

A SHOT AT MENS REA IN AIDING AND ABETTING  
ILLEGAL FIREARMS POSSESSION  
UNDER 18 U.S.C. § 922(G)

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INTRODUCTION

Whether the term used is “sensible” gun laws, “reasonable” gun laws, or “common-sense gun laws,” the message is always the same: No one in his right mind could possibly oppose such laws; law-abiding gun owners have nothing to fear from them; they will not infringe on anyone’s legitimate gun rights . . . .

. . . [But] do they, in fact, represent a real and present danger to the gun rights of Americans?<sup>1</sup>

~Richard Poe

In the Southwest, a neighbor of twenty years asks a fellow homemaker if she may borrow a firearm for protection. Unbeknownst to the homemaker, who loans the gun, the neighbor is an illegal alien. In the Midwest, as hunting season opens, a sportsman wants to try his friend’s new rifle. The friend does not know that this hunter, whom he has known for many years, was once convicted of misdemeanor domestic violence, and lets him take the rifle hunting. In an inner city on the East Coast, a man gives a gun to his accomplice before they proceed to hold up a service station, knowing she is a convicted felon.

While the frequency of these occurrences is difficult to measure, guns are frequently borrowed and loaned in the United

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1. RICHARD POE, THE SEVEN MYTHS OF GUN CONTROL 193 (2001).

States.<sup>2</sup> Many would be surprised to learn that all three borrowers in the above situations committed a federal felony the moment they took possession of the gun.<sup>3</sup> But even more surprising is that all three *lenders* could be convicted of the same felony as the borrowers because of a disparity in the current federal gun laws and the convoluted application of the federal aiding and abetting statute.

Title 18, § 922(g) of the U.S. Code restricts persons in any one of nine categories—including convicted felons, illegal aliens, and drug addicts—from knowingly possessing firearms or ammunition.<sup>4</sup> Title 18, § 922(d), restricts the sale or disposal of firearms or ammunition to an individual that one knows or has reason to know is in one of the nine restricted categories.<sup>5</sup> However, if one is charged with aiding and abetting illegal firearm possession—that is, charged under § 922(g) via the federal aiding and abetting statute<sup>6</sup>—innocent people could be held strictly liable because of two distinct flaws.

The first flaw is in the construction of § 922(g). The mens rea requirement in the statute is that the principal—the one actually possessing the gun—knowingly possess a firearm. All other elements

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2. Perhaps the most famous anecdote about borrowing a firearm is Charlton Heston's story from the 1990s:

[M]any people in the film community oppose firearms, some quite virulently. During the Los Angeles riots in 1992, a good many of these folk suffered a change of heart. As smoke from burning buildings smudged the skyline and the TV news showed looters smashing windows, . . . I got a few phone calls from firmly anti-gun friends . . . "Umm, Chuck, you have quite a few . . . ah, *guns*, don't you?"

"Indeed."

"Could you lend me one for a day or so? I tried to buy one, but they have this waiting period . . . [.]"

"Yeah, I know. I remember you voted for that."

Charlton Heston, *My Favorite Amendments*, NAT'L REV., Sept. 25, 1995, at 96, 96; see also GENNARO F. VITO ET AL., *CRIMINOLOGY: THEORY, RESEARCH, AND POLICY* 277 (2d ed. 2007) (relating criminologist James Jacobs's argument that laws restricting gun retailers are ineffective in part because "[t]hose ineligible to buy a gun may steal guns during burglaries or borrow a gun from a friend or relative"); Lisa Parsons-Wraith, *Turn a Borrower into a Buyer*, SHOOTING INDUSTRY, Feb. 2000, at 20, 20 ("Women just starting out in the shooting sports have a tendency to borrow equipment . . . [and their] borrowed gear is usually a jumble of mismatched clothing and guns nobody *else* likes to shoot anymore."). But see William Leith, *And Chuck Created God*, NEW STATESMAN, July 31, 2000, at 31, 32 (implicitly questioning the truthfulness of Charlton Heston's story).

3. See 18 U.S.C. § 922(g) (2006).

4. *Id.*

5. *Id.* § 922(d).

6. *Id.* § 2(a) (2006).

involve strict liability, meaning that the prosecution need prove only that the defendant falls into one of the nine restricted categories (for example, convicted felon, illegal alien, or drug addict). The prosecutor need not prove that the defendant *knows* she falls into a restricted category. The strict liability standard makes sense in a prosecution against a principal. But automatically applying the same (strict liability) mens rea standard to the aider and abettor (the one loaning or selling the gun)—which is precisely what the federal aiding and abetting statute requires<sup>7</sup>—clashes with the congressional intent behind § 922(d). When Congress enacted § 922(d), it decided to punish a person who sold or disposed of a firearm or ammunition to, for instance, a convicted felon or a drug addict *only if the person knew or should have known of the person's restricted status*. But if the prosecution must prove only that the principal is in a restricted class and that the alleged aider and abettor knowingly facilitated his possession, then it becomes a de facto strict liability offense for the aider and abettor, and a person could be convicted without regard to whether she knew or should have known of a buyer or borrower's restricted status. In other words, while § 922(d) requires the defendant to know or have reason to know of the principal's restricted status, aider and abettor charges under § 922(g) via the federal aiding and abetting statute possess no such requirement.

The second flaw is the jumbled application of aiding and abetting under 18 U.S.C. § 2(a). The statute requires placing the mens rea of the principal upon the aider and abettor.<sup>8</sup> But some federal circuit courts skirt this requirement and simply apply § 922(d)'s specific intent for aiding and abetting, or apply a specific intent for aiding and abetting while *also* applying the intent of the principal offender. The results, which are far from uniform, create a circuit split that could, given one interpretation, lead to a strict liability felony for aiding and abetting illegal firearms possession.

This Note explains the current circuit split regarding aiding and abetting illegal firearm possession and argues that the split should be resolved legislatively by restricting § 922(g) charges via § 2(a). Possible judicial remedies are also discussed. Considerations include how the U.S. Supreme Court would resolve the current circuit split:

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

8. *See id.*

the Court could either apply its reasoning in *Staples v. United States*<sup>9</sup> to § 922(g), or adopt its formulation of aiding and abetting in *Nye & Nissen v. United States*,<sup>10</sup> or it could do both. Ultimately, the current disparity is best resolved by Congress, for it does not appear that aiding and abetting will ever find uniform judicial application within criminal law.

Part I of this Note summarizes the legislative history of § 922(d) and § 922(g). Part II summarizes the legislative and judicial history of aiding and abetting. Part III outlines the current circuit split regarding aiding and abetting illegal firearms possession. Part IV discusses possible judicial and legislative remedies to resolve the current circuit split and argues that because § 922(g) remains an available charge via the federal aiding and abetting statute and because the application of aiding and abetting remains fickle despite numerous modifications by both Congress and the judiciary, the best solution is for Congress to amend § 922(g) by definitively eliminating the option of bringing a § 922(g) charge via the federal aiding and abetting statute.

## I. A BRIEF OVERVIEW OF 18 U.S.C. § 922(D) AND § 922(G)

While § 922(d) and § 922(g) originally applied separately to gun merchants and restricted classes, respectively, after 1986 they overlapped and ultimately contradicted one another regarding aiding and abetting. Before further discussing this contradiction, this Note takes a brief look at the history of these two statutes to provide insight into how this flaw originated.

### A. *The History of § 922(g)*

Congress first enacted 18 U.S.C. § 922 in the Gun Control Act of 1968,<sup>11</sup> and it first appeared in the U.S. Code in 1970.<sup>12</sup> What is now

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9. *Staples v. United States*, 511 U.S. 600, 602 (1994) (holding that the prosecution bears the burden of proving beyond a reasonable doubt that a defendant accused of unlawful possession of a machine gun *knew* that the weapon he possessed had the requisite characteristics of a machine gun as defined by the relevant statute).

10. *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (ruling that an aider and abettor can be convicted only upon a showing that he knowingly and actively participated in an illegal venture).

11. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1216–21 (codified as amended at 18 U.S.C. § 922 (2006)).

§ 922(g) was originally two separate subsections, § 922(g) and (h).<sup>13</sup> These two subsections were nearly identical and only differed in restricting “ship[ment] or transport” of firearms and “rece[ption]” of firearms, respectively.<sup>14</sup> Congress consolidated these subsections in the Firearms Owners’ Protection Act, which was enacted in 1986,<sup>15</sup> and first appeared in the U.S. Code in 1988.<sup>16</sup>

Originally, § 922(g) and § 922(h) restricted four classes of persons from shipping, transporting, or receiving any firearm or ammunition in interstate or foreign commerce:

- (1) [any person] who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- (2) [any person] who is a fugitive from justice;
- (3) [any person] who is an unlawful user of or addicted to [drugs] . . . ; or
- (4) [any person] who has been adjudicated as a mental defective or who has been committed to a mental institution . . . .<sup>17</sup>

When Congress consolidated § 922(g) and § 922(h) into § 922(g), it added three classes:

- (5) [any person] who, being an alien, is illegally or unlawfully in the United States;
- (6) [any person] who has been discharged from the Armed Forces under dishonorable conditions; or
- (7) [any person] who, having been a citizen of the United States, has renounced his citizenship . . . .<sup>18</sup>

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12. 18 U.S.C. § 922 (1970). For a detailed but biased history of the ratification of this law, see ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 109–16 (3d ed. 2004).

13. Compare 18 U.S.C. § 922(g)–(h) (1970), with 18 U.S.C. § 922(g) (2006).

14. 18 U.S.C. § 922(g)–(h) (1970).

15. Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 102(6), 100 Stat. 449, 452 (1986) (codified as amended at 18 U.S.C. § 922(g) (2006)).

16. 18 U.S.C. § 922(g) (1988).

17. 18 U.S.C. § 922(g)–(h) (1970).

Another notable change in 1986 was the removal from § 922(g)(1) of restrictions against those under a felony indictment.<sup>19</sup> In the 1994 Code, Congress also added a restriction against persons subject to certain restraining orders.<sup>20</sup> Finally, in 1996, Congress added § 922(g)(9), prohibiting firearm transportation, possession, or reception (in interstate or foreign commerce) by anyone “who has been convicted in any court of a misdemeanor crime of domestic violence.”<sup>21</sup>

### B. *Mens Rea in § 922(g)*

There is no explicit mens rea requirement in any version of § 922(g).<sup>22</sup> Based on the wording of the statute, the prosecution merely has to prove that the defendant belongs to one of the nine restricted classes and that the defendant transported a firearm in interstate or foreign commerce, possessed a firearm in or affecting commerce, or received any firearm which has been shipped or transported in interstate or foreign commerce.<sup>23</sup> Thus, on its face, § 922(g) appears to be a strict liability statute. Every federal circuit, however, holds otherwise.<sup>24</sup> The federal circuits have drawn this

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18. Firearms Owners’ Protection Act, § 102(6). Note that when Congress merged § 922(g) and (h), it also made some minor alterations to the first four restricted classes, but their substance went largely unchanged. *Id.*

19. *Id.* § 102(6)(A).

20. 18 U.S.C. § 922(g)(8) (1994). The vehicle for this amendment was the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110401(c), 108 Stat. 1796, 2014–15.

21. Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 658(b)(2), 110 Stat. 3009, 3009-372 (1996) (codified at 18 U.S.C. § 922(g)(9) (2006)).

22. 18 U.S.C. § 922(g) (2006); *id.* § 922(g) (2000); *id.* § 922(g) (1994); *id.* § 922(g) (1988); *id.* § 922(g)–(h) (1982); *id.* § 922(g)–(h) (1976); *id.* § 922(g)–(h) (1970).

23. 18 U.S.C. § 922(g) (2006).

24. *United States v. Smart*, 501 F.3d 862, 865 (8th Cir. 2007) (“[T]he government must prove beyond a reasonable doubt (1) a previous conviction for a crime punishable by imprisonment over one year, and (2) knowing possession of a firearm (3) that was in or affected interstate commerce.”); *United States v. Ayoub*, 498 F.3d 532, 543 (6th Cir. 2007) (“To convict a defendant for being a felon in possession of a firearm, the Government must prove three elements: (1) the defendant had previously been convicted of a felony; (2) the defendant knowingly possessed a firearm; and (3) the firearm traveled in interstate commerce.”); *United States v. Jameson*, 478 F.3d 1204, 1208–09 (10th Cir. 2007) (“To establish a violation of 18 U.S.C. § 922(g)(1), the government had to prove: (1) that [the defendant] had previously been convicted of a felony, (2) that he thereafter knowingly possessed a firearm, and (3) that such possession was in or affected interstate commerce.”); *United States v. Taylor*, 475 F.3d 65, 68 n.2 (2d Cir. 2007) (“A conviction under 18 U.S.C. § 922(g)[(1)] requires proof beyond a reasonable doubt that the defendant knowingly and intentionally possessed a firearm in and affecting commerce after previously

conclusion based on 18 U.S.C. § 924(a)(2)<sup>25</sup>—the penalty statute for § 922(g)—reasoning that because § 924(a)(2) requires a knowing violation of § 922(g), the government must prove that the defendant knowingly possessed a firearm.<sup>26</sup> “Knowingly” possessing is the only mens rea requirement in § 922(g), and regarding attendant circumstances, the prosecution need prove only that the offender is in one of the restricted classes, not that the offender knew of this fact. While this does no injustice to the principal offender, applying the same mens rea requirement to a person charged with aiding and abetting a § 922(g) violation may yield unjust results and defy congressional intent.

### C. *The History of § 922(d)*

Under the original § 922, Congress restricted possession of firearms and ammunition by individuals belonging to any of four restricted classes.<sup>27</sup> Under § 922(d), Congress forbade others (licensed

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having been convicted of a felony.”); *United States v. Leahy*, 473 F.3d 401, 408 (1st Cir. 2007) (“The federal felon-in-possession statute requires proof that the defendant *knowingly* possessed a firearm. Beyond that, however, 18 U.S.C. § 922(g) is a strict liability statute, which contains no specific mens rea element at all.” (citation omitted) (footnote omitted)); *United States v. Johnson*, 459 F.3d 990, 996 (9th Cir. 2006) (“‘Knowledge’ refers only to the defendant’s knowingly possessing the gun, and it does not require knowledge that he is violating the law.”); *United States v. Glover*, 431 F.3d 744, 748 (11th Cir. 2005) (“[T]he prosecution must prove beyond a reasonable doubt that ‘the defendant was (1) in knowing possession of a firearm, (2) a convicted felon, and (3) that the firearm affected interstate commerce.’” (quoting *United States v. Hall*, 77 F.3d 398, 402 n.4 (11th Cir. 1996))); *United States v. Gilbert*, 430 F.3d 215, 218 (4th Cir. 2005) (“[Conviction under § 922(g)(1) requires the prosecution to prove that] (1) the defendant previously had been convicted of a crime punishable by a term of imprisonment exceeding one year; (2) the defendant knowingly possessed, transported, shipped, or received, the firearm; and (3) the possession was in or affecting commerce, because the firearm had travelled in interstate or foreign commerce at some point during its existence.” (quoting *United States v. Langley*, 62 F.3d 602, 606 (4th Cir. 1995) (en banc))); *United States v. Riley*, 376 F.3d 1160, 1166 (D.C. Cir. 2004) (“To commit the crime, the felon need only possess the gun ‘knowingly.’”); *United States v. Henry*, 288 F.3d 657, 661 (5th Cir. 2002) (“The scienter element of § 922(g)(8) is found in § 924(a)(2), which [requires a knowing violation] . . . .”); *United States v. Lane*, 267 F.3d 715, 720 (7th Cir. 2001) (“18 U.S.C. § 924(a)(2) incorporates a general intent requirement, namely that a defendant must have known that the object he possessed was a gun.”); *United States v. Dodd*, 225 F.3d 340, 347 n.4 (3d Cir. 2000) (“[T]he general intent contained in the § 922(g) offense is merely the baseline intent to possess the firearm . . . .”).

25. 18 U.S.C. § 924(a)(2) (2006) (“Whoever *knowingly violates* subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.” (emphasis added)).

26. See *supra* note 24.

27. 18 U.S.C. § 922(h) (1970).

importers, manufacturers, dealers, and collectors) from selling or disposing of any firearm or ammunition to individuals belonging to one of those restricted classes.<sup>28</sup> Throughout the years, as Congress added restricted classes to § 922(g), it added the same classes to § 922(d).<sup>29</sup> Until 1986, however, § 922(d) restricted only importers, manufacturers, dealers, and collectors from selling or disposing of firearms to someone in a restricted class (provided they acted “knowing or having reasonable cause to believe that such person” is a member of a restricted class).<sup>30</sup> In 1986, Congress expanded the breadth of § 922(d) in the Firearms Owners’ Protection Act.<sup>31</sup> Beginning with this Act (and continuing to today), § 922(d) reads: “It shall be unlawful for *any person* to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person” is a member of a restricted class.<sup>32</sup> As will be shown below, because of this expansion, the requisite state of mind to support a § 922(d) conviction (essentially, a knew-or-should-have-known standard) contradicts what is required for a conviction of aiding and abetting a § 922(g) violation (a strict liability standard).

#### D. *Mens Rea in § 922(d)*

Unlike § 922(g), courts need not look to another statute to determine the mens rea requirement of § 922(d).<sup>33</sup> Under § 922(d), prosecutors must prove that any person who sells or otherwise disposes of any firearm or ammunition to a convicted felon or member of another restricted class did so with knowledge or reason

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28. *Id.* § 922(d).

29. Compare 18 U.S.C. § 922(d), (g)–(h) (1970), with § 922(d), (g) (2006).

30. See 18 U.S.C. § 922(d) (1970).

31. Firearms Owners’ Protection Act, Pub. L. No. 99-308, § 102(5)(A), 100 Stat. 449, 451–52 (1986) (codified at 18 U.S.C. § 922(d) (2006)).

32. See 18 U.S.C. § 922(d) (2006) (emphasis added). According to Stephen E. Higgins, Director of the Bureau of Alcohol, Tobacco and Firearms at the time of the revision, “This proposal would close an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons.” Memorandum from Stephen E. Higgins, Dir., Bureau of Alcohol, Tobacco and Firearms, to Assistant Secretary (Feb. 10, 1986), in 132 CONG. REC. 2470 (1986). Considering the breadth of this expansion, it is surprising that some consider the Firearms Owners’ Protection Act “the zenith of the NRA’s influence on Capitol Hill.” SPITZER, *supra* note 12, at 119.

33. 18 U.S.C. § 922(d) (2006).

to know that the buyer or borrower was a member of that class.<sup>34</sup> This is the origin of the problem. Although Congress expanded § 922(d) to make aiding and abetting illegal firearm possession a principal offense, it did not restrict charging a person with a § 922(g) violation via the aiding and abetting statute.<sup>35</sup> Because of this oversight and the current state of aiding and abetting law, the mens rea requirement for those charged with aiding and abetting a § 922(g) violation is confounded.

## II. A BRIEF OVERVIEW OF AIDING AND ABETTING

The problems with § 922(g) as applied via the aiding and abetting law are not solely the fault of Congress. Despite its frequent use by prosecutors and years of attention by courts, aiding and abetting is a fickle concept. Before exploring its numerous irreconcilable applications under § 922(g), a brief look at the development of the so-called aiding and abetting doctrine is helpful.

### A. *Common Law and Early Statutory Law*

Congress has always intended aiders and abettors to be held as equally liable for the crimes of principal offenders as the principal offenders themselves—originally only for piracy offenses,<sup>36</sup> and later for all felonies under federal law:

[E]very person who shall knowingly and intentionally aid or abet any person in the commission of any such felony, or attempt to do any act hereby made felony . . . shall be liable to indictment and punishment in the same manner and to the same extent as the principal party guilty of such felony, and such person may be tried and convicted thereof without the previous conviction of such principal.<sup>37</sup>

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34. See *id.*; see also, e.g., *United States v. Haskins*, 511 F.3d 688, 691–93 (7th Cir. 2007); *United States v. Collins*, 350 F.3d 773, 775–77 (8th Cir. 2003); *United States v. Xavier*, 2 F.3d 1281, 1286 (3d Cir. 1993); *United States v. Murray*, 988 F.2d 518, 521–22 (5th Cir. 1993); *United States v. Clegg*, 846 F.2d 1221, 1223–24 (9th Cir. 1988); *United States v. Garcia*, 818 F.2d 136, 138–39 (1st Cir. 1987).

35. See 18 U.S.C. §§ 2(a), 922(g) (2006).

36. Act of Apr. 30, 1790, ch. 9, § 10, 1 Stat. 112, 114.

37. Act of July 14, 1870, ch. 254, § 2, 16 Stat. 254, 255.

But judicial interpretation of the law produced myriad categories of aiders and abettors, summarized recently by the Supreme Court:

The common law divided participants in a felony into four basic categories: (1) *first-degree principals*, those who actually committed the crime in question; (2) *second-degree principals*, aiders and abettors present at the scene of the crime; (3) *accessories before the fact*, aiders and abettors who helped the principal before the basic criminal event took place; and (4) *accessories after the fact*, persons who helped the principal after the basic criminal event took place.<sup>38</sup>

In 1909, Congress passed a law that eliminated most of the common law distinctions and left only the accessory after the fact as a separate category.<sup>39</sup>

### B. *Aider and Abettor as Principal*

The Sixtieth Congress shortened the aiding and abetting statute in 1909: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."<sup>40</sup> Congress later codified the exact wording of the 1909 statute in 18 U.S.C. § 550.<sup>41</sup> Finally, in 1951 the language was slightly modified and codified as 18 U.S.C. § 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."<sup>42</sup>

By eliminating the separate categories of principals and accessories, Congress intended to make prosecution easier.<sup>43</sup> Instead of trying the aider and abettor for a separate crime, prosecutors could apply the same elements they would have applied to the principal. Although

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38. *Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 820 (2007).

39. Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1088, 1152; *see also* 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, 1358–59 (2002).

40. Act of Mar. 4, 1909, § 332.

41. 18 U.S.C. § 550 (1940).

42. Act of Oct. 31, 1951, ch. 655, sec. 17b, § 2(a), 65 Stat. 710, 717 (codified at 18 U.S.C. § 2(a) (2006)) (emphasis added).

43. "[I]t was Congress's intent to eliminate the archaic, common-law distinctions between the aider and abettor and the principal, to eliminate the need to determine whether the defendant . . . had acted as a principal . . . and in general, to make it easier to convict the aider and abettor." Weiss, *supra* note 39, at 1355–56.

this is not specifically called for in the statute, Baruch Weiss convincingly argues in an article recently published in the *Fordham Law Review* that the “elimination of distinctions [between principals and aiders and abettors] speaks in favor of applying to the accomplice whatever mental state applies to the principal.”<sup>44</sup> Weiss further contends that in many respects, courts have implemented effectively Congress’s intent that aiders and abettors be treated as principals—even when the aider and abettor’s mental state, or mens rea, is at issue.<sup>45</sup> But in 1938, Judge Learned Hand took the first step toward making the principal’s mens rea all but impossible to apply consistently to an aider and abettor.

### C. *United States v. Peoni* and *Nye & Nissen v. United States*

In *United States v. Peoni*, the Second Circuit held in an opinion written by Judge Learned Hand that aiding and abetting contains an independent mens rea requirement.<sup>46</sup> In that case, a jury had convicted the defendant Peoni for three counts of possessing counterfeit money: the first count for his own possession; the second for aiding and abetting Regno’s possession (to whom Peoni sold the fake bills); and the third for aiding and abetting Dorsey’s possession (to whom Regno sold the fake bills).<sup>47</sup> The court overturned the third count, finding Peoni did not have the requisite intent as to Dorsey’s possession of the bills:

[The aider and abettor must] in some sort associate himself with the venture, . . . participate in it as in something that he wishes to bring about, . . . [and] seek by his action to make it succeed. All the words used [in the statute]—even the most colorless, “abet”—carry an implication of *purposive attitude* towards it.<sup>48</sup>

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44. *Id.* at 1362. For Weiss’s full treatment and interpretation of the history of aiding and abetting, see *id.* at 1356–62.

45. *Id.* at 1362–65. Weiss proposes that the federal aider and abettor statute be applied under a “modified derivative approach” to achieve a fair, consistent, and reasonable application of the law. *Id.* at 1486–90.

46. *United States v. Peoni*, 100 F.2d 401, 402–03 (2d Cir. 1938).

47. *Id.* at 401–02.

48. *Id.* at 402–03 (emphasis added).

Just over a decade later, the Supreme Court adopted Judge Learned Hand's formulation in *Nye & Nissen v. United States*.<sup>49</sup> In that case, Moncharsh, the president and owner of one-third of the stock of Nye & Nissen's parent corporation, was convicted of aiding and abetting a conspiracy to defraud the United States by making invoices that misrepresented the "weights, grades, and prices of specified sales of eggs and cheese."<sup>50</sup> After quoting *Peoni*, the Court applied Judge Learned Hand's formulation of aiding and abetting to Moncharsh's actions.<sup>51</sup> Although Moncharsh did not make the invoices himself, the Court concluded that he "was the promoter of a long and persistent scheme to defraud, that the making of false invoices was part of that project, [and] that the makers of the false invoices were Moncharsh's subordinates."<sup>52</sup> The Court affirmed his conviction.<sup>53</sup>

The adoption of Judge Learned Hand's interpretation of the aiding and abetting statute caused even more splintering than the common law classifications Congress had previously eliminated.<sup>54</sup> Contrary to congressional intent, the courts of appeals all agree that, although the aider and abettor is just as guilty as the principal, to convict him the prosecution must establish an independent guilty mind, or some sort of intent to aid the crime itself.<sup>55</sup> The differing applications of § 922(g) via § 2(a) provide one illustration of the confusion raised in how to establish an independent guilty mind for offenses that require only that the principal act with *knowledge* of some particular fact, and not that he act with any particular *intent*.

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49. *Nye & Nissen v. United States*, 336 U.S. 613 (1949).

50. *Id.* at 614–16.

51. *Id.* at 619.

52. *Id.*

53. *Id.* at 620.

54. Weiss, *supra* note 39, at 1373 ("[The federal case law regarding aiding and abetting] is more accurately described as hopelessly muddled and divided . . . despite the seeming clarity of [Judge Learned Hand's] pronouncements . . . . [F]ederal courts ostensibly following *Peoni* . . . have employed at least six different approaches to the question of an aider and abettor's mental state.").

55. G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability under RICO*, 33 AM. CRIM. L. REV. 1345, 1389–90 (1996) ("The federal courts of appeals now uniformly use 'intent' as the necessary state of mind for accomplice liability, although occasionally 'knowledge' language (or knowledge-like results) can be found in the opinions."); see also *id.* at 1390 n.167 (providing illustrative cases from the federal circuits).

## III. SECTION 922(G), MEET § 2(A): THE CIRCUIT SPLIT SO FAR

A. *Setting the Stage: Two Different Standards for the Same Aiding and Abetting Crime*

Until 1986, when Congress consolidated § 922(g) and (h) and modified § 922(d), no law conflicted with the prosecution of § 922(g) or (h) pursuant to aiding and abetting via § 2(a).<sup>56</sup> But despite the absence of any apparent statutory conflict, before 1986 neither subsection (§ 922(g) or (h)) was used with much frequency in the context of prosecutions for aiding and abetting (judging by the number of cases that reached the appellate level).<sup>57</sup> Even after Congress enacted the Firearms Owners' Protection Act in 1986, prosecutions for aiding and abetting felony firearms possession under § 922(g) via § 2(a) remained rare, but they have continued to occur in many circuits.<sup>58</sup> And prosecutions are only slightly more common under § 922(d).<sup>59</sup>

Congress restricted the sale or trade of guns to certain classes by different types of merchants under the original § 922(d). In a different but analogous context, the Supreme Court determined that one does not have to acquire legal title to a firearm to fall under the statutory prohibition against knowingly making false statements in connection with the illegal "acquisition" of a firearm.<sup>60</sup> Thus, the Supreme Court declared in *Huddleston v. United States* that "if the pawnbroker 'sells' or 'disposes' under § 922(a)(6), the transferee necessarily 'acquires.' These words, as used in the statute, are correlatives."<sup>61</sup>

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56. *See supra* Part I.C.

57. For a few examples of cases involving pre-1986 convictions for aiding and abetting violations of § 922(h), see *United States v. Ellis*, 747 F.2d 1205 (8th Cir. 1984); *United States v. Mayo*, 705 F.2d 62 (2d Cir. 1983); *United States v. Matassini*, 565 F.2d 1297 (5th Cir. 1978).

58. *See, e.g.*, *Fields v. United States*, 201 F.3d 1025 (8th Cir. 2000); *United States v. Bunge*, No. 94-1138, 1994 WL 650231 (7th Cir. Nov. 16, 1994); *United States v. Dyer*, Nos. 93-6568, 93-6623, 1994 WL 462146 (6th Cir. Aug. 25, 1994); *United States v. Parrilla-Tirado*, 22 F.3d 368 (1st Cir. 1994); *United States v. Jackson*, No. 93-3128, 1994 WL 85041 (D.C. Cir. Mar. 9, 1994); *United States v. Canon*, 993 F.2d 1439 (9th Cir. 1993); *United States v. McCall*, No. 90-5389, 1991 WL 101570 (4th Cir. June 14, 1991).

59. For the period between January 2001 and October 2008, no federal circuit court of appeals decided more than ten cases that so much as mentioned § 922(d).

60. *Huddleston v. United States*, 415 U.S. 814, 815, 820 (1974) (internal quotation marks omitted) (quoting 18 U.S.C. § 922(a)(6) (1970)).

61. *Id.* at 820.

Since the modification of § 922(d) in 1986 to include all gun owners, every federal circuit court addressing the issue of disposal has concluded that one may be charged under § 922(d) for lending, or *temporarily* disposing of, a firearm to someone, so long as the act was done with knowledge or reason to know the person was a member of a restricted class.<sup>62</sup> Relying on the Eighth Circuit and the Supreme Court's *Huddleston* precedent, the Sixth Circuit recently clarified this standard, stating that "'disposal,' as a correlative of 'acquisition,' occurs when the defendant allows another person to 'come into possession, control, or power of disposal of a firearm.'"<sup>63</sup> Thus, § 922(d) is an all-inclusive statute restricting anyone in possession of a firearm from knowingly facilitating a member of a restricted class from taking possession.

But, as previously mentioned, few are charged under § 922(d).<sup>64</sup> Meanwhile, more than 100 appeals involving § 922(g) violations have reached each federal court of appeals since the year 2000. Considering the frequency of § 922(g) charges, the all-inclusiveness of the aiding and abetting statute (which applies to any crime under Title 18 of the U.S. Code), the absence of restrictions in § 922(g) against charging aiders and abettors under the statute, and the busy dockets of federal prosecutors, it is understandable that when a case does arise, a prosecutor would charge § 922(g) pursuant to § 2(a) rather than look for an independent provision. But the two aiding and abetting statutes (§ 922(d) and § 2(a)) are not interchangeable. As a separate crime for aiders and abettors, § 922(d) protects defendants by requiring knowledge or reason to know of the recipient's membership in a restricted class—a significantly higher mens rea requirement than that imposed by § 2(a) for aiding and abetting violations of § 922(g).<sup>65</sup> This lack of protection afforded defendants

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62. See, e.g., *United States v. Jefferson*, 334 F.3d 670, 672, 675 (7th Cir. 2003) (man who entrusted his brother—a convicted felon—to keep his gun locked in a safe, amounted to violation of § 922(d)'s prohibition against disposing of firearms to convicted felons); *United States v. Pierre*, Nos. 02-4295, 02-4333, 2003 WL 21729982, at \*3-4 (4th Cir. July 25, 2003) (woman who gave gun to her husband—a convicted felon—who then carried the gun from the storefront to his parked car, amounted to violation of § 922(d)'s prohibition against disposing of firearms to convicted felons).

63. *United States v. Washington*, Nos. 03-6573, 04-5364, 03-6599, 2006 WL 328009, at \*6 (6th Cir. Feb. 14, 2006) (quoting *United States v. Monteleone*, 77 F.3d 1086, 1092 (8th Cir. 1996)). Editor's Note: The language in *Monteleone* states that disposal occurs when a person "comes" into possession, power, or control of a firearm.

64. See *supra* note 59 and accompanying text.

65. See *supra* Parts I.D, II.

that are prosecuted under § 2(a) for aiding and abetting violations of § 922(g) is especially troubling because of the confused state of aiding and abetting doctrine. Prosecutions for § 922(g) via § 2(a) have produced a plethora of results; some reflect § 922(g)'s lack of protection for aiders and abettors, and some remedy it, if perhaps imperfectly.

B. *To (d), or not to (d): Aiding and Abetting § 922(g) Since 1986*

Despite the intent of Congress under § 922(d) that one must know or have reason to know that the one to whom she sells, loans, or gives a firearm is restricted from possession in order to be guilty of a crime, this section of the Note shows that § 922(g) prosecutions pursuant to § 2(a) sometimes occur without that mens rea requirement. The following cases illustrate only some of the confusion raised by the aiding and abetting statute, specifically as it applies to § 922(g).

1. *Applying the Principal's Mens Rea in the Seventh Circuit (sort of): United States v. Moore*

In *United States v. Moore*, the Seventh Circuit considered the appeal of Moore, who had been convicted of robbing a postal employee and violating § 922(g)(1) (which prohibits convicted felons from possessing firearms).<sup>66</sup> Moore carried out the robbery together with Miles, both of whom were convicted felons.<sup>67</sup> Although Miles alone wielded the gun during the robbery, the court held that Moore's § 922(g) conviction was supported by Moore's conduct both as a principal (by virtue of his active participation in the robbery) and as an aider and abettor to Miles's illegal possession of the gun.<sup>68</sup> The court applied the following aiding and abetting test:

[T]he aiding and abetting standard has two prongs—association and participation. To prove association, the state must prove that the defendant had the state of mind required for the statutory offense; to prove participation, . . . there must be evidence . . . that the defendant engaged in some affirmative conduct[, specifically] . . . that [the]

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66. *United States v. Moore*, 936 F.2d 1508, 1511–12 (7th Cir. 1991).

67. *Id.* at 1511–12, 1525.

68. *Id.* at 1525–28.

defendant committed an overt act designed to aid in the success of the venture.<sup>69</sup>

In its reasoning, the Seventh Circuit utilized an amalgamation of the congressional intent and Judge Learned Hand's independent mens rea test (that the aider and abettor *associate* himself with the venture and actively *participate* in its implementation).<sup>70</sup>

In upholding Moore's conviction under § 2(a) for aiding and abetting a § 922(g) violation, the court applied a standard with two prongs—association and participation. For "association," the court followed congressional intent and placed the mens rea requirement of § 922(g) upon Moore: "Under 18 U.S.C. § 922(g)(1), the required state of mind is that the defendant *knowingly* possessed the gun . . . . Moore was clearly aware of Miles'[s] use of a gun in both armed robberies and, thus, satisfied this prong of the aiding and abetting test."<sup>71</sup> Then, for "participation," the court took a variation of Judge Learned Hand's formula and determined that Miles's "possession of a gun was an important part of the success of the entire criminal venture," and therefore "Moore's participation in the armed robbery venture clearly included his participation in Miles'[s] illegal possession of a weapon that was a critical part of this criminal enterprise."<sup>72</sup>

The facts of the case make no mention of Moore actually supplying a firearm to Miles.<sup>73</sup> But in applying the knowledge mens rea requirement of § 922(g) and Judge Learned Hand's interpretation of the precursor to § 2(a), the court nevertheless affirmed the conviction.<sup>74</sup> Moore was no doubt a principal in a deadly criminal venture. Nevertheless, the court satisfied the mens rea requirement for aiding and abetting Miles's firearm possession by carrying over Moore's mens rea relating to the robbery, and by so doing violated both congressional intent (for § 922(g) *and* (d)) and Judge Learned Hand's specific intent formula (interpreting § 2(a)'s legal

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69. *Id.* at 1527 (last alteration in original) (internal quotation marks omitted) (quoting *United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978)).

70. *Id.*

71. *Id.* at 1527–28 (emphasis added) (citation omitted) (internal quotation marks omitted) (ellipsis in original) (quoting *United States v. McNeal*, 900 F.2d 119, 121 (7th Cir. 1990)).

72. *Id.* at 1527.

73. *Id.* at 1511–13, 1525.

74. *Id.* at 1525–28.

predecessor). The mens rea the court deduced from the “entire criminal venture” was so powerful that it overrode the need to establish an actus reus, or act, on the part of the aider and abettor (for example, that Moore transferred, disposed of, or otherwise did something to aid in Miles’s possession of the gun).<sup>75</sup> It appears that, in the Seventh Circuit at least, if the “entire criminal venture” was limited to possession, one would only have to know of the principal’s possession to face charges under § 922(g) pursuant to aiding and abetting.

2. *Applying the Principal’s Mens Rea in the Ninth Circuit:*  
United States v. Canon

In the Ninth Circuit, at least one case simply applies the mens rea requirement of § 922(g) to aiders and abettors.<sup>76</sup> In *United States v. Canon*, defendant Delang appealed his conviction for aiding and abetting Canon’s felony firearm possession by handing him a firearm during a high speed chase.<sup>77</sup> Delang contended that “the court should have instructed the jury that he had to know Canon was a felon before Delang could aid Canon’s possession of a firearm.”<sup>78</sup> The court disagreed and affirmed the conviction, reasoning that “[t]he government did not have to prove Canon, as a principal, knew he was a felon. No greater knowledge requirement applies to Delang.”<sup>79</sup> Although the court referenced *Nye & Nissen* and insisted that the “government had . . . to prove Delang . . . participate[d] in [the crime] as in something that he wishe[d] to bring about,” the court did not discuss how, absent any knowledge of Canon’s prior convictions, Delang could wish to bring about a felony firearms possession.<sup>80</sup> At best, the court acted similarly to the Seventh Circuit in *Moore* and deduced the mens rea for the aiding and abetting violation from the other crimes Delang committed. At worst, the Ninth Circuit treated aiding and abetting felony firearms possession as a strict liability offense.

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75. *See id.*

76. *United States v. Canon*, 993 F.2d 1439, 1440–42 (9th Cir. 1993).

77. *Id.*

78. *Id.* at 1442.

79. *Id.* (citation omitted).

80. *Id.* (first and third alterations in original) (internal quotation marks omitted) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).

Fortunately, the Ninth Circuit all but overruled *Canon* in *United States v. Graves*.<sup>81</sup> Convicted as an accessory after the fact to Prince's illegal handgun possession,<sup>82</sup> Graves appealed, arguing that "the statute requires the government to prove that he had knowledge with respect to the essential elements of Prince's crime in order to show that he acted [illegally] to aid Prince."<sup>83</sup> In other words, Graves would have to have known that Prince possessed a weapon *and* that Prince had a previous felony conviction. The court agreed and, because there was no evidence Graves knew of Prince's prior felony conviction, reversed the conviction.<sup>84</sup> Because the court was not specifically addressing § 922(g) via § 2(a), however, it did not overturn *Canon*, but noted its "failure in *Canon* to make what would appear to be a logical exception in a case in which a principal is presumed to have knowledge of his own status but there is no reason an aider and abettor should be presumed to have such knowledge."<sup>85</sup> So, although *Canon's* precedent stands, the Ninth Circuit is aware of the strict liability it imposes upon aiders and abettors and may remedy it in the future.

### 3. *A Demand for (d) in the Third Circuit: United States v. Xavier*

In 1993, the Third Circuit also ruled on § 922(g) via § 2(a) in *United States v. Xavier*.<sup>86</sup> In that case, Xavier drove a man to a supermarket so that the man could provide Xavier's brother with a handgun, and Xavier's brother used the gun in a shooting immediately thereafter.<sup>87</sup> This incident led to multiple charges and convictions against Xavier.<sup>88</sup> Xavier appealed the conviction of aiding and abetting felony firearm possession, arguing that "knowledge of [his brother's] conviction . . . is an essential element of the crime."<sup>89</sup> The court agreed.<sup>90</sup>

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81. *United States v. Graves*, 143 F.3d 1185, 1186 (9th Cir. 1998).

82. Accessories after the fact are charged pursuant to 18 U.S.C. § 3 (2006).

83. *Graves*, 143 F.3d at 1187.

84. *Id.* at 1187, 1191.

85. *Id.* at 1188 n.3.

86. *United States v. Xavier*, 2 F.3d 1281, 1284–87 (3d Cir. 1993).

87. *Id.* at 1284–85.

88. *Id.*

89. *Id.* at 1286.

90. *Id.*

The court's reasoning examined § 922 in its entirety, and determined that Congress did not intend to allow for the conviction of aiders and abettors under § 922(g) via § 2(a), but rather, intended to treat aiders and abettors as principals under the principal offender statute, § 922(d):

As the text of [§ 922(d)] indicates, one cannot be criminally liable . . . without knowledge or reason to know of the transferee's status.

. . . Allowing aider and abettor liability under § 922(g)(1), without requiring proof of knowledge or reason to know of the possessor's status, would effectively circumvent the knowledge element in § 922(d)(1) and . . . abrogate congressional intent.<sup>91</sup>

While the Seventh and Ninth Circuits ignored or failed to notice § 922(d) when determining the mens rea required for a conviction under § 2(a) for aiding and abetting a § 922(g) violation, the Third Circuit followed its proscription in the aiding and abetting formula for § 922(g). This approach does not even require an analysis of aiding and abetting, because § 922(d) makes aiders and abettors principal offenders and does not involve § 2(a).<sup>92</sup>

4. *A Recent Demand for (d) in the Sixth Circuit: United States v. Gardner*

The Sixth Circuit recently adopted the Third Circuit's approach in *United States v. Gardner*.<sup>93</sup> That case was the first to address the circuit split over convictions for illegal firearms possession under § 922(g) pursuant to the federal aiding and abetting statute.<sup>94</sup> In that case, Gardner appealed numerous convictions stemming from an attempted armed robbery.<sup>95</sup> The Sixth Circuit reversed Gardner's conviction for aiding and abetting a felon in possession of a firearm in violation of § 922(g)(1) via § 2(a).<sup>96</sup> Gardner had been convicted pursuant to § 2(a), but the court ruled that:

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91. *Id.* (internal quotation marks omitted).

92. *See supra* Part I.C–D.

93. *United States v. Gardner*, 488 F.3d 700, 714–15 (6th Cir. 2007).

94. *Id.* at 713–16.

95. *Id.* at 706–09.

96. *Id.* at 721.

[I]n order for Gardner's conviction as an aider and abettor under § 922(g) to stand, the government must have presented some proof that Gardner *knew or had cause to know of* [the principal's] status as a convicted felon. The government presented no such evidence. As such, no rational trier of fact could have concluded that Gardner aided and abetted [the principal's] gun-possession.<sup>97</sup>

Like the Third Circuit, the Sixth Circuit applied the congressional intent of § 922(d) to § 922(g) in the instance of aiding and abetting.<sup>98</sup>

With both *Xavier* and *Gardner* serving as persuasive authority for the other circuits, and *Graves* all but overturning *Canon's* unjust precedent in the Ninth Circuit, if the issue arises in other circuits, it is likely that the movement will continue to favor implementing the mens rea of § 922(d) into cases involving § 922(g) via § 2(a). But even with these precedents, one may not necessarily rely on this outcome. Because of the infrequency of § 922(d) charges and the all-inclusiveness of the aiding and abetting statute,<sup>99</sup> federal prosecutors, judges, and defense attorneys may never question the mens rea requirements of aiding and abetting a § 922(g) violation.<sup>100</sup> Furthermore, given the continued debate surrounding gun rights, recently reinvigorated by the Supreme Court's ruling in *District of Columbia v. Heller*, both gun rights and gun control advocates alike would like to see uniform application of federal gun laws.<sup>101</sup> With this in mind, resolving the current split surrounding the mental state required for convictions under § 922(g) via § 2(a) could provide the opportunity to achieve uniformity not only in this gun law specifically, but also in the application of aiding and abetting doctrine generally.

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97. *Id.* at 716 (emphasis added).

98. *Id.* at 715.

99. *See supra* note 59 and accompanying text.

100. *See supra* note 58 (listing cases where violations of § 922(g) were charged pursuant to § 2(a), but were not discussed on appeal).

101. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008) (holding that the Second Amendment confers an individual right to keep and bear arms). Even the president of the NRA agrees with most of the current gun laws. *See* WAYNE LAPIERRE & JAMES JAY BAKER, SHOOTING STRAIGHT: TELLING THE TRUTH ABOUT GUNS IN AMERICA 54 (2002) (advocating for the stringent enforcement of current gun laws and illustrating the senselessness of enacting further restrictions when current restrictions are all but ignored in high crime areas).

## IV. SOLUTIONS: RECONCILING § 922(D) AND § 922(G) VIA § 2(A)

Ensuring the proper mens rea requirement is applied to those charged with aiding and abetting illegal firearms possession may be done by either Congress or the judiciary. Since both § 922(d) and § 922(g) have a “knowingly” mens rea standard, a brief discussion of this standard and how it translates from principals to aiders and abettors is in order.

The idea that the state of mind or intent behind an act should be measured in addition to the act itself is a well-established legal maxim:

As long as we continue to treat each other as persons and to value moral life, . . . and do not simply treat each other as potentially dangerous machines, the harmdoer’s attitude towards the victim, expressed by mental states, will be crucial to our emotional, moral and practical response.<sup>102</sup>

Professor Joshua Dressler differentiates the types of mens rea into intent, knowledge, willfulness, negligence, recklessness, and malice.<sup>103</sup> Intent is the requirement most laypersons associate with criminal law: “At common law, a person ‘intentionally’ causes the social harm of an offense if: (1) it is his desire (i.e., his conscious object) to cause the social harm; or (2) he acts with knowledge that the social harm is virtually certain to occur as a result of his conduct.”<sup>104</sup> Although knowledge to a level of virtual certainty can equal intent, some crimes do not focus on knowledge of social harm but on mere knowledge of other acts, or attendant circumstances, that the law deems socially harmful, such as the importation of drugs.<sup>105</sup> Section 922(g) is one such statute: even though possession of a firearm or ammunition by a restricted class member is not socially harmful in itself, possession is restricted because of the potential of this act to cause social harm.<sup>106</sup>

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102. Stephen J. Morse, *Inevitable Mens Rea*, 27 HARV. J.L. & PUB. POL’Y 51, 63 (2003).

103. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 129–45 (4th ed. 2006).

104. *Id.* at 130.

105. *Id.* at 136.

106. According to Professor Franklin Zimring, Congress had three major objectives in enacting the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–928 (2006)). The first two objectives are transparent in (what is now) § 922(g):

(1) Eliminating the interstate traffic in firearms and ammunition that had previously frustrated state and local efforts to license, register, or restrict ownership of guns.

Because the prosecution is required to prove only that the principal *knew* that he possessed a gun (knowledge of his restricted status is automatically imputed to him), directly imposing the principal's mens rea upon an alleged aider and abettor conflicts with Judge Learned Hand's formulation of the required mens rea for aiders and abettors (which requires proof that the aider and abettor *associated* himself with the venture and actively *participated* in its implementation).<sup>107</sup> Although courts aim to establish purposive attitude, or intent, on the part of the aider and abettor, this intent is often muddled together with the mere knowledge required of the principal, as seen in some of the previously discussed cases.<sup>108</sup> Thus, the judiciary may reconcile § 922(g) with aiding and abetting by either heightening its mens rea requirement or formulating a uniform application of aiding and abetting. Congress may also provide a solution by circumventing aiding and abetting entirely in this context by prohibiting charges of § 922(g) via § 2(a).

#### A. *Judicial Solutions*

As previously discussed, for a conviction under § 922(g) the courts require that the principal knowingly possess a firearm.<sup>109</sup> "Knowingly" is found not in § 922(g), but in the § 924(a)(2) sentencing guideline.<sup>110</sup> Dressler describes "knowingly" as follows: "A person has 'knowledge' of a material fact if he: (1) is aware of the fact; or (2) correctly believes that the fact exists."<sup>111</sup> But the knowledge requirement in § 922(g), or perhaps in any criminal law statute, is not so easily established. Some argue that the Supreme Court's case law "has left lower courts, defendants, and legislators with sufficient precedent to justify *any* interpretation of the word 'knowingly' in a

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(2) Denying access to firearms to certain congressionally defined groups, including minors, convicted felons, and persons who had been adjudicated as mental defectives or committed to mental institutions.

(3) [The third objective was to restrict the importation of "surplus military firearms."]

Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 149 (1975).

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

108. See *supra* Part III.B.1-2.

109. See *supra* Part I.B.

110. See *supra* Part I.B.

111. DRESSLER, *supra* note 103, at 136.

federal criminal statute.”<sup>112</sup> Nevertheless, as one possible remedy to clarifying aiding and abetting in the context of § 922(g), courts could apply an *implied* knowledge standard on the theory that a defendant should be held strictly liable for dealing with dangerous “devices” or felons—even absent actual knowledge of the underlying facts that render his actions illegal (for example, knowledge that he is dealing with a convicted felon).<sup>113</sup> Although the Supreme Court has applied this approach in some contexts (where, for example, the underlying activity related to narcotics or hand grenades), it rejected this approach in *Staples v. United States* (where the underlying activity was possession of a machine gun).<sup>114</sup> A bolder and more beneficial approach would be to reexamine and reaffirm an independent mens rea standard applicable to aiders and abettors, similar to Judge Learned Hand’s formulation in *Peoni*.

1. *Implied Knowledge: Staples v. United States*

In *Staples v. United States*, the Supreme Court overturned Staples’s conviction for possessing an unregistered machine gun in violation of 26 U.S.C. § 5861(d).<sup>115</sup> Staples claimed he did not know the weapon was a machine gun and that it barely functioned when he used it.<sup>116</sup> The wording of this statute requires strict liability; unlike § 922(g), § 5861(d) does not derive mens rea from its sentencing guideline.<sup>117</sup> The Court reasoned, however, that “silence on this point by itself does not necessarily suggest that Congress intended to

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112. Katherine R. Tromble, Note, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 VAND. L. REV. 521, 533 (1999) (emphasis added). Specifically, Tromble argues that the Supreme Court’s mens rea jurisprudence has established, on the one hand, a maximum knowledge standard that requires knowledge of the law being broken, and on the other, a minimum knowledge standard that requires only knowledge of the underlying action. *Id.* at 527–33.

113. *Staples v. United States*, 511 U.S. 600, 607 (1994) (reasoning that “as long as a defendant knows that he is dealing with a dangerous device [that places him in a position of public responsibility], . . . he should be alerted to the probability of strict regulation”—even absent express congressional intent to dispense with a mens rea element).

114. *Id.* at 608–12.

115. 26 U.S.C. § 5861(d) (1994) (making it unlawful for any person “to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record”); *Staples*, 511 U.S. at 602–03.

116. *Staples*, 511 U.S. at 603.

117. The sentencing provision for violations of § 5861(d) simply states: “Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both.” 26 U.S.C. § 5871 (1994).

dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal."<sup>118</sup> Dismissing the government's contention that, as a public welfare offense, § 5861(d) made Staples strictly liable, the Court determined that the "destructive potential [of guns] . . . cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting § 5861(d) as not requiring proof of knowledge of a weapon's characteristics."<sup>119</sup>

Interpreting § 922(g) by the *Staples* standard, one could argue that Congress implied that the principal must know, not only of the firearm possession, but also of his membership in a restricted class. This interpretation, then, would supplement the *mens rea* currently derived from § 924(a)(2) (currently interpreted as requiring a knowing violation only of the firearm possession) by requiring prosecutors to establish an additional element (for example, in the context of felony firearm possession, that the principal *knew* of his own status as a convicted felon). When charging an aider and abettor, this solution would reconcile § 922(g) via § 2(a) with § 922(d) and would not be distorted by any interpretation of aiding and abetting. By requiring the prosecution to prove beyond a reasonable doubt that the aider and abettor knowingly facilitated the principal's firearm possession *with knowledge of the principal's membership in a restricted class*, charges of § 922(g) via § 2(a) would actually be more difficult to prove than charges under § 922(d) (which permits a conviction so long as the aider and abettor had "reasonable cause to believe" of the principal's restricted status).<sup>120</sup> No longer could an aider and abettor be convicted upon a showing only that he had reason to know of the principal's status. Accordingly, § 922(g) via § 2(a) would be more protective of aiders and abettors, and thus prosecutors would be encouraged to use § 922(d).

Although this standard would give just protection to aiders and abettors, it would likely give too much protection to principals. Principals charged for illegal firearms possession under § 922(g) have made numerous appeals for requiring proof of knowledge of class membership under the statute, with little success.<sup>121</sup> If this knowledge

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118. *Staples*, 511 U.S. at 605.

119. *Id.* at 612.

120. 18 U.S.C. § 922(d) (2006).

121. *E.g.*, *United States v. Bennette*, 208 F. App'x 219, 220–21 (4th Cir. 2006) (principal need not have known he was classified as a fugitive to sustain a conviction under § 922(g)(2)); *United*

standard were required of prosecutors, the burden of proof—like all criminal elements—would have to rise to a level beyond a reasonable doubt.<sup>122</sup> Thus, mistake-of-fact defenses could very easily impede prosecutors' efforts against principals:

It does not matter that the defendants' mistakes . . . may have been entirely unreasonable—reckless or negligent—under the circumstances. Acquittal follows inextricably from the fact that a person may not be convicted of an offense unless every element thereof, including the mental-state element . . . , is proved . . . .<sup>123</sup>

Although many defenses would be a hard sell to a jury or judge, planting reasonable doubt for some restricted classes may be surprisingly easy. For example, a drug addict charged with firearm possession under § 922(g)(3)<sup>124</sup> could make a valid claim that her drug addiction prevented actual knowledge of her problem. And with the passage of time, a convicted felon charged under § 922(g)(1)<sup>125</sup> or someone dishonorably discharged from the armed forces charged under § 922(g)(6)<sup>126</sup> could plausibly claim that he had forgotten the event entirely. Finally, given the intricacies of § 922(g)(8),<sup>127</sup>

States v. Montero-Camargo, 177 F.3d 1113, 1120 (9th Cir. 1999), *withdrawn*, 192 F.3d 946 (9th Cir. 1999), *opinion reinstated in relevant part*, 208 F.3d 1122, 1128 n.8 (9th Cir. 2000) (en banc) (principal need not have known he was in the United States illegally to be convicted under § 922(g)(5)); United States v. Langley, 62 F.3d 602, 605–06 (4th Cir. 1995) (principal need not have known of his own previous felony conviction to sustain a conviction under § 922(g)(1)).

122. *In re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.")

123. DRESSLER, *supra* note 103, at 167.

124. 18 U.S.C. § 922(g)(3) (2006).

125. *Id.* § 922(g)(1).

126. *Id.* § 922(g)(6).

127. *Id.* § 922(g)(8). In its entirety, § 922(g)(8) reads:

It shall be unlawful for any person—

. . . .

. . . who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

which restricts possession by one subject to a restraining order, numerous mistakes of fact could plant reasonable doubt.<sup>128</sup> The best judicial solution, then, may rest with a uniform standard for aiding and abetting.

2. *Mens Rea in Aiding and Abetting: Judge Learned Hand's "Purposeful Intent"*

Authors have described Judge Learned Hand's formulation of aiding and abetting as a standard of "true purpose,"<sup>129</sup> "purposive intent,"<sup>130</sup> or "natural and probable consequences."<sup>131</sup> Baruch Weiss argues that the various interpretations of *Peoni* are almost entirely wrong.<sup>132</sup> Nevertheless, what he describes as the "purposeful intent" interpretation of Judge Learned Hand's ruling would reconcile Congress's intent behind § 922(d) (convictions only if an aider and abettor at least has reason to know of the principal's restricted status) with its intent behind § 922(g) (convictions for knowing violations only) by implementing an independent mens rea requirement for aiders and abettors that would protect those charged under § 922(g) via § 2(a) from strict liability.<sup>133</sup>

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(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; . . .

. . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

128. See generally Thomas L. Fowler, *Ignorance of the Law: Should It Excuse Violations of Certain Federal Restrictions on the Possession of Firearms?*, 23 CAMPBELL L. REV. 283 (2001).

129. Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236 (2000) (internal quotation marks omitted).

130. See 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, 788 (1997) (proposing that courts "revitalize" *Peoni* by setting up a standard that allows judges to consistently and correctly infer the aider and abettor's "purposive intent" to help bring about the principal's firearm violation).

131. Weiss, *supra* note 39, at 1424–35 (internal quotation marks omitted). Weiss argues that *Peoni* "does not even purport to determine the mental state of the aider and abettor; in fact, it explicitly leaves that question open." *Id.* at 1424.

132. *Id.* at 1424–35.

133. *Id.* at 1376–93.

Weiss describes purposeful intent as the following:

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

... This... reading of *Peoni* means that the aider and abettor must *always* act with the purpose and desire to bring about the crime, even when the principal is liable on some lesser mental state.<sup>134</sup>

This follows Judge Learned Hand's definition that one must participate in the act with the desire to assist in its success.<sup>135</sup> For aiding and abetting illegal firearms possession, this standard would require that the aider and abettor not only knew that the principal was a member of a restricted class, but also desired to facilitate his possession. Although charges under § 922(d) do not require this level of intent, this interpretation would largely reconcile § 922(d) and § 922(g) via § 2(a) by ensuring that no aider and abettor is held strictly liable for not knowing underlying facts he had no reasonable cause to believe existed, and for something he did not intend.

Unfortunately, the effectiveness of the purposeful intent application is not universal. Even though applying it to § 922(g) via § 2(a) would meet, or even exceed, the mens rea requirement of § 922(d), purposeful intent provides too much protection to aiders and abettors in some situations. Consider its application, for example, in the context of 18 U.S.C. § 924(c), a statutory provision that enhances sentences for "any person who, during and in relation to any crime of violence or drug trafficking crime[,] . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm."<sup>136</sup>

[Under purposeful intent,] *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

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134. *Id.* at 1376–77 (footnote omitted).

135. *See supra* Part II.C.

136. 18 U.S.C. § 924(c) (2006).

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.<sup>137</sup>

Purposeful intent works for aiding and abetting when applied to § 922(g), but because other crimes can be aided and abetted much more subtly, it will not work as a universal standard. Neither judicial remedy—*Staples*'s insistence of actual knowledge or *Peoni*'s focus on purposeful intent—reconciles aiding and abetting illegal firearms possession with § 922(d) without collateral consequences. Thus, the best remedy lies with Congress and an amendment to § 922(g).

#### B. *The Best Solution: Congressional Restriction of § 922(g) via § 2(a)*

In the United States, for better or worse, Congress makes the federal laws.<sup>138</sup> Section 922 is one example of instructions inconsistently followed by the judiciary. And given its power to revise the laws, Congress should rectify the mens rea disparity between § 922(d) and § 922(g) via § 2(a). Based on the numerous modifications Congress has made to § 922(g) over the years, one can safely conclude that Congress is familiar with the statute and is willing to amend it.<sup>139</sup> Although the Third and Sixth Circuits were able to discover § 922(d) easily enough,<sup>140</sup> other courts have missed the mark,<sup>141</sup> perhaps in part because that section is largely overshadowed by the prominence of § 922(g) prosecutions.<sup>142</sup> Because some courts have missed § 922(d) altogether—and others may do so in the future—Congress would be wise to revise § 922(g) with directions to use § 922(d)—instead of § 922(g) via § 2(a)—in aiding and abetting prosecutions. A proposed amendment to § 922(g) could read as follows: “This section shall only apply to principal offenders; those who aid and abet any offense herein shall be charged as principals pursuant to subsection (d) of this statute.” Although not a frequent occurrence in Title 18, cross-references within a statutory

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137. Robinson, *supra* note 130, at 787; accord Weiss, *supra* note 39, at 1382–85.

138. U.S. CONST. art. I, § 1.

139. See *supra* Part I.A.

140. See *supra* Part III.B.3–4.

141. See *supra* Part III.B.1–2.

142. See *supra* note 59, and text accompanying and following note 64.

scheme appear frequently in other sets of laws, including the Internal Revenue Code.<sup>143</sup>

Congress could also act to reform aiding and abetting doctrine generally, but such an attempt may prove to be a futile gesture. Aiding and abetting is an equitable doctrine that will continue to be applied inconsistently by the courts on a case-by-case basis.<sup>144</sup> This result already occurred when Congress originally eliminated the common law categories of aiders and abettors.<sup>145</sup> Absent a more miraculous effort by Congress, a uniform aiding and abetting standard will likely arise only within the judiciary itself. Thus, to resolve the mens rea discrepancy between § 922(d) and § 922(g) via § 2(a), Congress should prohibit charges of § 922(g) via § 2(a) altogether.

#### CONCLUSION: TWO BIRDS, ONE STONE?

Strict liability charges of aiding and abetting illegal firearms possession is not an immediate danger to law-abiding gun owners. Those charged with violating § 922(g) via § 2(a) are typically convicted because of their participation in another offense. Often, the § 922(g) charge is but the lowest offense on a long list of felonies. Nevertheless, in light of today's polarized political climate surrounding restrictions on gun ownership and gun rights, some favoring gun control may find in § 922(g) a powerful tool against gun owners generally. Thus, it is in the best interest of those who advocate that gun possession is an individual right to see that § 922 is amended to prevent § 922(g) charges pursuant to § 2(a). Regardless of the gun debate, justice demands a certain guilty mind for each felony, and Congress did not intend gun owners to be strictly liable for lending firearms to certain classes of borrowers. Although either a congressional amendment to § 922(g) or judicial reinvigoration of aiding and abetting would resolve the disparity between § 922(d) and

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143. See, e.g., I.R.C. § 67(b) (West 2006).

144. See Weiss, *supra* note 39, at 1373 (“[The federal case law regarding aiding and abetting] is more accurately described as hopelessly muddled and divided . . . despite the seeming clarity of [Judge Learned Hand’s] pronouncements. . . . [F]ederal courts ostensibly following *Peoni* . . . have employed at least six different approaches to the question of an aider and abettor’s mental state.”).

145. See *id.* at 1368 (“The ‘knowledge versus purposeful intent’ controversy continued beyond [Congress’s 1909 consolidation of the common law categories] and well into the twentieth century.”).

§ 922(g) via § 2(a), criminal law would greatly benefit from a clarification of mens rea standards in *both* the gun laws and the aiding and abetting doctrine. But because aiding and abetting remains impossible to implement uniformly throughout the spectrum of criminal laws, it would be a far easier task to remedy the misnavigated waters of § 922 legislatively with an amendment to § 922(g).