A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under § 924©

Tyler B. Robinson  
*University of Michigan Law School*

Follow this and additional works at: [https://repository.law.umich.edu/mlr](https://repository.law.umich.edu/mlr)

Part of the [Courts Commons](https://repository.law.umich.edu/mlr/vol96/iss3/6), [Criminal Law Commons](https://repository.law.umich.edu/mlr/vol96/iss3/6), and the [Legislation Commons](https://repository.law.umich.edu/mlr/vol96/iss3/6)

**Recommended Citation**

Available at: [https://repository.law.umich.edu/mlr/vol96/iss3/6](https://repository.law.umich.edu/mlr/vol96/iss3/6)

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under § 924(c)

Tyler B. Robinson

Firearms are common tools of the violent-crime and drug-trafficking trades. Their prevalence is reflected in the frequency with which federal prosecutors charge, juries apply, and courts review 18 U.S.C. §924(c). That provision imposes heavy penalties for either the use or carrying of a firearm "during and in relation to any crime of violence or drug trafficking crime," in addition to the punishment provided for the underlying violent or drug-related offense. A conviction under section 924(c) carries at the very least a mandatory, consecutive five-year sentence, even when the underlying crime already provides enhanced punishment for use of a dangerous weapon during its commission. The sentence increases to twenty years for a second or subsequent conviction, and further in-


3. See 18 U.S.C. § 924(c)(1). For example, a five-year term of imprisonment under § 924(c) may be added to a sentence under 18 U.S.C. § 2113 for armed bank robbery, even though § 2113(d) already enhances the sentence for bank robbery from a 20-year to a 25-year maximum if the defendant "puts in jeopardy the life of any person by the use of a dangerous weapon or device." 18 U.S.C. § 2113(d) (1994). At least one district court has concluded that a consecutive § 924(c) sentence on top of a sentence enhancement provided by the predicate statute constitutes double jeopardy — punishment twice for the same offense — unless the elements of a § 924(c) violation encompass a different set of actions than do the elements of a § 2113(d) violation. See United States v. Foreman, 914 F. Supp. 385, 387 (C.D. Cal. 1996). The Supreme Court has firmly established, however, that if there is clear legislative intent to impose two separate, cumulative punishments for the same conduct, there is no double jeopardy violation. See Missouri v. Hunter, 459 U.S. 359, 368-69 (1983).

Congress expressly provided such intent with respect to § 924(c) following two Supreme Court decisions, handed down in 1978 and 1980, that held § 924(c) inapplicable to cases in which the predicate felony statute contained its own sentence enhancement provision for the use of a dangerous weapon. See Busic v. United States, 446 U.S. 398 (1980); Simpson v. United States, 435 U.S. 6 (1978). In 1984 Congress responded by expressly amending the language of § 924(c) to ensure that all persons who commit Federal crimes of violence, including those crimes set forth in statutes which already provide for enhanced sentences for their commission
creases in specified increments — to a maximum of thirty years for a first offense and life without parole for a subsequent conviction — depending on the type of firearm employed, and on whether the firearm is equipped with a silencer or muffler. Accordingly, section 924(c) draws a broad range of underlying criminal activity within the scope of additional mandatory penalties whenever a firearm is involved.

The breadth and severity of section 924(c)'s application to violent and drug-related crimes makes it all the more important that an adequate check be placed on the statute's application to accomplices to the predicate offense. Federal courts have failed, however, to elucidate a clear or consistent rule of accomplice liability under section 924(c). Under 18 U.S.C. § 2 anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense is punishable as if he had committed the crime himself. Judge Learned Hand provided in United States v. Peoni what has become the definitive rule for accomplice liability under this statute: a defendant must "associate himself" with the criminal venture of the principal, and "participate in it as in something that he wishes to bring about, that he seek[s] by his action to make . . . succeed." Although courts addressing accomplice liability under section 924(c) consistently recite Judge Hand's formulation of section 2 in Peoni, they do so reflexively, echoing the language of the rule with insufficient attention to the theoretical rationale behind it.

The Peoni rule has thus become disconnected, body from spirit, as courts have relied on the same statement of the rule to articulate two divergent standards for determining when a defendant is an accomplice to a principal's use or carrying of a firearm during a vio-

6. 100 F.2d 401 (2d Cir. 1938).
7. 100 F.2d at 402; see also United States v. Ledezma, 26 F.3d 636, 641 (6th Cir. 1994) (citing Peoni and noting that all federal circuits have adopted Judge Hand's interpretation of § 2).
8. See, e.g., United States v. Delpit, 94 F.3d 1134, 1150-51 (8th Cir. 1996); United States v. Cruz-Paulino, 61 F.3d 986, 998 (1st Cir. 1995); United States v. Lowery, 60 F.3d 1199, 1202 (6th Cir. 1995); United States v. Ortega, 44 F.3d 505, 507 (7th Cir. 1995); United States v. Monroe, 990 F.2d 1370, 1373 (D.C. Cir. 1993); United States v. Langston, 970 F.2d 692, 705 (10th Cir. 1992); United States v. Horton, 921 F.2d 540, 543 (4th Cir. 1990); United States v. Smith, 832 F.2d 1167, 1170 (9th Cir. 1987); United States v. Reichert, 647 F.2d 397, 401 (3d Cir. 1981); United States v. Alvarez, 610 F.2d 1250, 1253 (5th Cir. 1980); see also United States v. Medina, 32 F.3d 40, 45 (2d Cir. 1994) (citing, but not reciting, Peoni).
lent or drug-trafficking crime. Both standards require that in the course of the predicate offense — the crime of violence or drug trafficking during which the principal uses or carries a firearm — the accomplice must know that the principal is armed. Because the language of section 924(c) does not provide for a specific mens rea element, courts infer that knowledge of the facts constituting the offense establishes the required level of culpability. As knowledge constitutes the requisite criminal intent of the principal violator of section 924(c), knowledge must also be established on the part of the accomplice, the logic being that in order for the latter to merit the same level of punishment as the former, he must share the same level of culpability.

The two standards diverge, however, in the level of participation necessary to support an inference that the defendant, in the lan-

9. Knowledge can only be inferred through circumstantial evidence, for it is impossible to prove directly what was subjectively in the mind of the defendant. Thus, although courts uniformly embrace the knowledge requirement, they may differ as to the extent of circumstantial evidence sufficient to support an inference that the defendant knew the principal had a firearm. Compare United States v. DeMasi, 40 F.3d 1306, 1316 (1st Cir. 1994) (holding that an accomplice’s surveillance of a Brink’s truck, which was accompanied by two armed guards during its scheduled stop, supported an inference that the defendant knew that a planned robbery of the truck would require the use of weapons in order to subdue the guards) with United States v. Hamblin, 911 F.2d 551, 558-59 (11th Cir. 1990) (rejecting an inference that an accomplice to an armed bank robbery must have known that the principal would use a gun because it would be hard for him to rob the bank without one).

10. See, e.g., United States v. Santeramo, 45 F.3d 622, 623-24 (2d Cir. 1995) ("[K]nowledge of the facts constituting the offense ordinarily is implicit in a criminal statute that does not expressly provide a mental element."); United States v. Wilson, 884 F.2d 174, 177-79 (5th Cir. 1989); see also Michael J. Riordan, Using a Firearm During and in Relation to a Drug Trafficking Crime: Defining the Elements of the Mandatory Sentencing Provision of 18 U.S.C. § 924(c)(1), 30 DUQ. L. REV. 39, 44-46 (1991). When knowledge of the facts constituting the offense is the requisite level of mens rea necessary to find a defendant guilty, the offense is said to be a "general intent" crime, meaning the level of culpability does not rise to a "specific intent" on the part of the defendant to purposely bring about the facts constituting the offense. Sometimes the common law or statutory definition of a particular crime requires the former level of culpability, while other crimes require the latter. Certain other crimes specify an even lesser level of culpability, such as "recklessness," meaning the defendant acted out of reckless disregard for the facts constituting the commission of the offense, or "negligence," meaning the defendant unreasonably failed to recognize the facts constituting the offense. See generally MODEL PENAL CODE § 2.02 (1962). Negligence, recklessness, knowledge, and purpose describe increasing levels of culpability such that a purposive intent satisfies a mens rea standard of knowledge, recklessness, or negligence, while knowledge of the facts constituting the offense satisfies a recklessness or negligence standard, but not purpose, and so on. See MODEL PENAL CODE § 2.02.

11. See, e.g., United States v. Powell, 929 F.2d 724, 727 (D.C. Cir. 1991) (rejecting a "natural and probable consequences" standard for accomplice liability under § 924(c) in favor of a knowledge requirement, as the second "puts the accomplice on a level with the principal, requiring the same knowledge for both"); cf. United States v. Batt, 811 F. Supp. 625, 628 (D. Kan. 1993) (concluding that "[a] negligence standard would not support the imposition of criminal liability on the principal, and it should likewise not support accomplice liability"); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 6.8, at 158 (1986) (criticizing a natural-and-probable consequences rule of accomplice liability because it would "permit liability to be predicated upon negligence even when the crime involved requires a different state of mind" (footnote omitted)).
guage of Peoni, participated in the principal's section 924(c) offense "as in something that he wishes to bring about, that he seek[s] by his action to make . . . succeed."12 Under one standard — which this Note will refer to as the broad standard of liability — the defendant who knows that the principal is armed can be held liable as an accomplice to the section 924(c) violation when he acts with the intention to assist or influence the commission of the underlying predicate crime.13 Under the second — or narrow — standard, however, courts require more specifically that a defendant act with the intention directly to facilitate the use or carrying of the gun by the principal, beyond mere participation in the predicate crime that underlies the principal's section 924(c) offense.14

For purposes of illustrating this distinction, imagine that two men, P and A, rob a bank. Both men enter the bank, and P holds up the teller and customers at gunpoint while A goes behind the teller window and stuffs a bag with cash. P and A are both guilty of bank robbery.15 P also violates section 924(c).16 A clearly knew that P used a firearm in the commission of the robbery in which he participated, and, for purposes of this hypothetical, we can assume that P and A agreed ahead of time that P would hold everyone at gunpoint. Under the broad standard of accomplice liability, A aided and abetted P's use of the firearm by participating in and facilitating the bank robbery, knowing that P used the firearm to further the robbery. Under the narrow standard, however, A did not directly facilitate the use of the firearm merely by stuffing bags with money and therefore did not aid and abet P's section 924(c)

12. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
13. See, e.g., United States v. DePace, 120 F.3d 233, 238-39 (11th Cir. 1997) (holding accomplices who carried firearms liable for § 924(c) violations on the basis of their participation in an underlying scheme to steal large quantities of marijuana from undercover DEA agents); United States v. Simpson, 979 F.2d 1282, 1285 (8th Cir. 1992) (finding the defendant's conduct, which was integral to the predicate crime of bank robbery, sufficient to hold her liable as an accomplice to the principal's use of a firearm during the robbery); Powell, 929 F.2d at 729 (finding that an accomplice can only be held liable under § 924(c) if he "knew to a practical certainty" that the principal would be using or carrying a firearm).
14. See, e.g., United States v. Bancalari, 110 F.3d 1425, 1429 (9th Cir. 1997) (holding that the defendant "must have knowingly and intentionally aided and abetted the use or carrying of the firearm during and in relation to the" predicate crime of kidnapping); United States v. Salazar, 66 F.3d 723, 729 (5th Cir. 1995) (holding that to convict the defendant as an accomplice to the use of a gun during a prison escape, the government must prove that the defendant knew about the gun and took some action designed to assist the principal's use of the gun); United States v. Luciano-Mosquera, 63 F.3d 1142, 1150 (1st Cir. 1995) (holding that the defendant accomplice must have known about the gun and taken "some action in relation to the [firearm] that was intended to cause the firearm to be carried during and in relation to the drug trafficking offense").
15. See 18 U.S.C. § 2113(a) (1994) ("Whoever, by force and violence, or by intimidation, takes ... any property or money ... belonging to, or in the care, custody, control, management, or possession of, any bank ... [s]hall be fined under this title or imprisoned not more than twenty years, or both.").
violation, even though he knew that $P$ would use a firearm in order to commit the robbery.\textsuperscript{17}

Whatever strikes the reader as the more intuitively appealing rule of liability in the above hypothetical, both standards are problematic in that neither holds true to the rule of accomplice liability set out in \textit{Peoni} — at least not all of the time. As presently conceived,\textsuperscript{18} the broad standard threatens overinclusive liability in certain circumstances, while the narrow standard may be underinclusive. Additional hypotheticals demonstrate these defects. Under the broad standard, $A$, who participated in a simple hand-to-hand drug deal that, in and of itself, had nothing to do with using or carrying a firearm so far as he was concerned, can nevertheless be convicted of aiding and abetting the carrying of the gun that co-dealer $P$ carried to the deal. $A$ is considered an accomplice to $P$’s section 924(c) violation under this broad standard if he participated in the drug transaction merely aware of and able to benefit from the gun’s presence, even though it was exclusively $P$’s actions and intentions that determined that a firearm had any relation to the transaction.\textsuperscript{19} Under \textit{Peoni}, however, because $A$ does not act intentionally to bring about $P$’s carrying of the firearm, $A$ should \textit{not} be held liable as an accomplice. Thus, the broad standard may be overinclusive relative to \textit{Peoni}.

On the other hand, the narrow standard may be underinclusive of the \textit{Peoni} rule. $A$, who masterminded and organized a plan to commit armed robbery knowing that firearms would be integral to effect its commission and fully intending — although not expressly instructing — that they be used, could nevertheless successfully insulate himself from section 924(c) liability. He could do so by remaining comfortably at home while his subordinates $P$ and $Q$ execute the plan with the implicit understanding that they will have to use their own guns to pull it off. $A$’s ability to evade accomplice liability in this case similarly neglects the \textit{Peoni} rule.\textsuperscript{20}

\textsuperscript{17} If additional facts demonstrated, however, that $A$ had provided the gun for $P$ to use, or that it had been $A$’s idea to use a gun in the first place, $A$ might be said to have assisted or influenced $P$’s use of the firearm and then could be held liable as an accomplice to the § 924(c) offense under the narrow standard as well.

\textsuperscript{18} The standards “as conceived” are not to be confused with the standards “as applied.” In applying the standards, courts readily, although not universally, conform conceptually flawed rules to intuitively just results, and vice versa. See \textit{infra} note 106. But this is no answer for failing to articulate a reasoned rule of liability, for if it were, there would be no reason for a rule of law at all — we would simply entrust courts to provide ad hoc, intuitively appealing outcomes.

\textsuperscript{19} See, e.g., United States v. Morrow, 977 F.2d 222, 230-31 (6th Cir. 1992) (en banc), discussed \textit{infra} text accompanying notes 74-82.

\textsuperscript{20} See, e.g., United States v. Medina, 32 F.3d 40, 45-47 (2d Cir. 1994), discussed \textit{infra} text accompanying notes 107-14.
This Note neither fully rejects nor singly embraces either standard of liability. It seeks, rather, to define a realm of circumstances under which each respective standard permits a court properly to infer a purposive intent on the part of an accomplice to "bring about" the principal's use or carrying of a firearm in violation of section 924(c). On another level, then, the object is to revitalize the language of Peoni — to which courts applying inconsistent standards consistently claim allegiance — with a clear and uniform meaning. Toward that end, this Note advocates a context-responsive standard of accomplice liability under section 924(c), whereby the participation required of the defendant to aid and abet the firearm offense responds to the circumstances of the principal's "use" or "carrying" of the firearm during a predicate violent or drug-trafficking crime.

This Note proceeds cautiously. The divergent standards courts currently apply reflect confusion over, and a shortage of reflection on, the dual mens rea requirement of complicity law as applied to the multilayered structure of section 924(c)'s proscription against "use" or "carrying" of a firearm in connection with a second, underlying predicate offense. This Note therefore endeavors to fully develop the building blocks of the analysis in their own right before moving on to the design of a new accomplice liability regime under section 924(c). Part I reflects on the nature of complicity doctrine21 and suggests that under the language of Peoni, an accomplice is punishable to the same extent as the principal only when (1) both share the same mens rea with respect to the commission of the principal's offense, and (2) the accomplice acts with the purpose to assist or influence the principal to commit the acts constituting that offense. Part II dismantles section 924(c) into its component parts of "carrying" or "use" and sets forth two distinct contexts to which divergent standards of accomplice liability might independently apply. In light of the Peoni rule's intentional act requirement discussed in Part I, Parts III and IV then advance different standards of accomplice liability in the "carrying" and "use" contexts, as defined in Part II. Part III argues that section 924(c)'s "carrying" prong should require application of the narrow standard of liability under which a defendant must directly facilitate the principal's carrying of the firearm in order to aid and abet section 924(c). Part IV suggests that section 924(c)'s "use" prong permits application of the broad standard for establishing accomplice liability in certain circumstances, but demands application of the narrow standard in others. This context-responsive application of the two different standards leads to a consistent and unified rule of liability that is faithful to Judge Hand's formulation of complicity in Peoni. This

21. Complicity refers to the act and intent that render one an accomplice.
Note concludes with a consideration of the overriding all-or-nothing nature of complicity in punishing the accomplice as a principal, and identifies the need for greater sensitivity to context in order to render an unwieldy doctrine more docile, and, consequently, more just.

I. INTERPRETING THE LAW OF COMPLICITY

This Part explicates the doctrine of accomplice liability as formulated in Peoni in order to inform the fashioning of an appropriate standard of aiding and abetting under section 924(c). Section I.A explains the derivative nature of complicity and suggests how this informs a critical distinction between the mens rea of accomplice and principal toward the principal's crime, and the mental element required of the accomplice toward his own conduct in order to punish him on a level with the principal. This distinction has important implications for the rule of complicity under section 924(c): the accomplice must know that the principal uses or carries a gun during the predicate crime, but must also act intentionally to assist or influence him to do so. Section I.B explores the role of the intentional act requirement in triggering accomplice liability.

Complicity is a difficult doctrine conceptually because it embodies a unique rule of criminal responsibility that imposes the same punishment on different individuals — principal and accomplice — according to different sets of acts and different criminal states of mind. The doctrine is still more difficult to apply to section 924(c), as that statute defines an offense of "carrying" or "using" a firearm only in relation to a second, underlying predicate violent or drug-trafficking offense. As a result of the many actors, actions, and intentions at play, it is all too easy to confuse who is doing what, and why. The sections that follow attempt to distinguish and then relate the elements of act and intent concerning the predicate crime to those concerning the section 924(c) offense. A central feature of this project is that the contours of the latter are defined in terms of the former.

A. Derivative Responsibility and Accomplice Intent

Accomplice liability under 18 U.S.C. § 2 holds a person criminally responsible for acts that he assists or influences another party in performing.22 This puts an unusual spin on criminal responsibil-
ity. The criminal law is rooted, in part, in the retributive principle that blame is justly deserved only for, and in proportion to, the harms that one causes by his or her own voluntary acts.\textsuperscript{23} Accomplice liability, by contrast, imposes criminal responsibility on one person for the voluntary acts of another. Liability is in this sense derivative. Although liability under section 2 requires a separate, individually voluntary act of influence or assistance by the accomplice, the accomplice is not considered culpable for a separate crime of influencing or assisting the principal; rather his act makes him derivatively responsible for the principal’s crime as a matter of law.\textsuperscript{24} The accomplice is punished as if he were the principal, but then only as a function of his own act of influence or assistance, which would not, standing alone, constitute the commission of the crime for which he is punished.\textsuperscript{25}

Notwithstanding certain finer theoretical deficiencies,\textsuperscript{26} the derivative nature of accomplice liability underscores an important distinction in the law of complicity between the mental state required

\textit{supra}, at 342-43. Because these two generalized headings provide a more manageable account of the list of actions encompassed by 18 U.S.C. § 2, they will be used as a shorthand for the language of § 2 throughout this Note.


\textsuperscript{24} See Pereira, 347 U.S. at 9-10 (citing Nye & Nissen, 336 U.S. at 618 (noting that the theory that “‘one who aids, abets, counsels, commands, induces, or procures the commission of an act is as responsible for that act as if he committed it directly’ . . . is well engrained in the law” (citing the trial court’s jury instructions))); United States v. Simpson, 979 F.2d 1282, 1285 (8th Cir. 1992); United States v. Pino-Perez, 870 F.2d 1230, 1236-37 (7th Cir. 1989); Joshua Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem, 37 Hastings L.J. 91, 97-98 (1985).

\textsuperscript{25} For further discussion of the derivative nature of accomplice liability, see Kadish, \textit{supra} note 22, at 337-42. Kadish identifies two basic outcomes of this derivative relationship. First, a secondary actor generally cannot be held liable unless the principal actually committed the wrongdoing. \textit{See id.} at 338. Two secondary implications follow from this point: (a) a secondary actor cannot be held liable for aiding and abetting a crime unless that crime was actually committed; and (b) a secondary actor cannot be held liable for aiding and abetting a crime committed by the principal if the principal incurs no liability upon himself, for example when a principal feigns intent to commit the crime precisely in order to ensnare his accomplice in the crime. Second, derivative liability allows a secondary actor to be held liable as an accomplice for aiding and abetting another to commit a crime that the secondary actor is not himself capable of committing. \textit{See id.} at 338-39.

\textsuperscript{26} The derivative concept of accomplice liability is not without conceptual flaws. For example, if accomplice liability is derivative of the principal’s liability, it follows that the level of liability imposed on the former could not exceed that of the latter. Yet, as Kadish argues, the accomplice who cold-bloodedly provokes the principal to kill in the heat of passion ought to incur greater liability than the principal. \textit{See} Kadish, \textit{supra} note 22, at 340. Kadish suggests three situations in which derivative complicity doctrine fails:

[w]here the primary party is not culpable and therefore incurs no guilt that the accomplice can be made to share; where the principal is guilty, but of a lesser crime than the secondary party deserves to be held for; and where the secondary party risks but does not intend the unlawful actions of the primary party. \textit{Id.} at 369. Although the reader should be aware of these deficiencies, fuller discussion is beyond the designs of this Note. For a more thorough examination of these issues, see \textit{id.} at 340-42.
of the accomplice toward the principal's commission of the offense, and that required of the accomplice toward his own act in furtherance of the principal's commission of the offense. The federal standard for accomplice liability, embodied in Judge Learned Hand's Peoni rule, recognizes this distinction.

In United States v. Peoni, the defendant Peoni sold counterfeit bills to Regno, who then sold the same bills to Dorsey, all three of whom knew that the bills were counterfeit. Peoni was convicted on three counts of possessing counterfeit money; one count for his own possession, and two more counts deriving from Regno and Dorsey's possession of the bills. The Second Circuit reversed, holding that Peoni could not be held liable for Dorsey's possession because Peoni had no "purposive attitude" toward Dorsey's subsequent possession of the bills after Regno. In other words, once Peoni sold the bills to Regno, Regno was free to dispose of the bills as he chose and might just as well have passed the bills himself than have sold them to a second possible passer. The court stated the rule of accomplice liability to demand that the accomplice "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."

Later cases have understood the "association" requirement of Peoni to mean that the defendant accomplice must possess the same mental state with respect to the elements constituting the principal's crime that is required to convict the principal for the offense. Thus, whether the crime committed calls for specific purposive intent, knowledge of the facts constituting the offense, or simply recklessness or negligence to convict the principal, the accomplice must also have that same mental state toward the principal's commission of the crime.

With respect to the accomplice's own conduct, however, the language of Peoni requires that the accomplice intentionally act to facilitate the principal's crime — that he affirmatively "seek by his

27. 100 F.2d 401 (2d Cir. 1938).
28. See 100 F.2d at 401.
29. See 100 F.2d at 402.
30. See 100 F.2d at 402-03.
31. 100 F.2d at 402.
33. More precisely, the accomplice must have at least the same level of culpability as the principal. Of course, an accomplice might have a higher level of culpability than the principal with respect to the principal's crime and still qualify as complicitous toward its commission. See supra note 10.
action to make it succeed."³⁴  Beyond sharing the principal’s level of culpability toward the elements constituting the principal’s crime — which may vary depending on the crime in question — the accomplice must, in all cases, purposively intend that his own actions influence or assist the principal to commit the acts constituting that offense.³⁵  As noted by commentators on complicity theory, this intentional act requirement is independent of, and additional to, the mens rea required toward the offense of the principal.³⁶  Thus section 924(c), under which knowledge of the facts constituting the offense provides the requisite level of mens rea, results in two different standards of culpability for the accomplice’s state of mind: one toward the principal’s conduct, and another toward his own conduct in assisting the principal. The accomplice must share in the principal’s knowledge that he uses or carries a gun during and in relation to a crime of violence or drug trafficking, he also must perform some act with the purposive intent that it influence or assist the principal’s knowing use or carrying of the firearm. A secondary party who merely knows that his actions will assist or influence the principal’s commission of a crime, or who acts recklessly or negligently with respect to a risk that his actions will do so, cannot be held liable as an accomplice.³⁷

The intentional act requirement of complicity has two important implications in the section 924(c) context. First, this requirement dictates that a secondary actor should not be held liable as an accomplice for crimes that go beyond the conduct that the secondary actor intended to assist or influence.³⁸  Thus, where the principal uses a gun to commit an assault but the secondary actor merely seeks by his action to assist in the commission of an unarmed assault, the latter cannot be deemed an accomplice to the armed assault of the former because he does not associate himself with the

³⁴ Peoni, 100 F.2d at 402; see also EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 18.01, at 692 (4th ed. 1992) (explaining that before a defendant may be held responsible for aiding and abetting others in the commission of a crime, the government must prove beyond a reasonable doubt that the defendant acted with the intention of causing the crime charged to be committed); LAFAVE & SCOTT, supra note 11, § 6.7, at 143-48; Kadish, supra note 22, at 347-49.

³⁵ See Kadish, supra note 22, at 346-48.

³⁶ See id. at 349; LAFAVE & SCOTT, supra note 11, § 6.7, at 136.

³⁷ See LAFAVE & SCOTT, supra note 11, § 6.7, at 145-48. Kadish suggests that the intentional act requirement of criminal accomplice liability operates similarly to a manifestation of consent to liability under principles of civil agency law. The intention to further the acts of another serves to identify the secondary actor with the principal actor’s conduct. If liability resulted for acts that are not intentionally, but only knowingly, in furtherance of the criminal acts of another, fear of criminal liability may constrain people from engaging in otherwise lawful conduct merely on account of their awareness of what other people do. See Kadish, supra note 22, at 353-55.

³⁸ See Kadish, supra note 22, at 348, 350.
use of the gun. The second implication is that because the intention required for accomplice liability — to assist the principal in committing the crime — focuses precisely on the end commission, the secondary actor can still be held liable as an accomplice if the principal should use different means to that end. Thus, if the secondary actor intends by his actions to assist the principal commit an armed assault, and the principal unexpectedly brandishes a gun instead of a knife, the secondary actor is still liable as an accomplice to the armed assault that he intended by his actions to assist. This still leaves open the question, however, of the extent or degree of intentional assistance or influence necessary for courts to hold that actor liable as an accomplice under section 924(c).

B. Facilitative Acts

There is no decisive or affirmative standard governing the threshold actus reus requirement for complicity, and virtually any act of influence or assistance will suffice. Once it is established that the accomplice bears the requisite criminal intent, courts may find that even minimal and trivial contributions qualify as facilitation of the crime. This is because the law of complicity is centrally concerned with the accomplice's intent to contribute. Returning to the derivative nature of complicity, it is the principal's commission of the offense, and not the acts of assistance or influence, for which the accomplice is punished. When the accomplice seeks by his actions to contribute to the principal's crime, he voluntarily identifies himself with it and effectively adopts it as if his own. Knowing contribution, while indicative of an acceptance or resignation toward the principal's conduct, does not show that the accomplice affirmatively embraced the principal's offense. Only when the accomplice's own conduct manifests an intent to further the criminal acts of the principal will the law then impute those acts to him.

This is not to say that the acts of the accomplice would be irrelevant if courts somehow could be positive of an intent to assist the principal without them. The function of the facilitative act is twofold: to evidence intent, and to manifest a willingness to act on that

39. See id. at 350.
40. See id. at 350-51.
41. The question remains whether and when the accomplice to such an armed assault should be held liable as an accomplice under § 924(c) for the principal's introduction of a gun into the crime. For analysis of that question, see infra Part IV.
42. See, e.g., United States v. Bennett, 75 F.3d 40, 45 (1st Cir. 1996) ("[O]nce knowledge on the part of the aider and abettor is established, it does not take much to satisfy the facilitation element."); Dressler, supra note 24, at 102.
43. See supra notes 22-26 and accompanying text.
44. See Dressler, supra note 24, at 109-10; Kadish, supra note 22, at 354-55.
intent. The law does not punish thoughts alone. It imputes the acts of a principal to an accomplice only when the latter both intends to assist or influence the former and demonstrates a willingness to act on that intent, even though the acts may not have causally, but merely probably, contributed to their intended result. It is both the thought and the effort that count. The relevant question then becomes when purposive intent can be inferred on the part of an accomplice within the respective contexts of "use" or "carrying" of a firearm by the principal violator of section 924(c).

II. ANATOMY OF SECTION 924(c)

Section 924(c) criminalizes either the "carrying" or "use" of a firearm, "during and in relation to any crime of violence or drug trafficking crime." This Part breaks down section 924(c) into its component "use" and "carrying" prongs, and explores the meaning courts have constructed for these two terms and the requirement that the act of "use" or "carrying" occur "during and in relation to" the predicate crimes covered by the statute. Section II.A explains


46. Unlike the principal's own liability for committing the offense, accomplice liability requires no causal relationship between the accomplice's intentional acts in furtherance of the crime and the principal's ultimate commission of it. See Dressler, supra note 24, at 99; Kadish, supra note 22, at 357. Therefore, it is sufficient that the accomplice's assistance or influence merely encourages or makes it easier for the principal to commit the crime, although the crime may well have been committed as it was and when it was, without the aid of the accomplice. See LaFave & Scott, supra note 11, § 6.7, at 140-41. Even so, no accomplice liability attaches to attempted assistance or influence that is totally ineffectual and unknown to the principal, because acts unknown to the principal simply could not have assisted or influenced him in the commission of the offense. See Kadish, supra note 22, at 358-59. Professor Kadish thus summarizes the rule as one of probability, attaching liability to acts of assistance or influence that "could have contributed to the criminal action of the principal." Id. at 359.


48. In 1984 Congress amended the language of § 924(c) to provide "during and in relation to" as a requisite nexus between the "use" or "carrying" of a firearm and the predicate crime. See S. REP. No. 98-225, supra note 3, at 313. This language replaced the term "unlawfully" as qualifying "carrying" or "use" in the commission of a federal felony. See S. REP. No. 98-225, supra note 3, at 314 n.10. The revised language was designed to preclude application of the statute to situations in which the firearm's presence, although unlawful for reasons independent of § 924(c), was merely coincidental to the crime. See S. REP. No. 98-225, supra note 3, at 314 n.10; see also Riordan, supra note 10, at 43-47. Consistent with Congress's design, the Supreme Court has interpreted the "in relation to" element to require that the knowing use or carrying of the gun at least facilitated or had the potential of facilitating the predicate offense. See Smith v. United States, 508 U.S. 223, 238 (1993). While Congress introduced the "during and in relation to" requirement as a separate statutory element in its own right, the Supreme Court and lower appellate courts have subsequently further refined its meaning in the context of discussing the proper meanings of "use" and "carrying." See infra sections IIA and B.
how the Supreme Court redefined the meaning of "use" under section 924(c) in 1995 to exclude mere possession or storage of a firearm and to require active employment of the weapon in the course of a predicate violent or drug-trafficking crime. Section II.B analyzes the definition of "carrying" that has emerged in the wake of the Supreme Court's insistence on a nonsuperfluous definition for "use" and highlights the critical fact that the two terms address mutually exclusive sets of cases. Thus, while the active employment of a firearm presents an operative factor in the predicate crime, the "carrying" of a firearm does not. This contextual distinction will have important implications for the ultimate question addressed in Parts III and IV: when courts may infer a purposive intent on the part of an accomplice to the predicate crime to assist or influence a principal's violation of section 924(c).

A. "Use" Defined

In Bailey v. United States,49 the Supreme Court undertook to clarify the meaning of "use" under section 924(c), a question that had become a "source of much perplexity in the courts," producing "conflict both in the standards ... articulated ... and in the results ... reached."50 The Court reinvigorated the meaning of "use" to require "active employment" of a firearm by the defendant that is "calculated to bring about a change in the circumstances of the predicate offense."51 In so doing, the Court explicitly created a definitional distinction between "use" and "carrying" such that the two terms would apply to separate kinds of cases.52

Defendants Bailey and Robinson had each been found guilty of section 924(c) violations relating to their respective convictions on federal drug offenses.53 The Court of Appeals for the D.C. Circuit had consolidated the two cases and affirmed both convictions under section 924(c)'s "use" prong. In interpreting "use" the D.C. Circuit applied an "accessibility and proximity" test and held that "'one uses a gun ... whenever one puts or keeps the gun in a particular place from which one (or one's agent) can gain access to it if and

50. 116 S. Ct. at 505 (citations omitted).
51. 116 S. Ct. at 508.
52. See 116 S. Ct. at 507 (rejecting the government's reading of "use" that is "of such breadth that no role remains for 'carry' ").
53. Bailey was pulled over by police for minor moving violations. A search of the car's interior revealed one round of ammunition and 30 grams of cocaine in the passenger compartment, and the police found cash and a loaded 9mm handgun in the trunk. Robinson was arrested after she sold crack cocaine to an undercover police officer out of her apartment. In executing a search warrant on the premises, police discovered an unloaded .22-caliber pistol and several grams of crack inside a locked trunk in the bedroom closet. See 116 S. Ct. at 503-04.
when needed to facilitate a drug crime.'"54 The Supreme Court unanimously reversed, declining to endorse an interpretation of "use" so broad that it would leave no meaningful role for "carrying" as an alternative basis of liability under the statute.55 Quoting Judge Williams' dissent from the appellate opinion, the Court argued that the test formulated by that court was "'either so broad as to assure automatic affirmance of any jury conviction or, if not so broad . . . unlikely to produce a clear guideline.'"56 The Court reasoned that if Congress had intended the statute to reach mere "storage" or "possession" of a firearm as in the case of Bailey and Robinson, it would have provided language to that effect.57 In the same vein, the Court assumed that the language of the statute would not proscribe both "use" and "carrying" unless Congress intended each term to have a "particular, nonsuperfluous meaning."58 Accordingly, Bailey narrowed the meaning of "use" to include only "active employment" of the firearm by the defendant, such that the firearm becomes an operative factor in relation to the predicate offense.59 The Court expanded on its new definition, asserting that active employment included "brandishing, displaying, battering, striking with, and . . . firing or attempting to fire" the weapon.60 Even reference to the presence of a firearm — disclosing or mentioning that one has a gun or that a gun is concealed nearby and is readily accessible — falls within the meaning of "use" if calculated to bring about a change in the circumstances of the predicate crime.61 So too does the silent but obvious and forceful presence of a gun at the site of a drug-trafficking or violent crime.62 Concluding that neither Bailey nor Robinson actively employed a firearm by these terms, the Court remanded for consideration of possible liability under the "carrying" prong.63

55. See 116 S. Ct. at 507.
56. 116 S. Ct. at 506 (quoting Bailey, 36 F.3d at 124-25 (Williams, J., dissenting)).
57. See 116 S. Ct. at 506.
58. See 116 S. Ct. at 507.
59. See 116 S. Ct. at 505.
60. 116 S. Ct. at 508.
61. See 116 S. Ct. at 508.
62. The Court distinguished this type of obvious and forceful presence from the mere "inert" presence of a firearm, which, without more, is not sufficient to trigger liability. See 116 S. Ct. at 508.
B. "Carrying" Defined

While the holding in Bailey explicitly addressed only the contours of "using" a firearm under section 924(c), the Court's decision nevertheless informed the meaning of "carrying" one as well by requiring that this second prong of section 924(c) address itself to a particular, nonsuperfluous set of cases. Thus, whereas the active employment definition of "use" contemplates a firearm that is an operative factor and actually facilitates the predicate offense, courts have interpreted "carrying" to contemplate a more subtle standard: one that defines a certain potential for facilitation. Specifically, courts have held that in the wake of Bailey, possession or storage of a firearm at or near the location of a drug-trafficking or violent crime cannot fall within the ambit of "carrying" a firearm.64 Possession and storage remain insufficient even though the firearm may be readily available and therefore serve to comfort and embolden the defendant.65

Courts instead have read "carrying" to require two essential conditions. First, the weapon must actually be transported, whether in a vehicle, on a defendant's person, or about his person — for example, concealed in a handbag or suitcase; and second, the firearm must be under the defendant's dominion or control and available for use contemporaneously with the commission of the predicate offense.66 Under the "carrying" prong then, the firearm necessarily remains concealed and never actually is brought to bear on the predicate crime. Were the circumstances otherwise to include even the mention or display of the gun, they would constitute "use" under the terms of Bailey. One might relate the two terms as follows: "carrying" refers to the transportation of a concealed firearm that has no bearing on the circumstances of the predicate crime, but that is nevertheless readily available for "use" in a manner that does effect a change in the circumstances of the predicate crime.67 The distinction will prove instructive as to the issue of

64. See United States v. Spring, 80 F.3d 1450, 1464-65 (10th Cir. 1996) (interpreting Bailey, 116 S. Ct. at 508); United States v. Riascos-Suarez, 73 F.3d 616, 623 (6th Cir. 1996) (same). This conclusion is consistent with Congress' 1984 amendment of the language of § 924(c) to provide that the firearm must be used or carried "during and in relation to" the predicate crime, in order to preclude coverage of cases where the presence of a firearm at the crime was merely coincidental. See supra note 48.

65. See Bailey, 116 S. Ct. at 508.

66. See, e.g., United States v. Willett, 90 F.3d 404, 407 (9th Cir. 1996); United States v. Miller, 84 F.3d 1244, 1259-60 (10th Cir. 1996); United States v. Ramirez-Ferrer, 82 F.3d 1149, 1154 (1st Cir. 1996); United States v. Giraldo, 80 F.3d 667, 676-78 (2d Cir. 1996); United States v. Baker, 78 F.3d 1241, 1247 (7th Cir. 1996).

67. There is some variation among circuits regarding just how available the firearm must be to qualify under "carrying." For example, the Second Circuit has held that the driver of a vehicle could be convicted under the "carrying" prong where a firearm, concealed beneath the change dish, was within easy reach. See Giraldo, 80 F.3d at 677. A back-seat passenger of the same vehicle, however, could not be held liable since he could not have reached the
when a court can properly infer that an accomplice to the predicate crime also aids and abets the principal's section 924(c) offense.

III. ACCOMPlice LIABILITY UNDER SECTION 924(c)'S “CARRYING” PRONG

This Part unites the discussion of complicity doctrine from Part I with the meaning of “carrying” a firearm addressed in Part II, and concludes that the narrow standard of accomplice liability recognized by the courts should apply in the carrying context. One should only be held responsible for the act of another in carrying a firearm in relation to either a violent or drug-trafficking crime if one acts intentionally to facilitate the carrying of the firearm on that occasion.

It might appear at first glance that the “carrying” prong swallows the “use” prong whole, because a defendant would likely have to “carry” a gun at some point in order to “use” it. All “use” cases might therefore be charged under the “carrying” prong, even though “use” and “carrying” mean two different things. There are two responses to this observation. First, it is undoubtedly true that in many cases, “use” and “carrying” may provide alternative bases for a § 924(c) conviction because a defendant engaged in both. “Carrying” involves concealed transportation, however, and there remain any number of possible cases of “use” that would not qualify under this definition. In the course of a drug transaction, for example, a drug dealer might refer to a firearm that is sitting in plain view on a nearby table in order to scare his customer. The dealer has “used” the gun according to Bailey but has neither concealed nor transported it at any point during the predicate crime. More important, however, the availability of alternative bases for the principal's § 924(c) liability in no way diminishes the importance of the difference between “use” and “carrying” to the analysis of accomplice liability advanced in this Note.

68. The reader may notice that the order of analysis in Parts III and IV — addressing accomplice liability under the “carrying” prong and then under the “use” prong — reverses the order of presentation in Part II. This asymmetry is unavoidably incident to the analytical development of the Note's central thesis. In Part II, discussion of “use” precedes that of “carrying” because the meaning of “carrying” only takes shape when viewed in light of the Bailey decision's “nonsuperfluous” definition of “use.” See supra section II.B. Parts III and IV discuss “carrying” followed by “use” because the distinction drawn infra Part IV between the standard of accomplice liability in incidental use versus integral use cases necessarily builds on the analysis of accomplice liability in “carrying” cases.

69. Throughout the analysis that follows in this Part and in Part IV, it makes no difference whether a defendant charged as an accomplice under § 924(c) was a principal or an accomplice to the predicate crime. This Note refers hereafter only to an “accomplice” to the predicate crime for two reasons: first, to avoid the excess verbiage of repeatedly specifying “or principal”; second, and more importantly, if the rule holds an accomplice to the predicate crime liable as an accomplice to the § 924(c) violation, it also would necessarily hold liable a principal violator of the predicate crime.

70. The Second Circuit has stated the rule as follows:

[That a defendant knew that a firearm would be carried, even accompanied by proof that he performed some act to facilitate or encourage the underlying crime in connection with which the firearm was carried, is insufficient to support a conviction for aiding and
The broad standard is inapplicable because, in the context of carrying as defined by Bailey and subsequent lower court decisions, the Peoni requirements of "association" and "participation" in the predicate offense do not manifest an intent purposively to influence or assist in the principal's commission of the section 924(c) violation. Under the mutually exclusive definitions of use and carrying, a firearm that is carried during and in relation to the predicate crime is extrinsic to the commission of the predicate offense. The principal's gun cannot effect a change in the circumstances of the predicate crime lest it become a case of use. Thus, the principal may commit the crime regardless of whether he decides to carry a firearm. Accordingly, the predicate accomplice's actions intended to bring about the principal's underlying violent or drug trafficking crime do not necessarily constitute action designed to bring about the section 924(c) offense — just as Peoni's sale of counterfeit bills to Regno did not evince a purposive intent toward their later sale to Dorsey.  

Moreover, the fact that the accomplice may participate in the predicate offense knowing that the principal is carrying or will carry the firearm fails to establish that the defendant is anything more than indifferent toward the principal's doing so. Certainly, one can make a strong argument for punishing such knowing participation. Society might well want to sanction and seek to deter a defendant's willingness to engage in a drug-trafficking or violent crime in which a firearm presents an immediate potential for use. The question, however, is whether the defendant deserves to be punished as if he had carried the firearm and created that potential himself when in fact someone else did. In such a case, the defendant does not sufficiently endorse the principal's conduct as something he himself would knowingly bring about absent any manifestation of purposive intent to assist or influence the principal in carrying the gun. Only the narrow standard therefore affords the requisite inference that the accomplice sought by his actions to assist or influence the principal in carrying a firearm during the predicate crime. Short of direct facilitation of the carrying of the firearm, the defendant's actions merely contribute to the circumstances or context — that is, abetting . . . .  

abetting . . . . [T]here must also be proof that the defendant performed some affirmative act relating to that firearm.  

Giraldo, 80 F.3d at 676. See also United States v. Luciano-Mosquera, 63 F.3d 1142, 1150 (1st Cir. 1995) ("Mere association with the principal, or mere presence at the scene of a crime, even when combined with knowledge that a crime will be committed, is not sufficient to establish aiding and abetting liability . . . . The defendant must have taken some affirmative action that facilitated violation of § 924(c)(1)." (citations omitted)).  

71. See United States v. Peoni, 100 F.2d 401, 402-03 (2d Cir. 1938).  

the predicate offense — that permit the section 924(c) offense of the principal to occur.73

Application of the narrow standard requiring direct facilitation under the carrying prong has important implications for existing case law. In United States v. Morrow,74 for example, the Sixth Circuit upheld a defendant’s section 924(c) conviction on a theory of accomplice liability that is incompatible with the rule advocated here. Morrow was arrested by agents of the United States Forest Service who caught him, unarmed, garbed in camouflage and a ski mask, cutting down marijuana plants from a crop concealed in a national forest.75 He was accompanied by Mooneyham, who wore a holstered .22-caliber handgun in plain view at his side.76 On these facts, a divided court affirmed Morrow’s conviction for aiding and abetting Mooneyham’s carrying of a firearm during and in relation to a drug-trafficking crime.77 Citing Peoni, the court stated the rule of aiding and abetting to require that “the defendant both associated and participated in the use of the firearm in connection with the underlying crime.”78 Nevertheless, the court found Morrow to have “participated” in the carrying of the firearm by Mooneyham merely on the basis of his participation in the predicate drug trafficking. Morrow did nothing affirmative to facilitate Mooneyham’s carrying of the firearm. He did not encourage or in any manner advance the firearm’s presence at Mooneyham’s side. Rather, the court based Morrow’s liability on a precisely reversed inferential relationship: not that Morrow’s activities facilitated the carrying of the firearm, but that the firearm facilitated Morrow’s activities. Morrow was said to have aided and abetted the carrying of the firearm because he was “as much a potential beneficiary of [it] being present as was Mooneyham. The firearm was facilitating Morrow’s

---

74. 977 F.2d 222 (6th Cir. 1992) (en banc).
75. See 977 F.2d at 224, 230.
76. See 977 F.2d at 224.
77. See 977 F.2d at 231.
78. 977 F.2d at 230-31 (emphasis added). The Morrow court referred to “use” of a firearm in phrasing the applicable standard, but then in applying it to the specific facts of the case, stated that the firearm was in fact “carried” by Mooneyham. 977 F.2d at 231. Since Morrow was decided in 1992, before the call for “particular, nonsuperfluous meaning” in Bailey, the court reached its holding in the context of precedent under which the meaning of “carrying” and “use” were loosely interchangeable. Yet despite the court’s analysis that Mooneyham “carried” the weapon in relation to the drug trafficking, wearing a handgun in a holster and in plain view would now arguably constitute “use” under Bailey insofar as the gun is thereby brandished, displayed, or assumes an obvious, forceful presence. See United States v. Bailey, 116 S. Ct. 501, 508 (1995). While it is worth noting the possibility that this case could fall under the use prong, this does not affect the above analysis of carrying because it would still only qualify as incidental use in relation to drug trafficking, to which the same standard of liability should apply as for carrying. See infra section IV.A.
drug trafficking efforts just as it was for Mooneyham.” The court inferred from the certainty of Morrow’s awareness of the firearm, combined with the fact that he wore a ski mask during the offense, that he intended that the weapon be present for his own, as well as Mooneyham’s, protection.

Five dissenting judges criticized the majority for failure to show an affirmative act whereby Morrow sought to bring about Mooneyham’s carrying of the firearm. The dissenters argued that the majority’s rationale transformed a charge of aiding and abetting into a rule of strict liability. Surely that is not the case, given that the majority holding still required Morrow to have participated in the predicate crime knowing that Mooneyham carried a firearm. Nevertheless, although Morrow may have benefited from the presence of Mooneyham’s gun, and even intended that the gun protect him as well as Mooneyham, the reasoning is circular; the accomplice is said to aid and abet the carrying of the firearm because the firearm aids and abets the accomplice. The rule dispenses with the inference required under Peoni that an accomplice seek by his actions to facilitate the conduct for which he is punished. To infer purposive intent from the mere presence of the gun renders the intentional act requirement of Peoni a foregone conclusion.

Morrow is significant in the larger body of case law because it is apparently the only decision — among the many decisions that have stated the broad standard of accomplice liability as the applicable rule — actually to have reached the question of the nature of participation required by that standard under the carrying prong. Other cases have stated the rule to allow that a defendant may aid and abet the carrying of a firearm without facilitating the carrying of the firearm directly, but have done so only in dicta, primarily in overturning a section 924(c) conviction on grounds that the defendant did not know that the principal carried a firearm in the first place. To the extent those cases can be read to agree with Morrow to endorse the broad standard of accomplice liability under the

---

79. 977 F.2d at 231.
80. See 977 F.2d at 231.
81. See 977 F.2d at 233.
82. See 977 F.2d at 234.
83. Although Morrow states a rule of liability more akin to the narrow standard of liability, the court’s application of the professed rule falls squarely under the broad standard in cases in which participation in the predicate offense substitutes for direct facilitation of the § 924(c) offense.
84. See United States v. Thomas, 987 F.2d 697, 701-02 (11th Cir. 1993); United States v. Powell, 929 F.2d 724, 728 (D.C. Cir. 1991); United States v. Hamblin, 911 F.2d 551, 557-58 (11th Cir. 1990); see also United States v. Medina, 32 F.3d 40, 46 (2d Cir. 1994) (noting that the cases that appear to advocate the first standard of accomplice liability have not reached the participation question except in dicta in the course of holding that the accomplice lacked the requisite knowledge of the firearm in the first place).
carrying prong, the rule advocated here disagrees. The larger body of cases is better construed as not having reached the question of participation. When future cases must address that question involving the carrying of a firearm, courts should require that an accomplice act directly to assist or influence the principal to carry a gun. This will ensure fidelity to the rule of Peoni that the presence of the firearm during the predicate crime be something the predicate accomplice "seek[s] by his action to make . . . succeed."85

IV. ACCOMPlice LIABILITY UNDER SECTION 924(c)'S "USE" PRONG

This Part addresses when a court may infer purposive intent on the part of an accomplice to a predicate violent or drug-trafficking crime86 to aid and abet the use of a firearm during the offense. Within the realm of "active employment" defined by the Supreme Court in Bailey, Section IV.A draws a distinction between cases in which the use of a firearm is "incidental" to the predicate crime of violence or drug trafficking and those in which use is "integral" to the commission of that offense. On the basis of this distinction, Section IV.B concludes that in incidental use cases, only the narrow standard of liability permits a court to infer purposive intent on the part of an accomplice to assist or influence the principal's use of a firearm. Section IV.C, however, concludes that in integral use cases, the broad standard of liability permits a court to infer purposive intent toward the use of a firearm from the act of aiding and abetting the predicate crime. In those cases, it is argued, the accomplice's efforts to assist or influence the commission of the underlying predicate crime also establish a specific intent to facilitate the use of the firearm directly.

A. INCIDENTAL USE VERSUS INTEGRAL USE CASES

The Supreme Court in Bailey defined "use" to entail "active employment" of a firearm during and in relation to a predicate violent or drug-trafficking crime.87 By "active employment," the Court contemplated that the firearm would be an "operative factor" in the predicate offense — that it would "bring about a change in the circumstances" of the crime, relative to situations in which the firearm had not been brought to bear on the offense.88 In that

85. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).
86. Once again, accomplice and principal as to the predicate crime are interchangeable with respect to the rule of accomplice liability under § 924(c). See supra note 69.
88. 116 S. Ct. at 505, 507-08.
sense the Court distinguished use from carrying and from instances of mere possession or storage of a firearm.\textsuperscript{89}

Use is not only distinct from carrying, but can itself be broken down into two different sets of circumstances that this Note terms as \textit{integral} use and \textit{incidental} use. The use of a firearm is \textit{integral} to the predicate crime when the weapon's active employment is an operative factor in the circumstances that define the principal's commission of the predicate violent or drug-trafficking offense. The definition of integral use forwarded here does not mean, however, that the use of the firearm must be an element of the predicate offense as defined by statute. The referent for integral use is not the language of the statute but the factual circumstances constituting a violation of that statute.\textsuperscript{90} By contrast, the use of a firearm is \textit{incidental} to the predicate crime when the weapon's active employment effects a change in circumstances that merely attend, but do not constitute, the elements of the crime's commission.

Some relatively simple hypotheticals illuminate the above distinction. These examples assume, as is required for liability in all cases, that the accomplice to the predicate crime knows that the principal is armed during the offense. Suppose first that \textit{A} engages in a cocaine transaction with \textit{B}. \textit{A} is accompanied by another man, \textit{P}, who is carrying a firearm at the time. The deal turns sour when \textit{B} refuses \textit{A} and \textit{P}'s terms. \textit{P} then pulls back the tail of his shirt and reveals the presence of his weapon in an effort to persuade the buyer that his terms are, in fact, most generous. The firearm is actively employed during and in relation to a predicate drug-trafficking crime.\textsuperscript{91} The use of the firearm in this instance, however, does not change the circumstances defining the commission of the predi-

\textsuperscript{89} See 116 S. Ct. at 507-08.

\textsuperscript{90} Thus, one might commit bank robbery by "force and violence or by intimidation" as that offense is defined by statute, see 18 U.S.C. § 2113(a) (1994), but employ some weapon or means other than a firearm to do so. The active employment of a firearm therefore is not technically an element of the offense. But when the factual circumstances of a particular case of bank robbery do involve the use of a firearm, the firearm constitutes the means of "force and violence" or "intimidation" necessary to satisfy the elements of the offense as statutorily defined.

Significantly, § 924(c) limits the set of potential predicate violent crimes to felonies that have an element of "use, attempted use, or threatened use of physical force against the person or the property of another," or that involve "a substantial risk that physical force against the person or property . . . may be used in . . . committing the offense." 18 U.S.C. § 924(c)(3) (1994). It is sufficient to speak of integral use cases in terms of § 924(c)'s violent crime prong because, to the extent that Congress could define a predicate "drug trafficking" crime that qualifies as an integral use case as defined by this Note, it would necessarily double as a predicate "crime of violence" as well. One can further conclude from this analysis that, because in integral use cases the circumstances of a firearm's use satisfy an elemental requirement of the predicate crime, an accomplice to the commission of the predicate offense \textit{necessarily} becomes an accomplice to the § 924(c) violation. See \textit{Devitt et al.}, \textit{supra} note 34, § 18.01, at 692 (explaining that a defendant accomplice must have acted with the intention of causing the crime charged to be committed).

\textsuperscript{91} See \textit{Bailey}, 116 S. Ct. at 507-08.
cate offense; the sale of the cocaine that A seeks by his act of participation to assist remains the same whether P displays the firearm or not. The use of the firearm is incidental and not integral to the commission of the predicate crime.92

Now suppose P and A rob a bank according to the same scenario set out in the introduction.93 Both men enter the bank and P holds up the teller and customers at gunpoint while A goes behind the teller window and stuffs a bag with cash. P and A are both guilty of bank robbery.94 What is more, in this instance, the use of the gun counts among the circumstances defining the predicate crime of violence, because if P had not held the teller and customers at gunpoint, P and A could not have committed an armed bank robbery.95 The use of the firearm here was integral to the commission of the predicate crime.

B. Aiding and Abetting Section 924(c) Violations in Incidental Use Cases

When the use of a firearm is incidental to the commission of the predicate crime, the narrow standard of liability should apply: an accomplice96 to the predicate offense aids and abets the section 924(c) offense only if he acts to assist or influence the principal's use of the firearm directly, as determined independently of, and in addition to, his participation in the predicate crime. The acts of an accomplice purposively to assist or influence the predicate crime do not translate into an intent to facilitate the principal's use of a fire-

92. Notice that it does not matter whether the incidental use of a firearm is a cause sine qua non of the predicate crime. Perhaps if P had not displayed the gun, the drug transaction to which A was an accomplice would not have occurred. The point is not what might or might not have happened. Circumstances can change quickly and unexpectedly in the course of illegal activity, particularly when firearms by nature present a threat of sudden and over-reactive violence. The point, rather, is what did happen, and what can then be said about the intent of an accomplice to the predicate crime toward the principal's use of a firearm. The distinction between integral versus incidental use, and circumstances that merely attend or actually define the commission of the predicate crime, exists independently of variation in the chain of causation or the myriad ways that a crime may rapidly and unexpectedly develop.

93. See supra text accompanying notes 15-17.


95. See 18 U.S.C. § 2113(a). Of course, § 2113 also prohibits the taking of property or money in the custody of a bank by means not involving force and violence or intimidation. See 18 U.S.C. § 2113(b). To say, then, that without the use of the gun P and A would not have committed a predicate crime under § 924(c) is not to say that they might not have still committed bank robbery. In that case, however, the bank robbery no longer constitutes a predicate "crime of violence" as defined by § 924(c). See supra note 90 and accompanying text.

96. The analysis applies just as readily when the defendant charged as an accomplice under § 924(c) was a principal in the predicate crime. See supra note 69.
arm incidental to that objective. Here, the circumstances of the predicate crime that the accomplice associates with — that, in the language of Peoni, he “seek[s] by his action to make . . . succeed” — are exclusive of the circumstances changed, or affected, by the active employment of the gun. Some further act on the part of the accomplice is therefore necessary to associate him with the gun, and to infer that his objectives embrace the circumstances to which the use of the firearm pertains. The accomplice’s intent to further the predicate crime does not otherwise suffice for the Peoni requirement of an intent to assist or influence the section 924(c) violation.

The Morrow case discussed above is instructive. Although the Sixth Circuit analyzed Mooneyham’s holstered firearm as a case of carrying, in the wake of Bailey, it might alternatively be characterized as use: the firearm strapped to Mooneyham’s side arguably presented an “obvious and forceful presence” during and in relation to his tending of the marijuana crop. Even so, the use of the gun in this case is incidental to the predicate drug offense because its “forceful presence” does not effect a change in the circumstances constituting the commission of the offense. The defining circum-

---

97. But cf. United States v. Polanco, 935 F. Supp. 372 (S.D.N.Y. 1996). Polanco sold cocaine out of his apartment to a confidential informant (“CI”) working for the Drug Enforcement Agency. See 935 F. Supp. at 373. During the buy, Polanco and the CI started arguing over price and quantity, whereupon a coconspirator of Polanco moved toward the CI and started “jumping around.” See 935 F. Supp. at 374. This second individual had a gun visible in the waistband of his pants. See 935 F. Supp. at 374. The court held that the coconspirator, in displaying the gun to the CI in a threatening manner, “used” the firearm under Bailey. See 935 F. Supp. at 375. The court then extended responsibility for the § 924(c) violation to Polanco on a coconspirator theory rather than an accomplice theory. See 935 F. Supp. at 375-76. Known as the “Pinkerton doctrine,” this theory provides that a conspirator can be held responsible for the substantive crimes committed by his coconspirators to the extent those offenses were reasonably foreseeable consequences of the conspiracy agreement. See Pinkerton v. United States, 328 U.S. 640, 646-48 (1946). The Pinkerton doctrine is sometimes resurrected as an alternative theory of liability to aiding and abetting. It has a narrower scope of application than accomplice liability in that it is only implicated in cases involving a conspiracy agreement. A complicity theory of liability may apply to all crimes that one person assists another in performing, whether by preexisting agreement or not. But within that narrower set of cases, the Pinkerton doctrine defines a much broader scope of liability, encompassing not just the acts of a principal that a defendant purposively intends to assist, but all conduct of a principal that is a reasonably foreseeable consequence of a mutual conspiracy agreement. Hence, the availability of the Pinkerton doctrine in cases of conspiracy does not speak to the same concerns as the more stringent “purposive act” standard for aiding and abetting. As in Polanco, it permits a defendant to be punished on a level with the principal, but for a much lower level of culpability. The defendant is held fully responsible for a co-conspirator’s purposive use of a firearm, where the defendant only negligently failed to foresee that the use of a weapon might advance the mutual conspiracy agreement. For a discussion of the relationship between the Pinkerton and complicity doctrines and an attempt to reconcile their differences, see Susan W. Brenner, Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions, 56 Mo. L. Rev. 931 (1991).

98. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

99. See supra text accompanying notes 74-85.

stances of the predicate offense that Morrow endeavored to bring about — namely, the harvesting of an illicit marijuana crop — remain the same whether Mooneyham had displayed a firearm or not. Morrow's efforts to assist Mooneyham harvest the marijuana, to further the circumstances constituting a drug-trafficking crime, do not signal an intent to further the circumstances of the firearm's use. Accordingly, the same standard of liability as applies under the carrying prong should also apply to incidental use cases under section 924(c).

C. Aiding and Abetting Section 924(c) Violations in Integral Use Cases

In integral use cases, the firearm is an "operative factor" that effects a change in the very circumstances that constitute the commission of the predicate offense. In other words, use of the firearm defines, in part, the commission of the predicate crime, without which a predicate crime could not be committed. In these cases the broad standard of liability can be applied: an accomplice to the predicate crime can, a fortiori, be held liable as an accomplice to the section 924(c) violation. When an accomplice seeks by his actions to bring about the circumstances that constitute the commission of the predicate crime, he seeks by those same actions to bring about the use of the firearm, because the defining circumstances of the predicate crime include the use of the firearm.

101. See supra section IV.A.
102. See supra notes 90 and 95.
103. "Can" is the appropriate term because in these cases either standard of accomplice liability should permit a court, consistent with Peoni, properly to infer that the accomplice intended to assist or influence the principal's use of a firearm, whether directly or by some other form of participation in the predicate crime.
104. As noted supra note 69, the reference to "accomplice" in the predicate crime also embraces a principal for purposes of § 924(c) liability.
105. One might object that a person may conceivably assist or influence the predicate crime without acting to facilitate the use of a firearm. The basis for this objection is as follows. As discussed supra note 90, integral use refers to the defining circumstances of the predicate crime that satisfy, but do not necessarily constitute, the statutory elements of the predicate crime in a particular case. The federal bank robbery statute that criminalizes the taking of property from a bank by "force and violence, or by intimidation" provides a useful example. 18 U.S.C. § 2113(a) (1994). The statutory elements of bank robbery do not require the use of a firearm for a violation, but the use of a firearm in a particular case of armed bank robbery satisfies the element of "force and violence" or "intimidation" required under the statute, and in turn under § 924(c)'s definition of a predicate crime of violence. While the question of integral use goes to particular circumstances, however, the question of accomplice liability for the predicate offense asks whether a defendant acted with the intention to assist or influence the statutory elements of the crime. Thus, it is possible to aid and abet all the elements of the predicate crime, but not to have acted with the intention to facilitate those particular defining circumstances involving the gun.

To illustrate, suppose someone participates in a bank robbery by acting as a lookout on the street while the principal goes inside and holds up the bank. The lookout honestly thinks that the principal intends merely to pass a note to the teller, threatening to use a gun that the
such a case, satisfaction of Peoni's intentional act requirement as to the *predicate crime* necessarily also satisfies Peoni with respect to the separate *section 924(c) violation*.

As under the carrying prong, this Note's rule of accomplice liability in the integral use context arrives at different results than does some of the existing case law.\(^\text{106}\) In *United States v. Medina*,\(^\text{107}\) for example, the Second Circuit reversed the defendant's aiding and abetting conviction under section 924(c) for his role in conceiving, planning, and implementing an armed robbery scheme. In order to execute his scheme, Medina recruited another person named Lopez

principal actually does not have. The lookout is an accomplice to the bank robbery; he acted with the intention to assist the taking of property from a bank by "intimidation." *See* 18 U.S.C. § 2113(a) (defining the elements of the offense of bank robbery). In fact, the principal brandishes a real firearm inside the bank, and thus the statutory elements for bank robbery are satisfied by the active employment of a firearm instead of an intimidating note. *See* 18 U.S.C. § 2113(a). How is the lookout accomplice liable as an accomplice to the use of the firearm? The answer is that he is not liable under the rules of liability advocated by this Note because in all contexts, whether they involve "carrying," "incidental use," or — as the case in this hypothetical — "integral use," the accomplice *must have knowledge* that the principal uses or carries a gun. If the lookout knows this, he knows, or at least expects, that the use of a firearm will provide the defining circumstances of "force and violence" or "intimidation" that constitute a commission of the crime of bank robbery. By acting as a lookout, the predicate accomplice acts with the intention to assist or influence a violent crime — as defined under § 924(c) — during and in relation to which a firearm is used. In integral use cases, the accomplice's *knowledge of the firearm's presence* bridges the inferential gap between acting with the intention of advancing the predicate crime and intending by those very same acts to advance a § 924(c) violation.

A related, more difficult question arises in a case where the lookout, or any sort of accomplice to the predicate crime, generally knows that the principal uses a gun, but does not know what *kind* of gun. The accomplice may have in mind a handgun, while in fact the principal wields a bazooka inside the bank. Given that § 924(c) attaches longer sentences depending upon the type of gun employed, and depending on if it is equipped with a silencer or muffler, should the stiffer penalty also be imputed to the accomplice? Or should the accomplice who does not know what type of firearm will be employed and does not act to facilitate a particular type of weapon simply receive the minimum five-year consecutive sentence? This problem is not limited to integral use cases, but may arise even when the accomplice encourages or facilitates use of a gun directly but still without knowing or intending a particular type of gun. In situations in which it cannot be shown that the accomplice acted with the intent to assist or influence the principal to use the particular type of gun employed, it would certainly seem unfair for courts to impose on the accomplice the greater sentence applicable to a particular type of weapon.

\(^{106}\) *See* United States v. Medina, 32 F.3d 40 (2d Cir. 1994) (reversing a conviction for aiding and abetting under § 924(c), and requiring specific facilitation of the firearm even though the defendant intentionally assisted in the predicate crime of armed robbery knowing that firearms would be used for its commission); United States v. Foreman, 914 F. Supp. 385 (C.D. Cal. 1996); *see also* United States v. Price, 76 F.3d 526 (3d Cir. 1996); United States v. Salazar, 66 F.3d 723 (5th Cir. 1995). In *Price* and *Salazar* the courts upheld convictions for aiding and abetting § 924(c) violations in the commission of an armed robbery and armed prison escape, respectively. *See Price*, 76 F.3d at 529; *Salazar*, 66 F.3d at 729. While these results are consistent with this Note's rule of liability for integral use cases, the courts obtained the right results by applying the wrong standard, requiring an act that directly facilitated the firearm (e.g., providing or encouraging its use) where the integral use standard would only require that the defendants acted with intent to bring about the predicate violent crime, knowing that firearms are used.

\(^{107}\) 32 F.3d 40 (2d Cir. 1994).
to commit the crime, who in turn recruited two other individuals.\textsuperscript{108} Medina provided a firearm to Lopez for use during the robbery, but ultimately police recovered different guns from the principals when they foiled the attempted robbery at the scene.\textsuperscript{109}

The court held that a defendant who is not present at the commission of the predicate offense cannot be said to aid and abet a section 924(c) violation merely because he knew that a firearm would be used or carried while simply aiding and abetting the overall enterprise in which the firearm is employed.\textsuperscript{110} Instead, the court asserted that the language of the statute requires a defendant to perform some act that directly facilitated or encouraged the use of a firearm.\textsuperscript{111} The court reasoned that although Medina knew his recruits intended to bring guns, the decision to do so was a "foregone conclusion" on their part. Thus, Medina's actions, including furnishing the revolver to Lopez, did not assist or encourage the principal to carry or use the particular gun seized from his person during the attempted robbery.\textsuperscript{112}

\textsuperscript{108}. Medina planned to rob his former employer, a construction company, and he recruited Lopez to carry out the robbery for fear that he would be recognized if he participated in the robbery himself. Lopez enlisted the help of Villanueva, and Delgado. Unfortunately for Medina, Villanueva and Delgado, Lopez became a government informant. See 32 F.3d at 42-43.

\textsuperscript{109}. See 32 F.3d at 43.

\textsuperscript{110}. See 32 F.3d at 47.

\textsuperscript{111}. See 32 F.3d at 45.

\textsuperscript{112}. See 32 F.3d at 45-46. Firearms were never, in fact, actively employed to commit the predicate crime because the police intervened before the robbery could take place. The court, however, did not concern itself with this detail in ostensibly creating a rule that applies to all cases of "carry or use." See 32 F.3d at 45-47. Moreover, the court's analysis of the proper standard of accomplice liability — and the facts of the case it found relevant to that analysis — would not be any different if the principal had entered the construction company and successfully robbed the premises at gunpoint. Even so, as an alternative to the wholesale rejection of Medina's analysis advocated in the text, courts addressing integral use cases might instead distinguish Medina on the facts as limited to a case of carrying a firearm during a robbery attempt. To the extent that Medina is confined to a case of carrying, the court applied the correct standard of accomplice liability: the government must prove Medina acted to facilitate the carrying of the firearm directly. Whether the government failed to satisfy that standard, of course, presents a different question.

Even under the narrow standard of liability, Medina's conviction still might have been affirmed. Medina's conduct in furthering the robbery scheme expressly called for the carrying and use of a firearm. Medina intended that a gun be carried in relation to the robbery, and acted on that intent by providing a firearm to Lopez for that very purpose. The fact that the particular gun ultimately carried in the course of the attempt was not the one Medina provided is simply a change in means toward the same ends. Recall from section I.B, supra note 40 and accompanying text, that the purposive intent required for accomplice liability focuses on the end commission. If the principal should use different means to that end, the secondary actor can still be held liable as an accomplice. In the example noted above, the secondary actor intended to assist the principal commit an armed assault, but the principal brandished a gun instead of a knife. The secondary actor is still liable as an accomplice to the armed assault that he intended by his actions to assist. Here, Medina intended to assist Lopez, and through Lopez, Villanueva, carry a firearm during and in relation to the attempted robbery in violation of § 924(c). A change in the particular gun does not affect this equation.
Both the rule and the result in *Medina* are wrong. The reason that the principal's use of a firearm was a "foregone conclusion" was precisely because Medina devised, planned, and delegated the commission of a crime that called for the principal to use a gun, be it his own or the one provided by Medina. Medina's failed efforts to provide a specific gun for the principal to use is the wrong focus of inquiry. Medina conceived and encouraged the commission of an armed robbery, the defining circumstances of which entailed the use of a firearm. In acting to further such a scheme, Medina acted to facilitate the use of a gun. The fact that Medina was not present during the robbery is no basis for excusing his role in the use of a firearm; quite the opposite is true. Those who mastermind violent crimes involving firearms should not be able to hide behind their agents. Medina recruited others to carry out his plan precisely in order to insulate himself from liability. The *Medina* court's failure to penetrate this vertical structure, commonly employed by organized criminals to protect the ultimate decisionmakers and their broader enterprises, only exacerbates present confusion about the proper scope of accomplice liability under section 924(c). The facts of the *Medina* case are better resolved under an integral use liability rule, where acts assisting or influencing the predicate crime, a fortiori, establish that the accomplice associates with the use of the gun and seeks by his actions to make that use succeed.

**Conclusion**

The larger conflict among federal courts in fashioning a standard of accomplice liability for section 924(c) reflects the all-or-nothing nature of complicity. An accomplice is punished to the same degree as a principal. As noted above, sometimes a secon-
dary actor merely acquiesces in the principal's use of a gun, as when he knows that the principal will employ the weapon. Other times, a secondary actor both knows the principal will use a gun and acts with the intent that he do so. Both sorts of actors are culpable, although the one who actually intends for the principal to use a gun is more so than the one who merely resigns himself to that conduct.115 But accomplice liability is blunt in that it either punishes the accomplice as a principal or not at all. Decisions like Morrow, advocating a mere "knowledge" standard of accomplice liability, may reflect a desire to convict a culpable defendant of something rather than nothing. Decisions like Medina, favoring the more narrow standard of liability, reflect the concern that only the most culpable secondary actors should receive the full punishment of a principal.116 Yet the holding in Medina injects the more narrow scope of liability into the wrong context. The rule of complicity falls short of its mark. In Morrow, accomplice liability reaches too far. Between the two, aiding and abetting doctrine deteriorates as courts try to navigate their way around inflexible and conflicting standards.117 In failing to examine the relationship between prong and predicate more closely, courts are missing an opportunity to reconcile competing standards according to context.

This Note's purpose in identifying and distinguishing a rule of liability for cases of carrying and incidental use from one applicable to cases of integral use, is not to suggest that every section 924(c) accomplice case can and must be categorized accordingly. Circumstances of use may indeed arise, the particulars of which elude integral versus incidental categorization. Nevertheless, marginal uncertainties that lap at and erode at the edges of any formulation of legal principle do not defeat the greater utility of the concepts developed in this Note among the majority of section 924(c) cases. The modest suggestion forwarded here is that when the integral use concept lends itself to the facts of a particular case, it provides a discrete expansion of accomplice liability under section 924(c) — well founded in the theory of complicity underlying Peoni — which in turn offers some relief to the all-or-nothing rigidity of that doctrine and the attending confusion in its application.

115. See Duff, supra note 72, at 165-68.
116. See id. at 165-68.
117. See United States v. Pipola, 83 F.3d 556, 565 (2d Cir. 1996) (limiting Medina to the fact that the use of a firearm was a foregone conclusion whereas in the present case, use of guns was an idea originated by the defendant); cf. United States v. Pimentel, 83 F.3d 55 (2d Cir. 1996) (resurrecting the Pinkerton doctrine as a much broader theory of liability in the wake of Medina's limitation on aiding and abetting); United States v. Masotto, 73 F.3d 1233 (2d Cir. 1996) (same); Parker v. United States, Nos. 96 Civ. 0955 (CSH), 88 Cr. 0379 (CSH), 1996 WL 609275 (S.D.N.Y. Oct. 23, 1996) (same); Paese v. United States, 927 F. Supp. 667 (S.D.N.Y. 1996) (same).