

## Reading *Rosemond*

Stephen P. Garvey\*

*In Rosemond v. United States, decided this past term, the Court spoke to the requirements under 18 U.S.C. § 2 for liability as an aider and abettor to the use or carriage of a firearm during a crime of violence or drug trafficking crime in violation of 18 U.S.C. § 924(c). Here I offer my reading of Rosemond. I hope it will be useful to litigants and lower courts (and law professors) as they try to understand what the Court said and didn't say—or maybe should have said differently—as it addressed Rosemond's arguments.*

### INTRODUCTION

Justus Rosemond got into a blue Mazda Protegé. Ronald Joseph got in too. One got in back. The other got in front. Vashti Perez then drove the two to a park in Tooele, Utah. The plan was to sell a pound of marijuana. One of the two prospective buyers got in the back. The deal went bad. The buyer grabbed the pot and made a run for it along with the other buyer. Joseph drew a 9 millimeter semiautomatic handgun and fired. Or maybe it was Rosemond. No one could say for sure. The witnesses disagreed. Perez, Rosemond, and Joseph then gave chase. But the police pulled them over about a mile away.<sup>1</sup>

Rosemond was charged with violating 18 U.S.C. § 924(c).<sup>2</sup> According to the government, Rosemond, “during and in relation to [a] . . . drug trafficking crime[,] . . . use[d] or carrie[d] a firearm,” thereby violating § 924(c).<sup>3</sup> Section 924(c)'s *raison d'être* is of course to encourage those planning on dealing drugs to leave their guns at home. If they don't, then on top of whatever time they get for the underlying drug offense, § 924(c) mandates five more years for using or carrying a gun, seven for brandishing it, and ten for discharging it.

---

\* Professor of Law, Cornell Law School. I thank Joshua Dressler and Sheri Johnson for their always insightful comments and conversation.

<sup>1</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014).

<sup>2</sup> Section 924(c) was originally enacted as part of the Gun Control Act of 1968. Congress has amended it several times over the years and the Supreme Court has decided several cases arising under it. See Fern L. Kletter, Annotation, *Construction and Application of 18 U.S.C.A. § 924(c), Prohibiting Use or Carrying of Firearm in Relation to Crime of Violence or Drug-Trafficking Crime or Possession of Firearm in Furtherance of Such Crimes—United States Supreme Court Cases*, 56 A.L.R. FED. 2D 577 (2014).

<sup>3</sup> 18 U.S.C. § 924(c)(1)(A) (2012). The predicate offense with which Rosemond was charged was possession of marijuana in violation of 18 U.S.C. § 841(a)(1).

Because the government's witnesses disagreed as to who fired the gun, Rosemond was charged as a principal and as an accomplice under 18 U.S.C. § 2(a). The trial court instructed the jury accordingly. The jury convicted, and the trial court added ten years to Rosemond's sentence.<sup>4</sup> The jury's general verdict didn't reveal whether it found Rosemond guilty as a principal or as an accomplice. Rosemond appealed, claiming that the court's instructions on accomplice liability were faulty. The Tenth Circuit affirmed his conviction.<sup>5</sup> The Supreme Court granted certiorari<sup>6</sup> and reversed.<sup>7</sup> The district court's instructions misstated the law of complicity as applied to § 924(c).<sup>8</sup> Justice Kagan wrote for the seven-member majority.<sup>9</sup> Justice Alito wrote an opinion concurring in part and dissenting in part, in which Justice Thomas joined.

Section 2, originally enacted in 1909,<sup>10</sup> speaks in general terms.<sup>11</sup> The Court is obliged to fill in the details. Yet over 100 years later, no one can say with confidence what precisely the government must show to establish complicity under § 2. The Court has through the years gestured in different directions. But I write not to judge. If thoughtful students of the criminal law disagree over what complicity law *should* look like (and they do),<sup>12</sup> the Court's differential gestures

<sup>4</sup> For the other counts on which Rosemond was convicted the judge imposed a four-year sentence.

<sup>5</sup> *United States v. Rosemond*, 695 F.3d 1151, 1156 (10th Cir. 2012).

<sup>6</sup> *Rosemond v. United States*, 133 S. Ct. 2734 (2013).

<sup>7</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1252 (2014).

<sup>8</sup> *Id.* at 1251 (“[T]he District Court erred in instructing the jury, because it did not explain that Rosemond needed advance knowledge of the firearm’s presence.”).

<sup>9</sup> Justice Scalia joined all but footnotes 7 and 8 of the majority opinion. *Id.* at 1240. *See infra* notes 20, 47.

<sup>10</sup> *See Standefer v. United States*, 447 U.S. 10, 18 (1980). The statute was amended in 1948, and again in 1951. For a helpful discussion of the history of § 2, as well as the relationship between § 2(a) and § 2(b), see Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1356–62 (2002).

<sup>11</sup> When I refer to § 2, I mean to refer more specifically to § 2(a): “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” 18 U.S.C. § 2(a).

<sup>12</sup> The academic literature on complicity includes most prominently the following: CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 209–35 (2000); K.J.M. SMITH, *A MODERN TREATISE ON THE LAW OF CRIMINAL COMPLICITY* (1991); John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 *S.C. L. REV.* 237 (2008); Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 *HASTINGS L.J.* 91 (1985) [hereinafter Dressler, *New Solutions*]; Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense*, 5 *OHIO ST. J. CRIM. L.* 427 (2008); R.A. Duff, ‘Can I Help You?’ *Accessory Liability and the Intention to Assist*, 10 *LEGAL STUD.* 165 (1990); John Gardner, *Complicity and Causality*, 1 *CRIM. L. & PHIL.* 127 (2007); Douglas Husak, *Abetting a Crime*, 33 *LAW & PHIL.* 41 (2014); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 *CALIF. L. REV.* 323 (1985); Sanford H. Kadish, *Reckless Complicity*, 87 *J. CRIM. L. & CRIMINOLOGY* 369 (1997) [hereinafter Kadish, *Reckless Complicity*]; Christopher Kutz, *Causeless Complicity*, 1 *CRIM. L. & PHIL.* 289 (2007);

over the years telling us what it *does* look like are understandable (but vexing all the same). Complicity easily confounds.

My aim for now is modest. I offer one reading of the Court's opinion in *Rosemond*. I hope it will be useful to litigants and lower courts (and law professors) as they try to understand what the Court said and didn't say—or maybe should have said differently—as it addressed Rosemond's arguments.

### I. "AN AFFIRMATIVE ACT IN FURTHERANCE OF THE OFFENSE"

The Court's analysis in *Rosemond* begins with the following: "As at common law, a person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent to facilitate the offense's commission."<sup>13</sup> The first element states broadly the *actus reus* needed to render an actor liable as an accomplice; the second states broadly the *mens rea*. Let me refer to an accomplice (or secondary party) as "S" and to a principal (or primary party) as "P."

---

Christopher Kutz, *The Philosophical Foundations of Complicity Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 147 (John Deigh & David Dolinko eds., 2011); Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395 (2007); Rollin M. Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581 (1941); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984); Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351 (1998); Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930); A.P. Simester, *The Mental Element in Complicity*, 122 L.Q.R. 578 (2006); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217 (2000); Gideon Yaffe, *Intending to Aid*, 33 LAW & PHIL. 1 (2014) [hereinafter Yaffe, *Intending to Aid*]; Gideon Yaffe, *Moore on Causing, Acting, and Complicity*, 18 LEGAL THEORY 437 (2012); Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, 15 CRIM. JUST. ETHICS 25 (1996); Sherif Girgis, Note, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460 (2013).

For helpful discussions on complicity doctrine outside the United States, see PARTICIPATION IN CRIME: DOMESTIC AND COMPARATIVE PERSPECTIVES (Alan Reed & Michael Bohlander eds., 2013); Luis Chiesa, *Reassessing Professor Dressler's Plea for Complicity Reform: Lessons from Civil Jurisdictions*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1 (2014); Markus D. Dubber, *Criminalizing Complicity: A Comparative Analysis*, 5 J. INT'L CRIM. JUST. 977 (2007). I'd also recommend the latest English Law Commission report on complicity. See THE LAW COMMISSION, PARTICIPATING IN CRIME, Law Com. No. 305 (May 2007) available at [http://lawcommission.justice.gov.uk/docs/lc305\\_Participating\\_in\\_Crime\\_report.pdf](http://lawcommission.justice.gov.uk/docs/lc305_Participating_in_Crime_report.pdf).

<sup>13</sup> 134 S. Ct. at 1245 (citing 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2, at 337 (2d ed. 2003), and Hicks v. United States, 150 U.S. 442, 449 (1893)). Let me make one small observation about the Court's statement. In many jurisdictions the *actus reus* for accomplice liability is not limited to "affirmative act[s]." The failure to perform a legal duty can also suffice. I'd guess that the Court referred to "affirmative act[s]," not because it wanted to exclude omissions as a basis for accomplice liability, but rather because the "affirmative act" formulation was (more or less) the formulation Rosemond himself offered, see Brief for the Petitioner at 13, 28, *Rosemond v. United States*, 134 S. Ct. 1240 (2014) (No. 12-895), which formulation the government in turn accepted as a correct statement of the law. See Brief for the United States at 14, *Rosemond v. United States*, 134 S. Ct. 1240 (2014) (No. 12-895).

Rosemond and the government agreed that the government needed to prove each of the above elements in order to persuade a jury to convict S as an accomplice. The problem, according to Rosemond, was that the trial court misinstructed the jury in his case when it tried to explain how those elements applied to § 924(c) and thus what the government needed to prove in order to persuade the jury to convict him as a § 924(c) accomplice. Indeed, Rosemond argued that the trial court got it wrong on both counts: it misstated both the *actus reus* and the *mens rea* required to convict him of complicity under § 924(c).

Start with the requisite *actus reus*. Rosemond argued that the jury couldn't find that he'd taken an "affirmative act in furtherance of" violating § 924(c) as an accomplice unless it found that he'd taken an affirmative act in furtherance of P's *use or carriage of a gun*. It wouldn't be enough for the jury to find that he provided aid or encouragement to P to violate § 924(c) in any old way: it had to find that he provided aid or encouragement to P somehow related to the use or carriage of a gun. For example, it wouldn't be enough for the jury to find that he promised to drive the car to the park where the deal was to take place. It had to find that he did something related more directly to the use or carriage of the gun, like giving P the gun, or giving him bullets for it, or telling P he needed to bring a gun, and so on.

The Court rejected Rosemond's argument. Complicity law's "established approach"<sup>14</sup> just didn't require what Rosemond said it did. At first blush Rosemond's argument does indeed look like a non-starter. If one can ever confidently appeal to "hornbook law," I would've said that the hornbook law of complicity requires S to aid or encourage P to commit offense  $\phi$ , but it doesn't require S to aid or encourage P to commit any specific element of  $\phi$ .<sup>15</sup> Moreover, complicity doesn't demand that the aid or encouragement S provides be anything more than trivial. Trivial aid will suffice. So too will aid that makes no causal difference to P's decision to  $\phi$ .<sup>16</sup> *Why* trivial or non-causal aid should suffice to establish the necessary connection between S's action and P's crime such that

---

<sup>14</sup> 134 S. Ct. at 1247.

<sup>15</sup> No surprise that the Court cited one early twentieth century and two late nineteenth century hornbooks in support of the proposition that the "common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part—even though not every part—of a criminal venture." *Id.* at 1246.

<sup>16</sup> *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.05[2][a], at 468 (6th ed. 2012) ("A secondary party is accountable for the conduct of the primary party even if his assistance was causally unnecessary to the commission of the offense."); A.P. SIMESTER ET AL., SIMESTER AND SULLIVAN'S CRIMINAL LAW: THEORY AND DOCTRINE § 7.4(ii), at 213 (5th ed. 2013) ("Although causation need not be shown, a sufficient degree of connection between S's conduct and the *actus reus* of P's offense must be proved."). Not everyone of course agrees that causation (in one sense or another) should be irrelevant to the law of complicity. *See, e.g.*, Gardner, *supra* note 12, at 128 (arguing that accomplices and principals both make a causal difference to wrongdoing but differ in the "types of causal contribution they make"); Dressler, *New Solutions, supra* note 12, at 124–25 (proposing that complicity law should distinguish between causal and non-causal accomplices such that the former are liable to greater punishment than the latter).

P's crime can be imputed to S is theoretically elusive, but the doctrine is what it is. S must do something to aid or encourage P, but he needn't do much.

But if Rosemond's *actus reus* argument was so far afield, why bother making it in the first place? I suspect the answer is simple: Because a number of lower courts had embraced it.<sup>17</sup> But why? Why would they subscribe to an argument whose premise hornbook law nips in the bud? What's going on? When all is said and done, my guess would be that the answer is to be found, not in the structure of complicity law, but in the structure of § 924(c).

Remember that § 924(c) makes it a crime to use or carry a gun during the commission of another crime. A defendant charged with aiding and abetting a § 924(c) violation could thus be charged with aiding and abetting two separate crimes: the predicate crime of violence or drug trafficking crime *and* the § 924(c) violation. The predicate offense consists of all the elements that make it up. The § 924(c) violation (one might think) consists of a single element: using or carrying a firearm. The conclusion follows: an accomplice to a § 924(c) violation must take an affirmative act to aid or encourage P's use or carriage of a firearm. If he doesn't, if he only acts to aid or encourage the predicate offense, then he might be an accomplice to the predicate, but not to a § 924(c) violation.<sup>18</sup> Or so Rosemond argued and several courts of appeals had held.

The Court saw things differently. A § 924(c) predicate offense consists of all the elements that make it up. But § 924(c) isn't a one-element crime. A § 924(c) violation consists of all the elements that make up the predicate *and* the use-or-carry element.<sup>19</sup> Rosemond's *actus reus* argument depended on portraying § 924(c)'s use-or-carry element as a crime unto itself, such that he could be liable as

---

<sup>17</sup> See Brief for the Petitioner, *supra* note 13, at 33–35 (collecting and discussing cases); 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, 786 (1997).

<sup>18</sup> Or perhaps the lower courts in question understood § 924(c) to constitute a single crime but nonetheless believed its use-or-carry element warranted special treatment insofar as a jury finding that a firearm was used or carried would mean an additional term of imprisonment ranging from five to ten years on top of the punishment already assigned to the predicate offense. The government should therefore be required to prove that a § 924(c) accomplice aided or encouraged not only the predicate offense but the use-or-carry element as well. If you regard § 924(c)'s add-on punishment as disproportionate or otherwise unwarranted, you might be sympathetic to such an analysis if only because it narrows § 924(c)'s scope. Sympathy aside, I see no more support in existing doctrine for this analysis than I do for the analysis described in the text.

<sup>19</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1247 (2014).

Rosemond . . . could assist in § 924(c)'s violation by facilitating either the drug transaction or the firearm use (or of course both). In helping to bring about one part of the offense (whether trafficking drugs or using a gun), he necessarily helped to complete the whole. And that ends the analysis as to his conduct. It is inconsequential, as courts applying both the common law and § 2 have held, that his acts did not advance each element of the offense; all that matters is that they facilitated one component.

*Id.* at 1247.

The Court described § 924(c) as a "combination crime," i.e., one crime consisting of the elements of the predicate offense combined with the use-or-carry element. See *id.* at 1248.

a § 924(c) accomplice only if he aided or encouraged P's commission of that single-element crime, i.e., only if he did something to aid or encourage P's use or carriage of a gun. But once § 924(c) is portrayed as one crime—once the use or carriage of a gun becomes just one element among others—the premise upon which Rosemond built his *actus reus* argument disappears. Once § 924(c) is understood as a single crime with multiple elements, all that remained to dispatch the argument was to apply complicity law's "established approach," according to which aiding or encouraging any element is good enough.<sup>20</sup>

## II. "WITH THE INTENT TO FACILITATE THE OFFENSE'S COMMISSION"

Rosemond's move from *actus reus* to *mens rea* put him on firmer doctrinal ground. Rosemond and the government agreed that complicity under § 2 required the government to prove that S acted "with the intent to facilitate the offense's commission."<sup>21</sup> Disagreement set in thereafter.

### A. Purpose or Knowledge?

Rosemond argued that in order to prove he acted with the intent to facilitate a § 924(c) violation the government had to prove that he *wanted* P to use or carry a gun during the predicate offense, not merely that he realized P was or would be using or carrying one. In the language of the Model Penal Code, Rosemond

---

<sup>20</sup> Because any P who commits a § 924(c) offense necessarily commits a § 924(c) predicate offense, the so-called "natural and probable consequences" doctrine would (if applied) hold any S who was an accomplice to P's § 924(c) predicate offense liable for his § 924(c) offense provided the § 924(c) offense was a natural and probable consequence of the § 924(c) predicate offense. See LAFAYE, *supra* note 13, § 13.3(b), at 361 ("The established rule, as it is usually stated by courts and commentators, is that accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided."); Weiss, *supra* note 10, at 1427–32 (describing lower court decisions relying in one way or another on the natural and probable consequences doctrine to analyze challenges to convictions under § 924(c)).

The *Rosemond* majority expressed "no view" on whether the "natural and probable consequence" doctrine constitutes "an exception to the general rule" that "intent must go to the specific and entire crime charged" because "no one contends that a § 924(c) violation is a natural and probable consequence of simple drug trafficking." 134 S. Ct. at 1248 n.7. This language can be read in at least two ways. It might mean that none of the parties contended that a § 924(c) violation is a natural and probable consequence of the simple drug trafficking charge involved in Rosemond's case. Or it might mean (more broadly) that no one could reasonably contend that a § 924(c) violation is a natural and probable consequence of any simple drug trafficking offense.

Justice Scalia withheld his consent from footnote 7, as he did from footnote 8. I'm guessing he abstained from footnote 7 either because he worried it might erroneously be construed as a wholesale rejection of the natural and probable consequences doctrine, or because he believed one *could* (depending on the facts) contend that a § 924(c) violation is a natural and probable consequence of simple drug trafficking.

<sup>21</sup> *Rosemond*, 134 S. Ct. at 1245.

argued that the government had to prove that when he aided or encouraged P his *purpose* was for P to use or carry a gun, and not merely that he *knew* P was or would do so.<sup>22</sup> The government insisted to the contrary that knowledge was enough.

Rosemond supported his argument with Judge Learned Hand's canonical statement on the *mens rea* required for complicity set forth in *United States v. Peoni*.<sup>23</sup> Peoni sold counterfeit bills to a fellow named Regno, who sold them in turn to Dorsey. "The question [was] whether Peoni was guilty as an accessory to Dorsey's possession."<sup>24</sup> After reciting several "definitions" touching on the *actus reus* of complicity,<sup>25</sup> Judge Hand pronounced:

It will be observed that all these definitions have nothing whatever to 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 he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless "abet"—carry an implication of purposive attitude toward it.<sup>26</sup>

---

<sup>22</sup> MODEL PENAL CODE § 2.02(2)(a) (1985). I should note for the record that the MPC defines "purposely" in one way when the element with respect to which that kind of culpability applies is a "nature of . . . conduct or a result" element and in another way when the element is an "attendant circumstance" element. Compare § 2.02(2)(a)(i), with § 2.02(2)(a)(ii). I should also note that the MPC defines "purposely" as to an attendant circumstance element and "knowingly" as to an attendant circumstance element in a similar (but not identical) way. Compare § 2.02(2)(a)(ii), with § 2.02(2)(b)(i).

<sup>23</sup> *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938). For reasons not entirely clear to me, courts (including the Supreme Court in *Rosemond*) and commentators routinely describe the language in Judge Hand's *Peoni* opinion as "canonical." But *why Peoni* enjoys that status (beyond so often being so declared) is puzzling. The opinion takes up only three pages in the *Federal Reporter*, its statement of the facts raises as many questions as it answers, and precisely what it holds is subject to reasonable disagreement. On the last point, see, for example, Weiss, *supra* note 10, at 1424 (Contrary to the conventional wisdom, "*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."); Yaffe, *Intending to Aid*, *supra* note 12, at 2 ("Federal courts in the United States, and many state courts as well, have done an admirable job since [*Peoni* was decided] of pretending as though they know exactly what Hand meant."). I'd guess that Judge Hand's reputation, together with the power of repetition, has something (maybe a lot) to do with it.

<sup>24</sup> *Peoni*, 100 F.2d at 401 (emphasis added). The question more specifically was whether Peoni was an accomplice to the crimes Dorsey committed, *i.e.*, "counterfeiting national bank notes" (codified in 1938 at 18 U.S.C. § 263) and "uttering forged obligations" (codified in 1938 as 18 U.S.C. § 265). See *id.* at 401–02.

<sup>25</sup> Although it seems little remarked upon, Judge Hand's opinion purports to extract an account of complicity's *mens rea* requirement from its *actus reus* requirement.

<sup>26</sup> *Peoni*, 100 F.2d at 402.

Under this rule, Judge Hand continued, “Peoni was not an accessory to Dorsey’s possession; . . . it was of no moment to him whether Regno passed [the bills] himself, and so ended the possibility of further guilty possession, or whether he sold them to a second possible passer.”<sup>27</sup> Peoni wasn’t liable as an accomplice to Dorsey’s possession unless he wanted Dorsey to come into possession of the counterfeit bills, but Peoni didn’t care one way or the other what Regno did with them.

As Rosemond construed this language (language the government also embraced), S could be liable as an accomplice under § 2 only if the government proved that when he rendered aid he wanted P to commit crime  $\phi$ , or in other words, that his purpose was for P to commit that crime. In order to prove liability as an accomplice to a § 924(c) violation under *Peoni*, the government would thus need to show that S wanted P to use or carry a firearm. Rosemond claimed that the judge’s instruction to the jury in his case nowhere made this requirement clear to the jury. He therefore deserved a new trial.

The Court agreed with Rosemond that *Peoni*’s statement of the law was indeed “*the canonical formulation* of . . . [the] state of mind” needed for accomplice liability under § 2,<sup>28</sup> noting that the Court itself had “appropriated” it in later cases.<sup>29</sup> The Court also noted that the intent required to hold S liable as an accomplice “must go to the specific and *entire crime* charged—so here, to the *full scope* (predicate crime plus gun use) of § 924(c).”<sup>30</sup> On one plausible reading the Court is here saying that liability as an accomplice under § 2 requires the government to prove that when S rendered aid or encouragement he intended P to commit crime  $\phi$ , where intent is limited to purpose (pursuant to *Peoni*) and where purpose must extend to each of  $\phi$ ’s material elements (pursuant to the Court’s observation that “intent must go to the specific and *entire crime* charged”).

So Rosemond wins, right? Nope. In the very next paragraph the Court says: “We have previously found that intent requirement [i.e., the *mens rea* requirement described in *Peoni*] satisfied when a person actively participates in a criminal venture with full *knowledge* of the circumstances constituting the charged offense.”<sup>31</sup> After describing the cases in which the Court had “previously [so] found,”<sup>32</sup> as well as the holding of “several Courts of Appeals . . . that the unarmed driver of a getaway car had the requisite intent to aid and abet armed bank robbery if he ‘knew’ that his confederates would use weapons,” the Court concluded: “So for purposes of aiding and abetting law, a person who actively participates in a

---

<sup>27</sup> *Id.* at 402–03.

<sup>28</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) (emphasis added).

<sup>29</sup> *See, e.g., Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (quoting *Peoni*, 100 F.2d at 402).

<sup>30</sup> *Rosemond*, 134 S. Ct. at 1248 (emphasis added).

<sup>31</sup> *Id.* (emphasis added).

<sup>32</sup> *Id.* at 1249 (citing *Pereira v. United States*, 347 U.S. 1 (1954), and *Bozza v. United States*, 330 U.S. 160 (1947)).



criminal scheme knowing its extent and character intends that scheme's commission."<sup>33</sup>

Is the Court now saying that liability as an accomplice under § 2 requires the government to prove that when S rendered aid or encouragement he intended P to commit crime  $\phi$ , where intent includes knowledge (pursuant to the cases in which the Court had previously found knowledge to suffice), and where such knowledge must extend to each of  $\phi$ 's material elements? So it would seem. Indeed, the Court states its holding (at the outset of the opinion) thus:

[W]hen [the Government] accuses a defendant of aiding or abetting [a violation of § 924(c)] . . . [w]e hold that the Government makes its case by proving that the defendant actively participated in the underlying drug trafficking or violent crime with advance *knowledge* that a confederate would use or carry a gun during the crime's commission.<sup>34</sup>

The Court's jurisprudence on the mental state or states required for accomplice liability under § 2 is no model of clarity, and *Rosemond* looks as if it does little to improve that state of affairs.<sup>35</sup> On the one hand, the Court calls *Peoni*'s embrace of purpose as the mental state required for accomplice liability "canonical." On the other hand, the Court's holding embraces knowledge as sufficient.

But perhaps the rule in *Peoni* and the Court's holding in *Rosemond* can be reconciled. Let me offer three strategies for doing so. Each narrows the scope of the *Peoni* rule, thereby rendering it consistent with *Rosemond*'s holding. The first relies on a distinction between conduct elements and circumstance elements; the second on a distinction between "non-aggravating" elements and "aggravating" elements; and the third on a distinction between "active participants" and "incidental facilitators."

---

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1243 (emphasis added). Rory Little understands *Rosemond*'s "bottom (if not uncomplicated) line" to be: "[A] criminal helper must have 'foreknowledge' of all the elements of the crime he is charged with." Rory Little, *Opinion Analysis: Justice Kagan Writes a Primer on Aiding and Abetting Law*, SCOTUSBLOG (Mar. 6, 2014, 9:04 AM), <http://www.scotusblog.com/2014/03/opinion-analysis-justice-kagan-writes-a-primer-on-aiding-and-abetting-law/>.

<sup>35</sup> Justice Alito put the point mildly when he said that "some tension" exists in the Court's "case law on the *mens rea* required to establish aiding and abetting." 134 S. Ct. at 1253 (Alito, J., concurring in part and dissenting in part). Having noted the tension, Justice Alito went on to say that "because the difference between acting purposely (when that concept is properly understood) and acting knowingly is slight, this [tension] is not a matter of great concern." *Id.* I have to differ, at least insofar the distinction is alleged to be analytically "not a matter of great concern." Suffice it to say that the distinction forms part of the Model Penal Code's much-regarded hierarchy of kinds of culpability, not to mention being at the heart of the long-standing debate over what is or should be the *mens rea* required for accomplice liability.

## 1. Conduct Elements and Circumstance Elements

Statements describing the *mens rea* required for accomplice liability often assume that one mental state applies to the entire offense  $\phi$  from which S derives liability. Witness the Court's statement in *Rosemond*: "[A] person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense (2) with the *intent* of facilitating the offense's commission." The *mens rea* for complicity is thus portrayed as a single mental state ("intent") the object of which is a single offense  $\phi$  ("the offense").

But that analysis ignores that fact that P's offense  $\phi$  consists of different elements. We can break  $\phi$  down into its conduct elements, result elements (if any), and attendant-circumstances elements.<sup>36</sup> We can then ask what, if any, mental state the law of complicity does (or should) require S to possess as to each of  $\phi$ 's elements at the time he provides P with aid or encouragement.

*Peoni* is widely understood to require purpose with respect to  $\phi$ .<sup>37</sup> But does *Peoni*'s insistence on purpose apply to *all*  $\phi$ 's elements? If so, then *Rosemond*'s holding is inconsistent with *Peoni*. *Peoni* would have required the government to prove (as *Rosemond* said) that S wanted (i.e., that it was his purpose) at the time he helped P for P to use or carry a gun, but the Court held that the government need only prove that S knew P was or would be using or carrying a gun.

But suppose *Peoni* doesn't require S's purpose to be that each of  $\phi$ 's elements obtain when he helps P. Suppose *Peoni* requires that S wanted P to perform the *conduct* constitutive of  $\phi$ -ing, but so far as the other elements of  $\phi$  are concerned, i.e.,  $\phi$ 's result and circumstance elements, *Peoni* requires only that S have had whatever mental states he would've had to have had if he'd been charged as a principal. S must want P to engage in the conduct constitutive of  $\phi$ , but S otherwise need only possess whatever mental state or states (if any) that  $\phi$  itself attaches to its various result and attendant circumstance elements.<sup>38</sup>

---

<sup>36</sup> For a persuasive argument to the effect that the MPC's analytical framework should include ulterior *mens rea* elements (e.g., specific intent elements) as a separate category, see J.J. Child, *The Structure, Coherence and Limits of Inchoate Liability: The New Ulterior Element*, 34 LEGAL STUD. 537 (forthcoming Dec. 2014) available at <http://onlinelibrary.wiley.com/store/10.1111/lest.12026/asset/lest12026.pdf?v=1&t=i12kcdse&s=72a6ff254372886652476a152247f20b465bc11e>.

<sup>37</sup> See, e.g., LAFAVE, *supra* note 20, § 13.2(e), at 352 ("[T]he *Peoni* rule is today generally accepted to mean that one does not become an accomplice by an intentional act of assistance or encouragement merely because he knows that such act will facilitate a crime.").

<sup>38</sup> Construed in this way, the *Peoni* rule comes close to the Model Penal Code's rule on the *mens rea* for complicity. Section 2.06 of the Code is commonly interpreted to require S to have as his purpose that P perform the conduct constituting the offense  $\phi$  to be imputed to S and to have whatever mental state  $\phi$  otherwise requires as to its result elements. The mental state S must have toward  $\phi$ 's attendant circumstance elements is left to "resolution by the courts." MODEL PENAL CODE AND COMMENTARIES § 2.06 cmt. 6(b), at 311 n.37 (1985). Two of the most able students of the Model Penal Code have nonetheless maintained that the "policy arguments against elevation of culpability as to a result element are equally applicable to circumstance elements." PAUL H.

Now suppose we characterize § 924(c)'s "use or carry" element as an attendant circumstance. One might say that the conduct constituting a § 924(c) violation is the conduct constituting its predicate offense, and one circumstance attending that conduct must be the use or carriage of a firearm. Suppose too that a defendant can be convicted as a principal for violating § 924(c) as long as he knew he was using or carrying a gun.<sup>39</sup> It would thus suffice for liability as a § 924(c) accomplice for S to have known that P was or would be carrying a firearm. *Peoni's* rule and *Rosemond's* holding are thus happily reconciled.<sup>40</sup>

The problem with this strategy is its premise. It can bring *Peoni* and *Rosemond* into harmony only if "us[ing] or carr[ying] a firearm" can fairly be characterized as an attendant circumstance. But I doubt it can be. Insofar as it describes something an actor *does*, the "us[ing] or carry[ing]" element is better characterized as a conduct element. Or maybe even better as part conduct and part attendant circumstance. The actor must *do* something *with* something, where the something done is "us[ing] or carr[ying]" (conduct), and where the something used or carried is a "firearm" (attendant circumstance).<sup>41</sup> Anyhow, describing the use-or-carry element as an attendant circumstance *simpliciter* just doesn't fit, and if it doesn't fit, the distinction between conduct and circumstance elements can't put *Peoni* and *Rosemond* together again.<sup>42</sup>

---

ROBINSON & MICHAEL T. CAHILL, *CRIMINAL LAW* 244 (2d ed. 2012). For a contrary argument to the effect that the "mens rea standard of the completed crime is not relevant to the mens rea standard of complicity," see Yaffe, *Intending to Aid*, *supra* note 12, at 30.

<sup>39</sup> See Weiss, *supra* note 10, at 1383 n.195 (collecting lower court cases in support of this supposition).

<sup>40</sup> Limiting *Peoni's* purpose requirement such that it extends only to  $\phi$ 's conduct elements would appear consistent with *Peoni's* facts (my understanding of which is limited to the description provided in Judge Hand's opinion). Even if we assume that *Peoni* somehow aided or encouraged Dorsey's possession when he sold the counterfeit bills to Regno, the government couldn't prove he did so wanting Dorsey to do whatever he needed to do to come into possession of the bills, i.e., the government couldn't prove that *Peoni's* purpose at that time was for Dorsey to perform the conduct constituting the crime of possessing counterfeit bills.

<sup>41</sup> How best to characterize § 924(c)'s "uses or carries a firearm" element within the MPC's analytical framework is of course one example of a more general problem. For the classic discussion of the problem and a proposed fix, see Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 *STAN. L. REV.* 681, 706–09, 719–25 (1983).

<sup>42</sup> Although I have difficulty seeing how § 924(c)'s "use or carries" element could on the merits be characterized as a circumstance element, I *can* see how one might be inclined to suggest that it *should* be so characterized "in an effort to justify *Rosemond's* holding," Kit Kinports, *Rosemond, Mens Rea, and the Elements of Complicity*, 52 *SAN DIEGO L. REV.* (forthcoming 2015) (manuscript at 33), i.e., in an effort to read *Rosemond* in such a way that its holding is consistent with *Peoni's* rule.

## 2. “Aggravating” Elements and “Non-Aggravating” Elements

In response to Rosemond’s claim that the government should be obliged to prove that his purpose was for P to use or carry a gun, the Court said:

What matters for purposes of gauging intent . . . is that the defendant has chosen, with full knowledge, to participate in the illegal scheme—not that, if all had been left to him, he would have planned the identical crime. . . . The law does not, nor should it, care whether he participates with a happy heart or a sense of foreboding. Either way he has knowingly elected to aid in the commission of a peculiarly risky form of offense.<sup>43</sup>

In the next paragraph the Court adds:

A final, metaphorical way of making the point: By virtue of § 924(c), using a firearm at a drug deal ups the ante. A would-be accomplice might decide to play at those perilous stakes. Or he might grasp that the better course would be to fold his hand. What he should not expect is the capacity to hedge his bets, joining in a dangerous criminal scheme but evading its penalties by leaving use of the gun to someone else. Aiding and abetting law prevents that outcome, so long as the player knew the heightened stakes when he decided to stay in the game.<sup>44</sup>

These passages suggest another way to reconcile *Peoni*’s rule with *Rosemond*’s holding. An accomplice to P’s § 924(c) predicate offense has chosen to “play the game.” He wants P to commit a crime. Having so chosen, he forfeits (or so one could argue) any standing he might otherwise have had to complain that the game is not exactly the one he wanted to play, i.e., that P commits the predicate offense with a gun when S would have preferred P to leave the gun behind. Having acted with the purpose that P commit the predicate offense, S lacks standing to complain when P commits not only the § 924(c) predicate offense but the § 924(c) violation as well, at least if S realized P was or would be using or carrying a gun.<sup>45</sup>

---

<sup>43</sup> *Rosemond*, 134 S. Ct. at 1250.

<sup>44</sup> *Id.*

<sup>45</sup> Although the Court refused to endorse or reject the natural and probable consequences doctrine, *see supra* note 20, that doctrine is (I would argue) rooted in the same general principle upon which the Court built its argument for rejecting Rosemond’s claim that purpose should apply to the use-or-carry element: An actor liable for one wrong forfeits some ground or another upon which to complain that he is being held accountable for another or greater wrong resulting therefrom. The natural and probable consequences doctrine and the Court’s argument are (so far as I can tell) both children of the canon law doctrine “*versari in re illicita imputantur omnia quae sequuntur ex*

Here is another way to put the point. The use or carriage of a gun aggravates and transforms a § 924(c) predicate offense into a § 924(c) violation. When P violates § 924(c), S has no standing to complain if the law holds him accountable for that offense, provided S wanted P to commit the predicate offense and believed that P was or would be using or carrying a gun during its commission. If we limit *Peoni*'s purpose requirement to non-aggravating elements of offense  $\phi$ , but permit knowledge to suffice as to any aggravating elements, then *Peoni*'s rule would no longer conflict with *Rosemond*'s holding. Purpose would apply to all of § 924(c)'s non-aggravating elements, but knowledge would suffice for § 924(c)'s aggravating use-or-carry element. *Rosemond*'s holding would thus keep faith with *Peoni*'s rule.

### 3. "Active Participants" and "Incidental Facilitators"

Here once again is the Court's statement of its holding: "We hold that the Government makes its case [against a defendant as a § 924(c) accomplice] by proving that the defendant *actively participated* in the underlying drug trafficking or violent crime with the advance knowledge that a confederate would use or carry a gun during the crime's commission."<sup>46</sup> One might imagine that when the Court said that a § 924(c) accomplice must "actively participate[]" in the predicate offense it meant only that he must satisfy complicity's traditional *actus reus* requirement.

That reading would be plausible—except for footnote 8.<sup>47</sup> Having stated as a general proposition that "for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission," the Court appended the following footnote:

---

*delicto.*' (One who traffics in the illicit is responsible for all wrongs that ensue)." Kadish, *Reckless Complicity*, *supra* note 12, at 376 n.19.

Indeed, the logic of the Court's argument in the passage cited in the text could be extended further than the Court allows. Once S has decided to "play the game," i.e., once he has aided or encouraged P to commit the § 924(c) predicate with the purpose that P commit that predicate, why should it matter whether or not he knows P is or will be using or carrying a gun? Why not say: "You decided to play the game. You didn't know the game involved a gun? Sorry. You should have known, even if you didn't." I'm not endorsing this line of thought. I mention it only to suggest that the Court's response to *Rosemond*'s plea for purpose bears at least a family resemblance to the natural and probable consequences doctrine on which it "express[ed] no view," *Rosemond*, 134 S. Ct. at 1248 n.7, and that the Court failed to explain why it limited the logic of its argument in the way it did.

<sup>46</sup> *Rosemond*, 134 S. Ct. at 1243 (emphasis added).

<sup>47</sup> Footnote 8 was the other footnote Justice Scalia refused to join. I'd guess once again that he didn't want to be on record as supporting what could become a new branch of jurisprudence under § 2 distinguishing between "active participants" and "incidental facilitators." Moreover, he may have detected nothing in the language of § 2 to support any such distinction.

We did not deal in these cases [i.e., the cases the Court cited in support of the above-mentioned general proposition], nor do we here, with defendants who *incidentally facilitate* a criminal venture rather than actively participate in it. A hypothetical case is the owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used. We express no view about what sort of facts, if any, would suffice to show that such a third party has the intent necessary to be convicted of aiding and abetting.<sup>48</sup>

Footnote 8 “express[ed] no view” on what “sort of facts” it would take to render “an incidental facilitator” liable as an accomplice. But the implication is hard to miss. If S was an “active participant,” then knowingly facilitating P’s commission of offense  $\phi$  will suffice to render S liable as an accomplice, but if S was a (mere) “incidental facilitator,” then he can’t be liable as an accomplice unless when he (incidentally) aided or encouraged P his purpose in so doing was for P to commit offense  $\phi$ . The *mens rea* required to render S complicit would thus depend on his *actus reus*: a smaller *actus reus* demands a larger *mens rea*. Knowledge is enough to nab the active participant, but purpose is needed to pinch the incidental facilitator.<sup>49</sup>

Recall that Peoni sold counterfeit bills to Regno, who in turn sold them to Dorsey. Peoni was charged as an accomplice to Dorsey’s possession (not Regno’s). Peoni’s connection to Dorsey was once removed. Peoni looks more like the gun dealer in the Court’s hypothetical than he does Rosemond.<sup>50</sup> Rosemond was an “active participant” in P’s violation of § 924(c). He got in the car, drove to the park, and was present throughout the deal, presumably ready to lend a helping hand if needed. If Peoni can fairly be characterized as an incidental facilitator, *Peoni*’s purpose requirement might be limited to accomplices within that class. If so, then once again, *Peoni* and *Rosemond* can happily co-exist. *Peoni*

---

<sup>48</sup> 134 S. Ct. at 1249 n.8 (emphasis added).

<sup>49</sup> The distinction between active participants and incidental facilitators is of course reminiscent of another distinction that has been proposed in an effort to reform complicity law: the distinction between substantial and trivial aid. Trivial aid requires more *mens rea*; substantial aid requires less. Indeed, if a participant qualifies as “active” insofar as the aid he provides is substantial, and if a facilitator qualifies as “incidental” insofar as the aid he provides is trivial, then the distinction between substantial and trivial aid maps onto the distinction between the active participants and incidental facilitators. Yet insofar as the distinction between substantial and trivial aid is a proposal to *reforming* complicity law, I have a hard time seeing how it could be said that any such distinction is part of the law of § 2, inasmuch as § 2 “must be read ‘against its common-law background.’” *Limelight Networks v. Akamai Technologies*, 134 S. Ct. 2111, 2119 (2014) (citing *Standefer v. United States*, 447 U.S. 10, 19 (1980)).

Another common proposal would link the requisite *mens rea* to the seriousness of P’s crime. If P’s crime were sufficiently serious (like murder), it would suffice to make S an accomplice if he provided aid or encouragement knowing what P had in mind; otherwise, purpose would be needed.

<sup>50</sup> See Weiss, *supra* note 10, at 1397 (describing the “connection” between Peoni and Dorsey as “especially tenuous”).

involved an incidental facilitator for whom liability as an accomplice requires purpose. Rosemond was an active participant for whom knowledge suffices.<sup>51</sup>

*B. Failure of Proof or Affirmative Defense?*

The final issue is the one on which the majority and Justice Alito parted ways. Recall the Court's holding one last time: "We hold that the Government makes its case [against a defendant as a § 924(c) accomplice] by proving that the defendant actively participated in the underlying drug trafficking or violent crime with the *advance* knowledge that a confederate would use or carry a gun during the crime's commission."<sup>52</sup> I've so far ignored the Court's insistence that S's knowledge be "advance" knowledge. Let me turn to it now.

What does the Court mean by "advance knowledge"? You might image it means that S isn't liable as a § 924(c) accomplice unless the government can prove that S realized P would be carrying a gun *before* P starts to commit the predicate offense. But that wouldn't be right. As Justice Alito observed, S has "advance" knowledge (per the majority) if he first learned that P was using or carrying a gun during the predicate offense, and if he "realistically could have opted out of the crime" but didn't.<sup>53</sup> He lacks such knowledge if he first learned that P was using or carrying a gun during the predicate offense but lacked a realistic opportunity to opt out.

Yet why insist on "advance" knowledge at all? The case of the unwitting S holds the answer. Imagine an S who aids P in the commission of a drug-trafficking offense and wholeheartedly wants P to commit that crime. What he *doesn't* want is for P to commit that crime with a gun. Indeed, imagine P assures S that he'll leave his gun at home. But (of course) he brings it with him anyway, and S realizes P is packing only in the midst of the deal. What's S to do? If he backs out he might get killed. If he carries on someone else might get killed. S calculates that the wiser course of action is to play along. He thus continues to provide aid knowing that P is carrying a gun. Is our unwitting S a § 924(c) accomplice?

The majority and Justice Alito each believed that the unwitting S should have *some* way to try to escape liability. The majority relied on its advance-knowledge requirement (and thus on a failure of proof "defense") to supply the needed relief. Justice Alito would have relied on necessity or duress (and thus on an affirmative defense) to supply it. I want to suggest that the two sides are really talking past one another. Justice Alito misunderstands the majority's logic (because the

---

<sup>51</sup> Peoni's involvement with Regno's offense would probably amount to active participation: Peoni was the one who sold him the fake bills (whether or not Peoni ever had possession of the bills himself). But the *Peoni* court never addressed the *mens rea* required to hold Peoni liable for Regno's illicit possession, although the opinion can fairly be read to at least leave open the possibility that knowledge would have been enough. See *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938).

<sup>52</sup> *Rosemond*, 134 S. Ct. at 1243 (emphasis added).

<sup>53</sup> *Id.* at 1253 n.1 (Alito, J., concurring in part and dissenting in part).

majority muddles it) and so concludes that an affirmative defense is the only way out for the unwitting S.<sup>54</sup>

Begin with the majority's failure of proof defense. How does the majority imagine an unwitting S might save his skin? According to the majority:

In such a circumstance [as an unwitting S finds himself], a jury is entitled to find that the defendant intended only a drug sale—that he never intended to facilitate, and so does not bear responsibility for, a drug deal carried out with a gun. A defendant manifests that greater intent, and incurs the greater liability of § 924(c), when he chooses to participate in a drug transaction knowing it will involve a firearm; but he makes no such choice when that knowledge comes too late for him reasonably to act upon it.<sup>55</sup>

What's the majority trying to say in this passage? Here are two possibilities. It might be saying a jury can find that an unsuspecting S lacks a mental state required to make him a § 924(c) accomplice inasmuch as he didn't *want* P to be armed even though he continued to provide aid after learning that P was armed. But the majority says earlier in its opinion that S is liable as a § 924(c) accomplice as long as he *knows* that P is armed. This reading would therefore render the majority opinion internally incoherent.<sup>56</sup>

On a more charitable reading, the majority is saying that the unwitting S is indeed liable *all else being equal* if he continues to provide aid once he realizes that P is armed. But if S learns that P is armed for the first time in the middle of the deal, then all else may not be equal. The unwitting S might continue to provide aid if he sees no realistic way out. He might believe that his continued participation is the *best* (but not only) way to ensure that no one gets hurt.<sup>57</sup> But

---

<sup>54</sup> Justice Alito's rhetoric got overheated here. He described the majority's opinion as an "unprecedented alteration of the law of aiding and abetting . . . [or] of the law of intentionality generally," and as a "radical step" that "fundamentally alters the prior understanding of mental states that form the foundation of the substantive criminal law." *Id.* at 1253, 1254 (Alito, J., concurring in part and dissenting in part). I have my doubts.

<sup>55</sup> *Id.* at 1251.

<sup>56</sup> If I understand him correctly, Justice Alito construed the majority in this way when he said: [T]he Court, having refrained on pages 1248–49 of its opinion from deciding whether aiding and abetting requires purposeful, as opposed to knowing conduct, quickly and without explanation jettisons the "knowing" standard and concludes that purposeful conduct is needed. This is a critical move because if it is enough for an alleged aider and abettor simply to know that his confederate is carrying a gun, then the alleged aider and abettor in the Court's hypothetical case (who spots the gun on the confederate's person) unquestionably had the *mens rea* needed for conviction. *Id.* at 1254–55 (Alito, J., concurring in part and dissenting in part).

<sup>57</sup> The majority missed the important difference between an unwitting S who believes his continued participation is the *best* way to avoid a greater harm and the unwitting S who believes his



once he realizes that P is armed, he may no longer *want* P to carry on with the conduct constituting the predicate offense. He may no longer care one way or the other whether P carries on with the deal.

On this reading the unwitting S is not liable as a § 924(c) accomplice because the *actus reus* and *mens rea* required for complicity fail to concur. The unwitting S satisfies the *actus reus* for accomplice liability (he continues to provide aid or encouragement to P), and he satisfies one mental state required for such liability (he knows that P is armed). But he lacks another required mental state: He no longer wants P to engage in the conduct constituting the predicate offense. Lacking a required mental state, he lacks complicity. No requirement of “advance knowledge” is needed to reach this result.

But now suppose the unwitting S believes the *only* way to avoid getting himself or someone else killed is for P to finish the deal. His realization that P is armed would leave intact his desire for P to finish the deal. His reason for wanting P to carry on has changed. Maybe he wanted the deal to go through before he learned about the gun because he wanted whatever benefit he was supposed to get as a result. Having learned about the gun he now wants the deal to go through because (we are assuming) he sees no other way to avoid greater harm. His only defense will therefore be an affirmative one, and as Justice Alito observed, the most likely candidates will be necessity or duress.<sup>58</sup>

---

continued participation is the *only* way to avoid such harm. *See id.* at 1251 (“finishing the sale might be the *best or only* way to avoid [a greater harm]”) (emphasis added). Justice Alito missed it too.

<sup>58</sup> Justice Alito’s opinion can be read to suggest that the only “practical” difference between affording the unwitting S an affirmative defense or a failure of proof defense is that the defendant bears the burden of proving the former and the government bears the burden of disproving the latter (i.e., the burden of proving the elements of the offense). The underlying standard is the same. The defendant would need to prove that he chose the lesser harm, or the government would need to prove that he chose a greater harm.

That suggestion would be misleading. The majority opinion requires the government to prove that S wanted P to carry on with the predicate offense, i.e., it requires proof of a mental state. Justice Alito would require the defense to prove the elements constituting the defenses of necessity or duress. The evidence used to discharge one burden might overlap with that used to discharge the other, but the objects of proof are analytically distinct. Although neither defense has been codified in federal law, nor has the Supreme Court yet provided an authoritative statement of the elements of either defense, here are some doctrinal obstacles an unwitting S might face when he tries to raise a necessity or duress defense that he wouldn’t face if he tried to raise a failure of proof defense.

First, if necessity is available only “where *physical forces* beyond the actor’s control rendered illegal conduct the lesser of two evils,” *United States v. Bailey*, 444 U.S. 394, 410 (1980) (dicta) (emphasis added), what “physical forces” render the unwitting S’s conduct the lesser evil? Second, if duress is available only if the defendant commits the crime “under an unlawful and imminent *threat* . . . of death or serious bodily injury,” *Dixon v. United States*, 548 U.S. 1, 5 n.2 (2006) (dicta) (emphasis added), what if no one ever “threatened” the unwitting S? Third, if neither defense is available if the defendant “recklessly or negligently placed” himself in the situation giving rise to the claim of necessity or duress, *id.* (dicta), won’t the government be quick to emphasize the fact that the unwitting S got himself into trouble in the first place because he wanted P to commit the § 924(c) predicate offense?

Again, no real disagreement exists between the majority and Justice Alito. Both agree that S is not liable as a § 924(c) accomplice, unless at the time S provides aid or encouragement to P he knows that P is or will be armed. They disagree on what else is going on in the mind of the unwitting S. The majority imagines an unwitting S who continues to provide aid because he believes that P's going through with the deal is the best way to avoid greater harm but no longer wants P to go through with the deal. The majority's unwitting S thus lacks a mental state needed to render him complicit. Justice Alito imagines an unwitting S who continues to provide aid because he believes that P's going on with the deal is the only way to avoid greater harm and so wants P to go through with the deal. Justice Alito's unwitting S satisfies all the elements needed to render him complicit. His only way out is an affirmative defense.<sup>59</sup>

Neither side is wrong. It all depends on what happens in S's mind when he realizes P is packing. An unwitting S should have both defenses available to him. If he can prove he no longer wanted P to proceed, the government will have failed to carry its prima facie case. If he wanted P to carry on despite his new-found knowledge, he can still prevail if he satisfies the elements of an affirmative defense.

#### CONCLUSION

The Court in *Rosemond* faithfully answered the question presented and in so doing settled some of the issues surrounding the requirements under § 2 for liability as a § 924(c) accomplice. But *Rosemond* left the most pressing question open. We still can't say with any precision just what in general the government must show was going on in the mind of one person in order to punish him for the criminal wrongs of another. We shouldn't fault the Court for leaving that question unresolved. For one thing it wasn't (immediately) presented. For another the

---

<sup>59</sup> Justice Alito believed the majority's analysis confused intent and motive (or ulterior intent). The majority (according to Justice Alito) believed that an unwitting S who continues to provide aid because he wants to avoid a greater harm (his motive) doesn't really want P to carry on with the predicate offense and so lacks the intent (understood as purpose) for him to carry on. But (as Justice Alito rightly said) the "intent to undertake some act is of course perfectly consistent with the motive of avoiding adverse consequences which would otherwise occur." *Rosemond*, 134 S. Ct. at 1255. The majority denied the charge. See *id.* at 1251 n.10. So far as I can tell the two sides are again talking past one another.

If S wants to avoid a greater harm and believes the only way to achieve that end is for P to carry on then he will necessarily intend (have as his purpose) that P carry on. Far from negating any intent for P to carry on, S's motive rationally entails that intent. P's carrying on is a necessary means to S's end. All S can therefore do is advance an affirmative defense. The charge that the majority has confused motive and intent might thus be defensible. But if S wants to avoid a greater harm and believes the best (but not the only) way to achieve that end is for P to carry on then he may or may not intend that P carry on. P's carrying on is not a necessary means to S's end. S can therefore advance a failure of proof defense. The charge that the majority has confused motive and intent would thus be unfounded.

answer might turn out to be that the question makes no sense. Maybe *nothing* can make one person responsible for the misdeeds of another.<sup>60</sup>

---

<sup>60</sup> See Husak, *supra* note 12, at 57 (“[N]o analysis of the conditions under which the act of the principal can be attributed to the aider will turn out to be defensible.”).

