent apply? And, what mental state applies when purposeful intent does not: knowledge?
3. Can a mental state other than either purposeful intent or knowledge apply to the aider and abettor? If the principal commits a strict liability offense, or some other lesser intent offense, does that affect the mental state required of the aider and abettor? What is the relationship, if any, between the mental state required of the aider and abettor and that required of the principal? Are they linked at all?
4. Does \textit{Peoni} set forth a specific intent standard?
5. Does \textit{Peoni} dispense with “ignorance of the law is no excuse,” and require that the aider and abettor know that his or her conduct violates the law?
6. What mental state does \textit{Peoni} require for jurisdictional elements, such as interstate transportation, which normally require no mental state at all on the part of the principal?

Two questions, however, have rarely been asked by the courts: how should the courts further Congress’s desire to eliminate distinctions between the principal and the aider and abettor; and, how should the

\begin{enumerate}
\item \textit{See}, e.g., \textit{United States v. Park}, 421 U.S. 658 (1975) (holding the responsible corporate officer criminally liable for company’s storage of contaminated food, even though he was unaware of the contamination); \textit{United States v. Freed}, 401 U.S. 601 (1971) (finding the possessor of hand grenades criminally liable, even though he was unaware that they were not properly registered); \textit{United States v. Dotterweich}, 320 U.S. 277 (1943) (contaminated food or drugs); \textit{United States v. Balint}, 258 U.S. 250 (1922) (narcotics); \textit{United States v. Figueroa}, 165 F.3d 111, 114 & n.3 (2d Cir. 1998) (reviewing Supreme Court cases); \textit{see also} \textit{Staples v. United States}, 511 U.S. 600, 606-07 & n.3 (1994) (summarizing cases, and noting that strict liability offenses dispense with the conventional mens rea requirement, but also adding that the Supreme Court has not recognized “true” strict liability offenses, and thus, the defendant charged with the possession of an unregistered machinegun usually must at least know that he or she is dealing with a dangerous item).
\end{enumerate}
courts account for the absence of the word “willfully” in the aiding and abetting subsection, an absence underscored by its presence in the neighboring causing subsection?

In answering the questions that the courts do ask, the cases have articulated various approaches, which are summarized below and thereafter discussed at length, and which answer these questions in different ways:

1. **Purposeful intent.** Knowledge is never sufficient; purposeful intent is always necessary. No matter what the facts, or what the nature of the substantive offense, an aider and abettor is liable only if he or she acts with the purposeful desire to bring about the crime. This purposeful intent mental state is always applicable, and is independent of any mental state that might apply to the principal.

2. **Bad purpose.** The aider and abettor has an independent mental state unconnected to that of the principal, but it is not simply purposeful intent. Even purposeful intent is insufficient for liability; the aider and abettor is not liable unless he or she acts not only with the desire to bring about the result, but also with a bad purpose and an awareness of the unlawfulness of the act.

3. **Knowledge is sufficient in most cases.** Knowledge remains the mental state of the aider and abettor, and all Peoni does is set forth a very limited exception to the rule that knowledge is sufficient. Peoni requires proof of the more culpable, purposeful mental state only in cases where there is a special need to limit the liability of the aider and abettor. Such a need arises in cases where the aider and abettor’s connection to the principal is as tenuous as it was in Peoni, where the defendant was charged with aiding and abetting the possession of counterfeit bills by his purchaser’s purchaser. A similar need to impose the tougher standard arises in cases where the defendant is a vendor making routine, lawful sales of innocent goods at the standard market rate to all purchasers, but knows that one of the purchasers will use the goods to commit a crime. In such unusual cases, aiding and abetting liability is appropriate only if the defendant did not simply know, but actually wanted, the crime to be committed. But, in the ordinary case, knowledge suffices.

4. **Knowledge is sufficient in a small number of particularly grave cases.** Peoni established a purposeful intent standard for most crimes, but certain crimes, such as treason or murder, are so serious that the law must penalize any act of abetting, even if committed simply with knowledge as opposed to purposeful intent.

5. **Knowledge is sufficient whenever coupled with a substantial act.** The mental state of the aider and abettor depends on the substantiality of the act of assistance. For a substantial act, knowledge is sufficient, while for a lesser act, the aider and abettor is liable only if acting with purposeful intent.
6. The aider and abettor's mental state is a derivative of that of the principal. Neither purposeful intent, nor bad purpose, nor knowledge is the mental state applicable to the aider and abettor. The aider and abettor's status is not measured by any independent mental state; rather, Peoni requires that the aider and abettor act with the same mental state as that required of the principal. If the principal is not guilty unless he or she acts with purposeful intent or bad purpose, the same holds true for the aider and abettor. But, if the mental state for the principal is mere knowledge, then the same is true for the aider and abettor. If no culpable mental state at all is required of the principal (because, say, the offense is a strict liability offense), then the same is true for the aider and abettor.

Determining which approach is employed by a given case is often a confounding task. Because the courts are typically unaware of the existence of the disparate approaches, a given court will often call legal pronouncements indiscriminately from previous aiding and abetting cases without realizing that those earlier cases are wholly inconsistent with one another. One recent First Circuit case illustrates this common problem. In summarizing the relevant law, it quotes language suggestive of the purposeful intent approach, the derivative approach, and the knowledge approach. The case then concludes that mere knowledge is sufficient for the two offenses at issue, even for the offense that requires a mental state of the principal that is more culpable than mere knowledge, namely, an "intent to cause death or serious bodily injury."

Despite the incongruities, the cases can often be categorized. Each of these approaches is analyzed in turn.

2. The Purposeful Intent Approach

Under this approach, Peoni always requires purposeful intent. The aider and abettor's mental state is a constant, unaffected by the mental state required of the principal. Even if the particular offense requires that the principal act only with knowledge or some other lesser mental state, the aider and abettor is not guilty unless he or she acts with the more culpable mental state of purposeful intent.

152. United States v. Otero-Mendoza, 273 F.3d 46, 51 (1st Cir. 2001) ("intended to help the principal" (quoting United States v. Taylor, 54 F.3d 967, 975 (1st Cir. 1995))); id. at 52 ("specific intent crime").
153. Id. at 51 ("consciously shared" in the principal's mental state (quoting Taylor, 54 F.3d at 975)); id. at 52 ("consciously shared" (citing United States v. Loder, 23 F.3d 586, 591 (1st Cir. 1994))).
154. Id. at 52 ("some knowledge of the principal's criminal intent" (citing Loder, 23 F.3d at 591)).
155. Id. at 52-53.
156. Id. at 51 (referring to the carjacking statute, 18 U.S.C. § 2119 (1994)).
One of the corollaries of this reading of *Peoni* is that Judge Learned Hand, by always requiring purposeful intent, established aiding and abetting liability as an offense of “specific intent” (in at least one of the phrase’s many meanings) rather than “general intent.” As the Supreme Court has recognized, “[i]n a general sense, ‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.” This specific intent reading of *Peoni* means that the aider and abettor must always act with the purpose and desire to bring about the crime, even when the principal is liable on some lesser mental state. Many cases have employed this specific intent approach, and for certain crimes, have recognized a sharp dichotomy between the specific intent mental state required of the aider and abettor and the mental state required of the principal, which is often knowledge (i.e., general intent). As we shall see, characterizing aiding and abetting liability as a specific intent offense has important practical consequences. It has also contributed significantly to the confusion in this area of the law, because “specific intent” is susceptible to many meanings, not all of which are consistent with the mental state for the aider and abettor set forth by Judge Hand in *Peoni*.

a. The Purposeful Intent Approach As Applied to Knowledge Offenses

i. Loansharking

*United States v. Scott* illustrates the application of the purposeful intent approach to the aider and abettor of a knowledge offense. The

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[A] person who causes a particular result is said to act purposefully if he consciously desires that result, whatever the likelihood of that result happening from his conduct, while he is said to act knowingly if he is aware that that result is practically certain to follow from his conduct, whatever his desire may be as to that result. *Id.* at 404 (quotation omitted).

158. *E.g.*, United States v. Hunt, 272 F.3d 488, 493 (7th Cir. 2001) (“a desire to help the activity succeed” (emphasis and quotation omitted)); United States v. Folks, 236 F.3d 384, 389 (7th Cir.) (same), *cert. denied*, 122 S. Ct. 74 (2001); United States v. Hill, 55 F.3d 1197, 1204 (6th Cir. 1995) (“with the desire that the crime be accomplished” (quoting United States v. Newman, 490 F.2d 139, 142-43 (3d Cir. 1974))).

159. *See, e.g.*, United States v. Samaria, 239 F.3d 228, 234-35 (2d Cir. 2001) (collecting Second Circuit cases); United States v. Jackson, 213 F.3d 1269, 1292 n.12 (10th Cir.) (collecting cases from various circuits), *vacated on other grounds*, 531 U.S. 1033 (2000).

160. For other meanings of “specific intent,” and a discussion on how the other meanings have influenced various courts in setting forth the mental state for the aider and abettor, see *infra* text accompanying notes 250-54, 323-37, 640-46.

161. 47 F.3d 1237 (2d Cir. 1995).
defendants were charged with violating 18 U.S.C. § 894(a)(1), which provides that whoever "knowingly participates in any way" in the use of extortionate means to collect on a loan is guilty of loansharking. One defendant was a mortgage broker who provided the victim with the needed financing on his home to repay the extortionate loan. One of the issues before the court was the mental state necessary to hold the mortgage broker liable for aiding and abetting: was he guilty if he simply knew that he was assisting in an extortionate transaction, or did he have to have the purpose or the desire to bring about the success of the crime?

The answer, the court determined, hinged on whether the defendant was a principal or an aider and abettor. The statute's explicit language—"knowingly"—"indicates that Congress decided that extortion was a grave enough evil to warrant criminal liability on the basis of knowledge alone... and did not impose the additional mens rea requirement of specific intent or purpose to bring about the crime." But, that was true only for the principal. Despite the existence of a lesser mental state for the principal, nothing in the statute changed the "well-settled rule" that an aider and abettor can be liable only if acting with "the specific intent that his act or omission bring about the underlying crime." Citing Peoni, the court in Scotti had no problem concluding that "aiding and abetting requires a finding of specific intent or purpose to bring about the crime... whereas [the loansharking statute] only requires knowledge." Thus, under Scotti's reading of Peoni, the aider and abettor's mental state—purposeful intent (which Scotti described as specific intent)—is independent of the principal's mental state. For the very same crime, the principal can be guilty when acting with knowledge or general intent, while the aider and abettor would not be guilty unless acting with the more culpable mental state of purposeful intent.

Scotti, then, is a straightforward application of the purposeful intent standard to a knowledge crime, with a resulting disparity in mental states between the aider and abettor and the principal. Scotti does not explain how it squares such a disparity in mental states with Congress's desire to eliminate all distinctions between the aider and

162. Id. at 1244 (quoting 18 U.S.C. § 894(a)(1)).
163. Id. at 1240.
164. See id. at 1244-46.
165. Id. at 1245-46 (emphasis omitted).
166. Id. at 1244. Of course, as this Article demonstrates, this rule is anything but "well-settled"; Scotti was oblivious to both contrary Supreme Court precedent, see, e.g., supra text accompanying notes 111-17, 139-42; infra text accompanying notes 310-13, 346-63, and contrary Second Circuit precedent, see, e.g., infra text accompanying notes 266-77, 320-22.
167. Scotti, 47 F.3d at 1244 (quoting United States v. Aiello, 864 F.2d 257, 262-63 (2d Cir. 1988)).
168. Id. (citing Aiello, 864 F.2d at 262-63, and United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).
WHAT WERE THEY THINKING?

abettor and the principal. Nor does Scotti discuss the word "willfully." Its requirement of specific intent for the aider and abettor seems to imply a requirement that the aider and abettor act "willfully." But, the word "willfully" is glaringly absent from the aiding and abetting provision; in 18 U.S.C. § 2, it is found in the causing subsection alone.

In any event, even apart from these unaddressed issues, the Second Circuit has not consistently applied Scotti. Rather, consistent with the lack of any doctrinal clarity in this area, the Second Circuit reached a different conclusion four years later, when it again confronted this issue of the mental state required of an aider and abettor of loansharking. The court reiterated the premise that aiding and abetting is a "specific intent" offense, and made it clear that the defendant had been charged and tried on an aiding and abetting theory, but then inexplicably concluded that the government was not required to prove specific intent. "The government needs only prove that [the aider and abettor's] participation was 'knowing,' not that he possessed specific intent." Even more puzzling was the court's citation to Scotti in support of that conclusion.

Nonetheless, whatever the vitality of Scotti in the Second Circuit today, it serves as a simple illustration of what occurs with some frequency under the purposeful intent approach, and indeed, under the other approaches that similarly define the aider and abettor's mental state without any reference to the mental state required of the principal. The mental state of the aider and abettor and the principal can diverge, and can diverge markedly, even though they have both been charged with the very same underlying offense.

ii. Bank Robbery

Another instance where application of the purposeful intent approach yields one mental state for the aider and abettor, while requiring another for the principal, is the offense of bank robbery. Bank robbery, as defined in 18 U.S.C. § 2113(a), is a general intent crime, not a specific intent crime. As long as the robber is aware of what he or she is doing, the robber need not desire any specific result.

169. See supra text accompanying notes 83-84; infra Part IV.C.
171. Id. at 383.
172. Id. at 380 n.1, 382-86.
173. Id. at 386.
174. Id. at 385-86.
175. 18 U.S.C. § 2113(a) (1994), first paragraph, punishes "[w]hoever, by force and violence, or by intimidation, takes ... from the person or presence of another ... any property or money or any other thing of value belonging to, or in the ... possession of, any bank ...."
All that the government need prove is "that the defendant possessed knowledge with respect to the actus reus of the crime (here, the taking of property of another by force and violence or intimidation)."  Consequently, as the Supreme Court has noted, it is no defense if the bank robber, lacking an intent to steal—i.e., "permanently to deprive the bank of its possession of the money"—simply takes the money from the bank in the hope of being arrested and returned to prison for alcoholism treatment.  Similarly, it is no defense if the robber intends only to recover his or her own deposit, or if the robber does not intend to intimidate the bank teller.

Yet, when it comes to the aider and abettor, the purposeful intent cases require proof of specific intent.  Acting with specific/purposeful intent to bring about the success of a bank robbery

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177. Id. at 268 (emphasis omitted).
178. Id.; see United States v. Mosley, 126 F.3d 200, 204 (3d Cir. 1997); United States v. DeLeo, 422 F.2d 487, 490 (1st Cir. 1970).
179. See Carter, 530 U.S. at 268-69 (citing United States v. Lewis, 628 F.2d 1276, 1279 (10th Cir. 1980)).
180. See Mosley, 126 F.3d at 204; United States v. Brown, 547 F.2d 36, 39 (3d Cir. 1976); DeLeo, 422 F.2d at 490-91.
181. See United States v. Foppe, 993 F.2d 1444, 1451 (9th Cir. 1993); see also United States v. Woodrup, 86 F.3d 359, 364 (4th Cir. 1996) (holding that "nothing in the statute even remotely suggests that the defendant must have intended to intimidate").
Eighth Circuit: United States v. Hill, 464 F.2d 1287, 1289 (8th Cir. 1972) ("[s]pecific intent or 'purposive attitude'"; United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971) ("The crime of aiding and abetting is one requiring 'specific intent' or as Judge L. Hand once described it 'purposive attitude.'" (citing United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938))); see also United States v. Holder, 566 F.2d 617, 618-19 (8th Cir. 1977) (holding that "purposeful attitude" is required of the aider and abettor of a robbery of a Postal Inspector in violation of 18 U.S.C. §§ 1153 and 2112, based on the holdings in Peoni, Nye & Nissen, Kelton, and Hill); United States v. Crow Dog, 532 F.2d 1182, 1195 (8th Cir. 1976) (same). But see United States v. Roan Eagle, 867 F.2d 436, 445 & n.16 (8th Cir. 1989) (attempting to reinterpret Kelton and Hill as if they did not require specific intent). The Roan Eagle court stated:

Although the language in Kelton might appear to be contradictory [to the conclusion that aiding and abetting does not require specific intent], the court was referring to specific intent or purposive attitude. The language indicates that there must be knowing participation in the activity, not that one can only be guilty of aiding and abetting if one has the specific intent to aid and abet.

Id.

Ninth Circuit: United States v. Dinkane, 17 F.3d 1192, 1196-98 (9th Cir. 1994). Dinkane involved an aider and abettor to armed bank robbery in violation of 18 U.S.C. § 2113(a), (d), which is an aggravated form of simple bank robbery. Id. at 1196. It is clear, however, from the opinion that the aider and abettor to either variety must act with specific intent. Id. at 1196-1200.

Tenth Circuit: United States v. Lambert, 995 F.2d 1006, 1008 & n.2 (10th Cir. 1993).
means, for example, acting with an intent to steal, a mental state not required of the principal. A getaway car driver lacking any intent to steal, who simply seeks to get arrested and returned to prison for alcoholism treatment, is not guilty, while the principal who enters the bank with the very same lack of intent to steal is guilty. A mother who sends her son into a bank for the same purpose is also not guilty of bank robbery; her son, however, is guilty.

In requiring purposeful intent of the aider and abettor of a bank robbery, these cases do not even mention, let alone reckon with, the less culpable mental state applicable to the bank robbery principal. To them, the general intent standard applicable to the principal is simply not relevant; the only applicable standard is the usual standard governing aiding and abetting liability: specific/purposeful intent. The mental state of the aider and abettor is governed by a standard that is unconnected to the standard governing the principal's mental state. Furthermore, these cases do not examine Congress's intent to eliminate all distinctions between the aider and abettor and the principal, nor do they explain why they require this mental state for the aider and abettor, when the word "willfully" is absent from the aiding and abetting subsection and present only in the causing subsection.

iii. Armed Bank Robbery

What is true for the aider and abettor of simple bank robbery is also true for the aider and abettor of armed bank robbery. The purposeful intent cases employ the very same purposeful intent approach for the weapon element of the crime of armed bank robbery, 18 U.S.C. § 2113(d), that they do for the crime of bank robbery itself. While subsection (a) of § 2113 makes it a federal offense to rob a bank, subsection (d) makes it a crime for anyone, in committing a bank robbery, to "put[] in jeopardy the life of any person by the use of a dangerous weapon or device." Thus § 2113(d) is comprised of two elements: bank robbery plus the aggravating element of a weapon.

183. See Carter, 530 U.S. at 268-70; see also United States v. Darby, 857 F.2d 623, 625-26 (9th Cir. 1988). Darby dealt with the mental state required for an attempted bank robbery, holding that the crime of attempted bank robbery requires specific intent, even while acknowledging that the completed crime of bank robbery requires only general intent. Id.; see also United States v. Bailey, 444 U.S. 394, 405 (1980) (explaining that attempt crimes require a "heightened mental state [i.e., specific intent] [to] separate[] criminality itself from otherwise innocuous behavior"). The court in Darby concluded that specific intent includes the intent to steal; thus, while the defendant who completes the robbery need not act with an intent to steal, the defendant who attempts the robbery must. 857 F.2d at 626. That conclusion regarding the specific intent of an attempt is presumably no less true for the specific intent of aiding and abetting.


185. E.g., United States v. Coleman, 208 F.3d 786, 793 (9th Cir. 2000) (quoting
Like the bank robbery element, the weapon element of § 2113(d) requires of the principal only general intent or knowledge, not specific intent. 186

Admittedly, when applied to the weapon element in the case of the principal, the distinction between knowledge and purposeful intent is somewhat esoteric. It is difficult to conceive of a bank robber using a gun, only knowing of the gun but not wanting to use it. Nonetheless, the cases are clear: it is enough if the principal simply knows that he or she is using a gun. 187 But, once again, under the purposeful intent approach, the knowledge standard applicable to the principal does not govern the aider and abettor.

The purposeful intent cases ignore the knowledge mental state applicable to the principal, and look instead to the universal standard governing all aider and abettors, namely, purposeful intent. The aider and abettor is guilty of armed bank robbery only if he or she purposefully intends and desires that the principal use a weapon. 188 Under this approach, a getaway car driver who purposefully abets a bank robbery, knowing that his or her confederate is using a gun, but not wanting the confederate to do so, is guilty only of bank robbery, not armed bank robbery. 189

iv. Use of Firearm During a Crime of Violence or Drugs

Another similar offense for which the purposeful intent approach requires a more culpable mental state for the aider and abettor than for the principal is 18 U.S.C. § 924(c)(1)(A). 189 The relevant portion of that section provides that whoever, "during and in relation to any crime of violence or drug trafficking crime[,...] uses or carries a firearm" is guilty of a criminal offense. 191 Section 924(c) provides for

-Dinkane, 17 F.3d at 1196).
186. See, e.g., United States v. Fazzini, 871 F.2d 635, 641 (7th Cir. 1989) (holding that "armed bank robbery is a general intent crime" (citations omitted)); United States v. Brown, 547 F.2d 36, 38-39 (3d Cir. 1976).
187. See, e.g., United States v. Reiswitz, 941 F.2d 488, 494-95 (7th Cir. 1991); United States v. Sanborn, 563 F.2d 488, 490-91 (1st Cir. 1977); Brown, 547 F.2d at 39. The distinction between knowledge and purposeful intent is not wholly without effect, even for the principal. For example, as shown below, if the use of the gun requires purposeful intent, then diminished capacity is a defense, but it is no defense if the use of the gun requires only knowledge. See infra text accompanying notes 239-49.
188. See Coleman, 208 F.3d at 793; United States v. Oliver, 60 F.3d 547, 551 (9th Cir. 1995), rev'd on other grounds, Jones v. United States, 526 U.S. 227, 251-52 (1999); Dinkane, 17 F.3d at 1196-97.
189. Dinkane, 17 F.3d at 1197 & n.3 (noting that its approach differs from that of the Second Circuit, which held in United States v. James, 998 F.2d 74, 80-82 (2d Cir. 1993), that aiding and abetting with knowledge of the gun is sufficient for armed bank robbery liability).
190. See generally Robinson, supra note 16.
191. 18 U.S.C. § 924(c)(1)(A) (1999). The statute also makes it a crime to "possess[] a firearm" "in furtherance of" crimes of violence or drugs. Id. The possession prong was added to the statute by the Criminal Use of Guns Act, Pub..L.
the imposition of a mandatory sentence, its length depending on the criminal record of the defendant and the nature of the firearm, consecutive to the sentence for the underlying offense of violence or drugs. The section creates an offense distinct from the underlying crime, and double jeopardy does not preclude conviction and sentencing for both a violation of § 924(c) and the underlying offense.\(^\text{192}\) As they do for any distinct offense, the provisions of the aiding and abetting statute apply.\(^\text{193}\)

What is the requisite mental state for a § 924(c) offense? For the principal, § 924(c) does not require specific intent;\(^\text{194}\) knowledge is sufficient.\(^\text{195}\) Of course, as is true of the gun element for the armed bank robber under § 2113(d), any theoretical distinction between knowledge and purposeful intent is usually irrelevant; it is hard to

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\(^\text{192}\) Congress amended § 924(c) in 1984 to ensure that the section's additional, consecutive punishment would apply even when the underlying crime of violence already provides for enhanced punishment for the use of a weapon. See United States v. Gonzales, 520 U.S. 1, 10 (1997). Thus, a defendant who robs a bank with a gun may be separately convicted and sentenced for armed bank robbery under 18 U.S.C. § 2113(d) and, in addition, for violating § 924(c), even though the former already has as an element “the use of a dangerous weapon or device.” See, e.g., United States v. Harris, 832 F.2d 88, 90-91 (7th Cir. 1987).

\(^\text{193}\) See, e.g., United States v. Price, 76 F.3d 526, 528-29 (3d Cir. 1996) (collecting cases from all the circuits).

\(^\text{194}\) United States v. Brown, 915 F.2d 219, 225 (6th Cir. 1990) (“[S]ection 924(c)(1) is not a specific intent offense.... [W]e adhere to the general rule of construction of criminal statutes that provides that where a statute does not specify a heightened mental element such as specific intent, general intent is presumed to be the required element.”). The Supreme Court's decision in Bailey, 516 U.S. at 137, which narrowed the understanding of “use” of a firearm under § 924(c), did not affect Brown's holding that § 924(c) is a general intent crime. United States v. Peralta, 930 F. Supp. 1523, 1529-30 (S.D. Fla. 1996), aff'd No. 01-11823, 2001 WL 1711251 (11th Cir. Dec. 28, 2001). But see United States v. Sorrells, 145 F.3d 744, 753 (5th Cir. 1998) (inexplicably holding that, after Bailey, the mental state for the principal, at least under the “use” prong of § 924(c), is no longer knowledge, but rather “knowledge or specific intent”).

\(^\text{195}\) United States v. Salazar, 66 F.3d 723, 728 (5th Cir. 1995); United States v. Santeramo, 45 F.3d 622, 623-24 (2d Cir. 1995) (collecting cases); United States v. Chairez, 33 F.3d 823, 825 (7th Cir. 1994); United States v. Williams, 985 F.2d 749, 755 (5th Cir. 1993); United States v. Powell, 929 F.2d 724, 727 (D.C. Cir. 1991); United States v. Edun, 890 F.2d 983, 987-88 (7th Cir. 1989); United States v. Wilson, 884 F.2d 174, 178-79 (5th Cir. 1989); United States v. Nelson, 733 F.2d 364, 370-71 (5th Cir. 1984); United States v. Barber, 594 F.2d 1242, 1244 (9th Cir. 1979), abrogated on other grounds, United States v. Foster, 133 F.3d 704 (9th Cir. 1998) (en banc), vacated on other grounds, 525 U.S. 801 (1998); Robinson, supra note 16, at 785 n.10.
imagine the § 924(c) principal who, while engaged in a crack sale, carries a gun, knowing of its presence but not desiring it. Still, one can conceive of an unusual case where that might be so. For example, a principal who regularly carries a firearm lawfully “in accordance with an alleged common practice and custom in the pertinent region,” who unexpectedly one day stumbles on an opportunity for a drug transaction, would obviously be aware that he or she has a gun, but might not be said to have desired or intended to carry it in relation to the drug transaction. Nonetheless, if he or she simply knows that he or she is carrying a gun, it is sufficient. Thus, this distinction between purposeful intent and knowledge may bear on the liability of the principal, albeit in very few cases.

For the aider and abettor, however, the distinction will significantly affect liability with some frequency. One can readily imagine many situations where the aider and abettor knows that the principal is carrying a gun, but does not necessarily desire that the principal do so. The purposeful intent cases focus on that distinction, and hold that despite the adequacy of knowledge for the principal, the more culpable, purposeful intent standard applies to the aider and abettor. Moreover, those cases apply the more culpable mental state to both components of § 924(c): the underlying crime of violence or drugs, and the use and carrying of the firearm. Thus, an aider and abettor is not guilty of a § 924(c) violation unless he or she facilitates not only the underlying crime with purposeful intent, but also the use or carrying of the firearm, again, with purposeful intent.


197. See id. at 431 (“[W]hether the perpetrator habitually totes a pistol is an immaterial issue.”). Apart from the requirement that the principal know that he or she is carrying the gun, the carrying of the gun must also be “during and in relation to” the drug offense. In the example, the principal clearly carried the gun “during” the drug transaction. As for the “in relation to” element, while that can be satisfied by showing that the principal had the “purpose” of using the gun with respect to the drug trafficking crime, Smith v. United States, 508 U.S. 223, 238 (1993), that element does not necessarily convert the offense into one of purposeful intent as opposed to knowledge. The “in relation to” element can also be proven without demonstrating purpose by demonstrating that the gun had some “effect” on, or the “potential of facilitating,” the drug offense. See id.; see also Muscarello v. United States, 524 U.S. 125, 137 (1998) (indicating that the “in relation to” element was added by Congress “in part to prevent prosecution where guns played no part in the crime” (quotation marks and citation omitted)).

Aside from the example in the text, the distinction between knowledge and purposeful intent would also have a practical effect for the § 924(c) principal who raises the defense of diminished capacity. That defense is only available if the § 924(c) principal must act with purposeful intent, but not if he or she need act only with knowledge. See supra note 187; infra text accompanying notes 239-49.

198. See, e.g., United States v. Taylor, 226 F.3d 593, 596-97 (7th Cir. 2000); United States v. Garth, 188 F.3d 99, 113-14 (3d Cir. 1999); Wright v. United States, 182 F.3d 458, 464-66 (6th Cir. 1999); United States v. Persico, 164 F.3d 796, 802 (2d Cir. 1999); United States v. Nelson, 137 F.3d 1094, 1103-04 (9th Cir. 1998); United States v.
surprisingly, these § 924(c) cases invoke the purposeful intent standard because "liability for aiding and abetting... requires... specific intent... and mere knowledge... is not sufficient for conviction."199 Thus, an act of assistance by the aider and abettor performed with mere knowledge that the principal is using or carrying a firearm, even when accompanied by purposeful intent to abet the underlying crime of violence or drugs, is insufficient. Of course, if the prosecution shows that a defendant has acted with knowledge of the use of the firearm, "a jury may more easily be able to infer that the defendant specifically intended to aid the use of the firearm,"200 but if the jury concludes that the defendant only knew of, but did not intend, the use of the firearm, there is no aiding and abetting liability.

To these aiding and abetting cases, the lesser mental state applicable to the § 924(c) principal is simply not relevant. Indeed, these cases fail even to mention, let alone reckon with, the knowledge/general intent standard governing the § 924(c) principal.201 Nor is there any reason they should, since, in their view, the only standard applicable to the aider and abettor is the usual standard of specific/purposeful intent, a standard that is independent of the standard required of the principal.202

b. The Purposeful Intent Approach As Applied to Strict Liability Offenses and to Strict Liability Elements

Some federal crimes—strict liability offenses—require no culpable mental state. For example, the Supreme Court has held that a corporate officer may, under certain circumstances, be liable for the

Bancalari, 110 F.3d 1425, 1429 (9th Cir. 1997); United States v. Pipola, 83 F.3d 556, 562-63 (2d Cir. 1996); United States v. Giraldo, 80 F.3d 667, 676 (2d Cir. 1996), abrogated on other grounds, Muscarello, 524 U.S. at 125; United States v. Bennett, 75 F.3d 40, 48 (1st Cir. 1996); United States v. Medina, 32 F.3d 40, 45-46 (2d Cir. 1994); Robinson, supra note 16, at 786 n.14.

199. Garth, 188 F.3d at 113; accord Persico, 164 F.3d at 802-03; Bancalari, 110 F.3d at 1430 ("Aiding and abetting is a specific intent crime." (citing United States v. Andrews, 75 F.3d 552, 555 (9th Cir. 1996))); Pipola, 83 F.3d at 562.

200. Nelson, 137 F.3d at 1104.

201. See, e.g., Persico, 164 F.3d at 802; Nelson, 137 F.3d at 1103-05; Bancalari, 110 F.3d at 1429-30; Pipola, 83 F.3d 561-66; Giraldo, 80 F.3d 674-78; Medina, 32 F.3d at 45-47. These cases all discuss the mental state applicable to the aider and abettor, see, e.g., Medina, 32 F.3d at 45 (citing Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), and United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)), without any reference to the lesser, knowledge standard applicable to the principal. They also make no reference to the "natural and probable consequences" doctrine. See infra Part II.C.

202. Thus, one court of appeals found that it was not error for the district court to give the jury a specific intent instruction on aiding and abetting, even though the underlying offense was only a general intent offense. United States v. Hicks, 980 F.2d 963, 974 (5th Cir. 1992). The court also noted that, in any event, even if it was an error, such an instruction was, from the defendant's perspective, "salutary error," as it increased the burden on the government. Id.
corporation’s storage of contaminated foods, even if he or she is unaware of the contamination.\textsuperscript{203} Similarly, a possessor of hand grenades may be liable, even if he or she is unaware that they were not properly registered.\textsuperscript{204} Offenses such as these require no culpable state of mind; there need be no proof that the defendant sought or knew of the “statutory elements that criminalize otherwise innocent conduct.”\textsuperscript{205}

Certain other offenses, although not strict liability offenses, may still contain strict liability elements. Because different elements of a criminal offense may require different mental states,\textsuperscript{206} a criminal statute may require a culpable mental state for certain elements of an offense, but not for others.\textsuperscript{207} A strict liability element is one that does not require a culpable mental state, yet may be contained within an offense that requires a culpable mental state for other elements, namely, those key elements that “separat[e] legal innocence from wrongful conduct.”\textsuperscript{208}

For example, the National Stolen Property Act, which prohibits the interstate transportation of stolen property\textsuperscript{209} and the possession of stolen interstate property,\textsuperscript{210} requires as one element that the property be stolen, and as another element that the property have crossed state lines. But, while the Act requires that the defendant know that the property was stolen,\textsuperscript{211} it does not require that the defendant know of the interstate nature of the transportation.\textsuperscript{212} As Judge Learned Hand

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\item \textsuperscript{203} United States v. Park, 421 U.S. 658, 673-74 (1975); see United States v. Dotterweich, 320 U.S. 277, 281 (1943) (misbranded and adulterated drugs); infra notes 346-63 and accompanying text.
\item \textsuperscript{204} United States v. Freed, 401 U.S. 601, 607 (1971); infra notes 217-21 and accompanying text.
\item \textsuperscript{205} United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994).
\item \textsuperscript{207} See, e.g., Freed, 401 U.S. at 612 (Brennan, J., concurring) (determining that the National Firearms Act created an offense based on strict liability as to some, but not all, of its elements); United States v. Corso, 20 F.3d 521, 526 (2d Cir. 1994).
\item \textsuperscript{208} X-Citement Video, Inc., 513 U.S. at 73.
\item \textsuperscript{209} 18 U.S.C. § 2314 (1994).
\item \textsuperscript{210} Id. § 2315.
\item \textsuperscript{211} Id. § 2314 (“knowing the same to have been stolen, converted or taken by fraud”); id. § 2315 ("knowing the same to have been stolen, unlawfully converted or taken").
\item \textsuperscript{212} See, e.g., United States v. Lack, 129 F.3d 403, 410 (7th Cir. 1997) (§ 2314); United States v. Rosa, 17 F.3d 1531, 1544 (2d Cir. 1994) (§ 2315); United States v. Lothian, 976 F.2d 1257, 1266 (9th Cir. 1992) (§ 2314); United States v. Mastrandrea, 942 F.2d 1291, 1294 (8th Cir. 1991) (same); United States v. Scarborough, 813 F.2d 1244, 1245-46 (D.C. Cir. 1987) (same); United States v. Lennon, 751 F.2d 737, 740 (5th Cir. 1985) (same); United States v. Franklin, 586 F.2d 560, 565 (5th Cir. 1978) (same); United States v. Kilcullen, 546 F.2d 435, 445 n.15 (1st Cir. 1976) (same); United States v. Ludwig, 523 F.2d 705, 706-07 (8th Cir. 1975) (same); United States v. White, 451 F.2d 559, 559-60 (6th Cir. 1971) (same); United States v. Strauss, 443 F.2d 986, 988 (1st Cir. 1971) (same); United States v. Roselli, 432 F.2d 879, 891 (9th Cir. 1970)
\end{enumerate}
}
himself held in construing a very similar statute, "it was enough, if they knew that the bales had been stolen, for it was not necessary that they should also know them to have been stolen from foreign commerce."213 Thus, two elements—stolen property and interstate transportation—differ in the requisite mental state; the "stolen" element requires knowledge, while the "interstate" element requires no mental state at all. The "interstate" element is thus a strict liability element contained in an offense requiring a culpable mental state for a different element.

In the National Stolen Property Act, the strict liability element is the element conferring federal jurisdiction—converting a state offense into a federal offense. This sort of jurisdictional element is typically a strict liability element. The jurisdictional element is usually one of strict liability, precisely because it is not what makes the conduct criminal, but rather what makes it criminal under federal, rather than only state, law.214 If a culpable mental state is required for the jurisdictional element, then someone who otherwise is guilty in every respect will have a defense if he or she does not know of the jurisdictional element, leaving the federal interest insufficiently protected.215 As the Supreme Court said: "The concept of criminal intent does not extend so far as to require that the actor understand not only the nature of his act but also its consequence for the choice of a judicial forum."216

213. United States v. Sherman, 171 F.2d 619, 623 (2d Cir. 1948) (L. Hand, J.). Soon after Judge Hand decided Sherman, the Second Circuit relied on it to reach the identical conclusion under the National Stolen Property Act. See Tannuzzo, 174 F.2d at 180 ("[K]nowledge that the goods...[moved interstate] was...not [necessary] for the substantive offense. To convict of that offense, it was only necessary to show that the defendant knew that the goods were stolen and that they were in fact transported in interstate or foreign commerce.") (citing Sherman).

214. See United States v. Feola, 420 U.S. 671, 676 n.9 (1975) (describing the jurisdictional requirement as one which "confer[s] jurisdiction on the federal courts for what otherwise are state crimes"). In Feola, the jurisdictional element, unknown to the defendants, was the federal identity of the undercover law enforcement agents whom they assaulted. Id. at 676.

The jurisdictional element, while perhaps the most common, is not the only strict liability element. Aggravating elements, which take what is already criminal conduct and subject it to enhanced penalties, can also be strict liability elements. See, e.g., United States v. Frazier, 213 F.3d 409, 418-19 (7th Cir. 2000) (holding that a drug dealer need not know that his or her employee is a minor to be subject to the enhanced penalties of 21 U.S.C. § 861(a)(1)) (collecting cases); United States v. Dimas, 3 F.3d 1015, 1022 (7th Cir. 1993) (holding that a drug dealer need not know that his or her distribution of drugs took place within 1,000 feet of a school to be subject to the enhanced penalties of 21 U.S.C. § 860(a)) (collecting cases).

215. Feola, 420 U.S. at 684.

216. Id. at 685.
What of the aider and abettor? What mental state must he or she have to be guilty of aiding and abetting a strict liability offense, or an offense containing a strict liability element? As discussed below, the purposeful intent approach requires that the aider and abettor act with purposeful intent for strict liability offenses, but not for strict liability elements.

i. Strict Liability Offenses

Perhaps the most striking application of the purposeful intent approach is in strict liability cases, where it creates an especially wide divergence between the mental state of the principal and the mental state of the aider and abettor. For example, one section of the National Firearms Act, 26 U.S.C. § 5861(d), makes it a crime to possess a firearm that has not been registered with the Secretary of the Treasury. In United States v. Freed,\(^{217}\) where the defendant was charged with possession of unregistered hand grenades, the Supreme Court held that “[t]he Act requires no specific intent or knowledge that the hand grenades were unregistered.”\(^{218}\) Although the lack of registration is the determinative fact that made the otherwise legal possession illegal, the defendant’s lack of knowledge of that fact is no defense. The statute is an exception in the “expanding regulatory area involving activities affecting public health, safety and welfare”\(^{219}\) to the usual requirement of criminal responsibility that there be “'vicious will' or mens rea.”\(^{220}\) The possessor of the hand grenades is guilty even if “consciousness of wrong-doing be totally wanting.”\(^{221}\)

Assume that Freed was abetted in his possession of the hand grenades by an aider and abettor. Need the aider and abettor, who is liable under the purposeful intent approach only if he or she acts with the purpose to bring about the crime, be aware of the lack of registration? Does specific/purposeful intent for the aider and abettor imply a culpable mental state even for a strict liability offense?

Yes, says the purposeful intent approach, at least in its most extreme form. In United States v. Lawson,\(^{222}\) the defendant was charged with aiding and abetting the receipt and possession of illegal


\(^{218}\) Id. at 607. The offense does have some mental state component in that the defendant must know that he or she is in possession of a hand grenade. But, once the defendant is in knowing possession, he or she need not know of the lack of registration. See id.; see also Staples v. United States, 511 U.S. 600, 609 (1994); United States v. Int’l Minerals & Chem. Corp., 402 U.S. 558, 560 (1971) (“Here as in ... Freed ... strict or absolute liability is not imposed; knowledge of the shipment of the dangerous materials is required.” (citation omitted)).

\(^{219}\) Freed, 401 U.S. at 607 (quoting Morissette v. United States, 342 U.S. 246, 251 (1952)).

\(^{220}\) Id. (emphasis omitted).

\(^{221}\) Id. at 609 (quoting United States v. Dotterweich, 320 U.S. 277, 284 (1943)).

\(^{222}\) 872 F.2d 179 (6th Cir. 1989).
machine guns in violation of 26 U.S.C. § 5861(c). The court acknowledged that, for the principal, the offense charged was "a strict liability offense," and therefore, "he need only possess the firearm" to be liable.\(^2\) With respect to the aider and abettor, however, the court cited *Peoni* and concluded that he had to have an "intent to aid" the commission of the offense.\(^2\) The court upheld the aider and abettor's conviction only after finding that he "acted with the requisite intent," "knew that his possession of the unregistered guns would be illegal," and had participated in the offense with "a desire to bring about the illegal possession of machine guns."\(^2\)

This disparity between the mental state of the principal and the mental state of the aider and abettor is of enormous consequence. It means that, under the purposeful intent approach, there are no strict liability offenses for aiders and abettors; they must always act with purposeful intent.\(^2\)

**ii. Strict Liability Elements**

Presumably, the purposeful intent approach should require for strict liability elements the same mental state it requires for strict liability offenses. The aider and abettor should be liable only upon acting with purposeful intent even for the strict liability element. In other words, a defendant charged with aiding and abetting the interstate transportation of stolen goods should be guilty only if he or she not only knew of, but also desired, the interstate transportation. An aider and abettor who wanted the stolen goods transported from New York to New Jersey in order to have them fenced there would be guilty. If, however, he or she knew of, but was indifferent to, the fact that they would be fenced in New Jersey, he or she would escape liability.

\(^{223}\) *Id.* at 181 (citing United States v. Decker, 292 F.2d 89, 90 (6th Cir. 1961)).

\(^{224}\) *Id.* (citing United States v. Stanley, 765 F.2d 1224, 1242 (5th Cir. 1985)).

\(^{225}\) *Id.; see also* United States v. Baumgarten, 517 F.2d 1020, 1027 (8th Cir. 1975) (holding defendant who aided and abetted violations of 26 U.S.C. § 5861 liable only if he had a "purposeful attitude," without referring to the strict liability nature of the offense for the principal).

\(^{226}\) In this sense, aiding and abetting is similar to the crime of attempt in that both are specific intent offenses. *see* United States v. Bailey, 444 U.S. 394, 405 (1980) (noting that attempt crimes require a "heightened mental state" (i.e., specific intent "[to separate] criminality ... from otherwise innocuous behavior"), no matter what mental state the underlying offense requires:

[T]here is no such thing as strict liability attempt. That is, even if the completed crime may be committed without intent, knowledge, recklessness or even negligence, the same is not true of an attempt to commit that crime. An attempt to commit a strict liability offense is thus possible only if it is shown that the defendant acted with an intent to bring about the proscribed result.

United States v. Gracidas-Ulibarry, 192 F.3d 926, 932 (9th Cir. 1999) (Silverman, J., concurring) (quoting 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.2 (1986)), *vacated on other grounds*, 231 F.3d 1188 (9th Cir. 2000) (en banc).
This view has been expressed by a number of cases dealing with the causer under 18 U.S.C. § 2(b); those cases have held that the causer must want to cause not only the proscribed act, but also the federal jurisdictional element.\textsuperscript{227} It seems that this was, at least at one point, Judge Learned Hand's view—that the aider and abettor must purposefully desire even the strict liability element (at least in the usual case of a federal jurisdictional element).\textsuperscript{228} But, this has not been the generally accepted view for the aider and abettor. Aiding and abetting cases after \textit{Peoni} seem almost uniform in concluding that there is no culpable mental state whatsoever for jurisdictional elements (as long as no culpable mental state is required of the principal).\textsuperscript{229} Thus, the aider and abettor of the interstate transportation of stolen goods need not be aware of the interstate nature of the transaction.\textsuperscript{230} The same holds true for the aider and abettor of other offenses containing the jurisdictional strict liability element, such as the interstate transportation of stolen cars;\textsuperscript{231} the use of interstate facilities to promote unlawful activity;\textsuperscript{232} robbery interfering with interstate commerce;\textsuperscript{233} and the use of interstate facilities in a murder for hire.\textsuperscript{234}

\textsuperscript{227} See infra text accompanying notes 469-82, 513-22.

\textsuperscript{228} See United States v. Paglia, 190 F.2d 445, 448 (2d Cir. 1951) (L. Hand, J.), \textit{overruled by} United States v. Taylor, 217 F.2d 397, 399 (2d Cir. 1954) (L. Hand, J); \textit{infra} text accompanying notes 469-82.

\textsuperscript{229} For one possible exception, see \textit{Metcalf v. United States}, 195 F.2d 213, 217 (6th Cir. 1952) (explaining that aidsers and abettors, "being in possession of stolen property and \textit{intending} that it be transported to another State," who then sell the property to someone "who they knew would promptly transport it to another State" are liable for violating the statutory prohibition on interstate transportation of stolen cars (emphasis added)) (citing \textit{Nye & Nissen}). However, even if \textit{Metcalf} meant to impose purposeful intent on the aider and abettor for the jurisdictional element, the Sixth Circuit has since abandoned that position. See United States v. Hayes, 739 F.2d 236, 237-39 (6th Cir. 1984) (18 U.S.C. § 2312).

A few unusual cases seem to hold with respect to jurisdictional elements that although the aider and abettor need not act with purposeful intent, he or she must at least know of the element. See, e.g., United States v. Wisniewski, 478 F.2d 274, 280 n.6 (2d Cir. 1973) (citing \textit{Peoni} and \textit{Nye & Nissen}, and then quoting with approval the district court's aiding and abetting instruction, which stated, in part, that "[o]ne must have knowledge of the essential elements of the offense, that is . . . that it was wilfully transported . . . from one state to another"); Backun v. United States, 112 F.2d 635, 636-37 (4th Cir. 1940).

\textsuperscript{230} United States v. Franklin, 586 F.2d 560, 565 & n.9 (5th Cir. 1978) (18 U.S.C. § 2314); United States v. Cowden, 545 F.2d 257, 263 (1st Cir. 1976) (same); United States v. Strauss, 443 F.2d 986, 988 (1st Cir. 1971) (same); United States v. Kierschke, 315 F.2d 315, 317 (6th Cir. 1963) (same); see United States v. Lothian, 976 F.2d 1257, 1266 (9th Cir. 1992) (same).

\textsuperscript{231} Hayes, 739 F.2d at 237-39 (§ 2312).


\textsuperscript{233} United States v. Nelson, 137 F.3d 1094, 1102-03 (9th Cir. 1998).

\textsuperscript{234} United States v. Razo-Leora, 961 F.2d 1140, 1143, 1148 (5th Cir. 1992).
Most of these cases do not explain why the aider and abettor requires no culpable mental state for strict liability elements. One possibility may be that at least some of these cases implicitly adopt the derivative approach, and require no culpable mental state of the aider and abettor because none is required of the principal. Another possibility is that they employ the purposeful intent approach, but make an exception for the jurisdictional element: the objective of the purposeful intent approach is, perhaps, to protect the marginal aider and abettor by compelling the government to prove a highly culpable mental state, but such protection need not be extended to cover the jurisdictional element, which functions only to determine whether a crime is a federal or state offense rather than whether it is a crime at all.

In any event, what is clear is that at least some of the cases requiring no mental state for the jurisdictional element are purposeful intent cases. For example, in a robbery and firearms case, the Ninth Circuit clearly adopted the purposeful intent approach, but held that the aider and abettor need have no knowledge whatsoever of the interstate element conferring federal jurisdiction for the Hobbs Act robbery count. Thus, even under the purposeful intent approach, if the principal need not know of the federal jurisdictional element, then the same holds true for the aider and abettor. This is so despite the holding of the purposeful intent cases that strict liability offenses—as opposed to elements—can be aided and abetted only with purposeful intent.

In sum, under the purposeful intent approach, there is an unexplained exception for jurisdictional elements. Unlike other elements, and unlike strict liability offenses, the strict liability jurisdictional element requires of the aider and abettor no culpable mental state at all.

235. Nelson, 137 F.3d at 1103 (holding that, for the aider and abettor of a § 924(c) offense, “mere foreknowledge that a gun would be used remains insufficient. The prosecution must still prove a specific intent to aid the firearms crime.” (emphasis omitted)).


237. Nelson, 137 F.3d at 1102-03.

238. In this respect, the aider and abettor is just like the co-conspirator. The Supreme Court has held that just as the federal nature of the agent need not be known to the defendant charged with the substantive offense of assaulting a federal agent, it need not be known to the defendant charged with conspiring to do so. United States v. Feola, 420 U.S. 671, 694-96 (1975); see United States v. Rosa, 17 F.3d 1531, 1544-46 (2d Cir. 1994) (explaining that a conspiracy to violate 18 U.S.C. § 2315, which prohibits possession of stolen property that has moved interstate, does not usually require that the conspirators know of the interstate jurisdictional element).
c. The Purposeful Intent Approach As Applied to the Diminished Capacity Defense

The dichotomy between the mental state required of the principal and that required of the aider and abettor can also affect the availability of certain defenses. A defense of diminished capacity—voluntary intoxication, for example—is a defense only in cases of specific intent crimes. Thus, in a homicide case, a district court should instruct the jury that evidence of intoxication is relevant to the charge of first degree murder, a specific intent offense, but not to second degree murder, involuntary manslaughter, or assault, which are not specific intent offenses.

But, what if the defendant is charged not with directly committing, but rather with aiding and abetting, a general intent offense, such as second degree murder or assault? According to the purposeful intent cases, "aiding and abetting contains an additional element of specific intent, beyond the mental state required by the principal crime" of second degree murder or assault. Because aiding and abetting always requires the additional mental element of specific intent, regardless of the mental state required for the underlying crime, voluntary intoxication is a defense for the aider and abettor, even when it is not a defense for the principal. Failure to give a voluntary intoxication instruction to a jury in such an aiding and abetting case is plain error. Hence, in a joint trial of a principal and

239. See, e.g., United States v. Sewell, 252 F.3d 647, 650-51 (2d Cir.), cert. denied, 122 S. Ct. 382 (2001); United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1196 (9th Cir. 2000) (en banc); United States v. Jackson, 213 F.3d 1269, 1291-92 (10th Cir.), vacated on other grounds, 531 U.S. 1033 (2000); United States v. Burdeau, 168 F.3d 352, 356 (9th Cir. 1999); United States v. Phelps, 168 F.3d 1048, 1056 (8th Cir. 1999); United States v. Gonyea, 140 F.3d 649, 650-51 (6th Cir. 1998); United States v. Oliver, 60 F.3d 547, 551 (9th Cir. 1995), overruled on other grounds, Jones v. United States, 526 U.S. 227 (1999); United States v. Fazzini, 871 F.2d 635, 641 (7th Cir. 1989); United States v. Lewis, 780 F.2d 1140, 1143 (4th Cir. 1986); see also Montana v. Egelhoff, 518 U.S. 37, 49 (1996) (indicating that a majority of states now allow evidence of voluntary intoxication as defense, but only to specific intent crimes); Hopt v. People, 104 U.S. 631, 633-34 (1881).

240. United States v. Sayetsitty, 107 F.3d 1405, 1411 (9th Cir. 1997) (citing United States v. Lopez, 575 F.2d 681, 684 (9th Cir. 1978)).


242. See Sayetsitty, 107 F.3d at 1412.

243. See Nacotee, 159 F.3d at 1075-76.

244. Sayetsitty, 107 F.3d at 1412. The court noted, id. at 1412 n.2, that its approach differed from that of the Eighth Circuit in United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir. 1989). See infra notes 379-82 and accompanying text.

245. Nacotee, 159 F.3d at 1075-76.

246. United States v. Jackson, 213 F.3d 1269, 1292 (10th Cir.) ("[T]he crime of aiding and abetting is a specific intent crime .... Therefore, voluntary intoxication is a potential defense for an aiding and abetting charge."). vacated on other grounds, 531 U.S. 1033 (2000).

247. Sayetsitty, 107 F.3d at 1412; see Nacotee, 159 F.3d at 1076-77 (holding that it was reversible error for the district court to refuse to give a requested jury instruction
an aider and abettor to second degree murder, both of whom get drunk together before committing the crime, the drunkenness of the principal would be irrelevant (and evidence of his or her intoxication might even be excluded altogether), whereas the intoxication of the aider and abettor would be an admissible, relevant factor to be considered in determining whether he or she acted with the requisite specific intent.  

Under this application of the purposeful intent approach, which permits the aider and abettor to raise the defense of diminished capacity even when the principal cannot, the aider and abettor is viewed as governed by a specific intent mental state that applies invariably, even if the underlying crime is one of general intent. The mental state of the aider and abettor is wholly unconnected to that of the principal. Although the principal’s liability may be predicated on a mental state less than specific intent, the aider and abettor is never liable unless acting with specific intent. Consequently, even when the underlying offense is a general intent offense, the aider and abettor may always invoke the defense of diminished capacity.

3. The Bad Purpose Approach

Under the second approach to Peoni, the mental state required of the aider and abettor is even more culpable than purposeful intent. Not only must the aider and abettor purposefully intend and desire that the principal commit the acts that constitute a violation of the law, the aider and abettor must also act with a bad purpose — i.e., he or she must understand that the principal’s conduct violates the law, and desire that the conduct violate the law. The aider and abettor must act “voluntarily and intentionally and with the specific intent to do something which the law forbids or with the specific intent to fail to do something which the law requires to be done, that is to say, with bad

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248. See Sayetsitty, 107 F.3d at 1412. When confronted with the need to prove specific intent for the aiding and abetting of what otherwise is an offense of general intent, prosecutors simply drop the aiding and abetting theory altogether if the facts allow it. They proceed solely on the theory that the defendant is a principal, thereby foreclosing a defense of voluntary intoxication, which may be raised only with respect to specific intent crimes. See United States v. Hatatley, 130 F.3d 1399, 1404-05 (10th Cir. 1997).

249. This peculiar result—that voluntary intoxication is a defense for the aider and abettor but not the principal—echoes the law applicable to attempts. Attempt crimes require specific intent even when the underlying crime does not, with the result that voluntary intoxication is a defense for the former, but not the latter. See, e.g., United States v. Sneeezer, 900 F.2d 177, 180 n.4 (9th Cir. 1990) (“The distinction between specific and general intent has been attacked on the ground, among others, that it leads to incongruous results like an intoxication defense for attempted rape but not completed rape.”).
As the quote clearly indicates, this bad purpose approach is also a "specific intent" approach, but it relies on another of the phrase’s many meanings. Apart from its use to describe purposeful intent, the phrase is sometimes used outside of the aiding and abetting context to describe a purpose to violate the law. For example, for criminal tax offenses, the Supreme Court has interpreted the relevant mental state as a "specific intent to violate the law," or "bad purpose." The bad purpose approach applies the phrase in that sense to the aider and abettor.

That the aider and abettor must act with "bad purpose either to disobey or disregard the law" appears often in aiding and abetting cases. Some cases temper this rather rigorous requirement and

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251. See United States v. Bailey, 444 U.S. 394, 403 (1980) (citing Wayne R. LaFave & Austin W. Scott, Handbook on Criminal Law § 28, at 201-02 (1972)); see also LaFave & Scott, supra note 2, § 3.5(e), at 223-25; infra text accompanying notes 641-44.
252. E.g., United States v. Gibbs, 182 F.3d 408, 433 (6th Cir. 1999); United States v. Gonyea, 140 F.3d 649, 653 (6th Cir. 1998); United States v. Rawlings, 982 F.2d 590, 592 (D.C. Cir. 1993) (quoting Criminal Jury Instructions for the District of Columbia 3.01 (3d ed. 1978)); United States v. Barclay, 560 F.2d 812, 814 n.2 (7th Cir. 1977) (quoting Walter J. LaBuy, Manual on Uniform Jury Instructions in Federal Criminal Cases, § 4.04 (1963), reprinted in 33 F.R.D. 525, 550-51)); see United States v. Francis, 164 F.3d 120, 121 (2d Cir. 1999) (“In the case of general-intent crimes... [t]he government would not need to prove that the defendant intended to violate the law...”); United States v. Enochs, 857 F.2d 491, 493 (8th Cir. 1988) (reasoning that if Congress had intended that statute, which prohibits removal of vehicle identification numbers from automobiles, to “require specific intent, it certainly could have added an appropriate phrase, such as ‘for an unlawful purpose’”).
254. Cheek, 498 U.S. at 200 (quoting United States v. Murdock, 290 U.S. 389, 394 (1933), which was overruled on other grounds sub. nom. Murphy v. Waterfront Comm’n of N.Y. Harbor, 378 U.S. 52 (1964)).
255. Brown, 151 F.3d at 486 (quoting Horton, 847 F.2d at 322).
256. See, e.g., United States v. Jackson, 213 F.3d 1269, 1291-92 & n.11 (10th Cir.), vacated on other grounds, 531 U.S. 1033 (2000); United States v. Zichettello, 208 F.3d 72, 109 n.15 (2d Cir. 2000) (quoting district court’s jury instructions), cert. denied, 531 U.S. 1143 (2001); Brown, 151 F.3d at 486; United States v. Kline, 922 F.2d 610, 612 (10th Cir. 1990) (quoting district court’s jury instructions); United States v. Iredia, 866 F.2d 114, 118 (5th Cir. 1989); United States v. Gaskins, 849 F.2d 454, 457 (9th Cir. 1988); Horton, 847 F.2d at 322; United States v. McKnight, 799 F.2d 443, 446 (8th Cir. 1986); United States v. Garza, 754 F.2d 1202, 1210 (5th Cir. 1985); United States v. Wright, 742 F.2d 1215, 1221-22 (9th Cir. 1984) (quoting with approval district court’s jury instructions), overruled on other grounds, United States v. Powell, 469 U.S. 57 (1984); United States v. Gomez, 733 F.2d 69, 73 (8th Cir. 1984); United States v. Marvin, 687 F.2d 1221, 1228 (8th Cir. 1982); United States v. McCaskill, 676 F.2d 995, 997 (8th Cir. 1982) (quoting with apparent approval the district court’s jury instructions); United States v. Waller, 607 F.2d 49, 51-52 (3d Cir. 1979); Pattern Jury
speak in terms of knowledge rather than purpose. Reflecting the longstanding vacillation in the aiding and abetting case law between purpose and knowledge, these cases require not that the aider and abettor act with the purpose to disobey the law, but rather with the knowledge that the principal's conduct violates the law. The aider and abettor must be "cognizant of the principal's criminal intent and the lawlessness of his activity."²⁵⁷

Whether it is knowledge of the lawlessness, or purposeful intent to behave lawlessly, this mental state is far more culpable and difficult to establish than the mental state of purposeful intent. One can readily imagine a situation where an individual acts with purposeful intent and desires a result, but does not want the result to be criminal, and is not even aware that the result is criminal. For example, a depositor about to deposit $11,000 in cash, who learns that the bank is required to report to the government any cash transactions in excess of $10,000,²⁵⁸ might divide the cash into two separate deposits to avoid the reporting requirement. In so doing, the depositor acts, in the language of the structuring statute, with the "purpose of evading the reporting requirements,"²⁵⁹ and therefore, with the specific intent to achieve the criminal result. The depositor might not be aware that that result is criminal; he or she might well believe that the splitting of the deposit is an entirely permissible way of circumventing an intrusive reporting requirement.²⁶⁰ Nonetheless, because structuring requires only purposeful intent—an intent to evade the reporting requirement—the depositor is guilty, even if he or she lacks an awareness of the unlawfulness of his or her conduct.²⁶¹ Thus, requiring a bad purpose imposes a more culpable mental state than that imposed by the purposeful intent approach.

²⁵⁷ Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, instruction no. 2.06 (1997) ("with the intent to violate the law") (quoted in O'Malley et al., supra note 39, § 18.01); Sand et al., supra note 39, instruction no. 11-2.
²⁵⁸ United States v. Burgos, 94 F.3d 849, 873 (4th Cir. 1996); accord United States v. Winstead, 708 F.2d 925, 927 (4th Cir. 1983) (concluding that the aider and abettor must be aware of the principals' criminal intent "and the unlawful nature of their acts").
²⁶⁰ Rather than being motivated by a desire to "keep the Government in the dark," a depositor might be "fearful that the bank's reports would increase the likelihood of burglary, or... endeavor to keep a former spouse unaware of his wealth." Ratzlaf v. United States, 510 U.S. 135, 145 (1994).
²⁶¹ Prior to Congress's amendment of § 5322 in 1994, such activity was not criminal unless conducted with knowledge of its unlawfulness. This was the holding of Ratzlaf, where the Supreme Court interpreted the word "willfully" in the structuring statute to require proof that the defendant was aware that his or her structuring violated, and not just circumvented, the law. 510 U.S. at 144-49. In response to Ratzlaf, however, Congress deleted the word "willfully" from § 5322 so that now ignorance is no longer an excuse, and structuring is a crime even when the defendant mistakenly believes otherwise. See supra note 150.
The bad purpose approach to aiding and abetting requires that the aider and abettor act with an "unlawful" state of mind even for crimes, such as structuring, which do not require that mental state of the principal. Other examples: although the drug dealer is guilty even if he or she acts without a bad purpose to disobey the law, the aider and abettor is not, unless he or she is "cognizant of the... lawlessness" of the drug activity, a defendant who knowingly files false statements with the federal government in violation of 18 U.S.C. § 1001, without any awareness of the unlawfulness of the act, is still guilty, while the aider and abettor is not.

Thus, the bad purpose approach, like the purposeful intent approach, employs a mental state for the aider and abettor that is independent of, and unrelated to, the mental state required of the principal by the underlying criminal statute. Bad purpose is always the required mental state, regardless of whether bad purpose, purposeful intent, knowledge, or some other mental state applies to the principal. The aider and abettor must always act with this bad purpose form of specific intent.

4. The Knowledge Approach

Both the purposeful intent approach and the bad purpose approach read Peoni as rejecting knowledge. A surprising number of cases, however, retain knowledge as the aider and abettor's mental state despite Peoni. Some of the knowledge cases simply ignore Peoni, while others limit it.

This knowledge approach, although obviously at odds with the purposeful intent and bad purpose approaches, does share one attribute with them: the aider and abettor possesses his or her own distinctive mental state, applicable regardless of the mental state required of the principal. Still, unlike the other approaches, this approach allows for some flexibility, as reflected by the assorted variations to the approach. Some of the knowledge cases seem to apply the knowledge standard to virtually all aiders and abettors, some to most aiders and abettors, and others to just a few.

264. United States v. Lorenzo, 995 F.2d 1448, 1455 (9th Cir. 1993).
265. United States v. Brown, 151 F.3d 476, 486 (6th Cir. 1998); United States v. Winstead, 708 F.2d 925, 927 (4th Cir. 1983); see United States v. Curran, 20 F.3d 560, 568-70 (3d Cir. 1994) (interpreting 18 U.S.C. § 2(b), and holding that because of the word "willfully" in that subsection, a causer of a violation of 18 U.S.C. § 1001 must be aware of the unlawfulness of his or her activity even though the principal need know no more than that the statement was false); see also infra text accompanying notes 525-43.
This variation on the knowledge theme, voiced by the Second Circuit almost twenty-five years after it had decided *Peoni*, was the first real curtailment of the purposeful intent approach. In fact, in large measure, it did away with the approach by limiting it to a small class of cases where there is a special need to restrict liability by imposing a highly culpable mental state: where the connection between the aider and abettor and the principal is especially tenuous (as it was in *Peoni*), or where the connection between them is utterly routine, as in the otherwise routine, lawful sale by a merchant of merchandise to a customer who then uses the merchandise to commit a crime.

In *Peoni*, the defendant was charged with aiding and abetting the possession of counterfeit bills not by the purchaser, but by the purchaser's purchaser. In allowing for the imposition of aiding and abetting liability only with the higher mental state of purposeful intent, Judge Learned Hand sought to protect the seller from perpetual liability in every conceivable jurisdiction as the counterfeit bills moved foreseeably from guilty hand to guilty hand." 266 But, in imposing the purposeful intent standard, he specifically allowed for the possibility that knowledge would have been sufficient had the defendant been charged with aiding and abetting the possession of the immediate purchaser rather than that of the remote purchaser. 267 As late as 1962, the Second Circuit in *United States v. Campisi* 268 noted that:

*[Peoni] relied on the fact that the principal, i.e. the individual whose possession defendant was charged with abetting, was not a vendee of the defendant. The court expressly left open the question whether the same result would obtain if the immediate vendee was charged with possession." 269

The Second Circuit in *Campisi* answered the question left open in *Peoni*, essentially holding that knowledge is sufficient for the immediate vendee. In *Campisi*, the defendants sold stolen bonds to purchasers who, in turn, forged the names of the registered owners and then uttered them. The defendants were charged with aiding and

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266. See United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938); see also supra text accompanying notes 132-33.
267. *Peoni*, 100 F.2d at 403 ("Perhaps [in acting with simple knowledge or foreseeability] he was Regno's [i.e., the immediate purchaser's] accessory.").
268. 306 F.2d 308 (2d Cir. 1962).
269. Id. at 311. Although it did not use "natural and probable consequences" terminology, *Campisi* realized that *Peoni* was not really an aiding and abetting case at all, but rather a "natural and probable consequences" case. See infra text accompanying notes 430-31.
abetting the immediate purchasers' forging and uttering. In making
the sales, the defendants acted with knowledge of what the purchasers
would do, but did not act with purposeful intent; they sold the stolen
bonds at an established price that was not affected by what the
purchasers did with the bonds, and thus, they were indifferent to what
happened after the sale. Nonetheless, the Second Circuit upheld
their convictions for aiding and abetting the immediate vendees,
limiting Peoni's purposeful intent standard to remote vendee cases
where it is unfair to impose liability unless the aider and abettor really
desires that distant, attenuated criminal conduct.

Because an aider and abettor typically works directly with the
principal, Campisi essentially relegates Peoni's purposeful intent
standard to a very narrow class of cases, leaving the knowledge
standard intact as the primary mental state applicable to the aider and
abettor. The only immediate vendee situation in which Peoni's
purposeful intent standard would still apply, according to Campisi, is
that involving the utterly routine sale of lawful goods. A merchant
who makes a routine sale of lawful goods should not become an aider
and abettor of the customer's subsequent crime absent a purposeful
desire on the merchant's part to aid and abet that crime. Judge Hand,
the court in Campisi opined:

> evidently thought it undesirable to charge a merchant with the
> unlawful use a customer may make of his product, although he may
> know of the unlawful use, when he is selling the goods he normally
> sells at the price he normally charges and he is not involved in the
> subsequent wrongdoing.\footnote{271}

But, that safe harbor for routine sales is a very limited one;\footnote{272}
knowledge is normally sufficient in an immediate vendee case. "[A]ny

\footnote{270. Campisi, 306 F.2d at 310.}

\footnote{271. Id. Campisi was referring to Judge Hand's view in Falcone, which was
subsequently affirmed by the Supreme Court. United States v. Falcone, 109 F.2d 579
(2d Cir.), aff'd, 311 U.S. 205 (1940). See also Flowers v. Tandy Corp., 773 F.2d 585,
590 (4th Cir. 1985), in which the court reasoned:

> [W]hether a seller of goods that are not themselves illegal to one who
> intends to use them illegally shares the buyer's illegal intent [thereby
> becoming an aider and abettor] has long been a close question in the law. . . .
> Resolution of the question has turned to a great degree on the
> innocuousness of the sale and the extent to which the buyer has revealed
> the particular use to which he plans to put the goods.

> Id. (citing Backun v. United States, 112 F.2d 635 (4th Cir. 1940), an early proponent
> of the knowledge approach rejected by Peoni).}

Although Falcone was a conspiracy case, Judge Hand, as noted above, viewed
the "knowledge versus purposeful intent" issue as being the same in the contexts of
both conspiracy liability and aiding and abetting liability. See supra note 134.

\footnote{272. "Falcone has been limited 'to its strict facts—the case of a supplier of goods,
innocent in themselves, who does nothing but sell those goods to a purchaser who, to
the supplier's knowledge, intends to and does use them in the furtherance of an illegal
conspiracy.'" Campisi, 306 F.2d at 310 (quoting United States v. Tramaglino, 197 F.2d
928, 930 (2d Cir. 1952)).}
deviation[,]... even a lawful departure from the normal course of business or cooperation in concealing delivery, is sufficient to connect the vendor with the criminality of the vendee."\textsuperscript{273} In \textit{Campisi}, because the sale of the stolen bonds was obviously not a routine sale of lawful goods, knowledge was sufficient.

\textit{Campisi}’s view of \textit{Peoni} is that rather than establishing a purposeful intent standard in all instances of aiding and abetting liability, \textit{Peoni} generally retains knowledge as the appropriate standard. It imposes the higher purposeful intent standard only in cases where the connection of the aider and abettor to the principal is too remote for liability on a lesser standard. Where the connection is direct, as in the immediate vendee cases, knowledge is generally sufficient, except in the cases falling within the safe harbor for routine, commonplace, and otherwise lawful sales.

Interestingly, \textit{Campisi} approved of the knowledge standard even though the crime in \textit{Campisi} itself was one of specific intent. The forging and uttering of the bonds was charged as a violation of 18 U.S.C. § 495,\textsuperscript{274} which requires a showing of specific intent to defraud.\textsuperscript{275} Yet, \textit{Campisi} upheld the conviction of the aiders and abettors—the sellers who sold the bonds to the principals—on the less culpable knowledge standard. The case applied the knowledge approach without regard to the mental state required of the principal.

\textsuperscript{273} \textit{Campisi}, 306 F.2d at 311 (citing United States v. Pampiano, 271 F.2d 273 (2d Cir. 1959)). The court in \textit{Campisi}, 306 F.2d at 311, openly borrowed the concept from conspiracy case law, citing the Supreme Court’s conspiracy decisions in \textit{Falcone} and \textit{Direct Sales Co. v. United States}, 319 U.S. 703 (1943). In \textit{Direct Sales}, the defendant sold unusually large amounts of morphine to a physician, knowing that the physician distributed the morphine illegally. The Supreme Court upheld the seller’s conviction for conspiring with the physician. Interestingly, while \textit{Campisi} seems to read \textit{Direct Sales} as establishing a knowledge standard, at least when non-routine sales of dangerous items such as morphine are involved, the Supreme Court in \textit{Direct Sales} was explicit in its holding that \textit{intent} was required. The seller is guilty of conspiracy if by his sale “he intends to further, promote and cooperate in it. This intent... is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist.” \textit{Direct Sales}, 319 U.S. at 711. The Supreme Court viewed the non-routine sale of morphine as a basis for inferring that the seller acted with intent, not as a basis for justifying a lower standard of knowledge.

\textsuperscript{274} 18 U.S.C. § 495 (1994) provides:

\begin{itemize}
  \item Whoever falsely... forges... other writing... for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States... any sum of money; or
  \item Whoever utters or publishes as true any such... forged... writing, with intent to defraud the United States, knowing the same to be... forged[, commits a federal offense].
\end{itemize}

\textsuperscript{275} \textit{E.g.}, United States v. Hall, 845 F.2d 1281, 1284-85 (5th Cir. 1988) (citing United States v. Smith, 631 F.2d 391, 396 (5th Cir. 1980)); United States v. Thompson, 576 F.2d 784, 786 (9th Cir. 1978); United States v. Robinson, 545 F.2d 301, 305 (2d Cir. 1976); United States v. Sullivan, 406 F.2d 180, 186 (2d Cir. 1969).
and illustrates how the aider and abettor may be liable based on a mental state of lesser culpability than that required of the principal.

Campisi's interpretation of Judge Hand—that knowledge is enough, except in a case of a remote aider and abettor, or in a case of a routine, lawful sale—has not gained widespread acceptance. Only the Fifth Circuit, in one very brief, never-cited decision, seems to have adopted it. Campisi has hardly ever been cited. A Seventh Circuit opinion rejected Campisi's approach without even citing Campisi.

Campisi's lack of popularity is understandable for a number of reasons. First, Judge Hand himself seems to have rejected Campisi's limiting of Peoni. In the many post-Peoni cases in which Judge Hand confronted the issue of an aider and abettor's mental state, he applied Peoni uniformly to require purposeful intent, and rejected mere knowledge as insufficient. He did so even in cases of immediate transactions other than routine, lawful sales; in such cases, knowledge should have sufficed under Campisi's reading of Peoni. Second, although in some earlier cases the Supreme Court seemed inclined to the knowledge approach, in Nye & Nissen it adopted Judge Hand's formulation without limitation. Had it adopted Campisi, the Supreme Court would have been compelled to reach a different result in Nye & Nissen itself, since that involved a simple case of a defendant aiding and abetting the making of a false statement, where knowledge would have sufficed under Campisi. Third, although Campisi limited Peoni's holding of purposeful intent to two classes of cases, Judge Hand in Peoni relied, in part, on the very language of the aiding and abetting statute: "All the words used [in the aiding and abetting statute]—even the most colorless, 'abet'—carry an implication of purposive attitude." If purposeful intent is inherent in the language of the

276. See United States v. Blanke, 572 F.2d 543 (5th Cir. 1978).
277. See United States v. Blankenship, 970 F.2d 283, 287 (7th Cir. 1992) (stating that the result under Peoni is the same whether or not the sale is routine and lawful; the seller becomes an aider and abettor only when the seller seeks to make the venture succeed).
278. See supra notes 134-37 and accompanying text.
279. For example, in United States v. Di Re, 159 F.2d 818, 818-19 (2d Cir. 1947), at issue was the liability of a third passenger in the car for the sale of counterfeit gasoline ration coupons. Under Campisi's limiting view of Peoni, the answer should have depended on whether the third passenger performed an act with the knowledge that it would assist the other two parties. A higher mental state, purposeful intent, should not have been applied, since the transaction was an immediate one—the potential aider and abettor was in the car with the principals. Moreover, transactions involving counterfeit coupons obviously cannot qualify for the safe harbor protecting lawful, routine sales. Yet, in Di Re, Judge Hand still applied the purposeful intent standard, citing Peoni. Di Re, 159 F.2d at 819 n.3.
280. See Bozza v. United States, 330 U.S. 160 (1947); Hanauer v. Doane, 79 U.S. (12 Wall.) 342 (1870); see also supra text accompanying notes 111-17, 139-42.
281. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
statute, then it must apply to all aiders and abettors, not just a limited few.

Even the Second Circuit itself has not continued to make the distinction it made in Campisi. Despite the many instances after Campisi was decided in 1962 in which the Second Circuit has cited Peoni, the Second Circuit has never since made Campisi's distinction between the immediate and remote aider and abettor, or between routine, lawful transactions and other transactions. Rather, less than a month after Campisi, the Second Circuit issued an en banc decision in another case, adopting, without citing Campisi, an entirely different approach—a derivative approach—to the aider and abettor's mental state. More recently, it has applied the purposeful intent approach in situations where the Campisi limitation would have required no more than knowledge.

Thus, although Campisi, in adopting the knowledge approach, provides a plausible limitation of Peoni, and has the additional virtue (alone among the non-purposeful intent cases) of explaining how a non-purposeful intent approach can be reconciled with Peoni, it has had virtually no impact.

b. The Vacillating Seventh Circuit: Knowledge Is Sufficient; Knowledge Is Not Sufficient; Knowledge Is Sometimes Sufficient If the Underlying Offense Is Particularly Grave

The Second Circuit is by no means the only circuit to have flip-flopped. The Seventh Circuit has also vacillated between knowledge

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282. A Westlaw search encompassing the period from the date Campisi was decided, July 23, 1962, through the end of 2001 reveals that the Second Circuit has cited Peoni fifty-seven times. A further search limiting the initial query to those cases that not only cite Peoni, but also use the word "abet" or some extension thereof, yields forty-six responses.

283. United States v. Jones, 308 F.2d 26 (2d Cir. 1962) (en banc).

284. See infra text accompanying notes 320-22.

285. For example, in Pipola v. United States, 83 F.3d 556 (2d Cir. 1996), the defendant, as leader of a group that executed various robberies, delegated to a co-conspirator the task of providing guns for the robberies. The defendant, who did not actually go out on the robberies himself, was convicted of aiding and abetting the co-conspirators' use of firearms in violation of 18 U.S.C. § 924(c) (1994). The court agreed with the defendant's contention on appeal that the government must prove that the aider and abettor acted "with the specific intent of advancing the commission of the [§ 924(c)] crime." Pipola, 83 F.3d at 562. Acting with mere knowledge that a gun would be used was not sufficient. Id.

If Campisi's interpretation of Peoni is still valid, knowledge should have been sufficient, since the defendant was an immediate, not remote, aider and abettor, whose act of assistance was the antithesis of routine and lawful. Pipola's failure to apply the knowledge standard strongly suggests that the Second Circuit has abandoned the Campisi interpretation of Peoni. Indeed, many of the § 924 cases in which the Second Circuit insisted on purposeful intent rather than knowledge are similarly inconsistent with Campisi. See supra note 198 (listing purposeful intent § 924(c) cases, including cases from the Second Circuit).
and purposeful intent over the past fifteen years, reaching conclusions that are confusing and utterly irreconcilable—almost inevitable when trying to promote a “knowledge” standard while, at the same time, acknowledging Peoni as controlling precedent. Judge Posner, in particular, has made numerous efforts to reinvigorate the old knowledge standard while ostensibly adhering to Peoni.

In United States v. Fountain, a murder case, the aider and abettor supplied a home-made knife to a fellow inmate who used it to kill a guard. The aider and abettor was convicted of aiding and abetting the murder. On appeal, the issue was whether the aider and abettor who supplied the weapon had to want the murder to take place, or just know that it would take place.

One would have thought that Peoni had long ago resolved that question in favor of “want” rather than “know.” Judge Posner, however, thought differently. Although he began by confirming that Peoni had rejected the knowledge approach, he made it clear that the knowledge approach, under certain circumstances, still applies:

Under the older cases, illustrated by Backun v. United States, 112 F.2d 635, 636-37 (4th Cir. 1940) ... it was enough that the aider and abettor knew the principal's purpose.... [However] after the Supreme Court in Nye & Nissen ... adopted Judge Learned Hand's test—that the aider and abettor “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,” United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)—it came to be generally accepted that the aider and abettor must share the principal's purpose in order to be guilty of violating 18 U.S.C. § 2, the federal aider and abettor statute.

Certain offenses, however, require a special rule:

But... there is support for relaxing this requirement when the crime is particularly grave. The holding of Backun itself may have been superseded, but a dictum in Backun—“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,” 112 F.2d at 637—makes so compelling an appeal to sense that [the defendant's] opening brief in this court, after quoting the dictum, states, “Defendant... has no quarrel with this rule of law.”

Judge Posner then proceeded to defend this distinction between lesser crimes, for which Peoni's heightened purposeful intent is

286. 768 F.2d 790 (7th Cir.), modified, 777 F.2d 345 (7th Cir. 1985) (per curiam).
287. Id. at 793. Although the case does not say so explicitly, it seems that the district court instructed the jury that knowledge alone is sufficient.
288. Id. at 797-98.
289. Id. at 798.
required, and "particularly grave" crimes, for which knowledge is sufficient:

Compare the following hypothetical cases. In the first, a shopkeeper sells dresses to a woman who he knows to be a prostitute. The shopkeeper would not be guilty of aiding and abetting prostitution unless the prosecution could establish the elements of Judge Hand's test. Little would be gained by imposing criminal liability in such a case. Prostitution, anyway a minor crime, would be but trivially deterred, since the prostitute could easily get her clothes from a shopkeeper ignorant of her occupation. In the second case, a man buys a gun from a gun dealer after telling the dealer that he wants it in order to kill his mother-in-law, and he does kill her. The dealer would be guilty of aiding and abetting the murder. This liability would help to deter—and perhaps not trivially given public regulation of the sale of guns—a most serious crime. *We hold that aiding and abetting murder is established by proof beyond a reasonable doubt that the supplier of the murder weapon knew the purpose for which it would be used.*

Unfortunately, Judge Posner provided no guidance as to which crimes constitute the "particularly grave" crimes for which the usual strict requirement of purposeful intent should be relaxed. But, his holding is clear: for "particularly grave" crimes, knowledge suffices.

Curiously, for a number of years following *Fountain*, Judge Posner and the Seventh Circuit proceeded as if its holding did not exist. For example, two years after the decision, Judge Posner, citing *Peoni*, stated that "[a]iding and abetting in the criminal law requires not only knowledge of the principal's objective but a desire to help him attain it," making no distinction between "particularly grave" crimes and crimes that are not so grave. Aiders and abettors for all crimes must "desire" to attain the criminal object.

A few years later, Judge Posner repeated the point—"want" rather than "know"—in discussing aiding and abetting liability under the Continuing Criminal Enterprise ("CCE") statute, also known as the "Drug Kingpin" statute. The statute applies to a supervisor of five or more persons, who derives substantial income from a continuing series of narcotics violations. This statute presented the perfect opportunity to apply *Fountain*’s special rule requiring only knowledge for "particularly grave" crimes; after all, what is a CCE violation if not

290. *Id.* (emphasis added).
291. Professor Blakey and Roddy observed that *Fountain* signified a sharp break with previous Seventh Circuit precedent and with the Supreme Court's decision in *Nye & Nissen*. Blakey & Roddy, supra note 6, at 1394 n.177. But, *Fountain*'s conclusion that, at least for serious offenses, knowledge suffices was essentially the same as the Supreme Court's conclusion over a century earlier in *Hanauer v. Doane*, 79 U.S. (12 Wall.) 342, 346-47 (1870). *See supra* text accompanying notes 111-17.
a “particularly grave” crime? And, if it is a grave crime, knowledge should be enough.

But, Judge Posner and the Seventh Circuit, sitting en banc, made it clear that knowledge is not enough; purposeful intent, even for a CCE violation, is required. After first quoting Peoni, Judge Posner emphasized that the aider and abettor is guilty only if he or she “wants” the enterprise to succeed:

One who sells a small—or for that matter a large—quantity of drugs to a kingpin is not by virtue of the sale alone an aider and abettor. It depends on what he knows and what he wants: Does he want the kingpin’s enterprise to succeed or is the kingpin just another customer?

If the seller simply knows but does not want, he or she is guilty only of selling the drugs to the kingpin, but not of aiding and abetting the CCE violation. Judge Posner did not even entertain the possibility that, for this “particularly grave” crime, perhaps knowledge should be enough. He cited Fountain in passing, but made no mention of its distinction between grave and not-so-grave offenses.

Subsequent Seventh Circuit cases, generally authored by Judge Posner, seemed for a while to continue this implicit rejection of Fountain usually in favor of the purposeful intent approach. In 1995, however, Judge Posner returned to the knowledge standard (but, oddly, without even citing Fountain). In United States v.

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294. United States v. Pino-Perez, 870 F.2d 1230, 1235 (7th Cir. 1989) (en banc).
295. Id. (emphasis added).
296. Based on Pino-Perez’s seeming rejection of Fountain, Professor Blakey and Roddy concluded that “[a]nomalous, Fountain is without effect in Seventh Circuit jurisprudence.” Blakey & Roddy, supra note 6, at 1394. Their conclusion is surprising; the research for their comments was current through July 15, 1996, id. at 1345 n.aa1, so they should have included Judge Posner’s subsequent decision in United States v. Ortega, 44 F.3d 505 (7th Cir. 1995). Although Judge Posner in Ortega did not cite Fountain, he did once again adopt the knowledge approach. See infra text accompanying notes 299-303.
297. Pino-Perez, 870 F.2d at 1235.
298. See United States v. Zafiro, 945 F.2d 881, 887-88 (7th Cir. 1991) (Posner, J.) (indicating that the defendant must “desire[] the illegal activity to succeed,” but suggesting that in the future it might be better to “jettison talk of desire” and focus instead on the dangerousness of the defendant’s act), aff’d on other grounds, 506 U.S. 534 (1993); United States v. Giovannetti, 919 F.2d 1223, 1229 (7th Cir. 1990) (Posner, J.). In Giovannetti, as part of his reaffirmation of the purposeful intent approach, Judge Posner went so far as to refashion the well-known “ostrich,” or as it is sometimes called, the “conscious avoidance,” jury instruction. Whereas traditionally the instruction allowed a jury to equate conscious avoidance only with knowledge, see, e.g., United States v. Gabriel, 125 F.3d 89, 98 (2d Cir. 1997) (“[T]he conscious-avoidance concept is pertinent . . . to the knowledge component of intent, but . . . a finding of conscious avoidance could not alone provide the basis for finding purpose or for finding intent as a whole.” (quoting United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181, 1195-96 (2d Cir. 1989))), Judge Posner, in an effort to retain the instruction even for the aider and abettor, decided that conscious avoidance could serve as the equivalent to purposeful intent as well. See Giovannetti, 919 F.2d at 1229.
Ortega, a drug case, Judge Posner found the evidence insufficient to support the conclusion that the alleged aider and abettor rendered assistance wanting the drug sale to take place. Reasoning, however, that wanting was not necessary and that knowledge was enough, Judge Posner affirmed the conviction:

One who, knowing the criminal nature of another's act, deliberately renders what he knows to be active aid in the carrying out of the act is, we think, an aider and abettor even if there is no evidence that he wants the act to succeed.... Peoni's formula for aiding and abetting, if read literally, implies that the defendant must to be convicted have some actual desire for his principal to succeed. But in the actual administration of the law it has always been enough that the defendant, knowing what the principal was trying to do, rendered assistance that he believed would (whether or not he cared that it would) make the principal's success more likely.... No more is required to make the defendant guilty of joining the principal's venture and adopting its aims for his own within the meaning of Peoni and the cases that follow it.

Ortega is a puzzling re-endorsement of the knowledge approach. Why didn't Judge Posner discuss Fountain's distinction between "particularly grave" and not-so-grave offenses? Implicitly (unless he had abandoned that distinction), Judge Posner was holding that the one-time sale of drugs in Ortega was a "particularly grave" offense justifying the application of the knowledge standard, and thereby lightening the burden on the prosecution. But, this is difficult to reconcile with his earlier application of the tougher standard of purposeful intent when the offense was a CCE violation, which involves a supervisor of five or more persons, who derives substantial income from a continuing series of narcotics violations. A CCE violation is obviously more "grave" than a one-time drug sale.

As inexplicable as Ortega's silence is on this issue, the case is a strong pronouncement in favor of knowledge. And, it is a pronouncement without any reservation limiting knowledge to "particularly grave" crimes. On the aider and abettor's mental state, Judge Posner's view had apparently evolved from knowledge sometimes to knowledge all the time.

Still, Ortega did not resolve the issue for the Seventh Circuit. Some subsequent Seventh Circuit cases ignored both Ortega and Fountain, and casually mentioned, as if alluding to a well-established, incontrovertible principle of law, that aiding and abetting requires not only "knowledge" of the crime, but also "intent to further" the crime. Other cases cited Ortega, but came to conflicting conclusions.

299. 44 F.3d 505 (7th Cir. 1995).
300. Id. at 508.
301. See Damato v. Hermanson, 153 F.3d 464, 473 (7th Cir. 1998) ("intent to further"); United States v. Woods, 148 F.3d 843, 847 (7th Cir. 1998) ("Of course,
as to what it signifies: one case read it straightforwardly to require only knowledge, but other cases read it tortuously to require purposeful intent.

One of the subsequent cases that did cite Ortega tried to refashion it as part of a larger effort to clarify the issue of the aider and abettor's mental state, but without much success. In United States v. Irwin, the Seventh Circuit attempted to achieve an impossible result: re-establish purposeful intent as the applicable mental state while treating all of its prior precedent as consistent with that conclusion. In Irwin, the government, not surprisingly, argued that knowledge suffices as the required mental state of the aider and abettor, and that purposeful intent should not be required. There certainly was much in the Seventh Circuit case law to support that position. Nonetheless, the court, in an opinion authored by Judge Manion, rejected that position and decided that knowledge alone was not sufficient. That position also had strong support in the case law. In effect, either result was justifiable in light of the years of inconsistent case law in the Seventh Circuit on the issue.

But, in rejecting the knowledge standard, Judge Manion in Irwin failed to acknowledge the inconsistency running through its cases, neglected Fountain altogether (failing even to cite it), ignored the distinction between "particularly grave" offenses and other lesser offenses, and twisted Ortega to bring it into line with the purposeful intent approach.

In fact, Judge Manion made quite an astonishing statement in his rejection of the knowledge approach: "None of our prior cases has suggested this is the appropriate test." His assertion that none of the prior Seventh Circuit cases had adopted the knowledge standard required a serious reworking of a number of the Seventh Circuit's prior opinions, especially those of Judge Posner. Purposeful intent, according to Judge Manion, had been the mental state required of aiders and abettors all along. The cases that had spoken of the sufficiency of knowledge, such as Ortega, did not mean to reject purposeful intent; rather, all they meant to say was that purposeful

knowledge alone is not sufficient to convict Woods of aiding and abetting; the government must also show intent to further the crime ....

302. United States v. Pearson, 113 F.3d 758, 762 (7th Cir. 1997).
303. United States v. Guerrero-Martinez, 240 F.3d 637, 641 (7th Cir. 2001) (indicating that the aider and abettor must "want[] the principal to succeed"); United States v. Irwin, 149 F.3d 565, 572-73 (7th Cir. 1998).
304. 149 F.3d 565 (7th Cir. 1998).
305. Id. at 573.
306. Id.
intent need not be proven separately. Judge Manion explained: usually, "when a defendant knowingly renders aid to a criminal endeavor and the natural consequence of such aid is to further the crime and help it succeed, the jury is entitled to infer that the defendant intended by his assistance to further the crime."\textsuperscript{307} Thus, proof of the defendant's knowledge permits the jury, under most circumstances, to infer that the defendant acted not only with knowledge, but also with purposeful intent. Additional proof of purposeful intent, above and beyond the inference to be drawn from the defendant's having acted with knowledge, is necessary only in those cases where the "assistance was quite minor" so that intent must be separately proven (e.g., by proof of "a pecuniary interest, a personal motive, or certainly overheard or recorded comments indicating a desire for the crime to succeed").\textsuperscript{308} But, in either case—whether proof of knowledge permitted the inference of intent, or whether proof of knowledge still had to be supplemented with additional proof of purposeful intent—purposeful intent had always been, according to Judge Manion, the mental state required of the aider and abettor.

It is almost impossible to reconcile Judge Manion's opinion in \textit{Irwin} with a careful reading of the extensive Seventh Circuit case law that preceded it. While many of the earlier cases came out strongly in favor of purposeful intent, many came out just as strongly in favor of knowledge. \textit{Irwin} ignores \textit{Fountain}, and its distinction between "particularly grave" offenses that require only knowledge, and offenses less than "particularly grave" that require purposeful intent. In short, it is not at all clear that the Seventh Circuit has abandoned the knowledge standard that Judge Posner championed in \textit{Fountain} and \textit{Ortega}.

\hspace{1em} \textbf{c. Knowledge Is Sufficient When the Aider and Abettor's Assistance Is Substantial; If the Assistance Is Less Than Substantial, Purposeful Intent Is Required}

Under this approach, in some instances the aider and abettor is liable if acting with knowledge, while in other instances, he or she must act with purposeful intent. Contrary, however, to the approach that Judge Posner took in \textit{Fountain}, the applicable mental state does not hinge on whether the offense is "particularly grave," and contrary to the approach of the Second Circuit in \textit{Campisi}, the applicable

\footnotesize

307. \textit{Id.} at 572.

308. \textit{Id.}

309. The Seventh Circuit has since cited \textit{Irwin} once on this issue with approval. \textit{See United States v. Jaderany}, 221 F.3d 989, 992 n.1 (7th Cir. 2000) (indicating that the aider and abettor is liable if he or she "desired to help" the principal (citing \textit{Irwin}, 149 F.3d at 569-70)), \textit{cert. denied}, 531 U.S. 1151 (2001).
mental state does not hinge on whether the act is routine and lawful, or on whether the aider and abettor had direct contact with the principal. Rather, the focus is on the extent of the assistance rendered by the aider and abettor. If the aider and abettor's assistance is substantial, then the aider and abettor is liable on a showing of mere knowledge. If the assistance is less than substantial, however, then the aider and abettor cannot be convicted absent proof of purposeful intent.

This approach was proposed at one time by the drafters of the Model Penal Code in a tentative draft, which was quoted with approval in 1961 by the Supreme Court in Scales v. United States.\(^{310}\) While purposeful intent (acting "with the purpose of promoting or facilitating the commission of the crime") is certainly sufficient for the imposition of aiding and abetting liability,\(^{311}\) mere knowledge is also sufficient if accompanied by a substantial enough act: "A person is an accomplice of another person in commission of a crime if... acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission."\(^{312}\)

Scales made no mention of Nye & Nissen's adoption of Peoni's very different purposeful intent standard. In any event, one year after Scales, the drafters of the Model Penal Code, in the final version, abandoned the knowledge standard in favor of the purposeful intent standard\(^{313}\) and the Supreme Court has apparently not mentioned the knowledge approach ever since.

That does not mean that the "knowledge plus substantial assistance" approach has been entirely jettisoned. In a number of cases, the Seventh Circuit has come close to endorsing—without adopting—this substantial act approach. The Seventh Circuit first hinted at this approach in 1972,\(^{314}\) and thereafter one district court

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311. Id. (quoting the Model Penal Code § 2.04(3)(a) (Tentative Draft No. 1, 1953)).
313. Model Penal Code § 2.06 cmt. at 314-19 & n.47 (1962); see Blakey & Roddy, supra note 6, at 1388-89 & n.160.
314. See United States v. Greer, 467 F.2d 1064, 1069 (7th Cir. 1972). The focus in Greer was not so much on the aider and abettor's liability for the initial crime, but rather on his liability for the principal's subsequent crime, which was a natural and probable consequence of the first. See infra notes 405-07 and accompanying text (discussing Greer and the "natural and probable consequences" rule).

Interestingly, in determining whether the aider and abettor's involvement in the subsequent crime was substantial, the court looked to the old common-law distinctions between the various participants in a crime, and asked whether the defendant was physically present during the crime (and therefore, a principal in the second degree) or not (and therefore, an accessory before the fact). Greer, 467 F.2d at 1069 & n.5. Although it recognized that Congress had abolished these distinctions,
case in the Seventh Circuit seemed to adopt it.\textsuperscript{315} Almost twenty years later, Judge Posner,\textsuperscript{316} even while advocating his other variations to the mental state of the aider and abettor, spoke up in favor of it. Relying on \textit{Peoni}, he began with the premise (a premise that, as we have seen, he has not consistently embraced) that the aider and abettor must act with \textit{"a desire to help the activity succeed,"} and that \textit{"knowledge... [is] not... enough."}\textsuperscript{317} But, he then pondered whether this purposeful intent approach should be abandoned:

To be proved guilty of aiding and abetting, still another element must be established: that the defendant desired the illegal activity to succeed. The purpose of this requirement is a little mysterious but we think it is to identify, and confine punishment to, those forms of assistance the prevention of which makes it more difficult to carry on the illegal activity assisted. A clerk in a clothing store who sells a dress to a prostitute knowing that she will be using it in plying her trade is not guilty of aiding and abetting.... The sale makes no difference to her illegal activity.... The boost to prostitution brought about by selling a prostitute a dress is too trivial to support an inference that the clerk actually \textit{wants} to help the prostitute succeed in her illegal activity. If on the other hand he knowingly provides essential assistance, we can infer that he does want her to succeed, for that is the natural consequence of his deliberate act. \textit{It might be better in evaluating charges of aiding and abetting to jettison talk of desire and focus on the real concern, which is the relative dangerousness of different types of assistance, but that is an issue for another day.}\textsuperscript{318}

Thus, the knowing provision of substantial or essential assistance is not yet, standing alone, sufficient. Right now, the substantiality of the assistance is merely a means of determining desire: one may infer the existence of desire or purposeful intent when the aider and abettor knowingly renders assistance that is substantial. In that sense, the current version of this approach is similar to the approach Judge Manion took in \textit{Irwin}, where he attempted to reconcile the knowledge cases with the purposeful intent cases, and concluded that knowledge coupled with substantial assistance was a fair basis from which to infer desire or purposeful intent. Judge Posner, however, has hinted at "another day" when substantial assistance with knowledge will be enough, whether or not it gives rise to an inference of desire.

\begin{enumerate}
\item the court stated that "[t]he common law characterizations are useful, however, in determining when a defendant's participation is sufficient to make him an accomplice." \textit{Id.} at 1069 n.5.
\item \textit{Id.} at 887.
\item \textit{Id.} at 887-88 (second emphasis added).
\end{enumerate}
5. The Derivative Approach

Under this approach, the mental state for the aider and abettor is the same as that for the principal. The mental state for the aider and abettor is not a constant, but varies with the crime. It may be purposeful intent, if, under the particular crime charged, the principal is not guilty unless acting with purposeful intent. It may be knowledge, bad purpose, or strict liability; for each offense, the aider and abettor's mental state is derived from that required of the principal. Put simply, under the derivative approach to aiding and abetting liability, "aiders and abettors must possess the same criminal intent as the principals."319

This derivative approach to the mental state of the aider and abettor was best explained by the Second Circuit in 1962, sitting en banc, in *United States v. Jones.*320 The court recognized that requiring

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319. United States v. North, 910 F.2d 843, 881 n.11 (D.C. Cir. 1990) ("Even though he was actually convicted only of aiding and abetting others in their violation of section 1505, aiders and abettors must possess the same criminal intent as the principals."); withdrawn in part and modified on other grounds, 920 F.2d 940 (D.C. Cir. 1990) (per curiam); id. at 890 n.21 ("Defendants convicted under 18 U.S.C. § 2 of aiding and abetting must have the same intent as defendants convicted under a principal statute."); accord, e.g., United States v. Ismoila, 100 F.3d 380, 387, 389-90 (5th Cir. 1996) (indicating that the aider and abettor must have "the same criminal intent as the principal," and then affirming the aider and abettor's convictions because she had acted with the mental states prescribed by the underlying offenses); United States v. Beck, 615 F.2d 441, 448-51 (7th Cir. 1980) (holding that "the state of mind required for the statutory offense must be shown for conviction as an aider and abettor," and thus, because the principal under the Arms Export Control Act, 22 U.S.C. § 2778, need not know that an export license is required for liability, the same is true for the aider and abettor; awareness of a legal duty not to export is sufficient) (citing *Peoni*); United States v. Evans, 572 F.2d 455, 481-82 & n.34 (5th Cir. 1978) (citing *Nye & Nissen* and *Peoni*, and then stating that "purposive participation" is shown when the aider and abettor "possess[es] the same criminal intent as the actual perpetrator"); United States v. Corbin Farm Serv., 444 F. Supp. 510, 524-25 (E.D. Cal.) (finding seller of pesticide liable as aider and abettor for selling pesticide with knowledge that the buyer would use it unlawfully, and noting that when the mental state set forth in the statute is "knowingly," the aider and abettor need not act willfully, but simply with "the same extent of knowledge ... as is required for a principal"), aff'd on other grounds, 578 F.2d 259 (9th Cir. 1978) (per curiam); see United States v. Barnett, 197 F.3d 138, 146 (5th Cir. 1999) ("To convict a defendant of conspiracy ... the Government must prove at least the degree of criminal intent necessary for the substantive offense itself. Likewise," to convict a defendant of aiding and abetting, "the government must prove that the defendant shared in the criminal intent of the principal." (quotation marks and footnotes omitted)); United States v. Grey Bear, 828 F.2d 1286, 1292 (8th Cir. 1987) (citing *Peoni* and *Nye & Nissen*, and then stating that "by far the most important element is the sharing of the criminal intent of the principal" (quotation omitted)), dismissed in part on other grounds, 863 F.2d 572 (8th Cir. 1988) (per curiam); United States v. Campa, 679 F.2d 1006, 1010 (1st Cir. 1982) ("The vital element to be proven is that the aider and abettor shared in the principal's essential criminal intent."). Additional cases adopting the derivative approach are discussed at length throughout this section of the Article.

320. 308 F.2d 26 (2d Cir. 1962) (en banc).
the same mental state for both the principal and the aider and abettor stems from the enactment of the aiding and abetting statute, whose "effect is to erase whatever distinctions may have previously existed between different classes of principals and between principals and aiders or abettors."\textsuperscript{321}

\textit{Jones} extended Congress's elimination of distinctions between the aider and abettor and the principal to the issue of the mental state: since an aider and abettor is treated as a principal, then the aider and abettor's mental state must also be the same as the principal's mental state. The court stated:

[[I]f a certain knowledge or intent is required to be proven in order to convict one of violating a federal criminal statute, the proof to convict one as an aider and abettor will not be different from that necessary to convict the violator, except that aiding, abetting, commanding, inducing, or procuring the commission of the crime must be proven rather than actual commission.\textsuperscript{322}]

Before turning to a more detailed examination of this derivative approach, a note of caution is in order. The phrase "specific intent" once again returns to confuse the cases. We have seen how "specific intent" serves as a descriptive label for the purposeful intent approach\textsuperscript{323} and for the very different bad purpose approach.\textsuperscript{324} From the bad purpose and purposeful intent cases, it has crept into the derivative cases as well, in part because of the ease with which the aiding and abetting cases cite one another, having little or no sense that very different approaches are being employed. Thus, many cases, in culling and combining pronouncements from the various aiding and

\textsuperscript{321} \textit{Id.} at 31.

\textsuperscript{322} \textit{Id.} at 31-32. \textit{Jones} failed to cite a number of earlier Second Circuit cases that suggested other approaches. For example, it did not cite \textit{Peoni}, although the Second Circuit had cited \textit{Peoni} in an earlier case when struggling with the same issue that it ultimately resolved in \textit{Jones}. See United States v. Santore, 290 F.2d 51, 76, 77-78 n.7 (2d Cir. 1960); see also \textit{id.} at 80 n.1 (Waterman, J., concurring in part and dissenting in part). \textit{Jones} also did not cite United States v. \textit{Campisi}, 306 F.2d 308 (2d Cir. 1962), which the Second Circuit had decided less than a month before deciding \textit{Jones}, and which had suggested a variation of the knowledge approach. See supra text accompanying notes 266-77. Nonetheless, \textit{Jones} still should have been, by virtue of its en banc status, the Second Circuit's determinative pronouncement on the subject of the aider and abettor's mental state. \textit{Jones}, however, has not been cited since by the Second Circuit in support of the derivative approach, and has also been ignored by subsequent Second Circuit cases suggesting other approaches. See, e.g., United States v. Scotti, 47 F.3d 1237 (2d Cir. 1995) (employing the purposeful intent approach, and containing no cite to \textit{Jones}). Indeed, the Second Circuit has not thereafter explicitly employed the derivative approach at all, although it has relied on cases from other circuits that have. See infra note 344. But, as demonstrated below, many cases in other circuits have adopted the derivative approach in a wide variety of contexts.

\textsuperscript{323} See supra text accompanying notes 157-60.

\textsuperscript{324} See supra text accompanying notes 250-54.
abetting precedents, end up, for example, with both derivative language and specific intent language.\footnote{325}

The derivative approach is obviously not properly described as a "specific intent" approach, at least as that phrase is used by the purposeful intent or bad purpose approaches. As used under the latter approaches, "specific intent" denotes a fixed, unvarying mental state for the aider and abettor, often very different from that of the principal, while as used under the derivative approach, the term denotes a mental state that varies to match that of the principal. Most cases that favorably quote derivative language along with seemingly inconsistent specific intent language do not make any effort to reconcile the contradictory language; they simply ignore the inconsistency and apply either the derivative approach or one of the specific intent approaches.\footnote{326} But, a few derivative cases containing specific intent language explain away that language in the following startling fashion: there is no difference between acting with specific intent and acting with the same mental state as the principal. "The specific intent requirement of the crime of aiding and abetting requires that the defendant consciously share the principal's knowledge of the underlying criminal act . . . ."\footnote{327} Put another way, "[t]he state of mind required by the specific intent element of aiding and abetting is the same as that required to prove the principal offense."\footnote{328}

\footnote{325} See, e.g., United States v. Sayetsitty, 107 F.3d 1405, 1412 (9th Cir. 1997) (explaining that the mental state for an aider and abettor consists of "'(1) . . . the specific intent to facilitate the commission of a crime by another, [and] (2) . . . the requisite intent of the underlying substantive offense" (emphasis omitted) (quoting United States v. Gaskins, 849 F.2d 454, 459 (9th Cir. 1988))). For other cases that combine a requirement of specific intent with the seemingly inconsistent requirement that the aider and abettor possess the same intent as the principal, see, for example, United States v. Salamanca, 990 F.2d 629, 638 (D.C. Cir. 1993), United States v. Valencia, 907 F.2d 671, 680-81 (7th Cir. 1990), United States v. Garrett, 720 F.2d 705, 713 (D.C. Cir. 1983), and Mack v. United States, 326 F.2d 481, 482, 484 (8th Cir. 1964). See also United States v. Otero-Méndez, 273 F.3d 46, 52 (1st Cir. 2001) ("For a specific intent crime, like aiding and abetting, the defendant must have consciously shared some knowledge of the principal's criminal intent."); United States v. Searan, 259 F.3d 434, 444 (6th Cir. 2001) (stating that the aider and abettor's act must be "designed to aid in the success of the criminal venture," but then stating that the aider and abettor is guilty if he or she "had the same mental state as that necessary to convict a principal of the offense" (citations omitted)); United States v. Smith, 198 F.3d 377, 383, 386 (2d Cir. 1999) (stating that the aider and abettor must act with "the specific intent of advancing the commission of the underlying crime," but then inexplicably holding that the government had to prove only that the aider and abettor's participation was "'knowing,' [which is the mental state for the principal, and] not that he possessed specific intent"), cert. denied, 531 U.S. 864 (2000).}

\footnote{326} See, e.g., Sayetsitty, 107 F.3d at 1412 (employing both derivative and specific intent language, and then ignoring the derivative language and adopting a purposeful intent approach).

\footnote{327} United States v. Loder, 23 F.3d 586, 591 (1st Cir. 1994).

\footnote{328} United States v. Mangual-Corchado, 139 F.3d 54, 51 (1st Cir. 1998) (McAuliffe, J., dissenting in part) (citing Loder, 23 F.3d at 591).
Without expressly saying so, the derivative cases employ the phrase “specific intent” in an entirely new sense. This third meaning of “specific intent” applies the phrase to any offense that requires a mental state beyond the “intention to make the bodily movement which constitutes the act which the crime requires.”

What does that mean? Bank robbery (a general intent offense under any definition) constitutes a general intent offense under this new definition, because no mental state is necessary beyond deliberately engaging in the bodily movements that constitute the act required by the crime: pulling out the gun and grabbing the money.

No additional mental state, such as an “intent to steal or purloin,” is necessary; an alcoholic who robs solely to get caught and returned to prison for further alcoholism treatment is still guilty of bank robbery, even though he or she does not intend to keep the money. Only if the defendant robs the bank without intending even his or her “bodily movements,” e.g., by sleepwalking, would the robber have a defense to this general intent offense.

But, any offense that requires any mental state beyond deliberately making the requisite “bodily movements” is a specific intent offense, even if the additional mental state is simple knowledge. Thus, under this definition, and only under this definition, the crime of receipt of stolen goods is a specific intent offense, because, in addition to receiving the goods deliberately, the defendant must possess an additional mental state: knowledge that the goods are stolen. It does not matter that the additional mental state is only knowledge, as opposed to purposeful intent or bad purpose.

330. See Carter, 530 U.S. at 268.
332. Id. at 268 (discussing the facts in United States v. Lewis, 628 F.2d 1276, 1279 (10th Cir. 1980)).
333. Id. at 269.
335. See United States v. Allen, 247 F.3d 741, 785 (8th Cir.) (holding, in the alternative, that even if specific intent is required, one who aids and abets a robbery, aware of the serious risk of death attending his or her conduct, has specific intent with respect to the resulting death), petition for cert. filed, No. 01-7310 (U.S. Oct. 22, 2001), at www.supremecourtus.gov/docket/01-7310.htm.
336. See United States v. Samaria, 239 F.3d 228, 233 n.2, 240 (2d Cir. 2001) (describing the crime of receipt or possession of stolen goods, 18 U.S.C § 2315 (1994),
Under this definition, aiding and abetting requires specific intent even under the derivative approach, because the aider and abettor must always have a mental state beyond deliberately engaging in the “bodily movements” necessary for the act of abetting. In our bank robbery example, while it is enough that the principal know or intend nothing more than his or her “bodily movement” of entering the bank and grabbing the money by force, the aider and abettor, by contrast, must know or intend something beyond the “bodily movement” of driving the car—he or she must also have some additional mental state relating to the bank robbery. If the driver deliberately drives to the bank thinking that the passenger is going to have lunch with the bank teller, he or she has not aided and abetted the bank robbery even under the derivative approach. The culpable mental state that ties the aider and abettor to the bank robbery, a mental state above and beyond the deliberate commission of the act of driving the car, is what—under this third meaning of specific intent—makes aiding and abetting a specific intent offense, even under the derivative approach.

The analysis now turns to a detailed examination of the derivative approach, and its application in the context of a variety of offenses.

a. The Derivative Approach As Applied to Knowledge Offenses

Once again, both 18 U.S.C. §§ 924(c) and 2113(d) provide useful examples of knowledge offenses. As indicated previously, § 924(c) proscribes the use or carrying of a firearm during crimes of violence and drug trafficking, and § 2113(d) proscribes bank robbery with the use of a weapon. Although these are knowledge offenses, the purposeful intent cases require that the aider and abettor act not just with knowledge, but with purposeful intent, and require the purposeful intent to cover not just the underlying crime of violence or drugs (§ 924(c)) or bank robbery (§ 2113(d)), but the principal’s use or carrying of the firearm. By contrast, under the knowledge approach, the aider and abettor would be liable if he or she rendered an act of assistance with mere knowledge that the principal was carrying a gun.

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337. The only exception would be for a strict liability offense, where the aider and abettor, like the principal, would need no mental state beyond deliberately engaging in the statutorily proscribed act, such as in the case of possession of hand grenades. See United States v. Freed, 401 U.S. 601, 607 (1971) (holding that possession of hand grenades is a strict liability offense under the National Firearms Act, as codified in 26 U.S.C. § 5861(d) (1964 ed., Supp. V)).

338. See supra notes 194-95 and accompanying text (citing cases holding that § 924(c) is a general intent crime, and that, consequently, the requisite mental state for the principal is knowledge); supra notes 186-87 and accompanying text (same with respect to § 2113(d)).

339. See supra notes 198-202 and accompanying text (§ 924(c)); supra notes 188-89 and accompanying text (§ 2113(d)).
The derivative cases also hold the aider and abettor of a § 924(c) offense or a § 2113(d) offense guilty on a knowledge standard, but they do so not because of an independent knowledge standard universally applicable to all aiders and abettors, but because these offenses are knowledge offenses, and the aider and abettor’s mental state is derived from that of the principal. Adopting this derivative approach, the Fifth Circuit reasoned as follows in a § 924(c) case:

The defendants were charged with aiding and abetting the use of a firearm. An aider and abettor must share in the criminal intent of the principal. To establish the state of mind required for a § 924(c) conviction, the government must prove that a defendant had knowledge of the firearm. To convict, the jury was required to find, therefore, that each defendant as an aider and abettor knew that the gun was at least available to one of the defendants.340

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340. United States v. Williams, 985 F.2d 749, 755 (5th Cir. 1993) (emphasis added and citations omitted). Williams is one in a line of Fifth Circuit cases holding that the § 924(c) aider and abettor’s mental state of knowledge is derived from the principal. See United States v. Wainuskis, 138 F.3d 183, 188 (5th Cir. 1998) (holding that because “an aider and abettor must share in the criminal intent to use the firearm,” the applicable mental state is knowledge); United States v. Salazar, 66 F.3d 723, 728 (5th Cir. 1995); United States v. Nelson, 733 F.2d 364, 370-71 (5th Cir. 1984) (holding that since the standard for the principal is knowledge, “[s]imilarly . . . the government had to prove that [the aider and abettor] knew that [the principal] was carrying a firearm”); see also United States v. Sorrells, 145 F.3d 744, 753 (5th Cir. 1998) (holding that the aider and abettor’s mental state is derived from that of the principal, but suggesting that Bailey v. United States, 516 U.S. 137 (1995), changed the mental state required of the principal in § 924(c) cases, and therefore, derivatively changed the mental state required of the aider and abettor).

Cases from other circuits also hold that the § 924(c) aider and abettor’s mental state is derived from that of the principal. See United States v. Thomas, 987 F.2d 697, 702 (11th Cir. 1993) (“[T]he government must present evidence proving that [the aider and abettor] had the ‘knowledge required to convict him under section 924(c).”’ (quoting United States v. Hamblin, 911 F.2d 551, 558 (11th Cir. 1990))); United States v. Powell, 929 F.2d 724, 727 (D.C. Cir. 1991) (indicating that knowledge to a practical certainty “puts the accomplice on [the same] level with the principal,” but justifying the knowledge standard also on the “natural and probable consequences” doctrine); see also United States v. Delpit, 94 F.3d 1134, 1152 (8th Cir. 1996) (holding that the aider and abettor “stepped into [the principal]’s shoes” for purposes of § 924(c)(1),” and upholding aider and abettor’s conviction where he knew that the principal was carrying the gun (quoting United States v. Simpson, 979 F.2d 1282, 1284-86 (8th Cir. 1992). cert. denied, 507 U.S. 943 (1993))).

The First Circuit also seems to hold that the § 924(c) aider and abettor’s mental state is derived from that of the principal, although, by its own acknowledgment, it is “difficult to articulate a precise intent standard for an aider and abettor.” United States v. Otero-Méndez, 273 F.3d 46, 52 (1st Cir. 2001). Thus, there is some confusion in the First Circuit’s cases. Compare United States v. Spinney, 65 F.3d 231, 235, 238-39 (1st Cir. 1995) (concluding that knowledge “to a practical certainty” is the mental state applicable to the § 924(c) aider and abettor, after stressing that the aider and abettor must have “consciously shared the principal’s knowledge” (citation omitted)), with id. at 235 (stating that the aider and abettor must “intend[] to ensure [the endeavor’s] success” (citing Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)), and must have “intended to help the principal” (citation omitted)).
A Seventh Circuit case put it even more forcefully. It applied the derivative approach, and held that the aider and abettor of armed bank robbery need not act with "specific intent" in the purposeful intent sense of an "inten[t] to aid the principal," reasoning as follows: the court first quoted Judge Learned Hand's "classic formulation" in Peoni, interpreting it to mean that "[p]roof of specific intent is not a requirement" (a most extreme statement, given the numerous contemporaneous contrary cases in the Seventh Circuit holding that aiding and abetting is a specific intent offense requiring purposeful intent). The court then made it clear that the state of mind of the aider and abettor is derived from that of the principal. Consequently, the court was prepared to impose specific intent (in the sense of purposeful intent) on the aider and abettor only when required of the principal. But, in that case, it was not. Armed bank robbery is not a specific intent offense. "[T]he state of mind required for conviction as an aider and abettor is the same state of mind

Some First Circuit cases routinely cite derivative cases from other circuits in support of knowledge. United States v. DeMasi, 40 F.3d 1306, 1316 (1st Cir. 1994) (knowledge to a practical certainty (citing Powell, 929 F.2d at 728)), cert. denied, 513 U.S. 1132 (1995); United States v. Torres-Maldonado, 14 F.3d 95, 103 (1st Cir. 1994) (knowledge to a practical certainty). But, intent language, nevertheless, seems to persist in the First Circuit. See United States v. Sullivan, 85 F.3d 743, 748 (1st Cir. 1996) (citing Spinney, 65 F.3d at 238, in support of knowledge to a practical certainty, but also stating that "[t]he evidence was sufficient to show that Sullivan . . . took some action intending to cause the gun to be used or carried" (emphasis added)); United States v. Luciano-Mosquera, 63 F.3d 1142, 1150 (1st Cir. 1995) (citing Torres-Maldonado, 14 F.3d at 103, for the knowledge standard, but also stating: "The question . . . is whether the evidence was sufficient to show that each appellant knew that a firearm would be involved . . . and took some action in relation to the M-16 that was intended to cause the firearm to be carried during and in relation to the drug trafficking offense" (emphasis added)).

341. United States v. Reiswitz, 941 F.2d 488, 494 (7th Cir. 1991) (quotation omitted).

342. Id.

343. See, e.g., United States v. Nacotee, 159 F.3d 1073, 1076 (7th Cir. 1998) (noting that an aider and abettor "must have had the specific intent to aid in the commission of the crime"); United States v. Irwin, 149 F.3d 565, 572 (7th Cir. 1998) (concluding that knowledge alone is insufficient, and requiring also a "desire [or intent] for the crime to succeed"); United States v. Woods, 148 F.3d 843, 847 (7th Cir. 1998) ("[K]nowledge alone is not sufficient to convict the [defendant] of aiding and abetting [§ 924(c) and § 2113(d) offenses]; the government must also show intent to further the crime . . . ."); United States v. Petty, 132 F.3d 373, 377 (7th Cir. 1997) ("[T]he essential elements of aiding and abetting [are]: knowledge of the crime, intent to further the crime, and some act of help by the defendant."); Bosco v. Serhant, 836 F.2d 271, 279 (7th Cir. 1987) ("Aiding and abetting in the criminal law requires not only knowledge of the principal's objective but a desire to help him attain it."); see also United States v. Ortega, 44 F.3d 505, 507 (7th Cir. 1995) (stating initially that "[t]he canonical definition of aiding and abetting a federal offense, stated by Judge Learned Hand in United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938), and repeated in innumerable subsequent cases requires not only that the defendant have aided his principal to commit a crime but also that he have wanted the principal to succeed," but then concluding that knowledge, even without purposeful intent, is sufficient (citations omitted)).
required for the principal offense. Armed bank robbery is a general intent crime.\textsuperscript{344}

In short, under the derivative approach, the § 924(c) and § 2113(d) aider and abettor need act only with knowledge (or notice) with respect to the gun, because knowledge is the mental state sufficient for liability for the principal.\textsuperscript{345}

b. The Derivative Approach As Applied to Strict Liability Offenses and Strict Liability Elements

i. The Supreme Court's Decision in United States v. Dotterweich: The Food, Drug, and Cosmetic Act

The real test of the derivative approach is its application to strict liability offenses. Does it go so far as to hold the aider and abettor strictly liable like the principal? Perhaps the strongest support for the derivative position comes from the Supreme Court's decision in United States v. Dotterweich.\textsuperscript{346} Remarkably, Dotterweich is not generally cited on the issue of the aider and abettor's mental state by the derivative cases, or for that matter, by any of the other cases concerned with the aider and abettor's mental state. Yet, it establishes that aider and abettor liability exists for strict liability offenses, and that the aider and abettor, like the principal, is liable on

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\textsuperscript{344} Reiswitz, 941 F.2d at 494 (citations omitted); see also United States v. Sanborn, 563 F.2d 488, 491 (1st Cir. 1977) (stating that knowledge of the gun is the mental state for the aider and abettor of a § 2113(d) offense, because knowledge is the mental state required of the principal).

The Second Circuit, which has insisted on the purposeful intent approach for the aider and abettor when the underlying offense is a violation of § 924(c), see supra note 198 (citing cases, including Second Circuit cases), has somewhat inconsistently applied the derivative approach when the underlying offense is a violation of § 2113(d). See United States v. Grubczak, 793 F.2d 458, 463 (2d Cir. 1986) ("[A]ll that need be demonstrated is that the [§ 2113(d) aider and abettor] was on notice of the likelihood of [the gun's] use." (quotation marks and citation omitted) (citing Sanborn, 563 F.2d at 491)); see also United States v. James, 998 F.2d 74, 81-82 (2d Cir. 1993) (finding it "indisputable" that the aider and abettor knew that the principal had a gun; "[U]nder our reasoning in Grubczak and our holding today, this ... was sufficient to support his conviction for armed robbery as opposed to simple robbery"). But see Grubczak, 793 F.2d at 462 n.1 (noting that dictum in United States v. Wardy, 777 F.2d 101, 106 (2d Cir. 1985), and cases from other circuits, suggest that the aider and abettor must not only know of the gun, but must also intend to aid the principal in the use of the gun).


\textsuperscript{346} 320 U.S. 277 (1943).
a strict liability basis, not on the basis of knowledge, specific/purposeful intent, or any other culpable mental state.

*Dotterweich* involved violations of the Federal Food, Drug, and Cosmetic Act, of which § 301(a) prohibits as a misdemeanor the “introduction into interstate commerce of any ... drug ... that is adulterated or misbranded.” The statute “dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.” The shipper of misbranded or adulterated goods is punishable under the statute even when acting “without any conscious fraud at all. It was natural enough to throw this risk on shippers with regard to the identity of their wares.”

The issue was the liability of Dotterweich, the president and general manager of a pharmaceutical corporation, for the shipping of the misbranded and adulterated drugs. He claimed that only the corporation could be liable. As for him, there was “no evidence ... of any personal guilt” on his part. There also was “no proof or claim that he ever knew of the introduction into commerce of the adulterated drugs in question, much less that he actively participated in their introduction. Guilt [was] imputed ... solely on the basis of his authority and responsibility as president and general manager of the corporation.”

The Supreme Court upheld his conviction. The corporation, rather than Dotterweich, may have been the entity that directly committed the offense (i.e., the corporation was the principal), but, while “a corporation may commit an offense ... all persons who aid and abet its commission are equally guilty.” The Court specifically cited the aiding and abetting statute, 18 U.S.C. § 2(a). With the enactment of

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349. *Dotterweich*, 320 U.S. at 281 (citations omitted).
350. Id. (quotation omitted).
351. See id. at 278-79.
352. Id. at 286 (Murphy, J., dissenting).
353. Id.
354. Id. at 284.
355. Id. at 281. At that time, the aiding and abetting statute was found in section 332 of the Penal Code, as codified in 18 U.S.C. § 550 (1909). The reference in *Dotterweich* to that section was clearly to what is now 18 U.S.C. § 2(a) (1994), the aiding and abetting subsection, rather than to what is now § 2(b), the causing subsection, since the latter had not yet been enacted at the time. The causing subsection was not passed until 1948, five years later. See supra text accompanying notes 85-88.

At least one case anachronistically viewed *Dotterweich* as a case of the officer causing (under § 2(b)), rather than aiding and abetting (under § 2(a)), the commission of the crime by the corporation. See United States v. Sain, 141 F.3d 463, 475 (3d Cir. 1998).
that statute, “all those responsible for [the crime are] equally guilty.”

But, in a strict liability offense, how does the factfinder ascertain whether a particular corporate officer aided and abetted the corporation in its shipment of the adulterated drugs? Dotterweich answers that question in the following fashion: “The offense is committed... by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs.”

In a later case, the Supreme Court explained Dotterweich to mean that the liability of the corporate officer depends on whether the officer had, “by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so.” If the officer had such authority, then even if he or she lacked purposeful intent or even knowledge, he or she is strictly liable.

Dotterweich has become known for the concept of the “responsible corporate officer.” What has rarely been recognized, however, is that the decision amounts to nothing more than an application of the doctrine of aiding and abetting to a strict liability offense. The aider and abettor, the responsible corporate officer, need not act with any culpable mental state, because the principal, the corporation, need not. Dotterweich adopts the derivative approach.

The Court did recognize, however, that the doctrine of aiding and abetting requires some modification when applied on a derivative basis to a strict liability offense. Normally, any act of facilitation, no matter how insignificant, satisfies the act requirement for aiding and abetting liability. But, for a strict liability offense in the corporate context, that would mean that every employee who assists in any way in storing, shipping, or handling the adulterated drugs, is liable even

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357. Id. at 284.
359. See, e.g., id. at 667-73; United States v. Iverson, 162 F.3d 1015, 1023 (9th Cir. 1998).
360. For an example of one case that may have recognized the aiding and abetting nature of Dotterweich, see Carolene Products Co. v. United States, 140 F.2d 61, 66 (4th Cir.) (holding officers of corporation liable for aiding and abetting violations of the Filled Milk Act, 21 U.S.C. §§ 61-63, a strict liability offense (citing Dotterweich)), aff'd on other grounds, 323 U.S. 18 (1944). See also United States v. Ming Hong, 242 F.3d 528, 531 (4th Cir.) (stating that “a corporation may commit an offense and all persons who aid and abet its commission are equally guilty” (quoting Dotterweich, 320 U.S. at 284)), cert. denied, 122 S. Ct. 60 (2001).
361. See Nye & Nissen v. United States, 336 U.S. 613, 618-19 (1949) (concluding that the theory of aiding and abetting “is well engrained in the law”) (citing cases, including Dotterweich).
362. See supra notes 14-15 and accompanying text.
when lacking knowledge of the adulteration. In essence, to compensate for the breadth conferred by the aiding and abetting doctrine on this strict liability statute, the Court heightened the act requirement. Instead of permitting liability for even an insignificant act, the Court required that the aider and abettor be someone in authority whose very significant act is the failure to exercise that authority to correct the violation.

Despite that modification, *Dotterweich* is unequivocally a derivative case (although subsequent derivative cases, which do not cite it, clearly fail to realize that). Moreover, despite the fact that it is a derivative case, it is still somehow consistent with *Peoni*; at least that is what the Supreme Court thought. In *Nye & Nissen*, the Supreme Court adopted the formulation in *Peoni* while, at the very same time, citing *Dotterweich* with approval.363

### ii. Strict Liability Firearms Offenses

The National Firearms Act, which proscribes the possession of unregistered firearms even when the defendant is unaware that the firearms are unregistered,364 is another good illustration of the application of the derivative approach to a strict liability offense. Convicted aiders and abettors have repeatedly argued on appeal that they can be liable, even for this sort of strict liability offense, only upon "a showing of specific intent to aid and abet the commission of a crime, even where such a showing is admittedly not necessary to convict a principal of the substantive crime."365 The derivative cases have repeatedly rejected such claims:

"It would be anomalous to hold that specific intent was a necessary element of aiding and abetting a crime, but not of the crime itself."

Since the aiding and abetting statute makes an aider and abettor punishable as a principal, a showing of specific intent should be required of an aider and abettor only if specific intent is also a necessary element for liability as a principal.366

Because the principal need not be aware of the unregistered nature of the firearm, the same is true for the aider and abettor.367

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364. See *supra* text accompanying notes 217-21 (discussing National Firearms Act and United States v. Freed, 401 U.S. 601 (1971)).
366. *Id.* at 391-92 (quoting United States v. Bell, 573 F.2d 1040, 1046 (8th Cir. 1978)). In rejecting the aider and abettor's claim that he could only be convicted if acting with specific intent, *Bell* cited *Nye & Nissen*. *Bell*, 573 F.2d at 1046.
367. See United States v. Tarr, 589 F.2d 55, 60-61 (1st Cir. 1978); *Burkhalter*, 583 F.2d at 391; *Bell*, 573 F.2d at 1045-46; United States v. DeBartolo, 482 F.2d 312, 317 (1st Cir. 1973); see also United States v. Rogers, 652 F.2d 972, 975 (10th Cir. 1981) (rejecting the argument of defendants, charged with violations of 26 U.S.C. §§ 5861(d)-(f), that the government had to prove scienter, and holding instead that the offenses were strict liability crimes, without discussing the fact that the defendants...
The same is true under this approach for aiders and abettors of other strict liability firearms offenses. Under 18 U.S.C. § 922(g)(1), it is unlawful for a convicted felon to possess a firearm. Knowing possession alone is not an offense; it is the prior felony conviction that converts the knowing possession into a felony. But, at least according to some appellate cases, the defendant need not be aware of his or her status as a felon.368 (The principal might be unaware that he or she is a felon because of the mistaken belief that the prior conviction was for a misdemeanor.) A defendant in knowing possession of the firearm violates the statute,369 even if he or she is unaware of the crucial element—the prior felony conviction—that defines the conduct as criminal. In that sense the offense is a strict liability offense.

What of the aider and abettor, such as one who encourages the felon to obtain and possess a firearm? According to the derivative approach, because there is no requirement that the principal know of his or her status as a felon, “[n]o greater knowledge” is required of the aider and abettor.370 “[T]he state of mind required for the statutory offense” is the state of mind required of the aider and abettor.371 Stated differently, the defendant may be convicted either as a principal or as an aider and abettor based on the same mental state.372

iii. Strict Liability Elements

What is true under the derivative approach for strict liability offenses is also true for strict liability elements, such as the federal jurisdictional element.373 Because the aider and abettor's mental state is the same as that of the principal, no mental state is required of the aider and abettor for such elements when none is required of the principal:

Because an aider and abettor is punished as a principal, the proof must encompass the same elements as would be required to convict any other principal. . . . Therefore, since it need not be proved that a

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368. See United States v. Canon, 993 F.2d 1439, 1442 (9th Cir. 1993) (citing United States v. Sherbondy, 865 F.2d 996, 1002-03 (9th Cir. 1988)).


370. Canon, 993 F.2d at 1442. But see United States v. Xavier, 2 F.3d 1281, 1286-87 (3d Cir. 1993) (“[T]here can be no criminal liability for aiding and abetting a violation of § 922(g)(1) without knowledge of having cause to believe the possessor’s status as a felon.”).

371. Moore, 936 F.2d at 1527 (quoting United States v. Valencia, 907 F.2d 671, 677 (7th Cir. 1990) (citing United States v. Beck, 615 F.2d 441, 449 (7th Cir. 1980))); see id. at 1528 (examining the mental state required by the underlying statute of the principal to determine the mental state required of the aider and abettor).

372. See id. at 1528 (“‘Moore was clearly aware of Miles’ use of a gun . . . the evidence was sufficient . . . to find that Moore was guilty of the firearms offense both as a principal and/or under an aiding and abetting theory.’”).

373. See supra text accompanying notes 209-14, 230-34 (giving examples of strict liability jurisdictional elements).
principal had knowledge or an intention that interstate facilities were to be utilized, the Government, likewise, need not prove such knowledge by a defendant charged as an aider and abettor.\footnote{374}

Stated simply, the derivative approach views the aider and abettor as standing "in the shoes of the principal," thereby requiring no culpable mental state for the strict liability jurisdictional element.\footnote{375}

Although the non-derivative approaches also require no mental state for the jurisdictional element,\footnote{376} the reason for that is not clear. Whereas the derivative cases arrive at the conclusion quite smoothly by looking to the principal, the other approaches are problematic since they do not look to the principal. Indeed, for strict liability offenses, as opposed to strict liability elements, these other approaches entirely ignore the principal, and require a culpable mental state of the aider and abettor even though none is required of the principal. The other approaches must explain why a culpable

\footnote{374. United States v. Vaccaro, 816 F.2d 443, 453-54 (9th Cir. 1987) (quotation marks and citation omitted) (affirming conviction under the Travel Act, 18 U.S.C. § 1952 (1982)), abrogated on other grounds, Huddleston v. United States, 485 U.S. 681 (1988). The Sixth Circuit, alone among the circuits, is of the view that the Travel Act requires proof that a defendant knew, or should have known, of the interstate element. See United States v. Winters, 33 F.3d 720, 722 (6th Cir. 1994) (acknowledging, however, that "[a]ll other Circuits that have considered the question have determined that the Travel Act’s interstate requirement is purely jurisdictional and carries with it no scienter requirement"); United States v. Betancourt, 838 F.2d 168, 174 (6th Cir. 1988) (noting that the Sixth Circuit’s approach “has been criticized in our circuit, and its application significantly relaxed”); United States v. Gallo, 763 F.2d 1504, 1521 n.25 (6th Cir.) (“This court is alone in requiring knowledge of the interstate nexus as a necessary element in the proof of a Travel Act violation.”), vacated in part on other grounds, 774 F.2d 106 (6th Cir. 1985); United States v. Prince, 529 F.2d 1108, 1111-12 (6th Cir. 1976). The Sixth Circuit, however, still seems to apply the derivative approach; apparently, because the “knew or reasonably should have known” standard applies to the principal, the Sixth Circuit applies it to the aider and abettor as well. See United States v. Alsobrook, 620 F.2d 139, 143-44 (6th Cir. 1980).

375. United States v. Strauss, 443 F.2d 986, 988 (1st Cir. 1971) (affirming conviction of aider and abettor under the National Stolen Property Act, 18 U.S.C. § 2314, even though he did not know of the interstate nature of the transportation) (citing Peoni); United States v. Kierschke, 315 F.2d 315, 317 (6th Cir. 1963) (holding that since the principal need not know of the interstate nature of the transportation, “[l]ikewise an accused does not have to know that the goods will be transported in interstate commerce, but it is sufficient if he causes, or aids, abets or induces such interstate transportation”).

The same is true for strict liability elements that are not jurisdictional in nature. See, e.g., United States v. Biasucci, 786 F.2d 504, 513 (2d Cir. 1986) (holding that “specific knowledge of a fact need not be proven to convict an aider and abettor, absent such direction in the statute itself,” and concluding that since the principal need not know the specific interest rate charged by the loansharking operation, such knowledge is also not required of the aider and abettor); United States v. Falu, 776 F.2d 46, 49 (2d Cir. 1985) (holding that since the principal is subject to an enhanced penalty even if unaware that the sale of drugs took place within 1000 feet of a school, such knowledge is also not required of the aider and abettor).

376. See supra text accompanying notes 230-38.
mental state is not necessary for strict liability elements, when it is required of strict liability offenses.

c. The Derivative Approach As Applied to the Diminished Capacity Defense

The derivative approach also affects the availability of the diminished capacity defense. Diminished capacity (e.g., voluntary intoxication) is a defense to crimes of specific intent (in the sense of purposeful intent). Under the purposeful intent approach, a voluntary intoxication defense is always available to an aider and abettor, no matter what the underlying offense, because aiding and abetting is in and of itself a specific/purposeful intent offense. By contrast, under the derivative approach, aiding and abetting is a purposeful intent offense only when the underlying crime is a purposeful intent offense. Thus, a defendant charged with being an aider and abettor to murder is permitted to raise the defense in connection with a charge of first degree murder—a specific/purposeful intent crime—but not in connection with the lesser included offense of second degree murder, which is a general intent crime. Because aiding and abetting is not inherently a specific/purposeful intent offense, it is not always a specific intent offense. To be guilty of aiding and abetting is to be guilty as if one were a principal of the underlying offense. Aiding and abetting is not a separate crime but rather is linked to the underlying offense and shares the requisite intent of that offense.

... Long ago this court clearly stated "generally speaking, to find one guilty as a principal on the ground that he was an aider and

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377. See supra text accompanying notes 239-41. It is clear that when the diminished capacity cases say that the defense can be raised only when the offense at issue is one of specific intent, they mean purposeful intent (and perhaps bad purpose). They clearly do not mean specific intent’s infrequently used third definition, i.e., a mental state beyond the “intention to make the bodily movement which constitutes the act which the crime requires.” See supra text accompanying notes 329-37. That last meaning is so broad, that it encompasses every aider and abettor (except when strict liability offenses are involved), even under the derivative approach. See supra text accompanying note 337. Thus, if used in that sense, the defense would be valid in every aiding and abetting case. But the derivative cases, in assessing the applicability of the diminished capacity defense, distinguish between aiders and abettors—those who must act with specific intent (because of the nature of the underlying offense) may invoke the defense, while those who need act with only general intent (again, because of the nature of the underlying offense), may not invoke it. Thus, any definition that concludes that aiding and abetting is always a specific intent offense is not the definition contemplated by the diminished capacity cases.

378. See supra text accompanying notes 242-49.

379. United States v. Roan Eagle, 867 F.2d 436, 445 (8th Cir. 1989). In applying the derivative approach, the court cited Peoni. Id. at 445 n.15.

380. See id. at 444-45.
abettor, it must be proven that he shared in the criminal intent of the principal . . . .”

The Eighth Circuit consequently upheld a jury instruction providing that voluntary intoxication is no defense for an aider and abettor if the underlying offense is second degree murder, because second degree murder is not a specific/purposeful intent offense.

C. The Real Meaning of Peoni: “Natural and Probable Consequences”

This survey of the aiding and abetting cases has demonstrated that the cases employ six different approaches: the purposeful intent approach, the bad purpose approach, three variations of the knowledge approach, and the derivative approach. These approaches, by requiring different mental states and by determining the admissibility of evidence of diminished capacity, at times, reach entirely different conclusions on a given set of facts. Notwithstanding these deep differences, the cases advocating the various approaches all ultimately rely on Peoni.

But, they misread Peoni. Despite the countless cases quoting, citing, and interpreting Peoni, and despite the various irreconcilable approaches that all speak in Peoni’s name, there has been an almost universal failure to recognize that Peoni is not an ordinary aiding and abetting case. Rather, it is a “natural and probable consequences” case that does not even purport to determine the mental state of the aider and abettor; in fact, it explicitly leaves that question open. Understanding Peoni requires an understanding of the “natural and probable consequences” doctrine.

The “natural and probable consequences” doctrine deals with an aider and abettor’s liability for additional crimes committed by the principal beyond the initial one that the defendant abets. It provides that once the aider and abettor abets the principal’s commission of an initial crime, he or she is also liable for any consequent crime committed by the principal, even if he or she did not abet the second crime, as long as the consequent crime is a natural and probable consequence of the first crime. “[O]nce a common design is established, the aider and abettor is responsible not only for the success of the common design, but also for the probable and natural consequences that flow from its execution, even if those consequences were not originally intended.” Thus, for example, a prison guard who aided and abetted prison inmates in their assault of a fellow

381. Id. at 445 (quoting Johnson v. United States, 195 F.2d 673, 675 (8th Cir. 1952)). Displaying an awareness rarely found on this issue in the circuits, the court in Roan Eagle acknowledged that in some of its earlier cases there might be some contrary language requiring specific intent. Id. at 445 & n.16
382. Id. at 445.
inmate was also liable for their assault of the escorting guard, a "natural and probable consequence" of the assault on the inmate.\textsuperscript{384} Another example is where an aider and abettor who took part in the misapplication of bank funds was also liable for the principals' subsequent filing of false statements with the Federal Deposit Insurance Corporation, even though he did not participate in the filing of the false statements, since the false statements were the "natural consequences" of the misapplication.\textsuperscript{385}

As we shall see, with respect to the consequent crime, the doctrine eliminates the act requirement; even though the aider and abettor commits no act to assist the consequent crime, he or she is nonetheless liable based on the act he or she committed to assist the initial offense. The doctrine also relaxes the required mental state so that once the defendant commits the initial offense with the requisite mental state—be it bad purpose, purposeful intent,\textsuperscript{386} knowledge, or derivative intent,\textsuperscript{387} depending on the approach—liability can then be imposed for the consequent crime based on a lesser mental state. The doctrine, thus, makes it relatively easy to impose additional liability on the aider and abettor once he or she has abetted the initial offense.

Most of the circuits have adopted, or at least recognized the existence of, the "natural and probable consequences" doctrine.\textsuperscript{388}

\textsuperscript{384} United States v. Vaden, 912 F.2d 780, 783 (5th Cir. 1990).
\textsuperscript{385} United States v. Austin, 585 F.2d 1271, 1277 (5th Cir. 1978).
\textsuperscript{386} See, e.g., United States v. Andrews, 75 F.3d 552, 556 (9th Cir. 1996). For the initial crime, Andrews adopted the purposeful intent approach, see id. at 555 (reasoning that the defendant must "specifically intend[] to facilitate commission" of the initial crime), but then recognized that for the consequent crime the defendant could be held liable based on the "natural and probable consequences" doctrine, id. at 556 & n.4. Based on the facts of that case, the Ninth Circuit held that the consequent crime, second degree murder, was not a natural and probable consequence of the initial crime, trashing a car.
\textsuperscript{387} See, e.g., United States v. Beck, 615 F.2d 441, 448-51 (7th Cir. 1980). For the initial crime, Beck adopted the derivative approach, see id. at 449 (stating that for the initial crime "the state of mind required for the statutory offense must be shown for conviction as an aider and abettor," and therefore, because the principal under the Arms Export Control Act, 22 U.S.C. § 2778, need not know that an export license is required, the same is true for the aider and abettor), but for the consequent crime of filing false export documents, Beck required no more than foreseeability, id. at 454.


Third Circuit: United States v. Green, 25 F.3d 206, 209 (3d Cir. 1994) (recognizing the existence of the doctrine, but not deciding whether to adopt it, since, in any event, the consequent crime in that case was not foreseeable).

Fifth Circuit: Vaden, 912 F.2d at 783; United States v. Pagan, 821 F.2d 1002, 1012 (5th Cir. 1987); Austin, 585 F.2d at 1277; Russell v. United States, 222 F.2d 197, 199 (5th Cir. 1955).


Seventh Circuit: United States v. Moore, 936 F.2d 1508, 1527 (7th Cir. 1991); United States v. Torres, 809 F.2d 429, 433 (7th Cir. 1987); United States v. Greer, 467
That is not surprising, since the doctrine has a close counterpart in the well-established Pinkerton\(^{389}\) doctrine, applicable to conspirators.\(^{390}\) In Pinkerton, the Supreme Court held that a conspirator is liable for any substantive offenses committed by co-conspirators in the course of, and in furtherance of, the conspiracy, if those offenses are reasonably foreseeable, necessary, or natural, even if not committed by, known to, or intended by the conspirator.\(^{391}\)

What precise mental state must the aider and abettor have regarding the consequent crime for that crime to be deemed a "natural and probable consequence" of the first? Granted it need not necessarily be as culpable as the mental state normally required, but what is the bare minimum? As demonstrated below, the cases differ on this point; some require no more than foreseeability, others require knowledge, and still others reject the doctrine entirely, requiring instead the same act and mental state as those required of aiders and abettors generally.

\(^{389}\) Pinkerton v. United States, 328 U.S. 640 (1946). Because aiders and abettors are also often charged with conspiracy, cases raising the issue of aiding and abetting liability for consequent crimes are usually resolved by application of Pinkerton rather than the "natural and probable consequences" doctrine. Thus, there are far fewer "natural and probable consequences" cases than those applying Pinkerton.

\(^{390}\) See, e.g., Powell, 929 F.2d at 726 (comparing the "natural and probable consequences" rule with the Pinkerton doctrine): United States v. Rosenberg, 888 F.2d 1406, 1426 n.14 (D.C. Cir. 1989) (Edwards, J., dissenting in part and concurring in part) ("At their core, the Pinkerton and the aider-and-abettor doctrines embody the same principle: a defendant who willingly enters into a confederacy of crime can legitimately be held accountable for all reasonably foreseeable offenses committed by his confederates."); LaFave & Scott, supra note 2, §§ 6.8(a)-(b), at 587-91. But see Greer, 467 F.2d at 1071 (holding that a conspirator's liability for crimes committed by other co-conspirators is broader than an aider and abettor's liability for the principal's crimes).

\(^{391}\) Pinkerton, 328 U.S. at 646-48.
But, all the “natural and probable consequences” cases are consistent in one respect. They all seem to treat *Peoni* as almost irrelevant, presumably viewing the case as limited to the issue of the initial crime rather than the consequent crime. In truth, however, *Peoni* has much to say on the mental state for consequent crimes, and the doctrine of “natural and probable consequences” probably best explains what *Peoni* really means. Contrary to the way *Peoni* was interpreted by later cases and even subsequently by Judge Hand himself, the case—and its famous formulation—is a narrow one, limited to consequent crimes and leaving open the question of the mental state for the initial crime.

The analysis of what *Peoni* really means begins, then, with an exploration of the “natural and probable consequences” doctrine. The analysis then turns to *Peoni* and demonstrates that *Peoni* was a “natural and probable consequences” case that did not establish any mental state for the ordinary aiding and abetting case.

1. Foreseeability

The broadest application of the doctrine allows for liability whenever the consequent crime is simply foreseeable. “[T]he accessory is liable for any criminal act which, in the ordinary course of events, was the natural or foreseeable consequence of the crime that he advised or commanded.” Thus, an aider and abettor who took part in the hijacking of cargo was also held liable for the principals’ subsequent, foreseeable kidnapping of the driver, even if the aider and abettor performed no act relating directly to the kidnapping, and did not know of the kidnapping or intend that it take place.

In *United States v. Beck*, the Seventh Circuit ruled that an aider and abettor of violations of the Arms Export Control Act was also liable for consequent crimes because they were foreseeable. After first concluding, based on the derivative approach, that Beck acted with the mental state necessary for the initial crime, the court proceeded to evaluate Beck’s liability for the principal’s consequent crime of filing false export documents—documents he did not even know were being prepared. The court reinstated Beck’s conviction

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392. *DeLaMotte*, 434 F.2d at 293 (emphasis added).
393. *See id.*
394. 615 F.2d 441 (7th Cir. 1980).
396. That *Beck* is a derivative case is demonstrated by its holding that, for the initial crime, the aider and abettor need not know that an export license is required because the principal need not know. 615 F.2d at 453.
398. *Beck*, 615 F.2d at 452. As the Seventh Circuit clarified in a subsequent case, the issue in *Beck* was “whether a defendant could be held liable as an aider and abettor of the crime of making a false statement, even though he had never actually seen the fraudulent documents at issue in the case.” *United States v. Ranum*, 96 F.3d
for that consequent crime, holding that an aider and abettor is liable if he "participates in a plan such that it is foreseeable that false information will be used in statements made to a government agency in order to further the plan."³⁹⁹

Had the case applied the same derivative approach that it applied to the initial crime, it would have required that the defendant know, not merely foresee, that the false documents were going to be filed. In holding the defendant liable on a laxer, foreseeability standard for a consequent crime in which he did not participate, and of which he was not aware, Beck was clearly relying on the "natural and probable consequences" doctrine.⁴⁰⁰

Section 924(c) serves as another example of a situation where some cases apply the "natural and probable consequences" doctrine on a foreseeability basis. Under § 924(c), there are always two intertwined crimes at stake—the underlying crime of violence or drugs, and the separate § 924(c) firearms offense. The use of the firearm will often be a natural and probable consequence of the underlying offense of violence or drugs.⁴⁰¹ Consequently, in determining the mental state required for the aider and abettor to be liable under § 924(c) for the principal's use of the gun, some cases have treated § 924(c) as dependent not on ordinary aiding and abetting principles, but rather on the "natural and probable consequences" doctrine. Following this line of reasoning, in United States v. Wills,⁴⁰² the Ninth Circuit stated: "To support a [§ 924(c)] conviction... there must be sufficient evidence... to persuade a rational trier of fact that [the aider and abettor] knew or could have reasonably foreseen that the destructive device was going to be used by his accomplice during the perpetration of the bank robbery."⁴⁰³ In another § 924(c) case, the Ninth Circuit stated, "[t]he evidence supports the inference that she knew about the

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³⁹⁹. Beck, 615 F.2d at 453 (emphasis added).
⁴⁰⁰. Although Beck did not use the phrase "natural and probable consequences," it clearly relied on the doctrine, demonstrated not only by its invocation of a foreseeability standard, but by its reliance on United States v. Austin, 585 F.2d 1271 (5th Cir. 1978). See Beck, 615 F.2d at 453.
⁴⁰¹. "[O]rdinarily, one co-conspirator's use of a firearm will be foreseeable because firearms are tools of the trade in drug conspiracies." United States v. Dixon, 132 F.3d 192, 202 (5th Cir. 1997) (quotation marks and citation omitted); see also, e.g., United States v. McKissick, 204 F.3d 1282, 1293 (10th Cir. 2000) (characterizing guns as "tools of the trade" for drug dealers); United States v. Regans, 125 F.3d 685, 686 (8th Cir. 1997) (same).
⁴⁰². 88 F.3d 704 (9th Cir. 1996).
⁴⁰³. Id. at 720-21 (emphasis added). Although Wills provides neither reasoning nor precedent for this statement of law, there can be no doubt that the case rests on the "natural and probable consequences" doctrine. Its application of reasonable foreseeability as the culpable mental state for the § 924(c) aider and abettor can be justified in no other way.
WHAT WERE THEY THINKING?

weapon or could have reasonably foreseen [the principal's] possession of it.\textsuperscript{404}

This broad foreseeability reading of the doctrine of "natural and probable consequences" has been subjected to some criticism. Some "natural and probable consequences" cases have argued that a foreseeability standard results in liability on a showing of mere negligence rather than criminal intent.\textsuperscript{405} As a result, one Seventh Circuit case applied the foreseeability standard in modified form. Foreseeability is sufficient for liability only when the aider and abettor is "substantially involved in the chain of events leading immediately" to that consequent crime.\textsuperscript{406} Otherwise, the aider and abettor must have either an intent to aid, or at least knowledge of, the consequent crime.\textsuperscript{407} In other words, the stronger the connection of the initial act to the consequent crime (although normally under the doctrine no act is required for the consequent crime), the less is required by way of the mental state.

But, at its broadest, the doctrine imposes liability on the aider and abettor for the consequent crime so long as the crime was foreseeable, even if the aider and abettor knew nothing of it, and even if the only act he or she committed related to the initial crime.

2. Knowledge

Other cases reject foreseeability and permit imposition of liability for the consequent crime only if the aider and abettor, when abetting the initial crime, knew that the principal was going to commit the consequent crime.\textsuperscript{408} In Rattigan v. United States,\textsuperscript{409} a purposeful intent case,\textsuperscript{410} a § 924(c) aider and abettor was extensively involved in the underlying crime of drug trafficking, knowing of, and benefiting from,
but performing no act linked to, the principal’s use of a gun.\textsuperscript{411} In upholding the aider and abettor’s § 924(c) conviction, the court stated that while the aider and abettor must intend to assist the underlying crime, for the consequent § 924(c) offense, it is sufficient “if the accomplice knows that the principal is armed.”\textsuperscript{412} Thus, the case reduced the mental state for the consequent crime from purposeful intent to knowledge, and eliminated the need for an act.\textsuperscript{413}

Not all cases applying the “natural and probable consequences” doctrine, however, dispense with the act requirement. One purposeful intent case applied the doctrine in reducing the mental state necessary for the consequent crime to mere knowledge, but still required that the aider and abettor commit an act assisting the consequent crime. In \textit{United States v. Woods},\textsuperscript{414} in affirming the conviction for aiding and abetting both the use of a gun in violation of § 924(c), and armed bank robbery in violation of § 2113(d), the Seventh Circuit placed itself squarely in the purposeful intent camp with respect to the initial offense: “knowledge alone is not sufficient to convict Woods of aiding and abetting; the government must also show intent to further the crime.”\textsuperscript{415} But, for the gun component of the § 2113(d) and § 924(c) violations, the court decided that

\begin{itemize}
\item \textsuperscript{411} The court intimated that benefiting from the gun was an adequate substitute for an act. \textit{Rattigan}, 151 F.3d at 558; \textit{see also} Bazemore v. United States, 138 F.3d 947, 950 (11th Cir. 1998) (requiring an act, but then finding that the act requirement was satisfied because the § 924(c) aider and abettor benefited from the gun); United States v. Morrow, 977 F.2d 222, 231 (6th Cir. 1992) (en banc) (characterizing the aider and abettor “as much a potential beneficiary of the firearm being present as was [the principal]. The firearm was facilitating [the aider and abettor’s] drug trafficking efforts just as it was for [the principal].”).
\item \textsuperscript{412} \textit{Rattigan}, 151 F.3d at 558 (emphasis added); \textit{see Wright v. United States}, 182 F.3d 458, 464-65 (6th Cir. 1999) (discussing \textit{Rattigan}).
\item \textsuperscript{413} \textit{See also} United States v. Price, 76 F.3d 526, 529-30 (3d Cir. 1996) (aiding and abetting robbery with knowledge of principal’s use of the gun is sufficient for § 924(c) liability, despite the absence of any act linked to the gun); United States v. Simpson, 979 F.2d 1282, 1285 (8th Cir. 1992) (same). A subsequent Third Circuit case seemed to re-characterize Price, intimating that the aider and abettor in Price, who did not carry the gun, and may not have known of the gun in advance, actually did commit some act that aided and abetted the principal’s use of the gun. \textit{See United States v. Garth}, 188 F.3d 99, 114 (3d Cir. 1999) (“[T]he conduct of Wilson and Garth was so intertwined that Garth aided and abetted a violation of § 924(c)(1).”).
\item \textsuperscript{414} 148 F.3d 843 (7th Cir. 1998).
\item \textsuperscript{415} \textit{Id.} at 847; \textit{see also id.} at 849-50 (citing United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938), and Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)).
\end{itemize}
knowledge was enough. Once Woods aided and abetted the robbery with purposeful intent, the court concluded that he "presumptively intends the natural and probable consequences of his actions."\textsuperscript{416} This presumption means that knowledge will always be sufficient. The "government need not prove that Woods desired that the robbers would brandish a gun; all it must show is that he intended to further the robbery, \textit{knowing} that a gun would be used."\textsuperscript{417} Nevertheless, while adopting the knowledge version of the "natural and probable consequences" doctrine, Woods rejected the doctrine's elimination of the act requirement. Knowledge was sufficient only because the aider and abettor performed an act of facilitation linked directly to the consequent crime of using or carrying the firearm.\textsuperscript{418}

3. Cases Rejecting the Doctrine

Many courts require both an act and the usual mental state even for the consequent crime, and simply ignore (and thereby implicitly reject) the "natural and probable consequences" doctrine. For example, despite its "natural and probable consequences" cases, the Ninth Circuit has required, in many other cases, that the aider and abettor of a § 924(c) or § 2113(d) offense commit an act assisting the use of the weapon, and also has required that the act be accompanied by purposeful intent.\textsuperscript{419} Those cases do not even mention the "natural and probable consequences" doctrine at all in discussing the mental state of the § 924(c) or § 2113(d) aider and abettor.\textsuperscript{420} By requiring

\begin{footnotes}
\textsuperscript{416} Id. at 847 (emphasis added) (citing United States v. Walker, 99 F.3d 439, 443 (D.C. Cir. 1996)).

\textsuperscript{417} Id. at 847-48 (emphasis added) (referring to 18 U.S.C. § 2113(d)). The court then applied the same concept to § 924(c). "Our discussion regarding Woods' knowledge of the use of a dangerous weapon under 18 U.S.C. § 2113(d) applies with equal force to the issue of whether Woods knew that a firearm would be used or carried in the commission of a violent crime" under § 924(c). Id. at 848. \textit{See generally} Robinson, \textit{supra} note 16 (discussing the split between those § 924(c) cases requiring of the aider and abettor specific intent with respect to the gun, and those cases requiring only knowledge).

\textsuperscript{418} Woods, 148 F.3d at 848.

\textsuperscript{419} \textit{See supra} notes 188-89 and accompanying text (citing Ninth Circuit § 2113(d) cases); \textit{supra} note 198 and accompanying text (citing § 924(c) cases, including Ninth Circuit cases).

\textsuperscript{420} Thus, \textit{United States v. Nelson}, 137 F.3d 1094, 1103-05 (9th Cir. 1998), and \textit{United States v. Bancalari}, 110 F.3d 1425, 1429-30 (9th Cir. 1997)—Ninth Circuit cases requiring that the aider and abettor commit an act directly related to the gun with purposeful intent—do not even mention \textit{United States v. Johnson}, 886 F.2d 1120, 1124 (9th Cir. 1989), and \textit{United States v. Wills}, 88 F.3d 704 (9th Cir. 1996)—the Ninth Circuit's earlier "natural and probable consequences" cases which permit liability on the basis of foreseeability. Curiously, one judge, Judge Rymer, was a member of both the Wills panel and the Nelson panel.

Similarly, the earlier case of \textit{United States v. Dinkane}, 17 F.3d 1192, 1196 (9th Cir. 1994), which requires that the aider and abettor commit an act directly related to the gun component of § 2113(d) with purposeful intent, also ignores the "natural and probable consequences" doctrine and the holding in \textit{Johnson}, see \textit{Dinkane}, 17 F.3d at
both an act and purposeful intent even for the firearm component, these cases treat the § 924(c) and § 2113(d) violations not as consequent crimes, but as distinct, independent crimes, for which an aider and abettor’s liability must be proven in the same manner as for any other crime.\textsuperscript{421}

Thus, an occasional case to the contrary notwithstanding,\textsuperscript{422} requiring both an act and purposeful intent even for the weapon component amounts to a wholesale rejection of the “natural and probable consequences” doctrine.

4. \textit{Peoni} Revisited

Thus far, we have seen that the “natural and probable consequences” cases relax the mental state required for the consequent crime, while the cases that reject the doctrine require the

1195-97, and is itself ignored by Wills, see Wills, 88 F.3d 704.

\textsuperscript{421} Even under this approach, which treats the consequent crime no differently than the original crime, an aider and abettor, who also happens to be a conspirator, can still be convicted for the consequent crime without purposeful intent—indeed, even without knowledge—under a \textit{Pinkerton} theory, see \textit{Pinkerton} v. United States, 328 U.S. 640 (1946), so long as the use or carrying of the firearm by a co-conspirator was done in the course of, and in furtherance of, the conspiracy, and was reasonably foreseeable. See, e.g., United States v. Pimentel, 83 F.3d 55, 58 (2d Cir. 1996); United States v. Masotto, 73 F.3d 1233, 1240-41 \& n.4 (2d Cir. 1996); United States v. Johnson, 886 F.2d 1120, 1123-24 (9th Cir. 1989). The § 924(c) cases do not explain why, on the one hand, they apply \textit{Pinkerton} to conspirators, and yet, on the other hand, ignore the “natural and probable consequences” rule for aiders and abettors. Perhaps, the difference lies in the broader reach of the crime of conspiracy. See United States v. Greer, 467 F.2d 1064, 1071 (7th Cir. 1972) (holding that a conspirator’s “liability is not as circumscribed as the liability of an accomplice,” and that “conspirators are held liable for setting up a structure which becomes the continuing focal point for crimes”).

\textsuperscript{422} In one case, discussing § 2113(d) aider and abettor liability, the Ninth Circuit, somewhat inconsistently, professed adherence at the same time to both the “natural and probable consequences” doctrine and the rule that the aider and abettor must purposefully abet not just the robbery, but also the use of the firearm. See United States v. Short, 493 F.2d 1170, 1172 (9th Cir.), \textit{modified on other grounds}, 500 F.2d 676 (9th Cir. 1974). Apparently \textit{Short} was of the view that the doctrine relaxes the requirements for aiding and abetting liability only for consequent crimes that are clearly distinct from the initial offense. Since the gun component of armed robbery is not a distinct offense, but merely an aggravating element of the underlying bank robbery offense, see, e.g., United States v. Beierle, 77 F.3d 1199, 1200 (9th Cir. 1996) (explaining that unarmed robbery is a lesser included offense of § 2113(d) armed bank robbery); \textit{Dinkane}, 17 F.3d at 1196 (same), it follows that the usual aiding and abetting principles, rather than the “natural and probable consequences” rule, govern liability for the gun. See \textit{Short}, 493 F.2d at 1172. If this were true, however, it is unclear whether the court’s view in \textit{Short} that the aider and abettor must also aid and abet the use of the gun would still be its view today. Although the court’s view assumes that an ordinary aider and abettor must aid and abet every element of the offense, that is no longer true in the Ninth Circuit. See \textit{Woods}, 148 F.3d at 849 n.2 (noting that “[e]ven the Ninth Circuit appears to be pulling back” from the view that an aider and abettor must aid and abet every element of the offense); see also supra note 14.
same mental state as that required for the initial crime. What virtually none of the cases discuss is the possibility that the aider and abettor's mental state for the consequent crime should be stricter, not laxer, than that required for the initial crime. In other words, if the aider and abettor commits an act only with respect to the first offense, and commits no act directly abetting the consequent offense, then perhaps it makes sense to compensate for this lack of an act by imposing a heightened mental state for the second offense. For example, while the aider and abettor would be liable under the knowledge approach for the initial crime on the basis of knowledge, he or she would be liable for a consequent crime, for which he or she committed no act, only on the basis of purposeful intent.

There is good reason to believe that this is exactly what *Peoni* really did. Contrary to the way it is almost universally understood, *Peoni* did not speak to the mental state required for the initial crime. Remember, in *Peoni*, the defendant was charged with aiding and abetting the possession of counterfeit bills not by the purchaser, but by the purchaser's purchaser. His only act—the sale of the counterfeit bills to the first purchaser—was an act that abetted the initial crime—the first purchaser's illegal possession. Significantly, however, he was not charged with that offense (probably for venue reasons), but rather with the consequent crime, the possession by the next purchaser in line.

The government argued that because Peoni "knew" that the first purchaser was likely to resell the bills "to another guilty possessor, the possession of the second buyer was a *natural consequence* of Peoni's original act, with which he might be charged." The government was clearly invoking the "natural and probable consequences” doctrine for what was a consequent crime.

Judge Learned Hand reviewed the history of aiding and abetting liability, and concluded that Peoni, in selling the counterfeit currency to the first purchaser, had not aided and abetted the possession by the second purchaser. Although Peoni may have known, or had reason to know, that the purchaser would sell the bills to a "second possible passer," that was "of no moment to him." In ruling that Peoni was not liable for the consequent crime absent a "purposive attitude," Judge Hand did not rule on whether this "purposive attitude" was also necessary for liability for the initial crime. On the contrary, Judge Hand noted that the question of whether the lesser mental state with which Peoni acted—knowledge—would be sufficient to hold him liable for the initial crime was still very much open.

423. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (emphasis added).
424. *Id.* at 403.
425. *Id.* at 402.
426. *Id.*
427. *Id.* at 403 (discussing, but not deciding, whether knowledge was sufficient to
But, that was not the issue in the case; the issue in the case was the liability for consequent crimes, not initial ones:

Perhaps [Peoni] was [the immediate purchaser’s] accessory.... Be that as it may, nobody, so far as we can find, has ever held that a contract is criminal, because the seller has reason to know, not that the buyer will use the goods unlawfully, but that some one further down the line may do so.  

By rejecting knowledge and requiring purposeful intent for liability for a crime committed “further down the line,” Peoni’s holding represents a strong rejection of the doctrine that the aider and abettor is criminally responsible for any crime that is the natural and probable consequence of the first. Indeed, Peoni goes to the opposite extreme. For consequent crimes, instead of reducing the mental state required and making the imposition of liability easier, Peoni heightens the mental state, making the imposition of liability harder. Even if knowledge is the standard for the initial crime, only purposeful intent will suffice for the consequent crime. The heightened mental state compensates for the absence of a requirement for an act directly assisting in the commission of that consequent offense.

Of all the cases attempting to ascertain the ordinary aider and abettor’s mental state, only United States v. Campisi realized that Peoni did not address that issue, but rather the issue of the mental state for a consequent crime. Indeed, it was by limiting Peoni to consequent crimes that Campisi was able to conclude that the aider and abettor’s mental state for the initial crime, in most circumstances, is simple knowledge. Virtually none of the other cases that have adopted approaches other than the purposeful intent approach have ever made a similar effort to reconcile their approaches with Peoni. Only Campisi realized that Peoni’s purposeful intent approach applies only to the narrow class of cases dealing with consequent crimes, and does not govern the ordinary aiding and abetting case.

Nonetheless, Peoni has long been viewed as the seminal aiding and abetting case. The reason for that probably lies in Judge Hand’s subsequent application of Peoni’s purposeful intent standard to the ordinary aider and abettor, and the Supreme Court’s adoption of the Peoni formulation in Nye & Nissen, which also involved an

render Peoni liable as the aider and abettor of the first purchaser’s possession).

428. Id.


430. 306 F.2d 308 (2d Cir. 1962).

431. For an extensive discussion of Campisi’s approach to ordinary aiding and abetting liability, see supra text accompanying notes 266-77.

432. See supra text accompanying notes 134-36.

433. 336 U.S. 613, 619 (1949); see supra text accompanying notes 145-46. A third reason may be that Peoni, although it left open the issue of the ordinary aider and abettor, concluded that purposeful intent is required for the consequent crime by the
ordinary aider and abettor. Thus, while Peoni itself is not a true aiding and abetting case, it has almost universally been viewed as the case to have conclusively determined the aider and abettor's mental state.

III. THE MENTAL STATE OF THE CAUSER

As we have previously seen, 18 U.S.C. § 2 provides for imputed liability not only for anyone who aids and abets pursuant to § 2(a), but also for anyone who "causes" pursuant to § 2(b). The causing subsection typically steps in where the accomplice acts through an innocent intermediary, and where, because there is no guilty principal, the doctrine of aiding and abetting does not apply. While the case law dealing with the aider and abettor is far richer and more extensive than that dealing with the causer, the causing cases have spawned disparate views as to the appropriate mental state. In general, the current case law regarding the mental state of the causer generally echoes the divisions in the case law of the aider and abettor, with some cases employing purposeful intent, others bad purpose, others knowledge, and yet others a derivative mental state.

In at least two key respects, however, the analysis of the mental state of the causer differs from that of the aider and abettor. First, the causing subsection contains the word "willfully"; it provides that whoever "willfully" causes a criminal act to be done is guilty as a principal. The aiding and abetting subsection, by contrast, does not contain the word "willfully," or any of the other adverbs (e.g., knowingly, intentionally, deliberately, recklessly, etc.) typically denoting a specific mental state.

What does "willfully" imply for the mental state of the causer? And, what, if anything, does its absence in the neighboring aiding and abetting subsection imply for the aider and abettor? Should the statute be read to mean that only the causer need act "willfully," while the aider and abettor need not? Does the presence of the word "willfully" in § 2(b) help in determining which interpretation of Judge Hand's Peoni formulation is correct? The cases take a variety of approaches to these questions.

Second, the analysis of the causer's mental state also differs from that of the aider and abettor in another respect: the federal jurisdictional element. For the principal, this element is generally one of strict liability that requires no culpable mental state. For the aider and abettor, all the post-Peoni cases, no matter what their

very words of the aiding and abetting statute itself. See supra text accompanying note 281.

434. See supra text accompanying notes 61-67, 85-95 (summarizing the history of § 2(b)).
435. See supra text accompanying notes 61-67.
436. See supra text accompanying notes 206-16.
general approach, similarly treat the jurisdictional element as one of strict liability. None requires that when aiding and abetting the transportation of stolen goods across state lines, for example, that the aider and abettor know or desire that the transportation be interstate.\textsuperscript{437} In applying their respective approaches to various offenses, the aiding and abetting cases ignore the jurisdictional element entirely, or just unthinkingly treat it in the same way as in cases where the defendant is a principal.

By contrast, while the aiding and abetting cases ignore the element, the causing cases are preoccupied with it;\textsuperscript{438} in fact, this element may be the one most frequently discussed in the causing cases. For some odd reason, the causing cases usually treat the jurisdictional element in the same way as they do all other elements of a crime, which means that the purposeful intent approach requires that the causer purposefully intend the jurisdictional element, and the knowledge approach requires that the causer know of the jurisdictional element.\textsuperscript{439}

A. Initial Judicial Efforts at Ascertaining the Mental State of the Causer

1. The Case Law Prior to the 1948 Enactment of the Causing Provision

Until 1948, there was no general causing statute; rather, individual substantive statutes sometimes contained causing language within their provisions. One example is the National Stolen Property Act,\textsuperscript{440} which both before and after 1948 gave rise to numerous causing cases. Until 1948, the statute, which prohibits the interstate transportation of stolen property, applied to "whoever shall transport or cause to be transported" stolen property across state lines.\textsuperscript{441} When Congress enacted the causing subsection in 1948, and by its terms, made it

\begin{footnotesize}
\begin{enumerate}
\item See supra text accompanying notes 229-34.
\item Indeed, a recent student comment was devoted exclusively to those cases dealing with the causer of the interstate transportation element of the National Stolen Property Act, and the different views as to whether a culpable mental state is required for that element. See Gonzalez, supra note 95.
\item A few cases have noted that the jurisdictional element illustrates a difference in mental state between the aider and abettor and the causer, though without any explanation as to why there should be a difference. See, e.g., United States v. Cowden, 545 F.2d 257, 263 (1st Cir. 1976); United States v. Strauss, 443 F.2d 986, 988 (1st Cir. 1971) (rejecting argument of the defendants, who were convicted as aiders and abettors under § 2(a), that the government should have been required to prove that they knew or foresaw the interstate transportation of the stolen goods, but commenting that "[t]his argument might have some merit had they been convicted under 18 U.S.C. § 2(b)").
\item United States v. Sheridan, 329 U.S. 379, 381 n.5 (1946) (emphasis added) (quoting section 3 of the National Stolen Property Act, which was then codified at 18 U.S.C. § 415 (1939), and is now codified at 18 U.S.C. § 2314 (1994)).
\end{enumerate}
\end{footnotesize}
universally applicable, it eliminated the individual causing language of the National Stolen Property Act and other similar statutes as unnecessary. The 1948 version of the causing subsection, however, did not yet contain the word “willfully.” Three years later, in 1951, while making other, unrelated amendments to § 2, Congress added the word “willfully” to the causing subsection without any legislative history explaining why.

Prior to 1948, the absence of a general causing statute did not mean that the concept of the causer was absent. By case law, the concept was universally applicable to federal criminal offenses even pre-1948, and the pre-1948 cases already began demonstrating the differences that now characterize the varying approaches to the mental state of the causer.

Early Supreme Court cases used language that seems arguably to suggest a purposeful intent approach. For example, in a 1917 mail-fraud case, the Court found the defendant guilty as a causer, because he had “deliberately calculated” that his actions would bring about the fraudulent mailing by an innocent dupe. Twenty years later, the Court affirmed the conviction of a bank teller for causing an unwitting bank bookkeeper to make false entries in the records of the bank, finding that the entries were “the intended and necessary result of respondent’s deliberate action in withholding the deposit tickets.”

Again, the key fact was that the crime was not known, but intended.
Other cases, however, embraced other approaches to the mental state of the causer. For example, one pre-1948 case under the National Stolen Property Act (which then contained its own causing language) employed the knowledge approach, while another case involving the same statute employed the derivative approach. Both cases applied their respective approaches even to the jurisdictional element.

In a knowledge case, *United States v. Sheridan*, the defendant negotiated out-of-state forged checks, knowing that the checks would subsequently move interstate to be presented to the bank on which the checks were purportedly drawn. He was charged with causing the banks to transport the checks interstate. He argued that he could not be a causer if he simply knew of, but was indifferent to, the subsequent interstate transportation.

The Supreme Court recognized that the defendant might not have desired the interstate transportation, since the transportation would adversely affect him by resulting in disclosure of the scheme once the check was returned unpaid. Nonetheless, the Court held the defendant liable for causing the interstate transportation of the checks, because “[c]ertainly he knew the checks would have to be sent [from Michigan] to the Missouri bank for collection.”

*Sheridan* apparently adopts the knowledge approach. The defendant’s knowledge that the checks were to be sent interstate was a sufficiently culpable mental state to make the defendant a causer. Moreover, for the causer, *Sheridan* applies the knowledge standard even to the jurisdictional interstate element, despite the fact that

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448. 329 U.S. 379 (1946).
449. Id. at 380-83, 391.
450. Id. at 382.
451. Id. at 388. However, the Court also recognized that the defendant may have desired the interstate transportation, because it was “intended to provide an interval for escape before that disclosure would be made.” Id.
452. Id. at 391 (emphasis added). The Court concluded that knowledge was enough, despite the phrase in the statute’s forged check provision requiring “unlawful or fraudulent intent.” Id. at 386 (quoting 18 U.S.C. § 3 (1939)). The legislative history clearly indicated that this additional language did not heighten the mental state beyond that applicable in an ordinary stolen goods case, id. at 389-90, where the statute did not have such language, id. at 381-82 n.5.
453. *Sheridan*, in employing a knowledge approach, was arguably inconsistent with *Kenafskey*, see supra note 445 and accompanying text, which used purposeful intent language. See Blakey & Roddy, supra note 6, at 1412-13 (arguing that the cases are inconsistent).
knowledge is required of neither the principal nor the aider and abettor (no matter what the approach), for whom the federal jurisdictional element remains a strict liability element. Obviously, given that this case pre-dated the causing subsection, "willfully" had nothing to do with Sheridan's adoption of the knowledge approach, or with the extension of the knowledge approach to the jurisdictional element.

The opinion is also significant in one other respect. Contrary to the distinction made time and time again in the cases between knowledge and purposeful intent, the Court in Sheridan intimated that knowledge is the rough equivalent of intent: because the defendant knew that the interstate transportation of the forged checks was inevitable, "it would follow he intended the paying bank to send the checks there for that purpose. He knew they must cross state lines to be presented. One who induces another to do exactly what he intends... hardly can be held not to 'cause' what is so done."454

This blurring of knowledge and purposeful intent was pretty unusual. Although the Supreme Court has, in a number of cases outside the accomplice context, come close to equating the concept of knowledge with the concept of intent,455 this offhand comment in a causing case was most certainly not consistent with the distinction that the courts, including the Peoni court, have viewed as crucial in the accomplice context.

In any event, Sheridan's requirement of a culpable mental state—knowledge—for the causer was ignored by the Second Circuit in a subsequent derivative case, which held on similar facts that knowledge is simply not required for the causer, at least for the jurisdictional element. Not even citing Sheridan, the Second Circuit in United States v. Tannuzzo456 upheld the conviction of a causer, even though there was no evidence showing that he was aware that the stolen goods would be transported interstate.457 Tannuzzo did not require that the

454. Sheridan, 329 U.S. at 391 (emphasis added).
455. See United States v. Bailey, 444 U.S. 394, 404 (1980). In Bailey, the Court stated:
Perhaps the... most esoteric... distinction... is that between the mental states of "purpose" and "knowledge."... In the case of most crimes, the limited distinction between knowledge and purpose has not been considered important since there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.
Id. (quotation marks and citations omitted); see United States v. United States Gypsum Co., 438 U.S. 422, 445 (1978) ("Generally this limited distinction between knowledge and purpose has not been considered important since there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results." (quotation marks and citation omitted)); infra note 609.
456. 174 F.2d 177 (2d Cir. 1949) (Augustus Hand, J.). Although the case was decided in 1949, it dealt with conduct that took place in 1946, and applied the pre-1948 version of the National Stolen Property Act, which then had the self-contained causing language. See id. at 179-80.
457. Id. at 179. "The most that can be said against him is that he was only
causer know of the interstate transportation, because the underlying “offense does not require proof of knowledge on his part that the stolen goods were to be transported in interstate commerce. It only requires that he knew that the goods had been stolen and that he caused them to be thus transported.”

This was classic derivative language. The court looked first to the elements of the offense as applied to the principal, and determined that because knowledge of the jurisdictional element is not required of the principal, such knowledge is also not required of the causer. Although the court’s rationale was inconsistent with *Sheridan*, it did make some sense. The statute provided that “whoever shall transport or cause to be transported” is guilty of the offense. The statute equated causing with actual transportation. As *Tannuzzo* pointed out, it had already been well established that the actual transporter need not know of the interstate nature of the transportation.

Requiring a culpable mental state of the causer when one is not required of the actual transporter would have done violence to the statute’s equation of the two. *Tannuzzo* felt no need to distinguish between the actual perpetrator and the causer, and in citing cases in support of its conclusion that the causer need not possess a culpable mental state for the jurisdictional element, *Tannuzzo* did not limit itself to causing cases. In other words, in adopting a derivative approach, all *Tannuzzo* had to do was look to the mental state of the principal, and that is precisely what it did.

In short, even prior to the enactment of the causing subsection, there was already clear evidence of different approaches: the Supreme Court’s language in its early causing cases seemed to suggest a purposeful intent approach, while in *Sheridan* it employed a knowledge approach. In marked contrast to what cases had done with the aider and abettor, *Sheridan* extended the notion of a culpable mental state even to the strict liability jurisdictional element. The Second Circuit in *Tannuzzo* used the derivative approach, requiring no culpable mental state when none was required of the principal.

*interested in obtaining a good price and would have been willing to have the furs sold to an out-of-state buyer had that disposition been brought to his attention.*" *Id.* at 180.

458. *Id.*


461. *Id.* (citing United States v. Sherman, 171 F.2d 619, 623 (2d Cir. 1948) (L. Hand, J.) (holding that a principal charged with receiving stolen goods need not know that they were stolen while moving in interstate commerce), Rosen v. United States, 271 F. 651, 654-55 (2d Cir. 1920) (same), and Kasle v. United States, 233 F. 878, 882 (6th Cir. 1916) (same)). *Tannuzzo* also cited *Loftus v. United States*, 46 F.2d 841, 847 (7th Cir. 1931), which dealt with a defendant who was charged with both the substantive offense of transporting and receiving stolen automobiles in interstate commerce, and conspiracy to commit such offense. None of the cases cited by *Tannuzzo* involved defendants who were charged as causers.
2. The Post-1948, Pre-"Willfully" Case Law

a. Judge Learned Hand's Cases

Congress added the causing subsection, 18 U.S.C. § 2(b), in 1948, and added "willfully" to that provision three years later in 1951. In 1950, Judge Learned Hand confronted a case requiring him to apply the new, pre-"willfully" version of § 2(b). He was not happy with the drafting of the new subsection. What particularly irked him was that the new causing subsection failed to specify a mental state.\textsuperscript{462} Although that was also true (and still is true) for the adjacent aiding and abetting subsection, Judge Hand had no doubt that an aider and abettor is guilty only with a culpable mental state. According to Judge Hand, the verbs in the aiding and abetting subsection—"aid," "abet," "counsel," "command," "procure," and "induce"—in themselves imply some sort of culpable mental state. "All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude."\textsuperscript{463} Thus, in his view, because the verbs of the aiding and abetting subsection already connote a culpable state of mind, that subsection does not need "willfully" or some similar adverb to prescribe a culpable mental state.

The verb "causes" of the causing subsection, on the other hand, does not imply a culpable mental state, which was too troubling a conclusion for Judge Hand to accept. Although a literal reading of the pre-"willfully" version of § 2(b) might have suggested that a causer is criminally liable even without any culpable mental state, it was "very hard to believe that the [causing subsection] really intended so drastically to enlarge criminal liability, though it must be conceded that it is difficult to see what it meant, if it did not mean just that."\textsuperscript{464} Judge Hand was not prepared to accept the notion that "such baffling language was intended to have so revolutionary a consequence."\textsuperscript{465}

Judge Hand therefore concluded that Peoni's mental state for the aider and abettor under § 2(a) must also be imported into § 2(b); the causer, no less than the aider and abettor, must "in some sort associate himself with the venture,... participate in it as in something that he wishes to bring about,... seek by his action to make it succeed."\textsuperscript{466} Whatever differences that may exist between the causer, on the one hand, and the aider and abettor, on the other (that the aider and abettor, for example, is required to assist a guilty principal,

\textsuperscript{462} See United States v. Chiarella, 184 F.2d 903, 909-10 (2d Cir. 1950) (L. Hand, J.), modified on other grounds, 187 F.2d 12 (2d Cir.), rev'd on other grounds, 341 U.S. 946 (1951); see also Blakey & Roddy, supra note 6, at 1411.
\textsuperscript{463} United States v. Peoni, 100 F.2d 401, 402 (1938).
\textsuperscript{464} Chiarella, 184 F.2d at 909.
\textsuperscript{465} Id. at 910.
\textsuperscript{466} Id. at 909 (quoting Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)).
while the causer may act through an innocent intermediary,\footnote{467} and that the aider and abettor is liable for any act of facilitation, while the causer is liable only if he or she "causes" the commission of the offense\footnote{468}), there are no differences regarding their requisite mental states.

Judge Hand's own subsequent causing cases confirm this equation between the aider and abettor and the causer. In his view, the uniform standard was purposeful intent, and he applied the purposeful intent standard to the causer even before Congress added the word "willfully." His cases also make it clear that he believed that this uniform purposeful intent standard should apply even to the jurisdictional element.

In \textit{United States v. Paglia},\footnote{469} yet another causing case under the National Stolen Property Act, the defendant was charged with causing the interstate transportation of counterfeit checks by cashing them in Cleveland knowing that they would be sent by the banks in due course to New York.\footnote{470} The case arose under the pre-"willfully" version of the causing statute,\footnote{471} yet Judge Learned Hand applied the purposeful intent standard. He determined that the causer must "make the venture his own; the crime must be a fulfillment in some degree of an enterprise which he has adopted as his; his act must be in realization of his purpose."\footnote{472} This was essentially identical to his formulation in \textit{Peoni}.

In applying the purposeful intent approach to the causer, Judge Hand did not distinguish between the jurisdictional element and other elements of the crime. Although Judge Hand had himself already held, some three years earlier, that the principal need not be aware of the federal jurisdictional component,\footnote{473} \textit{Paglia} dealt with a causer, not a principal. Unlike the principal, the causer, according to Judge Hand, was required to have purposeful intent even for the jurisdictional element. Because there was no indication that the defendant wanted the counterfeit checks to travel to New York, there could be no criminal liability, even though the defendant "knew, or at least... had every reason to suppose, that the result would be [the checks'] return to New York."\footnote{474} The transportation of the checks was
“a matter of entire indifference to Paglia; indeed, it would have suited his purposes better, had they been lost or destroyed as soon as he got the money, for that would have made detection more difficult.” 475

Paglia is significant in four respects. First, it applies a purposeful intent standard to the causer. Second, it confirms the conclusion that Judge Hand made no distinction between the mental state of a causer and that of an aider and abettor. He freely cited aiding and abetting cases, including Peoni and Nye & Nissen, in applying the purposeful intent standard to the causer. 476 Moreover, he did so even prior to the addition of the word “willfully” to the causing subsection.

Third, from Paglia it is clear that Judge Hand believed that his purposeful intent standard is universally applicable not only to both the aider and abettor and to the causer, but also to every element of the crime—even to a jurisdictional element that normally requires no mental state on the part of the principal. The causer must not simply know, but want, to bring about every element, including the jurisdictional component.

In applying the purposeful intent approach even to the causer’s strict liability jurisdictional element, Paglia constitutes the most far-reaching extension of the purposeful intent approach. Presumably, because Judge Hand was of the view that the mental states of the causer and the aider and abettor are the same, he would have required purposeful intent for the jurisdictional element not just of the causer, but also of the aider and abettor. As we have seen, however, almost no post-Peoni case has gone that far. 477

Fourth, what is true for a strict liability element, such as the interstate element, would presumably be true for a strict liability offense. It is fair to infer from Paglia that Judge Hand would have applied a purposeful intent mental state to all causers and all aiders and abettors, even those involved in a strict liability offense.

Paglia’s extension of the purposeful intent approach even to the jurisdictional element was wholly inconsistent with the Supreme Court’s earlier decision in Sheridan, 478 in which the Court determined that knowledge was sufficient. Paglia was also inconsistent with the Second Circuit’s decision in Tannuzzo, 479 which had applied a derivative approach to conclude that because no mental state was required of the principal for the jurisdictional element, none was required of the causer.

In 1954, Judge Hand confessed error, acknowledging that his purposeful intent position was inconsistent with Sheridan (but not

475. Id.
476. Id. at 448 & n.5.
477. See supra notes 229-34 and accompanying text.
479. United States v. Tannuzzo, 174 F.2d 177 (2d Cir. 1949).
mentioning Tannuzzo). In *United States v. Taylor*, Judge Hand ruled on facts very similar to those in *Paglia*: a defendant who cashed counterfeit checks in Cleveland, and thereby caused them to be transported interstate to New York for redemption, and who "must have known" that the interstate transportation would take place, was guilty of causing a violation of the National Stolen Property Act. Despite his previous extension in *Paglia* of the purposeful intent approach to the jurisdictional element, in *Taylor*, he held that mere knowledge of the interstate component was sufficient. Somehow Judge Hand had missed *Sheridan* when deciding *Paglia*. *Sheridan* "was authoritative upon us when we decided *United States v. Paglia*,... but unfortunately, although it had been rendered more than four years before, we did not learn of it. We now recognize our error, and overrule our decision." Nonetheless, Judge Hand was still of the view that the causer's culpable mental state applies even to the jurisdictional element. Judge Hand's only modification, in deference to the Supreme Court in *Sheridan*, was to reduce the mental state for the jurisdictional element a notch to knowledge. That is still a very different standard for the causer than for the actual perpetrator, for whom the jurisdictional element requires no mental state at all. And, presumably, because of his unified view, he would have required knowledge of the jurisdictional element for the aider and abettor, too. Finally, nothing in *Taylor* indicated that he had changed his view that purposeful intent continues to be the accomplice's mental state for all the other elements of a crime.

b. The Supreme Court's Decision in *Pereira v. United States*

The Supreme Court's decision in *Sheridan*, which forced Judge Hand to modify his view on the mental state required of the causer for the jurisdictional element, was reaffirmed by the Supreme Court in *Pereira v. United States*, a case involving both the National Stolen Property Act and the mail-fraud statute. The Court in *Pereira* held that under the pre-"willfully" version of 18 U.S.C. § 2(b),

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480. 217 F.2d 397 (2d Cir. 1954) (L. Hand, J.) (overruling *Paglia*).
481. *Id.* at 398 (citation omitted); see Blakey & Roddy, *supra* note 6, at 1412.
482. *Taylor*, 217 F.2d at 399. Puzzlingly, in acknowledging his previous failure in *Paglia* to cite *Sheridan* and its principle of knowledge or reasonable foreseeability, Judge Hand made no mention of his similar failure to cite the previous Second Circuit decision in *Tannuzzo*, which held that the causer needs no mental state whatsoever for the federal jurisdictional element.
484. By that point, the statute had been re-codified as 18 U.S.C. § 2314 (1994).
486. Although *Pereira* was decided in 1954, the criminal conduct at issue in *Pereira* took place in 1951 prior to the October 21, 1951 amendment that added the word "willfully" to § 2(b). Thus, although the case explicitly relies on § 2(b), it omits
knowledge (or its rough equivalent, reasonable foreseeability)\textsuperscript{487} was sufficient, at least for the jurisdictional element.\textsuperscript{488}

Once again, the defendant caused the mailing and interstate transportation of a fraudulently obtained check by presenting it at a bank in one state, which, in turn, mailed the check to the bank in another state on which the check was drawn.\textsuperscript{489} With respect to the causing of the mail fraud violation, the Court stated: "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."\textsuperscript{490} With respect to the causing of the violation of the National Stolen Property Act, the Court stated:

When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he "caused" it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send this check across state lines.\textsuperscript{491}

Thus, the Supreme Court once again allowed for liability based on knowledge, and seemed to require it even for the jurisdictional element, thereby setting the causer apart from both the principal and the aider and abettor.

Pereira's import, however, is not entirely certain. First, although it very much seems to be a knowledge case, Pereira, like Sheridan, also

\textsuperscript{487} Of course, knowledge and reasonable foreseeability are not exactly the same. See United States v. Bentz, 21 F.3d 37, 40 (3d Cir. 1994) ("Theoretically ... the two methods of proving causation are distinct. Under Pereira, the ordinary course of business prong requires knowledge, whereas reasonable foreseeability is an objective test."); United States v. Rapp, 871 F.2d 957, 964 (11th Cir. 1989) (holding that even though defendant "set in motion" the fraudulent bank loan application, and even though the subsequent submission of false affidavits by co-conspirators was "reasonably ... foreseeable as a natural consequence of the conspiracy," defendant still did not cause the submission of the false affidavits, because he had no knowledge that the affidavits had to be executed and submitted to obtain the loan), abrogated on other grounds, United States v. Wells, 519 U.S. 482, 486 n.3 (1997). Indeed, this Article's analysis of the "natural and probable consequences" rule demonstrates that some cases reduce the mental state required of the aider and abettor for the consequent crime to knowledge, while others reduce it further to foreseeability. But, for causing liability, the cases generally seem to equate the two, as demonstrated in the quote below from Pereira. See infra text accompanying note 490.

\textsuperscript{488} Id. at 8-10.

\textsuperscript{489} Id. at 5, 8.

\textsuperscript{490} Id. at 8-9 (emphasis added) (citing United States v. Kenofsky, 243 U.S. 440 (1917)).

\textsuperscript{491} Id. at 9 (emphasis added) (citing United States v. Sheridan, 329 U.S. 379 (1946)).
uses intent language: "it follows that Pereira intended the El Paso bank to send this check across state lines."^492

Second, Pereira, like Sheridan, deals only with the jurisdictional element. As shown below, some cases, therefore, limit Pereira's knowledge approach to such an element, and some cases limit it even further to the specific jurisdictional element of mailing in a mail fraud prosecution. Other cases, however, view it more generally as establishing knowledge or reasonable foreseeability as the mental state not just for the jurisdictional elements that happened to be at issue there, but for the causing of all elements.

If Pereira does stand generally for the knowledge approach, it could not have derived the knowledge standard from the word "willfully" (as it was a pre-"willfully" case), but instead, must have derived the standard from something intrinsic to the concept of causing. A subsequent case crystallized the reasoning in the following fashion:

Every enlightened system of jurisprudence... must have rules or guidelines to determine when a person will no longer be held responsible for a result "caused in fact" by his act or omission.

... We would hesitate to endorse the principle that a causal relationship could be found... [i]n the absence of some evidence that [the defendant] intended, knew, or could have reasonably foreseen that the innocent persons to whom he entrusted the bonds would take them across state lines...^494

Finally, the precise import of Pereira is uncertain also because, as shown below, it can be read not to adopt any mental state at all; some cases interpret it to mean that knowledge is sufficient but not necessary.

Whatever Pereira's conclusion, it did not rely on "willfully." What is perhaps most interesting is that many of the subsequent, post-"willfully" cases rely on Pereira without any analysis as to whether Congress's subsequent addition of the word "willfully" changed Pereira's conclusion.

^492. Id. (emphasis added).

^493. This is similar to Judge Learned Hand's reasoning in Chiarella, where he was not prepared to accept the proposition that the new causing statute would impose liability without some sort of culpable mental state (although in his case, that mental state was purposeful intent rather than knowledge or foreseeability). See supra text accompanying notes 462-66.

^494. United States v. Scandifia, 390 F.2d 244, 249 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969); see King v. United States, 364 F.2d 235, 240 (5th Cir. 1966) ("In the context of a criminal statute, the word 'causes' has a somewhat different meaning than that imparted to it in other areas of the law.... [A] criminal purpose or intent must accompany the causal nexus before conviction for a crime can be had.").
Before turning to the post-Pereira, post-"willfully" causing cases, however, the analysis turns to an examination of Congress's addition in 1951 of the word "willfully."

B. What Was Congress's Reason for Adding the Word "Willfully"?

The obscure background to Congress's addition of the word "willfully" in 1951 to the causing subsection necessarily renders any conclusions about its implications for that subsection, let alone the neighboring aiding and abetting subsection, tentative at best. Nonetheless, the presence of the word "willfully" in the causing subsection, contrasted with its absence in the aiding and abetting subsection, seems to give rise to an obvious inference: Congress must have intended that the mental state for the causer be different from that of the aider and abettor; otherwise, Congress would not have added the word only to the causing subsection and not the aiding and abetting subsection.

Even that seemingly easy inference, however, may be an erroneous one. In fact, what little information that exists seems to suggest the exact opposite: that the word was added by Congress not to differentiate between the two types of accomplices, but rather to confirm Judge Learned Hand's repeated efforts to equate them. The word was needed to bring the causing subsection in line with the aiding and abetting subsection, which had no need for the word because its verbs—"aid," "abet," "counsel," "command," "induce," and "procure"—sufficiently convey the concept of "willfully."

A determination of precisely what Congress intended in 1951, when it added "willfully" to the causing subsection, requires an understanding of the state of accomplice jurisprudence at the time of the amendment. Although before 1951 different approaches to the mental state of the aider and abettor had already emerged, no one seemed conscious of the fact that there were disparate approaches, and hence, of any need to legislatively clarify the aider and abettor's mental state. Judge Hand had repeatedly and comfortably interpreted the aiding and abetting subsection as containing a culpable mental state, despite the absence of "willfully," or any similar adverb typically used to prescribe a mental state. By contrast, Judge Hand had struggled mightily with the 1948 version of the causing subsection, criticizing it for its failure to prescribe a culpable mental state. He had judicially implanted the mental state of the aider and abettor into the causing subsection, and tried to establish a uniform standard of purposeful intent for both. Although there is no relevant legislative history, it seems that in 1951 Congress added the

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495. See supra text accompanying notes 124-36.
496. See supra text accompanying note 463.
497. See supra text accompanying notes 462-82.
word “willfully” to 18 U.S.C. § 2(b) in response to these precise concerns of Judge Hand. Congress's purpose in adding the word “willfully” was not to change the causer's mental state from what it was pre-1951, or to distinguish it from the aider and abettor, but simply to confirm Judge Hand's pre-1951 view that the causer must act with some sort of culpable mental state (which the pre-1951 subsection, at least on its face, did not require), and that the mental state applicable is the same as for the aider and abettor: “willfulness.”

The conclusion that the 1951 amendment merely confirmed the pre-1951 state of the law—that the causer, like the aider and abettor, had to act “willfully”—was articulated by the Second Circuit some fifteen years later. When a district judge mistakenly quoted the pre-1951 version of § 2(b) in instructing the jury, the court on appeal concluded that the absence of the word “willfully” made no difference:

As far as we are advised, even before the 1951 amendment the definition of a “principal” as one who “aids, abets, counsels, commands, induces or procures” the commission of a federal crime or “causes” an act to be done that would be a federal crime “if directly [done] by him or another” has uniformly been interpreted as meaning one who did these acts “wilfully” or “knowingly.”

There is one wrinkle, however. While Judge Hand thought that the uniform mental state was “willfulness” in the sense of purposeful intent, the last word in this quote seems to suggest that “willfully” means only “knowingly,” not purposeful intent. This raises the question again of precisely what “willfully” means. To say Congress added “willfully” to confirm that a causer requires a culpable mental state, and that the culpable mental state is the same as that of the aider and abettor is one thing, but it is quite another thing to say that Congress went as far as to also adopt Judge Hand's stance that that mental state is purposeful intent.

The determination of precisely which culpable mental state Congress meant is complicated by its choice of “willfully,” which Congress had to know is a word of multiple meanings and does not always mean purposeful or specific intent. Well before the addition of the word in 1951, the Supreme Court had pointedly stressed that “willful, as we have said, is a word of many meanings, its construction often being influenced by its context.” Those pre-1951 “many
meanings" encompassed almost the full gamut of mental states. On one extreme, the Supreme Court, in cataloguing the interpretations of "willfully," included the highly culpable mental state of acting with a "bad purpose" or "without ground for believing [the conduct to be] lawful." On the other extreme, in 1925, Judge Hand himself had interpreted "willfully" to mean a much less culpable mental state: "The word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." That mental state excludes only someone who acts accidentally or unwittingly, but includes anyone who acts deliberately, whether or not he or she possesses some purpose to achieve a certain result or an awareness that the conduct violates the law. In 1948, relying on this broad definition of "willful," the D.C. Circuit upheld a conviction for "willful default in failing to answer [a lawful congressional] subpoena."

Such ambiguity in a word that appears so often in the law was, and is, highly problematic. Indeed, a few years after its addition in
1951 to the causing subsection, Judge Hand described the word “willfully” as “dreadful,” “awful,” and “one of the most troublesome words in a statute that I know.”

So, which of the many meanings of “willfully” did Congress intend when adding the word to the causing provision? If Congress was merely confirming some sort of culpable, pre-1951 approach, the question is: “Which one?” Perhaps, Congress was thinking not of Judge Hand’s purposeful intent approach, but of the Supreme Court’s knowledge approach in Sheridan. Perhaps, Congress was thinking of the derivative approach in Tannuzzo. “Willfully” was consistent with all the approaches, even Tannuzzo’s derivative approach; under that approach, “willfully” in § 2(b) simply means intentionally or deliberately so that whenever a causer acts intentionally or deliberately (and not by mistake or accident), he or she is derivatively liable with the same culpable mental state as the principal. As we shall see, there is no agreement on which culpable mental state—knowledge, purposeful intent, bad purpose, or a derivative mental state—Congress intended.

In sum, before the addition of the word “willfully,” Judge Hand had criticized the causing subsection for its absence of a culpable mental state, and had remedied the problem by importing the purposeful intent standard of the aider and abettor. Congress, in adding the word “willfully” to the causing subsection, simply intended to confirm Judge Hand’s view that the causer must also act with a culpable mental state, and apparently his view that the mental state is the same as that of the aider and abettor. But, by using the word “willfully,” with its many possible meanings, it is not clear that Congress was confirming that the uniform standard should be purposeful intent.

In any event, because “willfully” was apparently not intended to change the standard—whatever it may have been—that had applied to the causer before 1951, it makes sense that even post-“willfully” cases freely look to pre-“willfully” cases—primarily the Supreme Court’s decision in Pereira—to determine the causer’s mental state.

507. Cases continue to struggle with the meaning of “willfully.” See, e.g., United States v. George, 266 F.3d 52, 58-60 (2d Cir. 2001) (deciding that “willfully” in 18 U.S.C. § 1542 (1994), which makes it a crime “willfully and knowingly” to make a false statement in a passport application, must impose some additional mental state beyond “knowingly,” and concluding that it requires “purpose”).

508. Hayden, 64 F.3d at 129 n.5 (quoting Model Penal Code and Commentaries § 2.02, at 249 n.47 (Official Draft and Revised Comments 1985), which, in turn, quotes ALI Proceeding 160 (1955)).


511. That is the derivative approach to the mental state of the causer, as articulated by the Second Circuit in United States v. Gabriel, 125 F.3d 89 (2d Cir. 1997). See infra text accompanying notes 557-63.
WHAT WERE THEY THINKING?

C. The Current Approaches to the Mental State of the Causer

Given the history of 18 U.S.C. § 2(b), it is no surprise that the current state of the law with respect to the mental state of the causer and the meaning of "willfully" in § 2(b) "does not run straight." The causing cases exhibit even more inconsistencies than the aiding and abetting cases, complicated, moreover, by the word "willfully" in the causing subsection, and by the extension of the culpable mental state even to the jurisdictional element.

1. The Purposeful Intent Approach

Under this approach, the causer is not liable unless acting with purposeful intent to bring about the crime. As a general rule, this approach parallels the purposeful intent approach in the aiding and abetting context. But, because of the word "willfully," and because of the extension of purposeful intent even to the jurisdictional element, the parallel is not a precise one.

"Willfully" obviously plays no role in the aiding and abetting context; the aiding and abetting purposeful intent cases have adopted that approach without it. This is not so with the causing cases. For example, one causing case, in adopting the purposeful intent approach, turned to the word "willfully," and combined it with general agency principles. Section 2(b) makes the principal the agent of the causer, but the causer does not willfully make the principal an agent simply by knowing or foreseeing what it is that the principal will do. "Section 2(b) does . . . have overtones of agency, and, in our judgment, the willful causation to which it refers must be purposeful rather than be based simply upon reasonable foreseeability." In contrast to the aiding and abetting cases, the causing cases that adopt the purposeful intent approach extend it even to the jurisdictional element. Thus, under this approach, defendants charged with selling stolen cars to out-of-state customers, and thereby causing the interstate transportation of stolen cars in violation of the Dyer Act, are liable only if they desire the interstate transportation; knowledge or foreseeability is insufficient.

But, what of Pereira, Sheridan, and Taylor—causing cases that required no more than knowledge or foreseeability for the

512. Blakey & Roddy, supra note 6, at 1410-11.
515. Berlin, 472 F.2d at 14-15. On the facts of the case, the court in Berlin concluded that the defendants purposefully desired the interstate transportation, and therefore, affirmed the convictions. See United States v. Leppo, 177 F.3d 93, 96-97 (1st Cir. 1999) (collecting cases and discussing Berlin).
516. Pereira v. United States, 347 U.S. 1 (1954); see supra text accompanying notes 483-94.
517. United States v. Sheridan, 329 U.S. 379 (1946); see supra text accompanying
jurisdictional element? The purposeful intent approach limits them to their facts: knowledge or reasonable foreseeability suffices for liability when the contraband is checks, unlike liability for cars, which, by contrast, requires purposeful intent. "Since interstate automobile transportation is now commonplace, [reasonable foreseeability] would seem to render every sale of a stolen car a federal offense." Since interstate automobile transportation is now commonplace, [reasonable foreseeability] would seem to render every sale of a stolen car a federal offense.

Consequently, a defendant willfully causes the movement of cars interstate only when acting with purposeful intent. On the other hand:

[S]tolen securities or forged travelers checks under 18 U.S.C. § 2314, involve considerations not present in cases dealing with tangible stolen property. The cashing of a check or the sale of securities initiates a series of commercial operations—an established course of action without the existence of which a sale could not be accomplished and payment would not be forthcoming. Pereira v. United States, 347 U.S. at 9 . . . . It is the thief who, in order to secure his money, invokes the entirety of the normal course of commercial operations, and it can hardly be said that this invocation was not purposeful or intended. What need not be specifically intended—but need only be reasonably foreseeable—is that those operations may, in a particular case, entail interstate transportation.

Such is not the case in the ordinary sale of tangible . . . property.

In other words, because a stolen car or other "personal property [is] apt to cross state lines quite apart from any concern, purpose, or interest of the seller," the usual mental state of purposeful intent applies. This is not so with checks. Thus, under this approach, the causer must always act with purposeful intent, even with respect to the jurisdictional element of strict liability, except in the case of checks, which necessarily trigger the use of the interstate commercial infrastructure.

This approach is flawed in a number of respects. The distinction between checks and cars is simply unsustainable, and is a forced result of the effort to reconcile this approach with the earlier cases requiring only knowledge or foreseeability. In addition, while this approach relies, in part, on the word "willfully," one of its flaws is its failure to recognize that Congress may well have added the word "willfully" to

notes 448-53.

518. United States v. Taylor, 217 F.2d 397 (2d Cir. 1954) (L. Hand, J.); see supra text accompanying notes 480-82.


520. Id. at 15 (citations omitted).

521. United States v. Leppo, 177 F.3d 93, 97 (1st Cir. 1999) (summarizing Berlin).

522. The First Circuit in Leppo, a case also involving the causing of the interstate transportation of stolen film, reviewed the split in the circuits in this regard, and determined that whatever the standard, on the facts before it, the evidence was sufficient to sustain a conviction even under the purposeful intent standard. Id. at 97.
equate the causer with the aider and abettor. But, by requiring a culpable mental state for the jurisdictional element, and especially a mental state as culpable as purposeful intent, this approach increases, rather than eliminates, the differences between the causer and the aider and abettor, for whom such an element continues to be a strict liability element.

2. The Bad Purpose Approach

Under this approach, the causer must act "voluntarily and purposely, with a specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law." Generally, the bad purpose cases, like the purposeful intent cases, derive their mental state from the word "willfully."

One causing case went even beyond bad purpose. In *United States v. Curran,* the Third Circuit decided that the word "willfully" in 18 U.S.C. § 2(b), at least in some contexts, requires a mental state even more culpable than a general bad purpose to disobey the law. The defendant there, by using nominee contributors, caused certain campaign treasurers to file false contributor lists with the Federal Election Commission in violation of the false statements statute. The Third Circuit reversed the convictions. First, it held that the district court had erred in essentially permitting the jury to convict the causer if it found that the causer had acted with the mental state applicable to the principal; in other words, the Third Circuit rejected the derivative approach:

When proceeding under section 2(b) in tandem with section 1001, the government must prove that a defendant caused the intermediary to make false statements. The intent element differs from that needed when the prosecution proceeds directly under section 1001. The prosecution must not only show that a defendant had the requisite intent under section 1001 (deliberate action with knowledge that the statements were not true), but must also prove that he "willfully" caused the false representations to be made.

"Willfullness" in this context is an important component of section 2(b), and it is necessary that the term be understood.

The court in *Curran* then decided that the "willfully" component of § 2(b), at least in the context of the election laws, requires that the

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523. United States v. Markowski, 772 F.2d 358, 364 (7th Cir. 1985); see United States v. Stern, 858 F.2d 1241, 1247 (7th Cir. 1988) (adopting a derivative approach, but noting that *Markowski* had approved the quoted section as an instruction to the jury).

524. See, e.g., *Markowski,* 772 F.2d at 364.

525. 20 F.3d 560 (3d Cir. 1994).


527. *Curran,* 20 F.3d at 567-68.
prosecution prove not only the usual state of mind required for a § 1001 offense, but, in addition, that the defendant was aware of the wrongfulness and unlawfulness of his conduct.\textsuperscript{528} But, even that, while necessary, was insufficient. "Nor was it adequate to simply charge the jury that to find intent it could consider whether defendant knew that he was doing 'something unlawful' or that he was doing 'something wrong'" in some general way.\textsuperscript{529} Rather, the defendant also had to be aware of the precise reporting requirements at issue, and must have specifically sought to frustrate them. Thus, the government had to prove that "[the] defendant knew of the treasurers' reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful."\textsuperscript{530}

\textit{Curran} arrived at this heightened bad purpose approach by borrowing the meaning of the word "willfully" from an entirely different context, one that had nothing to do with causers or aiders and abettors. We have already seen that "willfully" has different meanings in different contexts.\textsuperscript{531} In \textit{Ratzlaf v. United States},\textsuperscript{532} the Supreme Court held that the word "willfully" in the structuring statute\textsuperscript{533} imposed on the government the burden of proving that a structuring defendant knew not only that his or her conduct was unlawful, but also that he or she was violating a known legal duty.\textsuperscript{534} The Third Circuit in \textit{Curran} noted that "we find nothing in \textit{Ratzlaf}'s discussion of willfulness that would confine the rationale to the currency reporting statute,"\textsuperscript{535} implying that what was true for the

\textsuperscript{528} \textit{Id.} at 570.
\textsuperscript{529} \textit{Id.}
\textsuperscript{530} \textit{Id.} at 569. The court stated: In sum, the government had the burden of proving that defendant was aware that the campaign treasurers were bound by the law to accurately report the actual source of the contributions to the Commission, that the defendant's actions were taken with the specific intent to cause the treasurers to submit a report that did not accurately provide the relevant information, and that defendant knew that his actions were unlawful. \textit{Id.} at 570-71.
\textsuperscript{531} \textit{See supra} notes 500-08 and accompanying text.
\textsuperscript{532} 510 U.S. 135 (1994).
\textsuperscript{533} 31 U.S.C. §§ 5322, 5324 (1994) (preceding the amendment in 1994, which deleted the word "willfully" from § 5324); \textit{see supra} note 150.
\textsuperscript{534} \textit{Ratzlaf}, 510 U.S. at 138; \textit{see} Bryan v. United States, 524 U.S. 184, 192, 194-95 (1998) (discussing \textit{Ratzlaf}).
\textsuperscript{535} United States v. Curran, 20 F.3d 560, 568 (1994). \textit{Curran} also noted that it was relying on \textit{Ratzlaf} because of the similarity between the structuring context in \textit{Ratzlaf} and the election law context in the case, \textit{id.} at 569, thus intimating a basis for limiting its holding to the election context. \textit{See} United States v. Gabriel, 125 F.3d 89, 100-01 (2d Cir. 1997) (discussing \textit{Curran} and the scope of its holding). Indeed, one year after \textit{Curran}, the Third Circuit readily acknowledged that in other contexts "willfully" could also indicate a less culpable mental state. It need not always imply a purpose to violate the law; sometimes it simply means a purpose to commit an act that happens to be prohibited. \textit{See} United States v. Hayden, 64 F.3d 126, 128 (3d Cir. 1995).
word “willfully” in Ratzlaf’s structuring statute was true for the word “willfully” generally, including its meaning in § 2(b). 536

In borrowing from the structuring context—one of but two areas in which the Supreme Court has recognized this heightened bad purpose mental state537—and thereby concluding that a causer must know not only that in some generalized sense he or she is violating the law, but also know of the specific statutory duty that gave rise to the unlawfulness, Curran adopted what may well be the most rigorous mental state imposed by the criminal law.538 Curran has gone one step further than even the most extreme bad purpose aiding and abetting cases, which require only a generalized bad purpose to disobey the law.539

All this presupposes that Congress added the word “willfully” to heighten the mental state of the causer to this extraordinarily rigorous level. But, the history of § 2(b) suggests that “willfully” was added in 1951 only because Judge Hand was afraid that the section might otherwise be interpreted to require no mental state at all.540 In other words, it was added to require some culpable mental state, but not necessarily the extreme mental state required by Curran. Indeed, as we have seen, Congress was probably indicating its approval of Judge Hand’s importation of the aider and abettor’s standard into the causing subsection;541 but no aiding and abetting case, not even any of the bad purpose cases, has ever required of the aider and abettor a heightened bad purpose—not in 1951 and not since. Curran misinterpreted “willfully,” because it was unaware of Congress’s reason for adding it to the statute.

536. It is unclear whether Curran’s conclusion that Ratzlaf’s interpretation of the word “willfully” is valid in all contexts remains good law after Bryan. Bryan seems to read Ratzlaf narrowly, citing it as an exception rather than as a case stating a general rule for “willfully” everywhere. The structuring statute in Ratzlaf, and certain criminal tax statutes, see Cheek v. United States, 498 U.S. 192 (1991), require more than a general awareness of unlawfulness, because they “involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct.” Bryan, 524 U.S. at 194. The Court, thus, arguably limited the heightened bad purpose approach to these two unusual contexts.

537. See Bryan, 524 U.S. at 194 (citing criminal tax cases as the other instance); see supra note 536.

538. See supra text accompanying notes 148-51 (discussing the various criminal mental states).

539. See supra Part II.B.3. Of course, if the mental state required of the principal is specific knowledge of the precise legal duty violated, then some of the aiding and abetting cases might also require the same for the aider and abettor. However, Curran requires such a mental state of the causer even when it is not required of the principal. See 20 F.3d at 566-68.

540. See supra text accompanying notes 462-68; supra note 498 and accompanying text.

541. See supra note 498 and accompanying text; see also supra text accompanying note 499.
In addition to this problem, how does Curran explain the Supreme Court's decisions in Sheridan and Pereira, which provide that, at least in some circumstances, mere knowledge or reasonable foreseeability suffice? True, these were pre-"willfully" cases, but as we have seen, "willfully" was the standard that applied before the word itself was formally added to the statute. Indeed, pre-"willfully" cases like Pereira are freely cited by current cases in determining the appropriate mental state. Moreover, although Pereira and Sheridan deal with the jurisdictional element, they can be read to ground their mental state in the very concept of causing, which applies equally to all elements of a crime. Unfortunately, Curran does not address these issues at all.

3. The Knowledge Approach

The most straightforward reading of the Supreme Court's decisions in Sheridan and Pereira is that simple knowledge or reasonable foreseeability is the mental state required of the causer. Furthermore, knowledge or reasonable foreseeability applies to all elements; this approach makes no distinction between non-jurisdictional and jurisdictional elements. Thus, the causer of interstate transportation of stolen or counterfeit goods must know or reasonably foresee the interstate transportation. Likewise, the causer of an interstate transmission of a threat to injure another person must "at least reasonably foresee[] that his statement would be transmitted in interstate commerce by others." A defendant who did not "ha[ve] knowledge... or, at least, reasonable grounds to know, that his conduct involves, or will result in, such commerce" does not cause the interstate transportation of stolen goods.

The same is true for non-jurisdictional elements, as is illustrated by a series of false statement cases. A causer whose actions result in the making of a false statement to the government is guilty under this approach, even when it is clear that he or she is indifferent to the false statements, so long as the resulting false statements are "understood

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542. See supra text accompanying note 499.
543. See supra text accompanying note 494.
544. See, e.g., United States v. Cowden, 545 F.2d 257, 263 (1st Cir. 1976); United States v. DeKunchak, 467 F.2d 432, 436 (2d Cir. 1972); United States v. Masters, 456 F.2d 1060, 1062 (9th Cir. 1972); United States v. Scandifia, 390 F.2d 244, 249 (2d Cir. 1968), vacated on other grounds, 394 U.S. 310 (1969); Wapnick v. United States, 355 F.2d 136, 139 (2d Cir. 1966); United States v. Gordon, 253 F.2d 177, 182 (7th Cir. 1958); see also United States v. Leppo, 177 F.3d 93, 96-97 (1st Cir. 1999).
Thus, a union official, who submitted a false report to the union, was guilty of causing the subsequent submission of false statements by the union to the government, because the official knew that the union's accountant would rely on his false report in filing a required form with the Department of Labor.\(^\text{549}\)

On the other hand, because knowledge is the key mental element under this approach, where the causer does not realize that his or her false statement will result in a subsequent false entry in government books and records, such causer cannot be said to have caused, within the meaning of 18 U.S.C. § 2(b), that false entry to be made. An interesting example is the forfeiture case that the United States brought to obtain title to the weapons used in the assassination of President John F. Kennedy.\(^\text{550}\)

Under the firearms laws then in effect, the government could obtain forfeiture of a weapon only if it had been involved in a violation of the Federal Firearms Act.\(^\text{551}\) Because the assassination itself was not a violation of that particular Act, the government sought forfeiture on the grounds that the assassin, Lee Harvey Oswald, had violated the Act when he used a false name in purchasing the weapons.

The problem was, however, that the firearms statute at the time did not place any criminal prohibition on the purchaser;\(^\text{552}\) rather, it placed the obligation solely on the dealer, requiring the dealer to maintain accurate records showing the name and address of the purchaser. The government sought to circumvent this problem by contending that Oswald violated the Act by causing, pursuant to § 2(b), the dealer to keep false books in violation of the Act.\(^\text{553}\)

The Fifth Circuit found that Oswald was not the cause of the false entries, because the government failed to prove that Oswald knew that his use of a false name would cause a false entry in the records that the dealer was required to keep:

> [T]here is no basis for a finding that Oswald knew or had reasonable grounds to know that the firearms dealers from whom he ordered

\(^{548}\) United States v. Murph, 707 F.2d 895, 896 (6th Cir. 1983) (holding that the defendant, who sold fraudulent tax returns to a "tax return discounter," caused the discounter to submit the returns thereafter to the IRS for a refund, because such submission was "understood and foreseen," even though, once he made the sale, the defendant "had no interest in whether the return was ever filed or not" (citing Pereira)); see United States v. Hebeka, 89 F.3d 279, 282-83 (6th Cir. 1996) (discussing Murph).

\(^{549}\) United States v. Nolan, 136 F.3d 265, 272 (2d Cir. 1998); see also United States v. Fairchild, 990 F.2d 1139 (9th Cir. 1993) (holding that the defendant had acted "with the knowledge" that false statements would be made to the government); Brickey v. United States, 123 F.2d 341 (8th Cir. 1941) (finding that the defendant had known or reasonably could have foreseen that false statements would result).

\(^{550}\) King v. United States, 364 F.2d 235 (5th Cir. 1966).

\(^{551}\) Id. at 236 (citing what was then 15 U.S.C. § 905(b) (1950)).

\(^{552}\) Id.

\(^{553}\) Id. at 238-39.
the weapons here involved were required to keep records... and that his use of a fictitious name would result in the making of a false entry therein. Absent such a showing, the lower court's finding that he willfully caused the Federal Firearms Act to be violated cannot stand. Since no violation of the Act was proved, the weapons are not subject to forfeiture, and the judgment of the District Court must be reversed.554

Thus, if a defendant does not know or foresee that his or her false statement will make its way into a setting where false statements are so barred, he or she does not cause the subsequent false statements to be made. But, if he or she knows or can foresee, under this approach, that is enough.

The knowledge or foreseeability standard as applied to the causer seems to be the most straightforward application of Sheridan and Pereira, which upheld liability when the causer knew or reasonably foresaw that the bad checks at issue would travel interstate. Simply stated, one causes a result when the result is known or reasonably foreseeable at the time one acts.

This apparent simplicity, however, belies a number of problems. For example, what effect did the addition of the word "willfully" have? If it was designed only to confirm that the mental state of the causer is the same as that of the aider and abettor, then the causer, like the aider and abettor, should not have to act with knowledge or any other mental state when it comes to the jurisdictional element.

Moreover, even putting aside the jurisdictional element, the knowledge approach, when applied to the causer, is problematic—in fact, more so than when applied to the aider and abettor. In Peoni, Judge Learned Hand rejected the knowledge approach (in the "natural and probable consequences" context) in favor of purposeful intent for a sensible reason: if knowledge or reasonable foreseeability determines liability, that might create an endless chain of liability for, say, the first utterer of counterfeit bills, who could then be prosecuted for every subsequent possession wherever that possession takes place.555 As sensible as this reasoning was, however, the problem that it addressed was somewhat illusory, since liability of an aider and abettor is limited to situations where there is a guilty principal. Aiding and abetting liability would not have indefinitely followed the bills; as soon as they were passed to an innocent owner, the expansion

554. Id. at 241. Although the court spoke of the defendant as having "willfully" caused the offense, it seems pretty clear that the case did not view the word as having changed prior law. In fact, it relied heavily on United States v. Giles, 300 U.S. 41 (1937), see King, 364 F.2d at 238-40, which was decided long before the addition of "willfully" in 1951 to the causing subsection, and even before the 1948 enactment of the causing subsection itself.

555. See United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
of the original utterer's aiding and abetting liability would have come to a halt.

In the causing context, however, Judge Hand's question applies with more force: does a defendant who utters counterfeit bills cause their possession by every single person along the chain? Does a defendant who sells a car that he or she knows to be stolen cause its interstate transportation every time it subsequently crosses state lines? This problem of unlimited liability under a knowledge or reasonable foreseeability standard is more acute for the causer, because the causer is guilty even when acting through an innocent intermediary. Because a causer who utters a counterfeit bill obviously knows or foresees its movement across the country (even across the world), he or she is guilty for each subsequent possession, whether the possessor (the principal) is aware of the bills' counterfeit nature or not. Thus, unlimited liability, as serious a problem as it was under the knowledge approach in Peoni, is even more of a problem under the approach when applied to the causer.

4. The Derivative Approach

a. Generally

The derivative approach as applied to the causer is virtually the same as that applied to the aider and abettor: the mental state applicable is that derived from the principal.556

Probably the most emphatic proponent of the derivative approach as applied to the causer is the Second Circuit in United States v. Gabriel,557 where the defendant—like the defendant in Curran—was charged with causing the making of a false statement to the government in violation of 18 U.S.C. § 1001. The court explicitly rejected Curran's bad purpose approach, holding that the government's reliance on 18 U.S.C. § 2(b) did not mean that "the government is... required to prove a knowing violation of the law."558

Ratzlaf and the word "willfully" in the structuring statute, relied upon by Curran, were "of little aid in interpreting section 2(b)."559 Ratzlaf "did not hold that the government had to prove a knowing

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556. See United States v. Hock, 960 F.2d 153, No. 90-50061, 1992 WL 79295, at *01 (9th Cir. Apr. 21, 1992) (unpublished opinion). The court stated:
   It makes little sense to alter the level of intent required to sustain a conviction, depending on whether the person was in fact a principal or instead someone who aided or caused the commission of the crime. Instead... the proof should encompass the same elements as would be required to convict a principal.

Id.

557. 125 F.3d 89 (2d Cir. 1997).

558. Id. at 102.

559. Id.
violation of the law every time a statute used the term ‘willful.’ Rather, [Ratzlaf] stated that ‘[w]illful . . . is a word of many meanings, and its construction is often . . . influenced by its context.’”\(^{560}\) Because the structuring statute involves regulatory reporting violations that are not “obviously ‘evil’ or inherently ‘bad,’”\(^{561}\) it made sense for Ratzlaf to interpret “willfully” in that context to allow liability only if the defendant engages in a knowing violation of the law. It did not make sense, however, to import that meaning into § 2(b), which applies to virtually any criminal statute:

[T]he government need not prove a knowing violation of the law under [§ 2(b)]. The principal reason for our conclusion is simple. The general rule in criminal cases is that the government need not prove a knowing violation of the law—we see no reason that Congress would change that rule simply because a person caused an innocent intermediary to act.\(^{562}\)

But, in rejecting the bad purpose approach, Gabriel had to explain what, then, “willfully” means in § 2(b). “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.”\(^{563}\) In other words, if the causer acts intentionally (as opposed to by mistake or accident) and, while acting intentionally, has the same mental state required of the principal, then the causer has acted “willfully.”

Gabriel was adopted by the D.C. Circuit, which also rejected Curran and concluded that a defendant is a causer if he or she intentionally commits an act with the mental state of the underlying offense.\(^{564}\)

The Second Circuit in Gabriel, however, made no comparison between the causer and the aider and abettor, despite the historical equation of the two concepts made by the Second Circuit’s own Judge Learned Hand. Nor did the D.C. Circuit in adopting Gabriel’s holding. The Third Circuit in Curran arrived at its own interpretation of “willfully” and § 2(b) without making any such comparison. Had the Second Circuit in Gabriel made the comparison, it would have been forced to grapple with the inconsistency between its mental state for the causer and its mental state for the aider and abettor. Just two years before its decision in Gabriel, the Second Circuit had rejected

\(^{560}\) Id. at 100 (quoting Ratzlaf v. United States, 510 U.S. 135, 141 (1994)).


\(^{562}\) Gabriel, 125 F.3d at 101. The court added in a footnote that “[w]e assume but need not decide that if the underlying statute requires a knowing violation of the law, the government would have to establish that element.” Id. at 101 n.9.

\(^{563}\) Id. at 101 (first emphasis added).

\(^{564}\) United States v. Hsia, 176 F.3d 517, 521-22 (D.C. Cir. 1999).
the derivative approach for the aider and abettor, holding that aiding and abetting is a specific intent offense requiring purposeful intent, regardless of the mental state applicable to the underlying offense.565

The result: according to the Second Circuit, the causer, who, according the statute, must act “willfully,” has a mental state that varies depending on the mental state of the principal. Paradoxically, the aider and abettor, whose mental state is not explicitly prescribed by statute, has a fixed mental state: purposeful intent. But, it makes little sense to require purposeful intent for the accomplice whose subsection lacks the word “willfully,” and to vary the mental state for the accomplice whose subsection contains it.

This chameleon-like understanding of the word “willfully” in § 2(b) is all the more puzzling in light of an earlier interpretation by the Second Circuit of that very word in that very section, which intimated that the word inherently connotes a measure of culpable intent, and thereby “provides adequate protection for individuals who might unwittingly stumble into a violation of federal law.”566

b. Strict Liability Elements

The derivative approach applies to strict liability elements, such as the jurisdictional element, just as it applies to other elements. If the principal need not know of the interstate nature of the transportation of the stolen goods, then the causer need not know.567 This is true

565. See United States v. Scotti, 47 F.3d 1237 (2d Cir. 1995); supra text accompanying notes 161-68 (discussing Scotti); see also United States v. Samaria, 239 F.3d 228, 234-35 (2d Cir. 2001) (collecting recent Second Circuit cases stating that aiding and abetting requires specific intent).

566. United States v. Heyman, 794 F.2d 788, 792 (2d Cir. 1986). In interpreting “willfully,” the court in Heyman cited Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982), for the proposition that “a scienter requirement may mitigate a law’s vagueness,” and then Boyce Motor Lines v. United States, 342 U.S. 337, 342 (1952), for the proposition that the requirement of “culpable intent” protects a regulation from attack on its fairness. If Gabriel’s interpretation is right, however, then “willfully,” at least in § 2(b), adds essentially no scienter or culpable intent beyond that already contained in the underlying statute.

567. In holding that no mental state is necessary for the jurisdictional element, some cases do not even focus on whether the defendant at issue was a causer rather than a principal, or on the possibility that such a distinction might be significant. See, e.g., United States v. Mastrandrea, 942 F.2d 1291, 1294 (8th Cir. 1991) (holding that the defendant need not have known of the jurisdictional element, but without discussing the defendant’s status as a causer as opposed to a principal); United States v. Kibby, 848 F.2d 920, 922-23 (8th Cir. 1988); United States v. Kelly, 569 F.2d 928, 933-35 (5th Cir. 1978). Other cases do directly address the defendant’s status as a causer, still coming, however, to the same result based on the reasoning that the mental state of the causer is derived from that of the principal. See, e.g., United States v. Lack, 129 F.3d 403, 410 (7th Cir. 1997); United States v. Auerbach, 913 F.2d 407, 410 (7th Cir. 1990); United States v. Stern, 858 F.2d 1241, 1247 (7th Cir. 1988); United States v. Blackmon, 839 F.2d 900, 908 (2d Cir. 1988); United States v. Scarborough, 813 F.2d 1244, 1245-46 (D.C. Cir. 1987); United States v. Lennon, 751 F.2d 737, 741 (5th Cir. 1985); United States v. Hayes, 739 F.2d 236, 238 (6th Cir. 1984); United
despite the presence of the word "willfully" in the causing statute.\textsuperscript{568}

Thus, the Seventh Circuit, applying the derivative approach, rejected the argument made by a causer that, because of the presence of "willfully" in § 2(b), he could not be convicted of causing the interstate transportation of stolen goods unless the government proved that he had known that the transportation of the stolen goods would be interstate. The court stated:

Under § 2(b), it is illegal to cause someone else to do what if done personally would be a violation of federal law. Thus, an accomplice under § 2(b)—one who causes an illegal act to be done—stands in the shoes of the actor.... Since... it is not necessary that the person who uses an interstate facility to further an illegal business know such a facility operates interstate, it follows that an accomplice, standing in the shoes of such an actor, need not have knowledge of the interstate character of the facility used.\textsuperscript{569}

The same analysis applies to both the causer and the principal. For both:

Since interstate transportation is merely the linchpin for federal jurisdiction and bears no relationship, in terms of culpability, to the underlying criminal acts which are the objects of § 2314, it follows that the government should not have to prove that the interstate transport was in any way reasonably foreseeable.\textsuperscript{570}

But, if it is so clear that even for the causer the jurisdictional element is a strict liability element, why did the Supreme Court in \textit{Sheridan}\textsuperscript{571} and \textit{Pereira}\textsuperscript{572} require knowledge or foreseeability? The

\textsuperscript{568} See Lack, 129 F.3d at 409-10; \textit{Stern}, 858 F.2d at 1247.

\textsuperscript{569} \textit{Stern}, 858 F.2d at 1247; see also United States v. Greatwood, 187 F.3d 649, No. 98-10079, 1999 WL 451766, at ¶¶1 (9th Cir. June 29, 1999) (unpublished opinion); United States v. Michaels, 796 F.2d 1112, 1118 (9th Cir. 1986) (recognizing the argument that “willfully” in § 2(b) requires a culpable mental state for the interstate transportation element as “a clever argument, [but one that] is founded on the erroneous assumption that the specific inclusion of § 2(b) in the indictment somehow alters the nature of the offense.... In fact, the specific inclusion of § 2(b) is insignificant”.

\textsuperscript{570} Ludwig, 523 F.2d at 707; see Scarborough, 813 F.2d at 1245-46 (citing Ludwig); see also Blackmon, 839 F.2d at 907-08 (holding that although the defendants, who caused an innocent third party to make a fraudulent interstate wire transfer, must have foreseen the wire transfer, the interstate nature of the wire transfer need not have been foreseen for liability, because “the only purpose of the ‘interstate’ requirement is jurisdictional”).

\textsuperscript{571} United States v. Sheridan, 329 U.S. 379 (1946); see supra text accompanying notes 448-53.

\textsuperscript{572} Pereira v. United States, 347 U.S. 1 (1954); see supra text accompanying notes 483-91.
answer is, according to the derivative approach, that it did not. The *Pereira* line of cases involves a:

fraudulently obtained check ... drawn on a bank in one state and deposited by the accused in a bank in another state. In such cases, the courts have noted the inevitability of the transport of the check in interstate commerce, and have discussed the evident foreseeability that the accused's act would take on an interstate character.\(^573\)

But, the fact that the interstate transportation element happened to be reasonably foreseeable does not imply that foreseeability was necessary:

The discussion of imputed knowledge in these cases should not be read ... as authority for the proposition that there is a *requirement* of reasonable foreseeability under the statute. The issue is not squarely presented when the facts of the case show reasonable foreseeability in any event.\(^574\)

That conclusion—that the *Pereira* line of cases does not mandate a culpable mental state for the causer's jurisdictional element—does not, however, apply to the crime of mail fraud, which also was at issue in *Pereira*.\(^575\) Indeed, because of *Pereira*, all the cases concede that knowledge or foreseeability is required for the mailing component of the mail fraud statute.\(^576\) The reason that these cases can ignore *Pereira* when it comes to the causer of a violation of the National Stolen Property Act, while they cannot similarly ignore it when it comes to the mail fraud statute (although the case involved both statutes), lies in an important difference between the respective jurisdictional elements of the two statutes:

A final basis for [defendant's] argument is that "cause" under the mail fraud statute ... requires knowledge or reasonable

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\(^{573}\) *Ludwig*, 523 F.2d at 708.

\(^{574}\) Id.; see *United States v. Lack*, 129 F.3d 403, 410 (7th Cir. 1997) (citing *Pereira*, but still holding that the interstate travel element of the crime need not have been foreseeable by the causer); *United States v. Newson*, 531 F.2d 979, 981 (10th Cir. 1976) (same); see also *United States v. Leippo*, 177 F.3d 93, 95-97 (1st Cir. 1999) (collecting cases, and discussing the word "willfully" and *Pereira*, but finding it unnecessary on the facts before it to decide what mental state applies to the causer of a jurisdictional element); *Gonzalez*, supra note 95, at 653-55 (suggesting that *Pereira* did not decide the issue of what mental state is required for the interstate element, because on the facts of that case it was clear that the defendant had acted with a culpable mental state).


foreseeability that the mails will be used in commission of the fraud, and that therefore "cause" under section 2314 should as well. [Defendant] overlooks, however, the different purposes underlying the statutes. [S]ection 2314 is aimed at the evils of theft, fraud, and counterfeiting and not at the regulation of interstate transportation. Suppression of movement of the fruits of theft and fraud is only the means to the end of suppressing theft and fraud themselves.... On the other hand, the purpose of the mail fraud statute is to prevent the use of the mails to facilitate schemes to defraud.... Because interstate commerce is a means to an end for section 2314 and prohibiting unlawful use of the mails is the end of the mail fraud statute, it is perfectly reasonable that only the mail fraud statute requires... foreseeability.577

In other words, the same standard applicable to the principal applies to the causer. For those unusual statutes, such as the mail fraud statute, where the jurisdictional element (i.e., the mailing) is not a strict liability element, but one that must be reasonably foreseeable by the principal, the jurisdictional element must be reasonably foreseeable by the causer as well. The National Stolen Property Act, on the other hand, requires no mental state of the principal, and therefore, requires none of the causer.

In sum, under the derivative approach, strict liability elements are treated no differently for the causer than other elements of a crime. The mental state required of the causer is always the same as that required of the principal. Thus, no mental state is required of the causer for the jurisdictional element where no mental state is required of the principal. If, however, a culpable mental state is required of the principal for a jurisdictional element, such as foreseeability of the mailing in a case of mail fraud, then that same mental state is also required of the causer.

IV. A CRITIQUE OF THE VARIOUS APPROACHES

The rather extensive review of the history of 18 U.S.C. § 2, Peoni, the case law interpreting the aiding and abetting subsection, and the case law interpreting the causing subsection, yields a number of conclusions, summarized below and then discussed at greater length.

First, contrary to the generally held view that the federal cases have all adopted Peoni's purposeful intent approach, the cases actually employ six approaches: purposeful intent, bad purpose, three forms of knowledge, and derivative.

Second, although Peoni and other cases authored by Judge Learned Hand use purposeful intent language, Peoni itself does not adopt any approach at all with respect to the ordinary aider and abettor; rather,

577. United States v. Lennon, 751 F.2d 737, 741 (5th Cir. 1985) (quotation marks and citations omitted).
Peoni only deals with the “natural and probable consequences” doctrine.

Third, in enacting § 2 Congress sought to eliminate, not create, distinctions in mental state between the principal and the aider and abettor, and between the principal and the causer.

Fourth, Congress sought to eliminate differences in mental state not only between the principal and the accomplice, but also between the two types of accomplices. The addition of the word “willfully” to the causing subsection but not to the aiding and abetting subsection was not meant to distinguish between the aider and abettor and the causer, but to equate them.

Fifth, the mental state for the strict liability jurisdictional element, inexplicably, is often treated differently depending on whether the accomplice is a causer, who is typically required to possess a culpable mental state, or an aider and abettor, who is not.

Sixth, phrases like “specific intent” and “willfully” are quite ambiguous, and, at times, have misled those courts trying to ascertain the mental states of the aider and abettor and the causer.

Seventh, relatively few cases, especially the post-Peoni cases that treat the issue of mental state as conclusively resolved, deal with the issues of fairness and public policy in attempting to ascertain the appropriate mental standard. Rather, most simply resort to stare decisis, and employ the purportedly well-established standard, only to reach conflicting results.

In light of these propositions, which approach is “right”? Which approach did Judge Hand really adopt? Which approach did the Supreme Court adopt? Which approach did Congress intend? Which approach yields the most consistent, most desirable, and fairest results? Should the aider and abettor and the causer be governed by the same approach?

A. Judge Hand's View: The Purposeful Intent Approach

For the aider and abettor, there is little doubt that Judge Hand embraced the purposeful intent approach. In Peoni, he held that the defendant must “in some sort associate himself with the venture, . . . participate in it as in something that he wishes to bring about, . . . seek by his action to make it succeed.” The defendant must act with a “purposive attitude.”

True, we have seen how Peoni, upon closer examination, is not as clear as it seems. The other approaches, not just the purposeful intent approach, also cite it in support of their respective mental states, demonstrating how hard it is to define precisely what Peoni, standing

578. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
579. Id.
alone, really means. Furthermore, we have seen that *Peoni* is really not an aiding and abetting case at all; it leaves open the question of the aider and abettor’s mental state, addressing instead the question of “natural and probable consequences.”

Nonetheless, an examination of all of Judge Hand’s cases reveals quite clearly what his view was. *Peoni* does not stand alone. In cases other than *Peoni*, Judge Hand repeatedly rejected the competing knowledge approach. Similarly, in cases other than *Peoni*, he repeated his famous formulation in ways that unmistakably convey purposeful intent. The aider and abettor “must in some sense promote the [...] venture himself, make it his own, have a stake in its outcome.” The aider and abettor “must make the venture his own; the crime must be a fulfillment in some degree of an enterprise which he has adopted as his; his act must be in realization of his purpose.”

Thus, although *Peoni* may not be Judge Hand’s definitive aiding and abetting case, when it is read together with Judge Hand’s other cases, it is clear that Judge Hand was a strong proponent of purposeful intent.

Purposeful intent was the mental state that Judge Hand applied not only to the aider and abettor, but also to the causer. When he examined the pre-“willfully” version of the causing provision, and found that it did not prescribe a mental state, he borrowed the purposeful intent approach from the aider and abettor. He thus was of the view that the mental state applicable to the aider and abettor should apply to the causer. He was one of the very few judges who took the very sensible step of equating the two.

Not only did he apply the purposeful intent approach to both the aider and abettor and the causer, he extended the approach even further to encompass the strict liability jurisdictional element. Consequently, he reversed a causer’s conviction for interstate transportation of counterfeit checks, when the defendant only knew of, but did not desire, the interstate component of the

580. See supra Part II.C.4.
581. See United States v. Chiarella, 184 F.2d 903, 909 (2d Cir. 1950) (L. Hand, J.), modified on other grounds, 187 F.2d 12 (2d Cir.), rev’d on other grounds, 341 U.S. 946 (1951); United States v. Falcone, 109 F.2d 579, 581 (2d Cir.) (L. Hand, J.), aff’d, 311 U.S. 205 (1940); see supra notes 135-36 and accompanying text.
582. Falcone, 109 F.2d at 581; see supra note 135 and accompanying text.
583. United States v. Paglia, 190 F.2d 445, 448 (2d Cir. 1951); see supra note 137 and accompanying text.
584. United States v. Di Re, 159 F.2d 818, 819 (2d Cir. 1947) (L. Hand, J.), aff’d, 332 U.S. 581 (1948); see supra note 135.
585. See supra text accompanying notes 462-66.
Moreover, it was clear from his opinion that he would have applied this conclusion equally to the aider and abettor. According to Judge Hand, both accomplices must always act with purposeful intent, even with respect to the jurisdictional element.

He retreated from his application of purposeful intent to the jurisdictional element only when confronted with Supreme Court precedent that he had inadvertently missed; but then, in conformity with that opinion, he simply reduced the required mental state a notch to knowledge or reasonable foreseeability.

In adopting the purposeful intent approach, however, Judge Hand failed to take into account the reason behind the enactment of the federal aiding and abetting statute: the elimination of distinctions between the accomplice and the principal. Instead, he created new distinctions between the accomplices and the principal. Under his purposeful intent approach, the accomplice must generally act with purposeful intent, except for the jurisdictional element, which still requires knowledge. The principal, on the other hand, must act with whatever mental state is prescribed by statute, which usually means no mental state at all for the jurisdictional element. These gaps between the accomplice and principal are plainly inconsistent with congressional intent.

B. The Supreme Court's View: The Knowledge, Purposeful Intent, and Derivative Approaches

The Supreme Court in *Nye & Nissen v. United States* adopted Judge Hand's *Peoni* formulation, quoting it verbatim, apparently without realizing that in *Peoni* Judge Hand had left open the question of the aider and abettor, and limited himself to the issue of "natural and probable consequences." Today, *Nye & Nissen*, no less than *Peoni*, is viewed as the case that resolved the issue in favor of purposeful intent. As often as they cite *Peoni*, the purposeful intent cases cite *Nye & Nissen*.

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586. See supra text accompanying notes 469-77.
587. See supra text accompanying note 476.
588. See supra text accompanying notes 480-82.
589. Although many subsequent cases have agreed with Judge Hand when the accomplice is a causer, none have so held when the accomplice is an aider and abettor. Virtually all the subsequent aiding and abetting cases have treated the jurisdictional element as a strict liability element.
590. 336 U.S. 613 (1949).
591. See supra Part II.C.4.
592. See supra text accompanying notes 25-26; supra note 40 and accompanying text.
593. A Westlaw key cite search of the headnote in *Nye & Nissen* that incorporates the quote of *Peoni*, conducted on February 5, 2002, yielded 429 cases. Although cases adopting other approaches have also cited *Nye & Nissen*, a significant number of the 429 cases would be purposeful intent cases. See also supra note 30 (estimating the number of cases that have endorsed the *Peoni* formulation quoted in *Nye & Nissen* to
But, the Supreme Court has not limited itself to the purposeful intent approach; in fact, in other cases it has explicitly adopted some of the other approaches. For example, roughly eighty years before its decision in Nye & Nissen, the Supreme Court in Hanauer v. Doane relied on the knowledge approach in concluding that a vendor who sold military supplies, knowing that the purchaser would convey them to the Confederacy, was guilty of treason.

Then, some six years before Nye & Nissen, the Court in United States v. Dotterweich relied on the derivative approach in concluding that the president of a corporation was strictly liable for aiding and abetting its shipment of misbranded and adulterated drugs.

Four years later, and a mere two years before Nye & Nissen, the Court returned to the knowledge approach in Bozza v. United States, when it held that a defendant assisting in the operation of an illegal distillery was guilty of aiding and abetting the defrauding of the United States, because he knew that the goal of the distillers was to evade taxes.

Finally, twelve years after Nye & Nissen, the Court in Scales v. United States quoted with approval a draft of the Model Penal Code that allowed for liability based on mere knowledge when the act of facilitation is substantial.

Thus, the Supreme Court, at one time or another, has adopted the purposeful intent approach, the knowledge approach, and the derivative approach, and never really discarded any of them. For example, Nye & Nissen, while quoting Peoni's purposeful intent formulation, cites the derivative case of Dotterweich with approval. Even after Nye & Nissen, the Supreme Court has cited Dotterweich with approval.

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594. 79 U.S. 342 (1870); see supra text accompanying notes 111-17.
595. Hanauer, 79 U.S. at 347.
596. 320 U.S. 277 (1943); see supra text accompanying notes 346-63.
597. 330 U.S. 160 (1947); see supra text accompanying notes 139-42.
598. 367 U.S. 203 (1961); see supra text accompanying notes 310-13.
600. See United States v. Freed, 401 U.S. 601, 609 (1971) (citing Dotterweich). Relying, in part, on Dotterweich, the Court in Freed upheld the convictions, including the conviction on the conspiracy count, on a strict liability basis. It did so because the underlying substantive offense was a strict liability offense. See United States v. Feola, 420 U.S. 671, 688 (1975) (describing that in Freed "[w]e held that actual knowledge that the grenades were unregistered was not an element of the substantive offense created by Congress and therefore upheld the indictment both as to the substantive offense and as to the charge of conspiracy"). Freed is therefore fairly read as extending the derivative approach to the conspirator based, in part, on Dotterweich. This extension of Dotterweich's derivative approach took place long after Nye & Nissen, and suggests that the derivative approach retains its vitality even after Nye & Nissen.
The only approach that the Supreme Court has never adopted for the aider and abettor is the bad purpose approach.

For the causer, it is also not clear precisely which mental state the Supreme Court has adopted. The Supreme Court's primary causing case is **Pereira**, which dealt with the causing of the jurisdictional elements of both the mail fraud statute and the National Stolen Property Act. **Pereira** seems to suggest that knowledge is enough, but, as we have seen, the full import of the case is uncertain, and it is cited not only by knowledge cases, but also by purposeful intent cases and derivative cases. Ultimately, the case may not sustain much beyond the simple proposition that, in negotiating a bad out-of-state check, one causes its transportation interstate.

All the Supreme Court's cases—both the aiding and abetting cases and the causing cases—fail to include one critical component of analysis. Despite the fact that as early as 1926 the Supreme Court wrote of Congress's desire to eliminate the distinctions between the aider and abettor and the principal, the Court—like Judge Hand—has never considered Congress's intent when discussing the accomplice's mental state. Even in **Dotterweich**, where the Court utilizes the derivative approach (which epitomizes the elimination of such distinctions), it does not refer to this intent of Congress.

### C. Congressional Intent: The Derivative Approach

As we have seen, in enacting 18 U.S.C. § 2, Congress sought to abolish the antiquated distinctions between the accomplice and the principal that so bedeviled the common law. Only the derivative approach achieves this goal.

The other approaches accomplish the very opposite: they effectively multiply the distinctions between the accomplice and the principal. Because each of the non-derivative approaches imposes its independent mental state regardless of that of the principal, the mental states of the principal and the accomplice will often diverge dramatically. That is not what Congress intended.

This divergence also complicates, rather than simplifies, the jury's task, and such complication of the jury's task is also contrary to

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604. See **Pereira** 347 U.S. at 9 ("When Pereira delivered the check, drawn on an out-of-state bank ... for collection, he "caused" it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection ... ") (emphasis added); supra text accompanying notes 490-91.
605. See supra text accompanying notes 492-94.
606. See supra text accompanying note 520 (purposeful intent approach); supra notes 573-74 and accompanying text (derivative approach).
Congress's intent. If the jury is instructed to apply purposeful intent to an accomplice in a case involving a knowledge offense, for example, then the jury—because the accomplice will be guilty only with purposeful intent, while the principal will be guilty based on mere knowledge—will have to determine whether the defendant is an accomplice or a principal to know which mental state to apply. But, Congress did not want the jury to have to make that determination; that is why Congress originally provided that an accomplice “is a principal,” and continues to provide that an accomplice “is punishable as a principal,” and that is why the cases developed the “no distinction” rule, which, as we have seen, permits the jury to convict without making that determination.

The non-derivative approaches also necessarily resurrect the intricate common-law distinctions that were at the very heart of what Congress sought to eliminate. Once a jury, to determine which mental state applies, has to determine whether the defendant is an accomplice or a principal, the only way to do so is to fall back on the old common-law distinctions.

608. See United States v. Scotti, 47 F.3d 1237, 1247 (2d Cir. 1995) (holding, in the context of a knowledge offense, that “because aiding and abetting required proof of Rodriguez's purpose to bring about the crime, it is more difficult to prove than principal liability”); supra text accompanying notes 161-69.

609. Outside the accomplice context, the Supreme Court has indicated that knowledge and purposeful intent are generally interchangeable. See United States v. Bailey, 444 U.S. 394, 404 (1980) (criminal antitrust); United States v. United States Gypsum Co., 438 U.S. 422, 444 (1978) (escape from prison); supra note 455. But, that equation of the two mental states does not necessarily apply to the accomplice. First, the distinction between knowledge and purposeful intent is so firmly established in the law of the accomplice that a pronouncement by the Supreme Court in another context cannot be automatically extended to the accomplice. Second, the Supreme Court itself has indicated that this equation of the two mental states does not apply to “inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.” Bailey, 444 U.S. at 405. Presumably, that also holds true for the accomplice, who also engages in what often is—apart from the criminal mental state—innocuous behavior. See United States v. Gracidas-Ulibarry, 192 F.3d 926, 929 (9th Cir. 1999) (indicating that aiding and abetting, like the crime of attempt, requires a heightened mental state of specific intent to compensate for the uncertainty as to what precisely was intended by someone who did not actually commit the offense (quoting United States v. Sayetisitty, 107 F.3d 1405, 1412 (9th Cir. 1997))), vacated on other grounds, 231 F.3d 1188 (9th Cir. 2000) (en banc).

610. We have seen that “is a principal” was the language in the original 1909 aiding and abetting subsection, and “is also a principal” was the language in the original 1948 causing subsection. Congress changed those phrases to “as a principal” in 1951 for unrelated reasons that did not reflect any desire to change its goal of eliminating the distinctions between the accomplice and the principal. See supra text accompanying notes 80-93.

611. See supra Part I.B.

612. See supra text accompanying notes 99-103.

613. See supra text accompanying notes 71-84 (discussing the old common-law distinctions, and their abolition with the enactment of the aiding and abetting statute).
Making those distinctions is not only the precise task that Congress sought to abolish, it is also an impossible task; it is easy to see why Congress sought to eliminate the necessity of undertaking such a task. For example, assume two defendants are involved in a theft. One masterminds the theft, prepares the fraudulent paperwork, and then gives the paperwork to the second defendant, the driver, who simply picks up the stolen goods at the shipping dock:

[T]he distinction between aiders and abettors and principals in cases such as this is to a great extent semantic. Is the driver of the truck the principal because of his physical contact with the stolen goods? Or, should he be viewed as the aider and abettor because the plan for taking the goods was conceived by another person? Conversely, is the man who engineered the theft the principal, or rather the aider and abettor?

The answers to these questions may define which mental state to apply, and thereby define liability.

Or, assume a case of Hobbs Act extortion, defined as “the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear.” As part of a prearranged plan, one of the defendants makes the threat to the victim (thereby inducing the victim’s consent through the “wrongful use of . . . threatened force, violence, or fear”), while, on the next day, the other defendant picks up the money (“obtains . . . property from another”). Who is the principal, and who is the aider and abettor? Again, the answer may determine which mental state to apply, and thereby define liability.

But, Congress, in enacting § 2, and “abolish[ing] the distinction between principals and accessories,” intended to eliminate the need to engage in such an exercise:

18 U.S.C. § 2 . . . defines a principal for purposes of the federal criminal code, and its effect is to erase whatever distinctions may have previously existed between different classes of principals and between principals and aiders or abettors.

Any approach requiring different mental states of the principal and the accomplice for the same offense “introduce[s] new distinctions between principals and aiders and abettors, precisely the result § 2 was designed to avoid.” Thus, only the derivative approach comports with Congress’s intent.

614. United States v. Bryan, 483 F.2d 88, 95 (3d Cir. 1973) (en banc); see also supra note 102; supra text accompanying notes 99-102.
617. United States v. Jones, 308 F.2d 26, 31 (2d Cir. 1962) (en banc).
618. Id. at 33.
Finally, it is clear that Congress sought to eliminate distinctions not only between the accomplice and the principal, but also between the two types of accomplices.\(^{619}\) Yet, distinctions between the aider and abettor and the causer, often unrecognized, still abound. The jurisdictional element, as it frequently does, serves as a good example: the non-derivative cases routinely impose a culpable mental state on the jurisdictional element when the accomplice is a causer, but not an aider and abettor, whom they treat, in this respect, like the principal.\(^{620}\) Thus, according to the knowledge cases, while a causer must know or reasonably foresee that the principal will transport the stolen goods out of state,\(^{621}\) the aider and abettor need not.\(^{622}\)

An even more pronounced distinction between the aider and abettor and the causer is made by the Second Circuit, which, in its more recent cases, has (usually, but not always) applied the purposeful intent approach to the aider and abettor,\(^{623}\) but the derivative approach to the causer.\(^{624}\)

These distinctions between the mental state of the causer and that of the aider and abettor are inconsistent with Congress's intent to equate both the aider and abettor and the causer to the principal. Congress did so originally, by including the phrase "is a principal" in both of § 2's accomplice provisions.\(^{625}\) Although Congress amended that language in 1951 for unrelated reasons, it intended that the new phrase "punishable as a principal" continue to make the same point.\(^{626}\) That language equates the accomplices not only to the principal, but also to each other; the two accomplices, each deemed a principal, should be treated the same.

"[I]s a principal" or "punishable as a principal" is not the only language in § 2 that is inconsistent with the distinctions made by the non-derivative approaches between the causer and the aider and abettor. "Willfully" is also inconsistent with those distinctions. We have seen how, in response to Judge Learned Hand's concerns over the absence in the causing subsection of any language implying a culpable mental state, Congress added "willfully" to the causing

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619. See supra Part III.B. There are two obvious exceptions to the equation of the accomplices: the nature of the act ("cause" versus "aid" and "abet," etc.), see supra text accompanying notes 14-15, 104-08; and the nature of the principal (innocent versus guilty), see supra text accompanying notes 61-67, 85-88.

620. See supra text accompanying notes 448-53, 469-92, 514-22, 544-47 (causer); supra text accompanying notes 229-34 (aider and abettor).

621. See supra text accompanying note 544.

622. See supra text accompanying note 230.

623. See supra note 159 and accompanying text; supra text accompanying notes 161-69 (discussing Scotti).

624. See supra text accompanying notes 557-63 (discussing Gabriel).

625. See supra text accompanying notes 80-93; supra note 610. The causing subsection actually provided, when originally enacted in 1948, "is also a principal." See supra text accompanying notes 87-89.

626. See supra text accompanying notes 90-93.
subsection to bring the causer's mental state into line with that of the aider and abettor. Indeed, the Second Circuit recognized over thirty-five years ago that the mental state for both the aider and abettor and the causer had always been uniformly the same, both before and after the addition of the word in 1951.

Even if "willfully" was intended by Congress to distinguish between, rather than equate, the subsections, the Second Circuit's application of the derivative approach to the causer and the purposeful intent approach to the aider and abettor still makes little sense. Since the word "willfully" is present only in the causing provision, not the aiding and abetting provision, presumably, it is the causer who must act with the more culpable mental state. Yet, the Second Circuit's distinction will often impose the more culpable mental state not on the causer, but on the aider and abettor; in cases of knowledge offenses, the causer, governed by the derivative approach, will be liable based on only knowledge, while the aider and abettor, governed by the purposeful intent approach, will not be liable unless acting with purposeful intent. The subsection lacking the word "willfully" ends up imposing a more culpable mental state than the subsection containing "willfully."

Once again, the derivative approach achieves what Congress intended. Under the derivative approach, both the aider and abettor and the causer derive their mental state from the principal. When purposeful intent is the mental state for the principal, it is the mental state for both the aider and abettor and the causer. Similarly, when a jurisdictional element is a strict liability element for the principal, it is a strict liability element not only for the aider and abettor, but also the causer. The jury need not determine whether a participant was an accomplice as opposed to a principal. In this respect, Congress's intent that the aider and abettor and the causer be treated indistinguishably is satisfied.

D. The Approach Without a Sponsor: The Bad Purpose Approach

Our review of Judge Learned Hand's view, the Supreme Court's views, and Congress's intent, reveals the origins of all the approaches save one: the bad purpose approach. When confronted with the old dispute between knowledge and purposeful intent, Judge Hand chose purposeful intent. The Supreme Court adopted the knowledge, purposeful intent, and derivative approaches. Congress presumably wanted only that approach consistent with its goal of abolishing the distinctions between the principal and the accomplice, i.e., the derivative approach. But, how did the bad purpose approach originate?

627. See supra Part III.B.
628. See supra text accompanying note 499.
For the causer, the answer is relatively simple. Its governing provision, 18 U.S.C. § 2(b), contains the word “willfully.” As we have seen, one of the many meanings of “willfully” is acting with a bad purpose—a specific intent to violate the law;\(^6\)\(^2\)\(^9\) indeed, this is the meaning that, “as a general matter,” the word carries.\(^6\)\(^3\)\(^0\) Thus, it is understandable that many cases blithely assume that Congress added “willfully” to introduce the mental state of bad purpose. But, those cases, in making that assumption, do so unaware that “willfully” was added by Congress in 1951 not to introduce some new mental state or change the causer’s mental state from what it had been pre-“willfully,” but only to confirm the pre-“willfully” efforts to equate the causer’s mental state to that of the aider and abettor.\(^6\)\(^3\)\(^1\)

Any effort to determine what Congress intended in adding “willfully” depends, therefore, not only on the meaning of the word, but also on which mental state the cases had applied to the aider and abettor at the time. Since all the other approaches are consistent with “willfully” (even, as we have seen, the derivative approach\(^6\)\(^3\)\(^2\)), and all the other approaches had already been applied at one time or another to the aider and abettor, there is no basis for assuming that Congress meant bad purpose when it added “willfully” to the causing subsection.

A failure to recognize the real reasons for the addition of “willfully” can lead to troubling results. For example, the Third Circuit in Curran\(^6\)\(^3\)\(^3\) concluded that “willfully” implied not just bad purpose, but a heightened form of bad purpose—i.e., not just a general awareness that one is violating the law, but an awareness of the precise legal duty being violated.\(^6\)\(^3\)\(^4\)

For the causer, then, the origin of the bad purpose approach is relatively uncomplicated. The far more difficult question is how the bad purpose approach made its way into the aiding and abetting case law. After all, the word “willfully” appears neither in § 2(a) nor in Judge Hand’s famous aiding and abetting formulation. Nonetheless, “willfully” still seems to be the culprit. Despite its absence from § 2(a), the courts frequently use the word in opinions and instructions to the jury when defining the precise contours of the aider and abettor’s mental state.\(^6\)\(^3\)\(^5\) They use it not necessarily in the bad purpose sense,

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629. See supra note 501 and accompanying text.
630. See supra note 149 and accompanying text.
631. See supra Part III.B.
632. See supra text accompanying notes 511, 557-63.
634. See supra text accompanying notes 525-39.
but, at least in some instances, merely to stress that the aider and abettor is not guilty unless he or she "willfully" associates and "willfully" participates in the venture—in the sense that the defendant must act knowingly, intentionally, and deliberately, as opposed to accidentally or unwittingly (e.g., while sleepwalking). This is one of the other meanings of "willfully" that we have seen before.

But, the word is ambiguous. As we have seen, the ambiguity in a word that appears so often in the law led Judge Hand to describe the word as "dreadful," "awful," and "one of the most troublesome words in a statute that I know." What seems to have happened is that, in the context of the aider and abettor, one of its meanings—"deliberately"—was displaced by the otherwise inapplicable bad purpose meaning. Thus, even though "willfully" does not appear in the aiding and abetting subsection, its use in the efforts to explain that the aider and abettor must act deliberately created an opening through which its bad purpose meaning entered and then altered the mental state required of the aider and abettor.

Adding to the confusion created by "willfully" is the phrase "specific intent." We have seen how the aiding and abetting cases...
employ that phrase in at least three different ways. Like the ambiguity in the word “willfully,” inherent in the phrase “specific intent” is an “ambiguity” that has generated a “good deal of confusion.” Indeed, because of the phrase’s multiple meanings, its use has been subjected to “richly deserved criticism,” and the Supreme Court and appellate courts have strongly recommended that district courts, in their jury instructions, avoid the “‘specific intent’/‘general intent’ quagmire.”

Here, too, once “specific intent” was used in one sense, it created an opening for its other meanings. Apparently, the phrase “specific intent” was originally used in the aiding and abetting context to mean purposeful intent. Although designed to convey only that precise meaning, the phrase “specific intent” eventually brought along with it some of its other meanings. One of the unintended meanings was bad purpose, or the intent to violate a known legal duty.

A few courts have been sensitive to that misinterpretation of the phrase, and have rejected efforts by aiders and abettors to define “specific intent” in a way that requires an intent to disobey the law. Thus, one court speaking in the context of the aider and abettor’s mental state stated that “[w]here knowledge that an act is against the law is not an essential element of the offense, an instruction requiring

640. See supra text accompanying notes 157-60 (purposeful intent approach), 250-54 (bad purpose approach), 323-37 (derivative approach).
642. United States v. Golitschek, 808 F.2d 195, 201 n.2 (2d Cir. 1986); see United States v. Gracidas-Ulibarry, 231 F.3d 1188, 1195-96 (9th Cir. 2000) (noting that “the distinction between specific intent and general intent ‘has been the source of a good deal of confusion’” (quoting Bailey)); United States v. Laughlin, 26 F.3d 1523, 1527 (10th Cir. 1994) (“[I]nstruct[i]on in terms of ‘specific intent’ has been disfavored by the courts because of the confusion and ambiguous nature of such an instruction.”); United States v. Rawlings, 982 F.2d 590, 592 n.1 (D.C. Cir. 1993) (“[C]ourts have criticized [specific intent] as too general and potentially misleading to a jury.”); United States v. Barclay, 560 F.2d 812, 818 (7th Cir. 1977) (“We recognize that many commentators have regarded these jurisprudential concepts as awkward and unhelpful.”).
643. See Liporata v. United States, 471 U.S. 419, 433 n.16 (1985) (noting criticism of specific intent instructions, and suggesting that jury instructions be tailored to the mental state of the particular statute involved).
644. United States v. Ruiz, 932 F.2d 1174, 1182 (7th Cir. 1991). In United States v. Markowski, 772 F.2d 358 (7th Cir. 1985), the court commented that:

[D]istinctions among [the various mental states] tax the greatest interpreters. The piling of explanation on explanation in an effort to clarify what intent means may have the opposite effect. We have therefore held that with rare exceptions... a court need not elaborate for the jury on the differences between general and specific intent.

Id. at 364-65; see United States v. Dougherty, 763 F.2d 970, 973-74 (8th Cir. 1985) (agreeing that better approach is not to instruct the jury on specific intent, but rather to instruct on the precise mental state applicable to the individual offense); United States v. Brown, 739 F.2d 1136, 1143 (7th Cir. 1984) (“distinction between specific and general intent tends to confuse juries”).
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a finding of specific intent to disobey the law is not proper."\textsuperscript{645} Many other courts, however, have not been so alert.

In sum, the combination of the ambiguous phrase "specific intent" and the equally ambiguous word "willfully" led many cases to apply a mental state never envisioned by Judge Hand, the Supreme Court, or Congress—purposeful desire to violate the law. Once it is clear that this mental state, among the strictest known to the law, is not compelled by the word "willfully," then there is no justification for imposing it and thereby ignoring one of the long-established rules of criminal law: "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."\textsuperscript{646}

### E. Fairest Results

Putting aside what Judge Learned Hand, the Supreme Court, or Congress intended, which approach yields the fairest, most sensible results? Is there any sense in distinguishing between the aider and abettor and the causer? The analysis turns to the latter question first.

1. The Aider and Abettor and the Causer Should Be Governed by the Same Mental State

We have seen that unlike many others, Congress and Judge Hand sought to subject the aider and abettor and the causer to the same mental state. Fairness and consistency dictate the same.

Most circuits have not thought of comparing the two accomplices, but instead have simply developed two unconnected lines of cases that often reach different conclusions. Thus, as we have seen, by developing two unconnected lines of cases, the Second Circuit has concluded that the derivative approach applies to the causer, while the purposeful intent approach applies to the aider and abettor. That is not only contrary to what Judge Hand and Congress envisioned, it

\textsuperscript{645.} United States v. Gutberlet, 939 F.2d 643, 647 (8th Cir. 1991); see also United States v. Arambasich, 597 F.2d 609, 613 (7th Cir. 1979) ("Use of the phrase 'purposely intending to violate the law' may be erroneously interpreted by jurors, for example, to require that the defendant know his act violates a criminal statute, which is ordinarily unnecessary..."). Similarly, outside the aiding and abetting context, the courts have rejected claims that "specific intent" requires a finding of "bad purpose." United States v. Rawlings, 982 F.2d 590, 593 (D.C. Cir. 1963) (not "all federal crimes of specific intent...require proof of 'bad purpose'").

\textsuperscript{646.} Cheek v. United States, 498 U.S. 192, 199 (1991) (citations omitted); see Ratzlaf v. United States, 510 U.S. 135, 149 (1994) (recognizing the "venerable principle that ignorance of the law generally is no defense to a criminal charge" (citations omitted)); United States v. Freed, 401 U.S. 601, 612 (1971) (Brennan, J., concurring) ("If the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that the ordinary intent requirement—mens rea—of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy.").
also yields unfair results. It means that the liability of two similarly situated accomplices who commit identical acts with identical mental states can differ. When the principal is an innocent intermediary, then the accomplice is a causer and, therefore, governed by the derivative approach. When the principal is a guilty participant, however, then the accomplice is an aider and abettor and, therefore, governed by the very different purposeful intent approach.

An example illustrates the illogic in having the accomplice’s liability depend on the culpability of the principal. A drug dealer within the Second Circuit, who orders a member of his ring to shoot a drug rival, is guilty of assault for having commanded or induced the shooting. Because the Second Circuit applies the purposeful intent approach to aiders and abettors, the drug dealer is guilty only if he acted with purposeful intent. If, however, instead of ordering the shooting, he lies to his confederate, persuading him that he must shoot the rival in self-defense, then the drug dealer, having acted through an innocent intermediary, is not an aider and abettor, but a causer. Because the Second Circuit applies the derivative approach to causers, the drug dealer is guilty even if acting without purposeful intent, since assault is not a purposeful intent offense.647

These different mental states can lead to different results. The diminished capacity defense, for example, is relevant if the offense is a specific/purposeful intent offense, but not if it is a general intent offense.648 Thus, the Second Circuit, in applying one approach to the aider and abettor and another to the causer, would allow the drug dealer to raise as a defense that he was drunk only if the shooter was a culpable principal, but not if the shooter shot in self-defense. But what justification is there for this distinction? There is no reason that the guilt of the accomplice (the drug dealer) should depend on the vagaries of the state of mind of the principal (the shooter). Presumably, the drug dealer does not know, and does not care, whether the shooter whom he “commanded” or “induced” (in the language of § 2(a)) or “caused” (in the language of § 2(b)) acted innocently or with culpable intent, yet that factor could determine the accomplice’s mental state, the availability of the voluntary intoxication defense, and, thus, his liability.

What makes even less sense is distinguishing between the aider and abettor and the causer with respect to the strict liability jurisdictional element. Imagine that a fence instructs his new errand boy to transport stolen goods from point A to point B, both in New York, along a specific back road. Neither the fence nor the errand boy realize that the road briefly meanders into, and out of, New Jersey along its route. If the errand boy knows of the stolen nature of the

647. See supra note 241 and accompanying text.
648. See supra text accompanying notes 239-49, 377-82; supra note 377.
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goods, then he is a guilty principal, and therefore, the fence is an aider and abettor for having commanded, induced, or procured the crime. Both are guilty despite their lack of awareness of the interstate nature of the route, since knowledge of the interstate element is required neither of the principal nor the aider and abettor. But, if the errand boy is simply an innocent intermediary, then the fence is not an aider and abettor, since aiding and abetting liability implies a guilty principal. Instead, because the boy acts with an innocent state of mind, the fence is a causer. But, as a causer, he is guilty only if he knows or intends (depending on the approach) the jurisdictional element. Because he is unaware of the interstate route, he is not liable.

This result is obviously indefensible. Distinguishing between the causer and the aider and abettor yields unjustifiably different results for accomplices who commit the same act with the same mental state. Different results should depend on the accomplice’s own mental state and act, not on whether the principal through whom the accomplice acts is a culpable actor or an innocent intermediary.

Thus, the aider and abettor and the causer should be governed by the same mental state. If not, then at the very least, the causer should be treated like the aider and abettor when it comes to the strict liability jurisdictional element; regardless of the approach, there should be no culpable mental state required of an accomplice when it comes to strict liability elements.

The next question is: assuming the same standard applies to both the causer and the aider and abettor, which of the various approaches—purposeful intent, knowledge, or bad purpose—is the fairest, most sensible approach?

2. Advantages of the Derivative Approach: Fewest Anomalous Results; Conformity with Congressional Intent; Equal Treatment of All Participants

Of the various approaches, the derivative approach works the most straightforwardly. The derivative approach generally avoids anomalous, unfair distinctions between the principal and the accomplice. Whenever the principal needs no culpable state of mind, the same holds true for both the aider and abettor, and the causer. Given the many situations where it will be almost impossible to untangle who is a principal, who is an aider and abettor, and who is a causer, it makes sense to apply the same mental state. Once the same mental state applies, it becomes very easy to apply the “no distinction” rule and to instruct the jury that it need not determine whether a given participant acted as a principal or an accomplice.

The other approaches increase the likelihood of unfair results. In particular, the purposeful intent and bad purpose approaches end up
protecting those who deserve protection the least. The terms "counsel," "command," "induce," and "procure" (contained in § 2(a)), and "cause" (contained in § 2(b)), clearly encompass participants standing very high on the moral culpability ladder. But, because they are still accomplices, under the purposeful intent or bad purpose approaches, they cannot be convicted unless acting with a mental state that is often significantly harder to prove than the mental state of the principal. Even under the knowledge approach, the accomplice will, at times, be liable only with a more culpable mental state if the underlying offense is a strict liability offense.

For example, threatening the President via the mail is a federal criminal offense. Because this offense is one of only general intent, a defendant who mails a letter containing an obvious threat, but who intends no harm, is still guilty. Specific intent to injure the President is not an element. Assume that one defendant conceives of a plot to threaten the President, composes and writes a letter containing an obvious threat, and then persuades his friend, who aware of its contents, does nothing more than mail the letter. Presumably, only the sender of the letter is the principal, since the statute proscribes the "deposit[ing] for conveyance in the mail" any threatening letter, which is precisely what the friend did. The writer of the letter, even though far more culpable, is not a principal, but an "inducer" or "procurer" who is liable by application of the aiding and abetting statute.

If the governing standard is not the derivative approach but, say, the purposeful intent approach, then, because the writer is an aider and abettor, while the sender is a principal, they will be governed by very different mental states. The writer must act with purposeful intent, while the sender is liable based only on general intent, in accordance with the underlying statute. If neither has the intent to injure or frighten the President, the friend who volunteered to mail the letter is still liable, but the writer is not. Or, if both got drunk together, voluntary intoxication would be a defense for the writer but not the sender.

The same sort of problem arises under the bad purpose approach. The added requirement that the accomplice act with the purpose to violate the law, or with knowledge that the principal is violating the law, can lead to disturbing results, especially for offenses where the unlawfulness of the conduct is not readily obvious. In the structuring context, an owner of a cash business who sends an employee to the bank with the weekly proceeds, and instructs the

650. United States v. Johnson, 14 F.3d 766, 768 (2d Cir. 1994) (collecting cases, and noting that that is the view of a majority of, but not all, the circuits).
651. Such offenses are commonly referred to as *malum prohibitum* offenses. See, e.g., Jordan v. De George, 341 U.S. 223, 236 n.9 (1951) (Jackson, J., dissenting).
employee to structure the deposit to avoid generating a currency transaction report, may be acting without any awareness of the unlawfulness of structuring. Fortunately, for the owner, because she is not a principal but an accomplice (i.e., she "commanded" or "caused" her employee to commit the offense), under the bad purpose approach, she is not guilty of structuring unless, at the very least, she realizes that her conduct violates the law, and perhaps, in addition, she acts with that purpose. On the other hand, the hapless employee who actually carries out the structuring, and therefore, acts as a principal rather than an aider and abettor is guilty as long as he acts to evade the reporting requirement, even if he innocently believes his dividing one deposit into two is a perfectly legitimate way to do so.

All three non-derivative approaches—bad purpose, purposeful intent, and knowledge—yield a problematic result in the following example: a weapons dealer leaves instructions for an employee to go pick up hand grenades from a seller. Both the owner and the employee mistakenly believe that the hand grenades are properly registered. Although possession of unregistered grenades is a strict liability offense, the mistaken belief constitutes a defense for the owner, who falls within the scope of the aiding and abetting statute, and therefore, is liable only when acting with bad purpose, purposeful intent, or at least knowledge that the grenades were not registered. By contrast, the employee, as a principal, is strictly liable.

In all these cases, application of the derivative approach eliminates the divergence in mental states. That leads to a consistency of treatment and avoids situations where the more culpable party can hide behind a difficult-to-prove mental state.

3. Advantage of the Purposeful Intent and Bad Purpose Approaches: Protection of the Marginal Participant

If the derivative approach seems to be the most consistent with Congress's desire to eliminate distinctions, why, then, do the purposeful intent and bad purpose approaches distinguish between the participants by requiring a heightened mental state of the accomplice in cases of knowledge or general intent crimes? Most of the purposeful intent or bad purpose cases provide no reasoning; they simply cite earlier cases. Peoni provides some explanation; but it rests, at least in part, on a Sixth Amendment venue concern—a defendant who utters a counterfeit note, if liable as an aider and abettor based on simple knowledge, may well end up being hauled into court in every district where any possession along the future chain

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652. See supra text accompanying notes 255-61.
653. See supra text accompanying notes 217-21.
654. See supra text accompanying notes 222-26.
of transmission takes place— that is not valid in the vast majority of cases.

The Ninth Circuit has offered some measure of explanation for the purposeful intent approach. Aiding and abetting:

involve[s] a degree of uncertainty regarding the defendant's purpose to commit the underlying crime—an uncertainty that is not present in the case of a principal who actually commits the crime. Because of that uncertainty, it is reasonable to require proof of a specific intent that would not be required of one who completed the crime. 656

To put it another way, given the minimal nature of the act element of aiding and abetting, it makes sense to require a heightened mental state to insure that liability will not be imposed too easily. Without either purposeful intent or bad purpose, marginal participants will be liable for some very serious offenses. For example, consider the application of the knowledge approach to a gas station attendant who pumps gas for a customer, knowing that the customer will drive off to commit first degree murder, a specific intent offense. 657 Under the knowledge approach, pumping with mere knowledge equals murder. 658 That is pretty harsh. It also makes little sense: "it would be altogether incongruous that a person could be convicted as an aider or abettor, whom 18 U.S.C. § 2 makes 'punishable as a principal,' without proof of an element essential to convicting the principal himself." 659

The derivative approach also fails to afford protection to some marginal participants, although it does somewhat better than the knowledge approach. Because the principal requires specific intent to kill for first degree murder, the gas station attendant who has only knowledge, but not specific intent, is not liable under the derivative approach. Similarly, the secretary who alters an invoice at his boss's

655. See supra text accompanying note 133.
656. United States v. Gracidas-Ulibarry, 192 F.3d 926, 929 (9th Cir. 1999) (quoting United States v. Sayetsitty, 107 F.3d 1405, 1412 (9th Cir. 1997)), vacated on other grounds, 231 F.3d 1188 (9th Cir. 2000) (en banc). This is essentially an adaptation of the very similar argument that the Supreme Court has made in requiring a heightened mental state for an attempt offense. See United States v. Bailey, 444 U.S. 394, 405 (1980) (explaining that attempt crimes require a "heightened mental state," i.e., specific intent, "to separate criminality from otherwise innocuous behavior"); supra notes 183, 226, 249, 609 (comparing aiding and abetting to an attempt offense).
657. See supra text accompanying notes 270, 379.
658. That result would not apply if one adopts the variation to the knowledge approach that more than knowledge is required in cases of routine, lawful sales, see supra Part II.B.4.a, or the variation that knowledge is only enough when the act of assistance is substantial, see supra Part II.B.4.c. It would apply, however, if one adopts an unqualified knowledge approach, or the variation that allows for "particularly grave" offenses. See supra text accompanying notes 286-91.
instructions, but does not want to defraud the customer, is not liable under the derivative approach, because the secretary's knowledge is no substitute for the requisite specific intent to defraud. But, one still obtains difficult results under the derivative approach when the crime is second degree murder, assault, or bank robbery, which are general intent offenses. Under the derivative approach, the attendant is guilty of aiding and abetting those crimes by pumping the gas. A cab driver is guilty of bank robbery by driving the robber to the bank. A gun dealer is guilty of assault by selling a gun to someone who is about to commit an assault. Their knowledge of what the respective principals are about to do is a sufficiently culpable mental state, because those crimes are knowledge crimes. Finally, although first degree murder is a specific intent offense for which the gas station attendant is not liable, the attendant is still liable for any lesser included offense that is not a specific intent offense, such as second degree murder.

By contrast, the bad purpose and purposeful intent approaches protect the marginally involved participant who would be swept in as an accomplice by the easily triggered knowledge and derivative approaches. Because the act requirement is so minimal and permits the easy imposition of accomplice liability, the bad purpose and purposeful intent approaches have the effect of compensating with a heightened mental state, and thereby insuring that minimally involved defendants are not easily treated as the equivalent of a principal.

Of course, as we have seen, the heightened mental states also work to the advantage of the accomplice who is not at all marginal, and not deserving of special protection. In addition, the bad purpose approach, in particular, goes to an unnecessary extreme. Marginal accomplices are adequately protected by the purposeful intent approach. Once an accomplice desires a result, and the result is criminal, there is no reason to require that the accomplice be aware of the unlawfulness of the act when such awareness is not required of the principal.

4. Advantage of the Knowledge Approach: Simplicity and Deterrence

If the goal of accomplice liability is to create a simple rule designed to deter anyone from rendering assistance to a criminal, then knowledge makes the most sense. It clearly conveys the message to any potential accomplice who knows that the principal is committing,

660. See supra text accompanying notes 19-20.
661. See supra text accompanying notes 240-41, 379-82.
662. See United States v. Walker, 99 F.3d 439, 442 (D.C. Cir. 1996) (discussing United States v. Edmond, 924 F.2d 261, 267 (D.C. Cir. 1991), which noted that if a premeditated aider and abettor enlists an executioner at the last possible moment, the jury could convict the aider and abettor of first degree murder and the principal of second degree murder).
or about to commit, a crime not to help in any way on pain of being punished as a principal. Its clarity is what endeared it to the Supreme Court in *Hanauer v. Doane*,\(^6\) which relied on it to preclude the accomplice who rendered an act of assistance to the Confederacy from standing "on the nice metaphysical distinction" that he knew that he was facilitating the crime, but did not purposefully intend its success.\(^6\)

Thus, a gun dealer will presumably be deterred from selling a gun to someone about to commit a murder. The owner of a web hosting company will be deterred from carrying any sites that the owner knows disseminate child pornography. Presumably, with these acts of assistance deterred, fewer crimes will take place. Even in the case of the really marginal accomplice, like the gas station attendant, it makes some sense in terms of deterrence. If a gas station attendant simply refuses to pump gas every time he or she learns that the occupants of the car are about to drive off and commit an offense, no matter how easy it is to get gas at another station, there will be at least a few instances where crimes that would have been committed will be delayed and thereby forestalled.

That is, in a sense, the rationale of the cases like *Fountain*\(^6\) and *Hanauer v. Doane*, which allow for liability based on mere knowledge where the crime is, in Judge Posner's phrase, "particularly grave"\(^6\) (i.e., murder in *Fountain*, and treason in *Hanauer*), and the need for deterrence correspondingly great. At least for such serious crimes, it is so important to deter anyone from rendering any act of facilitation that the knowledge approach is applied to impose criminal liability relatively easily, even when the accomplice has no desire that the crime succeed. While for lesser crimes perhaps other concerns predominate, like the need to protect marginal participants (such as the shopkeeper who sells dresses to a prostitute\(^6\)), for "particularly grave" offenses the strong need for deterrence prevails.

Like the knowledge approach, the bad purpose and purposeful intent approaches also possess a measure of simplicity. However, by imposing more than just knowledge, they allow the attendant, the gun dealer, and the owner of the web hosting company to go about their businesses even when they knowingly facilitate crimes. Thus, if deterrence is the primary goal, these approaches are not nearly as effective as the knowledge approach.

The derivative approach is the least desirable of the approaches if simplicity and predictability (and the deterrence that accompanies

\(^{663}\) 79 U.S. 342 (1870).

\(^{664}\) Id. at 347.

\(^{665}\) United States v. Fountain, 768 F.2d 790 (7th Cir.), modified, 777 F.2d 345 (7th Cir. 1985) (per curiam); see supra text accompanying notes 286-91.

\(^{666}\) See supra text accompanying note 289.

\(^{667}\) See supra text accompanying notes 290, 318.
them) are the primary goals. From the perspective of the reasonable person trying to conform his or her conduct to the law, the derivative approach is the most complicated of the approaches, because it ties the mental state of the accomplice to that required for the underlying federal offense, which can vary so widely. Under the derivative approach, the potential accomplice will often not know whether his or her act is criminal. If, at his boss's instructions, a secretary alters an invoice that the boss then mails to the federal government, the secretary—who knows of the false nature of the document, but has no desire to defraud the government—may or may not be criminally liable, depending on the offense that the prosecutor chooses. The secretary will not be liable for aiding and abetting mail fraud, because mail fraud requires a specific intent to defraud, but may be liable for aiding and abetting the submission of false statements to the government, because that offense only requires that the defendant know the statements are false and does not require an intent to mislead or defraud. If deterrence is dependent on simplicity and predictability, the derivative approach will be the least effective of the various approaches.

The knowledge approach, then, is better than the derivative approach at achieving simplicity, predictability, and presumably deterrence. The problem with the knowledge approach, however, is that, while simple, we have seen that it can be too quick in imposing liability on marginal participants. While other jurisdictions solve that problem by creating a separate offense of knowing facilitation, which is less serious than the underlying offense, that solution is not currently possible in the federal system, where 18 U.S.C. § 2 provides that the accomplice is guilty of the underlying offense, not of some other, lesser offense.

Still, the problem of the harsh application of the knowledge approach does not unjustify its wholesale abandonment; rather, it speaks in favor of making limited exceptions when necessary. Indeed, as we have seen, that was the approach of the Second Circuit in United States v. Campisi, which, even after Peoni, retained the knowledge approach, but required purposeful intent for instances involving otherwise lawful, routine sales, or instances where the connection between the principal and the aider and abettor is too tenuous to allow liability merely on knowledge.

668. See supra text accompanying note 20.
670. See, e.g., United States v. Ranum, 96 F.3d 1020, 1028-29 (7th Cir. 1996).
671. E.g., United States v. Shah, 44 F.3d 285, 289 n.7 (5th Cir. 1995).
672. Model Penal Code § 2.06 cmt. at 319 (1962) (discussing New York State's approach, and listing other states that have followed New York's lead).
673. 306 F.2d 308 (2d Cir. 1962).
674. See supra Part II.B.4.a.
But, even with these modifications, the knowledge approach cannot be reconciled with Congress's desire to eliminate distinctions between the accomplice and the principal. A standard that applies knowledge to the accomplice no matter what the mental state applicable to the principal will create, rather than erase, serious distinctions between the accomplice and the principal.

For that reason, only the derivative approach comports with congressional intent. While it may not possess simplicity and predictability from the perspective of the person trying to ascertain whether his or her conduct will violate the law, that uncertainty places the accomplice in the same position as the principal, who is also subject to a myriad of federal statutes with different mental states. If Congress has determined that mental states should vary according to the offense, there is no justification for excepting all aiders and abettors or all causers from that determination.

V. THE RECOMMENDED APPROACH: A MODIFIED DERIVATIVE APPROACH

The derivative approach is the only approach that really treats the accomplice as a principal in accordance with 18 U.S.C. § 2. The approach also comports with congressional intent, avoiding disparities in mental state between the accomplice and the principal, and allowing for easy application of the "no distinction" rule. It eliminates the problems created by those causing cases that require a culpable mental state for the jurisdictional element, when none is required for the principal or the aider and abettor. It properly treats the jurisdictional element as a strict liability element that is designed to permit a federal court to assert jurisdiction, rather than as an element defining culpability. It is also fairest in that it applies the same mental state to all participants, and precludes more culpable participants from taking advantage of the heightened mental states that the bad purpose and purposeful intent approaches require.

It also has the advantage of being a more moderate, "middle of the road" approach. In cases involving purposeful intent or bad purpose offenses, it will increase the burden on the government beyond that required by the knowledge approach. But, in cases involving knowledge offenses, on the other hand, it will decrease the burden below that required by the purposeful intent or bad purpose approaches.

This Article advocates the derivative approach. If bad purpose is required of the principal, it should be required of the accomplice, but only then. If purposeful intent is required of the principal, it should be required of the accomplice, but only then. And, if knowledge is sufficient for the principal, it should be sufficient for the accomplice, but again, only then. If voluntary intoxication is no defense for a principal who commits a general intent crime, it should not be a
defense for the one who told him or her to commit the crime; if it is a
defense for the principal, it should be a defense for the accomplice.

That means, in the ordinary case, that the defendant is an aider and
abettor or a causer only if he or she deliberately (not by mistake or
accident) commits an act that aids and abets (or counsels, commands,
procures, or induces) or causes the principal’s commission of the
offense, and does so with the same mental state as that required of the
principal.

But, in certain aiding and abetting cases, the derivative approach
has to be modified. The approach works particularly well in cases
where the accomplice is substantially involved in the conduct, and
where there is, therefore, no justification for applying a mental state
that differs from that applicable to the principal. When one
participant writes the threatening letter, and the other one mails it, to
the President, there is no reason to apply different mental states just
because the sender technically is the principal and the writer is an
aider and abettor. The approach also works well, regardless of the
substantiality of the accomplice’s involvement, when the underlying
offense is a purposeful intent offense or a bad purpose offense. No
matter how insignificant the act of the accomplice, liability is
appropriate where the defendant acts with either purposeful intent or
bad purpose.

But, for the aider and abettor of a knowledge or lesser intent
offense, in instances where the aider and abettor’s act does not
substantially facilitate the commission of the offense, the derivative
approach will sometimes yield problematic results. As we have seen,
an aider and abettor can be held liable based on a relatively
insignificant act, like the simple pumping of gas by the gas station
attendant. Unlike the causer, who, by definition, must commit an act
substantial enough that it can be said to “cause” or bring about the
commission of the offense,675 the aider and abettor is liable for any act
of facilitation, no matter how insignificant.676 The gas station
attendant who deliberately pumps gas (an act that assists the robbers
in driving to, and then robbing, the bank), knowing what it is that the
robbers are about to do, has acted with general intent, which is all that
is required under the derivative approach to be liable for aiding and
abetting the bank robbery.

It makes sense, therefore, in cases involving knowledge offenses,
where the aider and abettor acts with mere knowledge (and would
normally be guilty under the derivative approach), to confine liability
to cases where the aider and abettor has rendered not just any act of
assistance, but rather one that is substantial, “the prevention of which

675. See supra text accompanying note 108.
676. See supra text accompanying notes 14-15. 105.
makes it more difficult to carry on the illegal activity assisted.\textsuperscript{677} In other words, to be substantial, the act must make it easier for the principal to commit the offense, an effect not ordinarily required with respect to the aider and abettor's act of facilitation.\textsuperscript{678} If the act of assistance is insubstantial in the sense that the principal could easily have obtained the assistance elsewhere (e.g., gone to a different gas station), then liability should not be imposed when the aider and abettor acts with knowledge but not purposeful intent.

We have seen a few cases that have suggested increasing the substantiality of the requisite act when necessary to protect a marginal participant. For example, the Supreme Court in Scales v. United States\textsuperscript{679} quoted an early version of the Model Penal Code adopting the knowledge approach (later rejected by the drafters of the Model Penal Code in favor of the purposeful intent approach), which provided for aiding and abetting liability when the defendant, acting with knowledge that the principal was about to commit a crime, "substantially facilitated its commission."\textsuperscript{680} In another case, Judge Posner intimated that the law of aiding and abetting would eventually jettison the purposeful intent requirement, but compensate for its absence by requiring an act substantial enough such that its prevention would "make[] it more difficult to carry on the illegal activity assisted."\textsuperscript{681}

The Supreme Court in United States v. Dotterweich\textsuperscript{682} took similar steps to protect the marginal aider and abettor in the case of a strict liability offense. In that case, the Court utilized the derivative approach to hold the president and general manager of a corporation strictly liable for aiding and abetting its shipment of misbranded and adulterated drugs. In doing so, however, it spread a wide net of liability. Typically, the mental state, rather than the act of assistance, is what filters out the marginal aider and abettor; the act requirement is usually so minimal that it excludes almost no one. But, by applying the derivative approach and holding the aider and abettor of a strict liability offense guilty without a culpable mental state, the Court effectively eliminated that filter. Consequently, absent some other means of limiting liability, anyone rendering any act of facilitation, including the most marginal employee who played only a minimal role in making, labeling, transporting, storing, loading, or unloading the adulterated drugs, would be liable.

The Supreme Court essentially addressed that concern by elevating


\textsuperscript{678} See supra text accompanying notes 14-15, 105.

\textsuperscript{679} 367 U.S. 203, 225 n.17 (1961).

\textsuperscript{680} See supra text accompanying notes 310-13.

\textsuperscript{681} Zafiro, 945 F.2d at 887; see supra text accompanying note 318.

\textsuperscript{682} 320 U.S. 277 (1943); see supra text accompanying notes 346-63, 596, 599-600.
the significance of the substantiality of the act. One who merely assists in the shipping is not an aider and abettor when it comes to a strict liability offense. Rather, "[t]he offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs." Because the mental state requirement was eliminated, the Court compensated by requiring more substantial involvement by the defendant before aiding and abetting liability could attach.

Finally, the Seventh Circuit, in a "natural and probable consequences" case, also tied the mental state to the substantiality of the act. It reduced the mental state required of the aider and abettor for the consequent offense to foreseeability, but only when the aider and abettor is substantially involved in the events leading up to the commission of the consequent offense. When the aider and abettor's involvement is less than substantial, however, then he or she is not liable for the consequent crime unless acting with knowledge or purposeful intent.

Thus, the cases have already contemplated, and occasionally implemented, an enhanced act requirement when necessary to protect the marginal aider and abettor who acts with no more than knowledge. They have also begun the process of determining what sort of substantial or enhanced act would suffice to provide that protection.

Concomitantly, the cases have also begun contemplating who is the sort of marginal participant that should benefit from a substantial act requirement. For example, in *United States v. Campisi*, the Second Circuit, while advocating the knowledge approach generally, determined that knowledge would be insufficient to protect the aider and abettor whose connection to the principal is tenuous, like that of the defendant in *Peoni*, or the aider and abettor who engages in the routine, lawful sale of goods used by the principal to commit the offense.

Consequently, for the aider and abettor, when the crime is one of general intent, and the defendant is arguably a marginal participant, the trial court, in instructing the jury, should modify the "pure" derivative approach and give an instruction along the following lines:

(The court should first instruct the jury that there must be a guilty principal who actually committed the offense.) If you find that the defendant deliberately committed any act at all that aided or facilitated the commission of the offense, and did so with either a purpose of making the crime succeed or the intent to violate the law, then the defendant is guilty of the offense as if [he/she] had

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684. See *supra* text accompanying notes 405-07.
685. 306 F.2d 308 (2d Cir. 1962); see *supra* text accompanying notes 268-73.
committed it [himself/herself]. If, however, you find that the defendant did not have the purpose of making the crime succeed or an intent to violate the law, but, nonetheless, find that the defendant acted deliberately and with the knowledge that [his/her] act would aid or facilitate the commission of the offense, then you may convict, but only if you find that the defendant's act of facilitation substantially aided or facilitated the commission of the offense. A substantial act is one that makes it easier for the principal to commit the crime. A routine, lawful sale of a commodity readily available to the principal from multiple sources would be an example of an act of facilitation that is not substantial.