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# CRIMINAL LAW— "BUT I DIDN'T KNOW WHO HE WAS!": WHAT IS THE REQUIRED MENS REA FOR AN AIDER AND ABETTOR OF A FELON IN POSSESSION OF A FIREARM?

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CRIMINAL LAW—“BUT I DIDN’T KNOW WHO HE WAS!”:  
WHAT IS THE REQUIRED MENS REA FOR AN AIDER AND ABETTOR  
OF A FELON IN POSSESSION OF A FIREARM?

INTRODUCTION

Adam stands outside a post office holding a handgun under his jacket. He slides the weapon out from under his jacket and hands it to his partner, Pete. This is not Pete’s first turn at this game. Ten years ago he was convicted of armed robbery of a post office, a federal felony offense carrying a penalty of up to five years in prison.<sup>1</sup> A moment later, Pete runs into the post office, brandishing the gun at the postal workers, and takes fistfuls of money from the cash register. Adam stands lookout. A witness on the street sees the encounter and phones the police. Within minutes the police arrive, and the two men are arrested.

Each man faces a litany of charges. Pete is charged with, among other crimes, a violation of 18 U.S.C. § 922(g)—being a convicted felon in possession of a firearm<sup>2</sup>—a crime punishable, under 18 U.S.C. § 924(b), by up to ten years in prison and a \$10,000 fine.<sup>3</sup> Whether Pete, as the principal offender, knew he was a convicted

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1. 18 U.S.C. § 2115 (2006). The statute provides,

Whoever forcibly breaks into or attempts to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building or part thereof, so used, any larceny or other depredation, shall be fined under this title or imprisoned not more than five years, or both.

*Id.*

2. *Id.* § 922(g)(1). The statute provides,

It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . 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.

*Id.*

3. *Id.* § 924(b). The statute provides,

Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

*Id.*

felon is of no matter; he is strictly liable so long as he willfully possessed the firearm.<sup>4</sup> As is customary with federal crimes involving multiple defendants, our original character, Adam, faces a charge of aiding and abetting the crimes with which his partner is charged and is subject to the same punishment.<sup>5</sup> Among the crimes he will be charged with is aiding and abetting a felon in possession of a firearm.<sup>6</sup> If he can convince a jury that he did not know his partner was a convicted felon, can Adam avoid a conviction on this charge? What is the required “mens rea”<sup>7</sup> for this crime?

Due to a split among the federal courts of appeals, the answer to that question depends upon *where* the alleged crime was committed.<sup>8</sup> For example, if the post office had been located in Jacksonville, Florida, Adam could still receive up to ten years in prison for aiding and abetting alone even if he can convince a jury that he had no knowledge of his partner’s criminal record.<sup>9</sup> This is because the Ninth and Eleventh Circuits have not read mens rea into the statute beyond knowledge that the individual in question has aided the principal in the possession of a firearm.<sup>10</sup> Set this hypothetical in Knoxville, Tennessee, and proof that Adam had no prior knowledge of his partner’s record may spare him the conviction because

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4. See *infra* note 97 and accompanying text.

5. 18 U.S.C. § 2. The statute provides,

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

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

*Id.*; see also BLACK’S LAW DICTIONARY 81 (9th ed. 2009) (defining aid and abet: “[t]o assist or facilitate the commission of a crime, or to promote its accomplishment”).

6. See 18 U.S.C. § 2.

7. Latin for “guilty mind,” *Black’s Law Dictionary* defines mens rea as [t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness <the mens rea for theft is the intent to deprive the rightful owner of the property>. *Mens rea* is the second of two essential elements of every crime at common law, the other being the *actus reus*—Also termed *mental element*; *criminal intent*; *guilty mind*.

BLACK’S LAW DICTIONARY 1075 (9th ed. 2009).

8. See *United States v. Samuels*, 521 F.3d 804, 811-12 (7th Cir. 2008); *United States v. Lesure*, 262 F. App’x 135, 142-43 (11th Cir. 2008); *United States v. Gardner*, 488 F.3d 700, 720 (6th Cir. 2007); *United States v. Xavier*, 2 F.3d 1281, 1286-87 (3d Cir. 1993); *United States v. Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993); *United States v. Moore*, 936 F.2d 1508, 1525-28 (7th Cir. 1991).

9. See *Lesure*, 262 F. App’x at 142-43.

10. See *id.*; *Canon*, 993 F.2d at 1442; *Moore*, 936 F.2d at 1508; see also discussion *infra* Part III.A.

the Sixth Circuit, along with the Third and Seventh Circuits, has ruled that some greater knowledge than merely acting to make the possession come about is required for a conviction on the charge of aiding and abetting a felon in possession of a firearm.<sup>11</sup> What if the robbery had occurred in Springfield, Massachusetts? The First Circuit and all other circuits not previously mentioned have yet to address this question, leaving speculation as to the future of this issue in those circuits.

Until Congress acts, this issue will remain one of judicial interpretation. Thus far, five circuits have ruled on the issue, and each has used a different reasoning.<sup>12</sup> A congressional amendment or overhaul of the law in this area is required. This Note will argue that until such a time as Congress addresses this issue, courts confronted with this issue should find that the alleged aider must have some greater knowledge than merely that the principal is a felon in possession of a firearm.<sup>13</sup> Though Congress has left the courts with an unclear view of its intention, the Third and Sixth Circuits provide a logical solution and predictable standard that other courts should follow.

Those courts of appeals that propose a standard that does not require knowledge of the principal's status as a felon point to the general aiding and abetting statute, 18 U.S.C. § 2, which requires that aiders and abettors be treated as principals.<sup>14</sup> This analysis is too simplistic and fails to recognize the broad scope of the Gun Control Act of 1968<sup>15</sup> and the subsequent Firearms Owners Protection Act.<sup>16</sup> Further, it is felled by the fact that to enforce this reading of the issue, the courts must read certain aspects of the law in this area out of the United States Code (the "Code") or as redundancies within the Code. This is an inadequate reading of the issue.

This Note will first set out the history of aiding and abetting law, as well as the history of the felon-in-possession statute. This discussion will demonstrate the strength of the proposition that some knowledge beyond mere knowledge of possession of the firearm must be required to convict for aiding and abetting a felon in

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11. *Gardner*, 488 F.3d at 715; *Xavier*, 2 F.3d at 1286-87; see *Samuels*, 521 F.3d at 811-12; see also discussion *infra* Part III.B.

12. See discussion *infra* Part III.

13. *Gardner*, 488 F.3d at 715; *Xavier*, 2 F.3d at 1286-87; see *Samuels*, 521 F.3d at 811-812; see also discussion *infra* Part III.B.

14. See discussion *infra* Part II.A.

15. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

16. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. § 922 (2006)).

possession of a firearm. This Note will then discuss relevant case law and the methods of statutory interpretation. Finally, this Note will present several hypothetical fact patterns that will demonstrate the problems inherent in the jurisdictions requiring no knowledge beyond that of possession, and the strengths—and shortcomings—of jurisdictions ruling that an alleged aider must have some knowledge of the principal offender's status as a convicted felon.

This Note recommends that some greater knowledge than merely knowingly taking action that places the felon in possession of the firearm must be required; that is to say that the knowledge of the aider as to the felon status of the principal is an issue that the courts and juries must consider. However, ultimately this Note implores Congress to clarify the issue by directly addressing the felon-in-possession statute and its relation to aiding and abetting law and its ancient roots.<sup>17</sup>

#### I. 18 U.S.C. § 2—HISTORY AND ANALYSIS OF AIDING AND ABETTING LAW

The concept of accomplice liability predates American law.<sup>18</sup> In *United States v. Peoni*, a preeminent case in the area of aiding and abetting law, Judge Learned Hand traced the long history of aiding and abetting law as far back as Fourteenth Century England.<sup>19</sup> In both the United States and England, a long tradition of

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17. While this Note will take a unique angle of analysis on this issue—including addressing the potentially contradictory rulings of the Court of Appeals for the Seventh Circuit—it is not the first piece of scholarship to address the split and its consequences. See Stephen R. Klein, Note, *A Shot at Mens Rea in Aiding and Abetting Illegal Firearms Possession Under 18 U.S.C. § 922(g)*, 7 *AVE MARIA L. REV.* 639 (2009). In his Note, Klein argues that “the split should be resolved legislatively by restricting § 922(g) charges via § 2(a).” *Id.* at 641. Klein, who presents his Note from a solidly pro-gun-owners'-rights point of view concludes that congressional action is necessary to create uniformity on this matter. *Id.* at 665-66. He reasons that it is in the best interests of those advocating gun owner rights to require a knowledge element, as a failure to do so could be used against lawful gun owners by gun control advocates. *Id.* at 667.

This Note will not offer a political or ideological opinion on this matter, nor will it suggest a particular politically motivated amendment. It will, however, seek to address uniformity and fairness in this issue.

18. *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); see also Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and Causar Under Federal Law*, 70 *FORDHAM L. REV.* 1341, 1344 (2002).

19. *Peoni*, 100 F.2d at 402. The court noted,

The substance of that formula goes back a long way. Pollock & Maitland, Vol. II, p. 507, in speaking of the English law at the beginning of the 14th Century, say that already ‘the law of homicide is quite wide enough to comprise . . . those who have ‘procured, counselled, commanded or abetted’ the felony’; cit-

common-law aiding and abetting law exists.<sup>20</sup> English common law separated the parties to a felony into four categories: principals who committed the crime, principals who were present at the scene and aided and abetted the commission of the crime, accessories before the crime, and accessories after the commission of the crime.<sup>21</sup> Under English law, this construction was often one of semantics rather than practicality as punishments were nearly always identical.<sup>22</sup> As with many aspects of English common law, aiding and abetting law crossed the Atlantic and became a part of American common law.<sup>23</sup>

#### A. *A History of Aiding and Abetting in American Law*

By all accounts, the English formulation became overly burdensome, ineffective, and eventually untenable.<sup>24</sup> In enacting the Alaska territory penal code in 1899, Congress began to chip away at the common law and required that “all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and

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ing Bracton, f. 142, as follows: ‘for it is colloquially said that he sufficiently kills who advises’ (praecipit) the killing.

*Id.*

20. *See id.*; *see also* *Standefer v. United States*, 447 U.S. 10, 15 (1980) (discussing the early common law rule that an accessory could not be convicted unless the principal offender was formerly convicted); 4 WILLIAM BLACKSTONE, COMMENTARIES \*33 (“A man may be principal in an offense in two degrees. A principal, in the first degree is he that is the actor or absolute perpetrator of the crime; and, in the second degree, he who is present, aiding, and abetting the fact to be done.”). *See generally* Rollin M. Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581, 583-623 (1941) (discussing the history of aiding and abetting law).

21. *See Standefer*, 447 U.S. at 15. The court stated,

In felony cases, parties to a crime were divided into four distinct categories: (1) principals in the first degree who actually perpetrated the offense; (2) principals in the second degree who were actually or constructively present at the scene of the crime and aided or abetted its commission; (3) accessories before the fact who aided or abetted the crime, but were not present at its commission; and (4) accessories after the fact who rendered assistance after the crime was complete.

*Id.*

22. *See* 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 231 (1882) (“Stated in the broadest and most unqualified way it came to this. There was no distinction between principals and accessories in treason or misdemeanour, and the distinction in felony made little difference, because all alike, principals and accessories, were felons, and were, as such, punishable with death.”).

23. *See Standefer*, 447 U.S. at 16.

24. Weiss, *supra* note 18, at 1358 (stating that “with the introduction of sentencing discretion . . . the common-law distinctions became an unnecessary burden”); *see also Standefer*, 447 U.S. at 16 (“Not surprisingly, considerable effort was expended in defining the categories . . . . In the process, justice all too frequently was defeated.” (citation omitted)).

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whether they directly commit the act constituting the crime or aid and abet [in] its commission, though not present, are principals, and [are] to be tried and punished as such.”<sup>25</sup> Congress continued to move in this direction by enacting a similar provision for the District of Columbia in 1901.<sup>26</sup> Finally, Congress enacted a national statute to address aiding and abetting in 1909, stating, “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>27</sup> The statute was initially codified as 18 U.S.C. § 550,<sup>28</sup> and in 1948 it was moved to 18 U.S.C. § 2.<sup>29</sup> The result was a criminal justice system that treated all perpetrators, be they principals or accessories, the same.<sup>30</sup>

In 1951, the statute was amended to change the language “is a principal” to “is punishable as a principal.”<sup>31</sup> This change, which has been referred to by one commentator as “a pro-prosecution amendment,”<sup>32</sup> prevented the defense from arguing that a defendant could not be “a principal” because he was not part of the class covered by the criminal statute.<sup>33</sup> To be a member of a statute’s required class is to be a member of the group described by the language of the statute that should be subject to that law.<sup>34</sup> As dis-

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25. Act of Mar. 3, 1899, ch. 429, § 186, 30 Stat. 1253, 1282; *see also Standefer*, 447 U.S. at 17-18 (discussing this change in law).

26. Act of Mar. 3, 1901, ch. 854, § 908, 31 Stat. 1189, 1337; *see also Standefer*, 447 U.S. at 18 (discussing this change in law).

27. Act of Mar. 4, 1909, ch. 321, § 332, 35 Stat. 1088, 1152.

28. 18 U.S.C. § 550 (1940).

29. Act of June 25, 1948, ch. 645, 62 Stat. 683, 684.

30. *Hammer v. United States*, 271 U.S. 620, 628 (1926) (“Section 332 of the Criminal Code abolishes the distinction between principals and accessories and makes them all principals. One who induces another to commit perjury is guilty of subornation under § 126 and, by force of § 332, is also guilty of perjury.” (citation omitted)).

31. Act of Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 710, 717.

32. Adam Harris Kurland, *To “Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense”: A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85, 90 (2005) (“This was a pro-prosecution amendment, which eliminated the defense argument that an individual could not be guilty as a principal under 18 U.S.C. § 2 when he lacked the capacity to commit the actual offense.”).

33. *Id.* This approach was already in effect in the wake of Supreme Court rulings in *Rothenburg v. United States*, 245 U.S. 480 (1918), *United States v. Giles*, 300 U.S. 41 (1937), and the Seventh Circuit ruling in *United States v. Hodorowicz*, 105 F.2d 218 (7th Cir. 1939), which all ruled that the issue of class was not germane to the discussion of aiding and abetting.

34. *Standefer v. United States*, 447 U.S. 10, 18 n.11 (1980). The Court stated the following:

In 1951, the words “is a principal” were altered to read “is punishable as a principal.” That change was designed to eliminate all doubt that in the case of offenses whose prohibition is directed at members of specified classes (*e.g.*,

cussed in *Standefer v. United States*, this means that one need only aid or abet a principal offender to be among the class covered by 18 U.S.C. § 2.<sup>35</sup> It is not necessary for the offender to be a member of a required class of the principal offense to be convicted of aiding and abetting a member of that class.<sup>36</sup> Further, Congress noted in its legislative history that the amendment was intended to settle the issue of “class” and not remove the equivalent status of the aider and the principal.<sup>37</sup> This distinction is critical because the statute underlying the topic of this discussion specifies a required class of any person “who has been convicted in any court of [ ] a crime punishable by imprisonment for a term exceeding one year.”<sup>38</sup> While 18 U.S.C. § 2 may seem plain in language, its application in practice has been far from clear.<sup>39</sup>

### B. *Aiding and Abetting Law in Practice*

The aiding and abetting statute is among the most often used statutes in federal criminal law.<sup>40</sup> This is because the statute attaches to *all* participants in *all* federal offenses involving multiple defendants.<sup>41</sup> In fact, it is well established that an aiding and abetting charge need not even be listed in an indictment as it is assumed

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federal employees) a person who is not himself a member of that class may nonetheless be punished as a principal if he induces a person in that class to violate the prohibition.

*Id.*

35. *Id.*

36. *Id.*

37. 18 U.S.C. § 2 (2006). The statute provides a note on legislative intent:

The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who “aids, abets, counsels, commands, induces or procures” another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States.

It removes all doubt that one who puts in motion or assists in the illegal enterprise but causes the commission of an indispensable element of the offense by an innocent agent or instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense.

*Id.* § 2 note (Historical and Revision Notes).

38. *Id.* § 922(g)(1).

39. *See infra* notes 43-68 and accompanying text.

40. Weiss, *supra* note 18, at 1346 (“[B]ecause of the doctrine’s applicability to all offenses and to all participants (other than the principal), the aiding and abetting statute is probably invoked more frequently than any other federal criminal statute.”).

41. *Id.* at 1345-46 (“The federal aiding and abetting doctrine applies to ‘the entire criminal code,’ so the ‘knowledge versus purposeful intent’ question can arise no matter what federal crime is at issue.” (citation omitted)).

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in all such cases.<sup>42</sup> Considering an aiding and abetting charge attaches to every case involving multiple defendants, it is reasonable to assume that the law in this area is clearly settled. However, with regard to the required mens rea of an aider or abettor, this is far from true.<sup>43</sup> One commentator described the status of the law in this area “as in a state of chaos—a chaos to which the cases seem oblivious.”<sup>44</sup> Another commentator observed that the law “has been spinning out of control for quite some time, [and] has now spun totally out of control.”<sup>45</sup>

A discussion of the progression of accomplice liability in the federal courts could logically begin with Judge Hand’s opinion in *United States v. Peoni*.<sup>46</sup> In *Peoni*, Judge Hand set out the standard for aiding and abetting law that is still used today.<sup>47</sup> He stated that in order to garner an aiding and abetting conviction, the accused must “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.”<sup>48</sup> This standard, known as the “purposeful intent standard,”<sup>49</sup> became universally adopted when the Supreme Court endorsed Hand’s language in *Nye & Nis-*

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42. *United States v. Neal*, 951 F.2d 630, 633 (5th Cir. 1992) (stating that “[a]iding and abetting . . . is an alternative charge in every indictment,” whether it is listed in the indictment or not); *United States v. Ruiz*, 932 F.2d 1174, 1180 (7th Cir. 1991) (noting that it is clearly settled that a count of aiding and abetting need not be presented to the jury if the evidence demonstrates that theory of liability); *United States v. Armstrong*, 909 F.2d 1238, 1241 (9th Cir. 1990) (“Aiding and abetting is implied in every federal indictment.”); *United States v. Duke*, 409 F.2d 669, 671 (4th Cir. 1969) (finding that a defendant may be convicted for aiding and abetting even if the indictment only charges him with the principal offense).

43. See Kurland, *supra* note 32, at 85; Weiss, *supra* note 18, at 1351. R

44. Weiss, *supra* note 18, at 1351. R

45. Kurland, *supra* note 32, at 85 (“For decades, prosecutors have successfully used pliant legal doctrines to impose criminal accessorial liability. Today, prosecutors are inconsistently applying and misapplying these doctrines to the point of abuse, confusion, and unfairness.” (citations omitted)). R

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

47. See Weiss, *supra* note 18, at 1349 (“The commonly held view is that the issue was resolved in 1938, when Judge Learned Hand held in the case of *United States v. Peoni* that the aider and abettor must not only *know* that his or her act will assist the principal, but also *want* his or her act to assist the principal.” (citation omitted)). R

48. *Peoni*, 100 F.2d at 402.

49. Weiss, *supra* note 18, at 1367. R

*sen v. United States*.<sup>50</sup> In *Nye*, the court described Hand's test as "well engrained in the law."<sup>51</sup>

While this concept may be considered "well engrained in the law," its application has not provided a clear standard to determine the mental state of the aider and abettor.<sup>52</sup> Interpretation of Hand's test has varied and led to a number of schools of thought relative to the required mens rea for aiding and abetting.<sup>53</sup> Similarly, federal courts have taken several different approaches on the issue.<sup>54</sup>

### 1. Purposeful Intent Standard

Some courts, including the Seventh Circuit, have chosen a literal interpretation of Hand's *Peoni* standard and mimicked Hand's language from that decision.<sup>55</sup> This is referred to now—as it was previously—as the purposeful intent standard. Purposeful intent has been described as a state of mind in which the aider not only acted to aid the principal, but acted with a desire to bring about the crime—a literal reading of Hand's opinion.<sup>56</sup>

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50. *Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949). In this case, involving a corporation and its president accused of conspiracy to defraud the United States of America, the Court endorsed Hand's opinion, stating that aiding and abetting "makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy." *Id.* at 620.

51. *Id.* at 618.

52. *Weiss*, *supra* note 18, at 1367.

53. *Id.* at 1372-80.

54. *Id.*

55. *See United States v. Zafiro*, 945 F.2d 881, 887 (7th Cir. 1991) (stating that aiding and abetting has three elements, requiring "knowledge of the illegal activity that is being aided and abetted, a desire to help the activity succeed, and some act of helping"); *see also United States v. Hunt*, 272 F.3d 488, 493 (7th Cir. 2001); *United States v. Folks*, 236 F.3d 384, 389 (7th Cir. 2001) (stating aiding and abetting is established by showing that the defendant had "knowledge of the illegal activity that is being aided and abetted, a desire to help the activity succeed and [participated in] some act of helping" (alteration in original) (quoting *United States v. Lanzotti*, 205 F.3d 951, 956 (7th Cir. 2000))); *United States v. Newman*, 490 F.2d 139, 142-43 (3d Cir. 1974) ("Unknowing participation is not sufficient to constitute an offense under the aiding and abetting statute. Rather, the government must prove beyond a reasonable doubt that the defendant participated in a substantive crime *with the desire that the crime be accomplished.*"); *Weiss*, *supra* note 18, at 1375.

56. *See United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938); *see, e.g., Hunt*, 272 F.3d at 493; *United States v. Hill*, 55 F.3d 1197, 1204 (6th Cir. 1995) ("Because aiding and abetting and the substantive offense are thus linked, courts correctly require defendants to possess a degree of knowledge about and intent to further the substantive offense." (citation omitted)); *see also United States v. Bailey*, 444 U.S. 394, 405 (1980); *Weiss*, *supra* note 18, at 1375.

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### 2. Bad Purpose Standard

Several courts employ a modified version of the purposeful intent standard called the “bad purpose standard.” Under the bad purpose standard, the aider must act not only with purpose but also with an awareness of the unlawfulness of his action.<sup>57</sup>

### 3. Knowledgeable Approach

Other courts have applied a standard known as the “knowledgeable approach,” which has been broken down into several categories.<sup>58</sup> The first category allows knowledge of one’s actions to suffice, except in such cases where the relationship between parties is so tenuous that it must be clear that the aider wished for the crime to come about.<sup>59</sup> The second category of knowledgeable approach requires purposeful intent except in matters that rise to the level of murder or treason, for which knowledge will be the standard.<sup>60</sup> The third approach under the knowledge umbrella requires that knowledge is sufficient whenever coupled with a substantial act. This approach recognizes a distinction between substantial and lesser acts: for substantial acts, knowledge will be sufficient, but for lesser acts, the purposeful intent approach is appropriate.<sup>61</sup>

### 4. Derivative Approach

The derivative approach, which appears to be the approach applied by courts that have ruled on aiding and abetting a felon in

57. See *United States v. Brown*, 151 F.3d 476, 486 (6th Cir. 1998). The court stated,

[I]n *United States v. Horton*, 847 F.2d 313, 322 (6th Cir. 1988), the court indicated that in order to be guilty under 18 U.S.C. § 2, a defendant must “willfully participate[ ] in the commission of a crime . . . . Participation is willful if done voluntarily and intentionally and with the specific intent to do something which the law forbids or with the specific intent to fail to do something which the law requires to be done, that is to say, with bad purpose either to disobey or disregard the law.”

*Id.* (second alteration and omission in original); see also Weiss, *supra* note 18, at 1375.

58. Weiss, *supra* note 18, at 1375.

59. *Id.*

60. See *United States v. Pino-Perez*, 870 F.2d 1230, 1235 (7th Cir. 1989) (en banc) (noting that one who aids by leasing a boat or selling a small quantity of drugs to a known drug trafficker would not be subject to the harsh punishment under the federal “kingpin” statute, 21 U.S.C. § 848); Weiss, *supra* note 18, at 1375.

61. See *Scales v. United States*, 367 U.S. 203, 225 (1961) (“[G]uilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt.”); see also Weiss, *supra* note 18, at 1429-85.

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possession of a firearm,<sup>62</sup> reasons that because the aider is to be treated as a principal, the required state of mind of the principal should attach to the aider and abettor.<sup>63</sup> The other approaches require review of the accomplice's mental state, thereby creating differences between principals and accomplices rather than treating them as equal offenders.<sup>64</sup>

If the derivative approach is used, one must study the underlying offense. Also, the question of whether the statute imposes accomplice liability on its own can be determined by studying the principal offense.

## II. "FELON IN POSSESSION OF A FIREARM"—A DISCUSSION OF THE PRINCIPAL OFFENSE

In order to determine what mens rea is required for a conviction for a violation of 18 U.S.C. § 922(g)(1)—felon in possession of a firearm<sup>65</sup>—it is imperative that the language, history, and purpose of § 922 is considered. The statute has had several incarnations, but the modern history of the statute centers around the passage of the Gun Control Act of 1968<sup>66</sup> and its successor, the Firearms Owners' Protection Act, passed in 1986.<sup>67</sup> These statutes were proposed in

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62. See *United States v. Lesure*, 262 F. App'x 135, 142-43 (11th Cir. 2008); *United States v. Gardner*, 488 F.3d 700, 711 (6th Cir. 2007); *United States v. Xavier*, 2 F.3d 1281, 1288 (3d Cir. 1993); *United States v. Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993); *United States v. Moore*, 936 F.2d 1508, 1527-28 (7th Cir. 1991).

63. See *United States v. North*, 910 F.2d 843, 881 n.11 (D.C. Cir. 1990), *withdrawn and superseded in part on reh'g by* 920 F.2d 940 (D.C. Cir. 1990) ("Even though he was actually convicted only of aiding and abetting others in their violation of section 1505, aiders and abettors must possess the same criminal intent as the principals."); see also Weiss, *supra* note 18, at 1475. Weiss argues that this must have been Congress's intent when they chose to eliminate the distinctions between principal offenders and accomplices. *Id.* at 1469.

64. Weiss, *supra* note 18, at 1469. Weiss concludes that a modified version of the derivative approach should be used, in which the only exception to the derivative approach would be in cases where the accomplice had acted with mere general-intent knowledge and his participation was not substantial. *Id.* at 1486-87. The example given is that of a gas station attendant, who pumps gas for a person, who then drives off to rob a bank. *Id.* at 1487. In such cases, Weiss argues that a more substantial contribution to the crime must be proven. *Id.*

65. 18 U.S.C. § 922(g)(1) (2006).

66. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. § 922).

67. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified at 18 U.S.C. § 922); see also JAMES B. JACOBS, *CAN GUN CONTROL WORK?* 23 (2002).

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response to public policy concerns surrounding gun violence and gun possession rights.<sup>68</sup>

A. *The Gun Control Act of 1968*

On April 4, 1968, Martin Luther King, Jr. was killed by an assassin’s bullet.<sup>69</sup> Two months later, on June 6, 1968, presidential candidate Robert F. Kennedy was also shot and killed.<sup>70</sup> In response to these tragedies and concerns over increased urban violence, Congress, at the urging of President Johnson,<sup>71</sup> acted to strengthen gun laws.<sup>72</sup> The result was the Gun Control Act of 1968,<sup>73</sup> the purpose of which was to aid law enforcement in fighting crime while avoiding an unnecessary burden on lawful gun owners.<sup>74</sup>

Included in the Gun Control Act of 1968 was a provision known as the “felon-in-possession law.”<sup>75</sup> This provision, codified at 18 U.S.C. § 922(g)(1), made it a crime for any person previously convicted of a crime punishable by one year or more in prison (a felony) to be knowingly in possession of a firearm in interstate commerce.<sup>76</sup> A violation of this code section is punishable by either a fine up to \$10,000 or ten years in prison.<sup>77</sup> This regulation has been referred to as “one of the most important pillars of federal gun controls”<sup>78</sup> encompassing, along with convicted felons in its firearm prohibition, anyone who “is a fugitive from justice; who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug . . . [or] narcotic drug or who has been adjudicated as a mental defective or who has been committed to any mental institution.”<sup>79</sup>

68. See JACOBS, *supra* note 67, at 23-27.

69. *Id.* at 23.

70. *Id.*

71. Gun Control Act of 1968 § 101; H.R. REP. NO. 90-1577, at 18 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 4410, 4425.

72. See JACOBS, *supra* note 67, at 23-24.

73. Gun Control Act of 1968 §§ 101-302; *see also* JACOBS, *supra* note 67, at 24.

74. Gun Control Act of 1968 § 101. Attorney General Ramsey Clark, in a letter to the Speaker of the House, urged the expeditious passage of the bill to “insure that strong local or State laws are not subverted by a deadly interstate traffic in firearms and ammunition.” H.R. REP. NO. 90-1577, at 19.

75. See JACOBS, *supra* note 67, at 25.

76. Gun Control Act of 1968 § 102.

77. *Id.*; *see* JACOBS, *supra* note 67, at 23.

78. See JACOBS, *supra* note 67, at 25.

79. Gun Control Act of 1968 § 102.

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The Senate proposed amendments that would have only treated as “felons” those offenders who were indicted or convicted of “violent” felonies.<sup>80</sup> However, the conference committee chose to enact the House of Representatives’ version of that section, which included all convicted felons and those under indictment for crimes with a penalty in excess of one year in prison.<sup>81</sup>

In order to enforce the felon-in-possession law, the Gun Control Act of 1968 included a provision that prohibited “any licensed importer, licensed manufacturer, licensed dealer, or licensed collector 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>82</sup>

Throughout the eighteen years during which the Gun Control Act of 1968 served as the governing law in this area, there were concerns that the legislation proved too burdensome on the federal government in parts and too burdensome on lawful firearm owners in others.<sup>83</sup> Finally, after years of pressure, Congress amended the Gun Control Act.<sup>84</sup>

#### B. *The Firearms Owners’ Protection Act*

In 1986, after numerous attempts to reform and improve upon the Gun Control Act of 1968, Congress enacted the Firearm Owners’ Protection Act, which strengthened certain parts of the original act while relaxing others.<sup>85</sup> As part of the process of drafting the new legislation and responding to concerns about the effectiveness of the 1968 Act, the House Subcommittee on Crime held hearings

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80. H.R. REP. NO. 90-1956 (1968) (Conf. Rep.), *as reprinted in* 1968 U.S.C.C.A.N. 4426, 4428.

81. *Id.*

82. Gun Control Act of 1968 § 101 (emphasis added).

83. H.R. REP. NO. 99-495, at 3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 1327, 1329. The report states,

There has been substantial concern since 1968 that the Gun Control Act had serious omissions that limited its ability to keep firearms out of the hands of criminals. Others have voiced concerns about the impact of enforcement of the act upon sportsmen. In each Congress since 1968 legislation had been introduced both to substantially strengthen the Act or to repeal or lessen its requirements.

*Id.*

84. *Id.*

85. Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986); H.R. REP. NO. 99-495, at 1 (“H.R. 4332 is designed to relieve the nation’s sportsmen and firearms owners and dealers from unnecessary burdens under the Gun Control Act of 1968, to strengthen the [Act] to enhance the ability of law enforcement to fight violent crime and narcotics trafficking, and to improve administration of the Act.”).

in the fall of 1985 and winter of 1986 in New York City, San Francisco, and Washington, D.C.<sup>86</sup> The subcommittee reviewed bills proposed by the House and Senate and reported on potential contributions to the Act.<sup>87</sup> The subcommittee noted with approval that proposed legislation in both chambers would expand the language of § 922(d), which until that time provided a penalty for a *licensed firearms dealer knowingly* selling or distributing firearms to a member of a restricted class under § 922(g) of the Gun Control Act.<sup>88</sup> The new statute would broaden the scope of that rule by removing the word “licensed,” creating liability for any firearms dealers, licensed or not.<sup>89</sup>

The Bureau of Alcohol, Tobacco and Firearms (ATF) also reviewed the Senate’s proposed legislation.<sup>90</sup> While generally dissatisfied with most of the proposed language, the ATF did approve the proposed change to § 922(d).<sup>91</sup> The ATF report notes,

Under [the] existing law it is only unlawful for a licensee to sell or otherwise dispose of firearms knowing or having reasonable cause to believe that such a person is in a prohibited category. This proposal would close an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons.<sup>92</sup>

The final language of the statute after the 1986 amendments 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 under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . .<sup>93</sup>

Since 1986, 18 U.S.C. § 922(d)(1) has remained in place and unchanged.<sup>94</sup> This is the language courts must parse in order to apply the felon-in-possession law.

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86. H.R. REP. NO. 99-495, at 5.

87. *Id.* at 8 (reviewing H.R. Res. 945, 99th Cong. (1986) and S. Res. 49, 99th Cong. (1986)).

88. *Id.* at 15, 17.

89. Firearms Owners’ Protection Act § 102.

90. H.R. REP. NO. 99-495, at 16.

91. *Id.* at 17.

92. *Id.*

93. 18 U.S.C. § 922(d)(1) (2006).

94. *Id.*

### C. *Modern Elements of the Felon-in-Possession Law*

As the current construction of the law, the crime of being a felon in possession of a firearm consists of three elements. First, the statute requires that the principal offender be a person “who has been convicted in any court of [ ] a crime punishable by imprisonment for a term exceeding one year.”<sup>95</sup> This element has been interpreted as a strict-liability offense,<sup>96</sup> and thus the principal need not be aware of his own status as a convicted felon to be included in the class required by § 922(g)(1).<sup>97</sup> Second, the principal must “ship or transport . . . or possess . . . any firearm or ammunition.”<sup>98</sup> Third, the firearm must be in “interstate commerce” as required by the commerce clause of the United States Constitution.<sup>99</sup> While

95. *Id.* § 922(g)(1).

96. *Black’s Law Dictionary* defines a strict-liability offense as “[a]n offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state. For example, illegal parking is a strict-liability offense.” *BLACK’S LAW DICTIONARY* 1188 (9th ed. 2009).

97. *See* *United States v. Jackson*, 120 F.3d 1226, 1229 (11th Cir. 1997) (“Based on the law, it does not appear that the district court erred in giving the instruction that it was not necessary that Jackson knew that he had been convicted of a felony.”); *United States v. Miller*, 105 F.3d 552, 555 (9th Cir. 1997), *abrogated on other grounds by* *Caron v. United States*, 524 U.S. 308 (1998) (“We agree with the decisions from other circuits that the § 924(a) knowledge requirement applies only to the possession element of § 922(g)(1), not to the interstate nexus or to felon status.”); *United States v. Capps*, 77 F.3d 350, 352 & n.2 (10th Cir. 1996) (“[A]s far as we can tell, no circuit has extended the knowledge component of § 922(g)(1) beyond the act of possession itself.”); *United States v. Langley*, 62 F.3d 602, 604-06 (4th Cir. 1995) (explaining there was no evidence that Congress intended to reverse prior law by extending the “knowing” requirement to require knowledge of interstate nexus); *United States v. Dancy*, 861 F.2d 77, 80-82 (5th Cir. 1988) (rejecting defendant’s argument that knowledge requirement applies to interstate nexus or felon status). *But see* *United States v. Reyes*, 194 F. App’x 69, 71 (2d Cir. 2006) (unpublished table decision) (“[W]e do not find it necessary to rule on the issue of whether the felon-in-possession statute requires the government to prove the defendant’s knowledge of his felon status.”).

98. 18 U.S.C. § 922(g). Without delving too deeply into this element, as it is ancillary to the topic of this Note, “possession may be either actual or constructive.” *United States v. Craven*, 478 F.2d 1329, 1333 (6th Cir. 1973); *see also* *United States v. Garrett*, 903 F.2d 1105, 1110 (7th Cir. 1990) (“Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.” (emphasis omitted) (quoting *United States v. Taylor*, 728 F.2d 864, 868 (7th Cir. 1984))). Thus, in order to fulfill this element, the principal need not physically possess the gun, but may satisfy the element through constructive possession. *Garrett*, 903 F.2d at 1110.

99. 18 U.S.C. § 922(g); *see also* U.S. CONST. art. 1, § 8, cl. 3. This prong will be met if the firearm has *ever* traveled in interstate commerce. That is to say, even if the perpetrator never moved the firearm across state lines, it would still be a violation so long as the firearm was manufactured or shipped from outside of that state. *See Scarborough v. United States*, 431 U.S. 563, 563 (1977). This case predates the Gun Control

these elements have been read without recent controversy regarding the principal offender, it is much less clear which elements apply to an aider and abettor.

### III. A DISCUSSION OF THE CIRCUIT SPLIT AMONG THE FEDERAL COURTS OF APPEALS

The issue of whether one must have knowledge of the principal's status as a "felon" under 18 U.S.C. § 2 when the underlying crime is being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) has prompted a split amongst the federal circuit courts of appeals. The Ninth and Eleventh Circuits have held that the government need not prove any knowledge beyond that of willfully aiding the possession of the firearm.<sup>100</sup> In contrast, the Third and Sixth Circuits ruled that the government is required to prove that the aider knew, or should have known, that the principal was a member of the class covered in § 922(g)(1).<sup>101</sup> The Seventh Circuit ruled in 1991 that no knowledge of the principal's felon status was required so long as the aider associated himself in the illegal possession.<sup>102</sup> This case remains good law in the Seventh Circuit; however, the court has since ruled that knowledge of the principal's status as a felon is a required element of the crime.<sup>103</sup> These rulings are difficult to distinguish, and this Note will address both rationales. The initial cases on both sides of the split arose in the early 1990s.<sup>104</sup> The issue then lay dormant for nearly fourteen years before cases in 2007 and 2008 brought the question to the forefront.

Several recent cases renewed the circuit split. The Sixth Circuit joined the Third Circuit and, in *United States v. Gardner*, required a heightened level of knowledge was necessary for a conviction on aiding and abetting a felon in possession of a fire-

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Act but was one in which the court ruled that proof that the possessed firearm "previously traveled [at some time] in interstate commerce" was sufficient to satisfy the required nexus between possession and commerce. *Id.* at 564, 577-78; see also *United States v. Bass*, 404 U.S. 336, 350 (1971) ("[W]e conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.").

100. See *United States v. Lesure*, 262 F. App'x 135, 142-43 (11th Cir. 2008); *United States v. Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993).

101. See *United States v. Gardner*, 488 F.3d 700, 716 (6th Cir. 2007); *United States v. Xavier*, 2 F.3d 1281, 1286-87 (3d Cir. 1993).

102. *United States v. Moore*, 936 F.2d 1508, 1527-28 (7th Cir. 1991); see also *Klein*, *supra* note 17, at 653-54.

103. *United States v. Samuels*, 521 F.3d 804, 811 (7th Cir. 2008).

104. See *Xavier*, 2 F.3d 1281; *Canon*, 993 F.2d 1439; *Moore*, 936 F.2d 1508.

arm.<sup>105</sup> A year later, the Eleventh Circuit, in *United States v. Lesure*, ruled in line with the Ninth and Seventh Circuits and held that no knowledge was necessary beyond a willful intent to make the firearm available to the principal offender.<sup>106</sup> However, the Seventh Circuit backed off its ruling in *Moore*, when in 2008 it ruled that knowledge of the principal's status was necessary.<sup>107</sup> Clearly, no trend has taken hold in this area of the law.

#### A. Knowledge Requirement: Possession Only

##### 1. Seventh Circuit

The original case in this area is *United States v. Moore*, a 1991 Seventh Circuit case.<sup>108</sup> In *Moore*, the alleged aider was involved as an associate in an armed robbery.<sup>109</sup> Moore claimed that he did not know the principal offender and thus could not have known that the principal was a convicted felon.<sup>110</sup> The court, citing Seventh Circuit precedent, implemented the *Peoni* two-prong test.<sup>111</sup> The test requires the government to prove that the aider associated with the principal and participated in the activity.<sup>112</sup> The court concluded that the evidence, from which the jury concluded that Moore acted with the other defendant, cleared the bar of the “participation” prong.<sup>113</sup> As for the “association” prong, the court explained that the aider must have “shared the criminal intent of [the principal].”<sup>114</sup> In this case, there was a finding that Moore knowingly participated along with the principal in a string of robber-

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105. *Gardner*, 488 F.3d at 715-16; *see also Xavier*, 2 F.3d at 1286.

106. *Lesure*, 262 F. App'x at 142-43.

107. *Samuels*, 521 F.3d at 811.

108. *Moore*, 936 F.2d at 1508.

109. *Id.* at 1512.

110. *Id.* at 1513.

111. *Id.* at 1527. The court recited the established 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, [a] high level of activity need not be shown . . . . Instead, there must be evidence to establish that the defendant engaged in some affirmative conduct; that is, there must be evidence that [the] defendant committed an overt act designed to aid in the success in the venture.

*Id.* (first alteration added) (quoting *United States v. Valencia*, 907 F.2d 671, 677 (7th Cir. 1990)) (internal quotation marks omitted); *see also United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

112. *Moore*, 936 F.2d at 1527.

113. *Id.* (“[W]e have previously determined that the evidence was more than sufficient to demonstrate that Moore was an integral part of the postal armed robbery.”).

114. *Id.* (citing *United States v. Maya-Gomez*, 860 F.2d 706, 756 (7th Cir. 1988)).

ies.<sup>115</sup> The court then turned to the language of 18 U.S.C. § 922(g)(1).<sup>116</sup> The court recited the common understanding of the required state of mind for that crime: “defendant knowingly *possessed the gun*.”<sup>117</sup> The facts of the case demonstrated that Moore knew, or should have known, that the principal possessed the gun, and it did not matter what else he knew, or did not know, about the principal.<sup>118</sup> Thus the court applied, while not specifically citing it, the derivative approach<sup>119</sup> to the aiding and abetting statute. In doing so the court found that the evidence was sufficient for a finding of guilty on the charge of aiding and abetting a felon in possession of a firearm, even though Moore did not know the principal was a convicted felon.<sup>120</sup> Thus the ruling in *Moore* requires no determination of the alleged aider’s knowledge of the principal’s status as a felon.<sup>121</sup>

## 2. Ninth Circuit

Two years later, the issue was in front of the Ninth Circuit in *United States v. Canon*.<sup>122</sup> In that case, two men—both previously convicted felons—were involved in a high-speed chase with police during which shots were fired at the pursuing officers.<sup>123</sup> The court, in a less extensive opinion than that of the Seventh Circuit, did not cite *Moore*. Rather, it discussed briefly an earlier aiding and abetting case, *Nye & Nissen v. United States*,<sup>124</sup> which held that the government need only prove that the aider wished to bring about the

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115. *Id.* at 1528.

116. *Id.*

117. *Id.* (emphasis added) (quoting *United States v. McNeal*, 900 F.2d 119, 121 (7th Cir. 1990)).

118. *Id.*

119. See *supra* notes 62-64 and accompanying text.

120. *Moore*, 936 F.2d at 1528.

121. See *United States v. Lesure*, 262 F. App’x 135, 142 (11th Cir. 2008) (contrasting the rulings in *Moore* and *Canon* with those of *Gardner* and *Xavier*); see also Klein, *supra* note 17, at 653-54. The Sixth Circuit acknowledged that the Seventh Circuit had not directly addressed the issue but stated, “Also, while the Seventh Circuit has not directly confronted this particular question, that court has held that a defendant in this type of case need only share the principal’s knowledge that the *principal* possessed a gun.” *United States v. Gardner*, 488 F.3d 700, 714 (6th Cir. 2007) (citation omitted). This would seem to lead logically to a conclusion that no knowledge of the principal’s status as a felon would be necessary.

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

123. *Id.* at 1440-41.

124. *Nye & Nissen v. United States*, 336 U.S. 613, 618-19 (1949). See *supra* notes 50-51 and accompanying text for a discussion of *Nye & Nissen*.

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act and that he sought to succeed in his action.<sup>125</sup> Because the evidence supported the contention that Canon was willfully involved in the act and thus implicitly wished to successfully bring about the act, the court found that he could be convicted of aiding and abetting a felon in possession of a firearm.<sup>126</sup> It must be noted that the sparse opinion in *Canon*, while still valid law in the Ninth Circuit, was subsequently criticized by that court due to a lack of analysis in support of its finding.<sup>127</sup>

### 3. Eleventh Circuit

In light of the lack of support for the Ninth Circuit's decision in *Canon*,<sup>128</sup> one might assume that the courts requiring knowledge may be on the decline. However, the Eleventh Circuit faced the same issue in *United States v. Lesure* and ruled that no evidence of further knowledge was necessary for a conviction.<sup>129</sup> The court first concluded that, because the issue was not properly preserved at trial, its review would be only for plain error.<sup>130</sup> Citing both the circuit split and lack of Supreme Court guidance on the issue, the Eleventh Circuit held that "plain error" did not apply in this matter.<sup>131</sup> However, the court did take the opportunity to address the issue that had split the circuits.<sup>132</sup> The court cited well-settled law that asserts that knowledge of one's own prior felony is *not* an element of § 922(g), and thus the court "would be hard-pressed to require the government to satisfy a greater knowledge requirement as to a § 922(g) aider and abettor."<sup>133</sup> This path of decisions, weakened as it may be, still represents decided, current law in the Ninth and Eleventh Circuits.

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125. *Canon*, 993 F.2d at 1442 ("The government had only to prove [defendant], as an aider and abettor, 'associate[d] himself with [Canon's crime], that he participate[d] in it as in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed.'" (first alteration added) (quoting *Nye & Nissen*, 336 U.S. at 619)).

126. *Id.*

127. *United States v. Graves*, 143 F.3d 1185, 1188 n.3 (9th Cir. 1998) ("Although we acknowledge that *Canon* decided the question whether an aider and abettor is required to know of the principal's status as a felon, we have serious reservations regarding the soundness of that determination. In particular, we note that the decision contains no analysis in support of its conclusion . . .").

128. *See id.*

129. *United States v. Lesure*, 262 F. App'x 135, 142 n.3 (11th Cir. 2008).

130. *Id.* at 141.

131. *Id.* at 142-43.

132. *See id.* at 142 n.3.

133. *Id.*

B. *Knowledge Requirement: Knowledge of the Principal's Status as a Felon*

1. Third Circuit

Three months after the Ninth Circuit Court of Appeal's ruling in *Canon*, the Third Circuit, in *United States v. Xavier*, became the first circuit to require the government to prove that the alleged aider possessed greater knowledge, beyond mere awareness of his physical actions.<sup>134</sup> There, the aider, the principal's brother, claimed that he was improperly convicted because the jury was not instructed to consider whether he knew or should have known that the principal was a convicted felon.<sup>135</sup> The court agreed, noting that "criminal liability for aiding and abetting a § 922(g) violation stands on a different footing because it depends on the status of the person possessing the firearm."<sup>136</sup> The Third Circuit did not address the required state of mind of an aider and abettor under 18 U.S.C. § 2 but, rather, pointed to the greater scheme of the Gun Control Act of 1968.<sup>137</sup> The court held that the standard for determining the status of the aider and abettor should be found under a § 922(g)(1) violation because Congress had addressed the aiding and abetting of this crime in another section of the statute—§ 922(d)(1).<sup>138</sup> That section states the following:

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—(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . .<sup>139</sup>

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134. *United States v. Xavier*, 2 F.3d 1281, 1286-87 (3d Cir. 1993). The court stated,

[W]e hold there can be no criminal liability for aiding and abetting a violation of § 922(g)(1) without knowledge or having cause to believe the possessor's status as a felon. Unless there is evidence a defendant knew or had cause to believe he was aiding and abetting possession by a convicted felon, it has not shown a "guilty mind" under 18 U.S.C. § 2(a).

*Id.*; see also *United States v. Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993).

135. *Xavier*, 2 F.3d at 1284, 1287.

136. *Id.* at 1286.

137. *Id.*

138. *Id.* ("Defendant was convicted as an aider and abettor under § 922(g) for precisely the activity proscribed in § 922(d)—providing a firearm to a convicted felon.")

139. 18 U.S.C. § 922(d) (2006) (emphasis added).

The court said that the behavior described in the plain text of § 922(d)(1) is effectively the same behavior that would be the source of aiding and abetting of a § 922(g)(1) violation if it were defined by 18 U.S.C. § 2, and thus Congress intended § 922(d) to serve as the aiding and abetting provision for subsection (g).<sup>140</sup> Therefore, “[a]llowing 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).”<sup>141</sup> The court ruled that for its decision to comport with congressional intent, it must find that § 922(d)(1) is the correct statutory language to look at to determine the elements to convict a participant of aiding and abetting a previously convicted felon in possession of a firearm.<sup>142</sup>

## 2. Sixth Circuit

After a fourteen-year period between decisions, the Sixth Circuit, in *Gardner*, issued an opinion concurring with the Third Circuit’s decision in *Xavier*.<sup>143</sup> The *United States v. Gardner* court chided the Ninth and Seventh Circuits for the lack of reasoning in their rulings and concluded that the Ninth Circuit “provides almost no support for its holding.”<sup>144</sup> While recognizing that the knowledge of one’s own prior felony conviction may be presumed, and thus is not an element to be proven in court, the Sixth Circuit noted, however, that a presumption that a third party has knowledge of the principal’s prior conviction is not necessarily a given.<sup>145</sup> The court reasoned that allowing the conviction without evidence that the aider knew or should have known the principal’s status would effectively write § 922(d) out of the statute.<sup>146</sup>

The court presented the following example to illustrate the paradox: if a gun dealer sold a gun to a convicted felon without knowledge or reason to have knowledge of his felony, he would not be criminally liable for the sale of the gun but could be liable for

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140. *Xavier*, 2 F.3d at 1286.

141. *Id.*

142. *Id.*

143. *United States v. Gardner*, 488 F.3d 700, 714-15 (6th Cir. 2007). “The Ninth and Seventh Circuits offer little reasoning for their conclusions . . . . The Third Circuit decision, in contrast, is well-reasoned and we concur with it.” *Id.*

144. *Id.* As noted, this opinion has been echoed by the Ninth Circuit subsequent to the *Canon* ruling. See *United States v. Graves*, 143 F.3d 1185, 1188 n.3 (9th Cir. 1998).

145. *Gardner*, 488 F.3d at 715.

146. *Id.*

aiding in the gun possession.<sup>147</sup> The Sixth Circuit decided that such a situation was untenable, so no further knowledge could reasonably be required of the aider.<sup>148</sup>

### 3. Seventh Circuit Changes Course

A year later, this conclusion found favor when the Seventh Circuit addressed the matter again in *United States v. Samuels*.<sup>149</sup> Curiously, this court did not mention the previous Seventh Circuit rulings on this question, including *Moore*. Rather, the court cited other Seventh Circuit case law regarding aiding and abetting offenses in general that held that merely being present was not enough to be found an aider or abettor and that knowledge of all of the elements of the crime is necessary.<sup>150</sup> Based on this rationale, the court found that an aider “must know or have reason to know that the individual is a felon at the time of the aiding and abetting, and, in turn, must assist the felon in possessing a firearm.”<sup>151</sup>

While the Seventh Circuit previously held that no knowledge of the principal’s status is necessary,<sup>152</sup> it is now clear that the circuit requires such knowledge.<sup>153</sup> The court did not fully join the Third and Sixth Circuits’ position in assessing aiding and abetting in the context of § 922(d) but, instead, demonstrated another path to which a court may reach a conclusion in this area and weakened the block of “no knowledge required” jurisdictions.

## IV. ANALYSIS OF COURTS’ RATIONALES

To accept 18 U.S.C. § 2 as the controlling statute for the alleged crime of aiding and abetting a felon in possession of a firearm without taking into account 18 U.S.C. § 922(d)(1) is to essentially write § 922(d)(1) out of the Code. However, accepting 18 U.S.C. § 922(d)(1) as the controlling statute without acknowledging the broader scope of 18 U.S.C. § 2(a) may make § 2(a) a simple redundancy or perhaps even irrelevant. As a result, § 2(a), a provision so

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147. *Id.*

148. *Id.*

149. *United States v. Samuels*, 521 F.3d 804 (7th Cir. 2008).

150. *Id.* at 811 (“To be guilty of aiding and abetting, an individual must have knowledge of the underlying illegal activity and a desire to assist in the success of the activity, and provide an act of assistance.”); *see United States v. Moore*, 936 F.2d 1508, 1527-28 (7th Cir. 1991).

151. *Samuels*, 521 F.3d at 812.

152. *See supra* note 121 and accompanying text.

153. *Samuels*, 521 F.3d at 812.

embedded in criminal law that it need not even be plead in an indictment, could be negated by a § 922(d)(1) charge.

This paradox makes the issue ripe for congressional intervention. While partisan squabbling may often result in a lack of clarity in statutory language and a lack of uniformity in judicial interpretation (and, indeed, in law review Notes),<sup>154</sup> there are basic concepts on which a common ground may be found. Justice Antonin Scalia stated, in defense of the strict constructionist judicial outlook, “[U]ncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes.”<sup>155</sup> Two years later, in a speech extolling the virtues of his colleague Justice Thurgood Marshall, Justice William J. Brennan, Jr. noted, “More than any other recent member of the Court, Justice Marshall leaves a legacy of powerful dissents protesting the curtailment of defendants’ rights—dissents with a vision of *fairness and order* that is stirring in its clarity.”<sup>156</sup> While Justice Scalia is not often likened to Justices Brennan or Marshall,<sup>157</sup> there is a common thread running through those quotes—the need for a sense of order and fairness under the law.

This analysis will seek to find that common ground on this issue. One need not espouse any ideological view to conclude that Congress must act to end confusion in this area of the law or that the decisions that do not require a prosecutor to prove knowledge of the principal’s status have created inconsistencies in the law. The analysis portion of this Note will suggest an approach that will create a logical solution to this problem both in the short term and the long term.

Finding such a solution involves several methods of analysis. This analysis will first examine the legislative history of the statute. The analysis will next examine the method of statutory interpretation employed by those courts that have heard this issue. In doing

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154. Stephen R. Klein in his Note on the subject wrote that “both gun rights and gun control advocates alike would like to see uniform application of federal gun laws.” Klein, *supra* note 17, at 658. Klein approached the issue from a “pro gun owner’s rights” perspective, effectively concluding that a congressional amendment was necessary. *Id.* at 667.

155. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

156. William J. Brennan, Jr., *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23, 28 (1991) (emphasis added).

157. See generally Travis A. Knobbe, Note, *Brennan v. Scalia, Justice or Jurisprudence? A Moderate Proposal*, 110 W. VA. L. REV. 1265 (2008).

so this analysis will conclude that the Courts of Appeals for the Third and Sixth Circuits have offered well-reasoned arguments that the statute, when read in its entirety, requires the secondary offender's knowledge of the principal offender's status.<sup>158</sup> The "no knowledge required" courts have read a "plain meaning" into the statute, which, rather than simplifying the issue, causes greater chaos in this area.<sup>159</sup> Thus, this Note will advocate that the most logical interpretation of this issue is that of the Third and Sixth Circuits. While the Seventh Circuit has now reached the same conclusion, this Note will contend that its reasoning is not as complete as those arguing for a knowledge requirement and it may create redundancies within the Code.

However, in adopting even the most logical approach offered by the courts, questions remain as to the true meaning of this statute. This Note will present several possible methods of interpreting Congress's intent in drafting the statute, all of which are viable. For that reason, this Note will ultimately suggest that a resolution in this area must come from Congress.

#### A. *Analysis of the Legislative History*

While the courts have not discussed the history of the statute, they have offered two starkly different positions on the appropriate burden of proof that a prosecutor must reach based on the text.<sup>160</sup> Analysis of the statutory scheme demonstrates that Congress may have unwittingly created one loophole while trying to prevent another. The legislative history of 18 U.S.C. § 922(d)(1) suggests that when the language of that statute was changed from "licensed persons" to "any person," the idea was to close a loophole that allowed non-licensed dealers to sell or dispose of weapons to a felon, who is in a prohibited class of firearm possessor under 18 U.S.C. § 922(g)(1), without penalty under that clause.<sup>161</sup> However, it may be that this amendment actually *increased* the burden on prosecutors to convict non-licensed aiders. It would have been reasonable to assume that the added knowledge element was *only* applicable to licensed dealers, while all others were subject to the same mental state as the possessor, under the former 18 U.S.C. § 922(d)(1).<sup>162</sup>

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158. See *supra* Part III.B.

159. See *supra* Part III.A.

160. See *supra* Part III.A-B.

161. See H.R. REP. NO. 99-495, at 17 (1986), as reprinted in 1986 U.S.C.C.A.N. 1327, 1348-49.

162. 18 U.S.C. § 922(d)(1) (1970).

This stance, as this analysis will establish, is untenable under the current construction.

While Congress may not have intentionally created this loophole, to interpret the statute in any other way than to provide all potential aiders and abettors with a requirement of knowledge of the principal offender's status would result in reading § 922(d) out of the Code and create more chaos in this area of the law. This point is not discussed by those jurisdictions that have heard the issue, but it is an important element to consider in making a recommendation on how courts should proceed, or in the alternative, how Congress should react to confusion in this area of the law.

In analyzing these rationales, it is important to discuss the methods of statutory interpretation employed by those circuits that have heard this issue and the relative strengths and weaknesses of their analysis as it relates to their interpretation of the crime of aiding and abetting a felon in possession of a firearm under 18 U.S.C. § 922 (g)(1).<sup>163</sup>

## B. *Discussion of Statutory Interpretation*

### 1. Plain Meaning of the Statute

It is commonly understood that the first step in interpreting a statute is to assess the plain meaning of the language, if such a plain meaning exists.<sup>164</sup> The plain meaning approach means that courts should read statutes with the view that Congress intended the words to produce their ordinary meaning.<sup>165</sup> It is well acknowledged that if the statute is plainly worded and easily discernable, the court should end its analysis of the meaning of the statute at that point.<sup>166</sup> Thus, the “knowledge required” circuits determined that there is no plain reading of the statute because to interpret “plain meaning” in the manner that the majority circuits have is to

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163. While this Note will discuss a number of methods of statutory interpretation, the focus of this Note is a discussion of the interpretation of the felon-in-possession statute.

164. See RONALD BENTON BROWN & SHARON JACOBS BROWN, *STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT* 38 (2002) (“[I]t is assumed that the legislature probably used the words, grammar, and punctuation in a ‘normal’ way to communicate its intent, so the words, grammar, and punctuation are to be given the meaning that they would ordinarily produce when trying to determine the legislature’s intent.”).

165. *Id.*

166. *See id.*

simply apply § 2 to the felon-in-possession law, which would create chaos in this area of the law.<sup>167</sup>

The decisions requiring knowledge of possession rely exclusively on the plain meaning approach when applying aiding and abetting to 18 U.S.C. § 922(g)(1). The courts reason that § 922(g)(1), standing on its own, does not require knowledge of felon status, thus aiding and abetting under 18 U.S.C. § 2(a) does not require knowledge of felon status.<sup>168</sup>

While this may seem like a plain reading of the law, this law is not “plain,” and these decisions create problems unforeseen by those courts. These problems arise because the statute does not stand alone but, rather, within the greater statutory scheme that is the Gun Control Act of 1968 and the Firearm Owners’ Protection Act, enacted in 1986.<sup>169</sup>

It is troubling that courts have interpreted this issue in a manner that nullifies another part of the statute.<sup>170</sup> As discussed earlier, § 922(d)(1) provides that anyone who sells or disposes of a weapon to a person covered by a restricted class must *knowingly* do so in order to be charged with a crime.<sup>171</sup> Using *Black’s Law Dictionary’s* definition of “aid and abet,” which is “[t]o assist or facilitate the commission of a crime, or to promote its accomplishment,”<sup>172</sup> it would be very difficult to argue that “selling or otherwise disposing” of a weapon to a convicted felon would not be assisting or facilitating the commission or promoting the accomplishment of the crime of being a felon in the possession of a firearm. These are acts that help the principal commit the offense; by their nature these acts have aided him. Even if the court were to reason that aiding and abetting was something other than selling or disposing of the weapon, could that action be reasonably seen as *more* culpable than actually handing the felon the firearm? If Congress has determined that the act of selling or disposing *is* more

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167. See *supra* Part III.A.

168. See *supra* Part III.A.

169. See Firearm Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986); Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

170. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 324 app. (1994) (discussing canons of construction including the problem with reading one piece of a statute in such a way as to nullify another piece of the statute); see also *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (“It is an ‘elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.’” (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979))).

171. See *supra* Part II.B.

172. BLACK’S LAW DICTIONARY 81 (9th ed. 2009).

culpable and thus a different class of offense, then they must provide guidance in this area. This analysis seems far-fetched, and, in fact, the courts did not make that argument.<sup>173</sup> For these reasons, the rationale behind the “no knowledge required” decisions fail.

## 2. No Knowledge Requirement Hypothetical

The following hypothetical demonstrates that this approach is untenable. Assume that, subsequent to the decisions in *Canon*, *Moore*, and *Lesure*, a registered, licensed gun dealer ran a background check<sup>174</sup> on a customer who had been convicted of a felony but the check erroneously came back without listing a felony. After the consummation of the purchase, the customer is arrested for possessing the firearm. The customer is charged as a felon in possession of a firearm under 18 U.S.C. § 922(g)(1)<sup>175</sup> and the dealer is charged with a violation of 18 U.S.C. § 2.<sup>176</sup> Under the *Canon-Moore-Lesure* rationale, the gun dealer could be convicted of aiding and abetting the crime because he willfully sold the gun.<sup>177</sup> There would be no discussion of whether he knew or should have known that the buyer was a convicted felon because the courts have disregarded § 922(d)(1).<sup>178</sup> If the jury found that the dealer intended to sell the gun to the principal offender, the dealer could be found guilty of a violation of 18 U.S.C. § 2 and sentenced to up to ten years in prison.<sup>179</sup>

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173. See *United States v. Lesure*, 262 F. App'x 135 (11th Cir. 2008); *United States v. Canon*, 993 F.2d 1439 (9th Cir. 1993); *United States v. Moore*, 936 F.2d 1508 (7th Cir. 1991). Although, in the wake of *Samuels*, *Moore* likely does not represent the Seventh Circuit's controlling decision in this matter. This Note will use this decision to demonstrate the weakness of those jurisdictions still not requiring the prosecution prove knowledge of the principal's status.

174. See generally James B. Jacobs & Kimberly A. Potter, *Keeping Guns Out of the "Wrong" Hands: The Brady Law and the Limits of Regulation*, 86 J. CRIM. L. & CRIMINOLOGY 93 (1995), for a discussion on gun background checks, which is beyond the scope of this Note.

175. 18 U.S.C. § 922(g)(1) (2006).

176. *Id.* § 2(a).

177. See *Lesure*, 262 F. App'x at 142-43; *Canon*, 993 F.2d at 1442; *Moore*, 936 F.2d at 1526-28.

178. See *supra* Part III.A.

179. See 18 U.S.C. § 2. While it may seem improbable that the buyer would be arrested at the consummation of the purchase while committing no crime, this is certainly a possibility. Imagine for the purposes of this example that the buyer's parole officer happened to observe the purchase and then notified a police officer. It is important to remember that the crime is *possession* of a firearm by a convicted felon. While this is typically coupled with charges for other criminal acts associated with the possession, 18 U.S.C. § 922(g) stands on its own as a criminal offense and does not require the

### 3. Knowledge of Principal's Status Required Hypothetical

What if the same factual situation occurred in the same jurisdiction, but in this case the prosecutor charged the dealer with a violation of § 922(d)(1)?<sup>180</sup> Assuming that the dealer used reasonable due diligence (a question of fact for the jury), he may be criminally liable under 18 U.S.C. § 922(d)(1). The act committed is the same and the penalty for a violation of § 2(a) in this circumstance is identical to the penalty for a violation of § 922(d)(1). Both result in a fine, a sentence of no more than ten years, or both.<sup>181</sup> The only difference is that the prosecutor would have a far greater burden under § 922(d)(1).<sup>182</sup> That being said, under what circumstance would a prosecutor bring a charge under § 922(d)(1)? Considering the greater burden, the statute would simply fall to the wayside. Therefore, to apply the reasoning of the courts in *Canon*, *Moore* and *Lesure*<sup>183</sup> is to write § 922(d)(1) out of the Code.

Assuming the rationale above, it is necessary to move beyond the alleged plain meaning of the statute and venture into further statutory analysis. When ambiguity exists between what the statute means or which other statutes should apply, it is appropriate to go beyond the text to determine the intent of Congress.<sup>184</sup> To further analyze the statute in front of them, courts should use common canons of statutory construction.<sup>185</sup> This analysis is important to the discussion of this issue because it demonstrates the narrow nature of the opinions that do not require knowledge of the principal's felon status.<sup>186</sup>

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possession itself to be accompanied by another crime. *See, e.g., Lesure*, 262 F. App'x at 142-43.

180. 18 U.S.C. § 922(d)(1).

181. Under 18 U.S.C. § 924(a)(2), the penalty for a violation of § 2 attaches to the principal offense. Both the principal offense, § 922(g)(1), and the other charged offense, § 922(d)(1), are punishable under § 924(a)(2) by a fine, no more than ten years in prison, or both.

182. 18 U.S.C. § 922(d)(1) ("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 [the person was convicted].") (emphasis added).

183. *See Lesure*, 262 F. App'x at 142-43; *Canon*, 993 F.2d at 1442.

184. *See EKSBRIDGE, supra* note 170, at 324 app.; Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400-01 (1950). R

185. *See ESKRIDGE, supra* note 170, at 323-28 app.; Llewellyn, *supra* note 184, at 401-06. Canons of construction, while not perfect, offer guideposts to ascertaining congressional intent. R

186. Klein did not employ this practice in his piece on the subject. *See Klein, supra* note 17. R

#### 4. Canons of Statutory Construction

Although not referring to the canons of construction specifically, it appears, based on their explanation, that the Third and Sixth Circuits went through the process of analyzing the statute in a broader context than did their counterparts.<sup>187</sup> The Third and Sixth Circuits began by investigating the statutory scheme.<sup>188</sup> These courts analyzed not only § 922(g)(1) but also the entire statutory scheme under which it was written.<sup>189</sup> This led the courts to a discussion of § 922(d)(1).<sup>190</sup> They reasoned that Congress must have intended § 922(d)(1) to act in conjunction with § 922(g)(1).<sup>191</sup>

As one observer has noted, “When a statute is unclear with respect to a particular question, lawyers and courts generally begin their search for statutory meaning by asking the question: Did the legislature intend this particular statutory provision to cover this particular fact pattern?”<sup>192</sup> In this instance, it seems apparent that the general aiding and abetting statute was not specifically intended to enforce the “aiding and abetting a felon to possess a firearm” fact pattern.<sup>193</sup> While § 2(a) may be broad enough to engulf this fact pattern, it was undoubtedly not created with these specific facts in mind, as it is meant to apply broadly to *any* offense.<sup>194</sup>

After reading § 2(a), the *Xavier* court ruled that if there is a knowledge element to selling or otherwise disposing of a firearm to a convicted felon, then there must be a knowledge element to aiding and abetting—which amounts, in many cases, to the same behavior.<sup>195</sup> This led the court to a discussion of another crucial element of statutory construction—reading the statute in such a manner as to avoid nullifying another part of the statute.<sup>196</sup>

As discussed in the previous section, the court reasoned that if it were to implement the logic used by those jurisdictions requiring no knowledge of the principal offender’s status as a felon, it would,

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187. See *United States v. Gardner*, 488 F.3d 700, 714-15 (6th Cir. 2007); *United States v. Xavier*, 2 F.3d 1281, 1286-87 (3d Cir. 1993).

188. *Gardner*, 488 F.3d at 715; *Xavier*, 2 F.3d at 1286.

189. *Gardner*, 488 F.3d at 715; *Xavier*, 2 F.3d at 1286.

190. See *supra* Part III.B.

191. See *Gardner*, 488 F.3d at 715; *Xavier*, 2 F.3d at 1286.

192. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 7 (1997).

193. See *supra* Part I.A.

194. 18 U.S.C. § 2 (2006).

195. *Xavier*, 2 F.3d at 1286.

196. *Id.*; see ESKRIDGE, *supra* note 170, at 324 app.

in essence, write § 922(d)(1) out of the Code.<sup>197</sup> The court reasoned that § 922(d)(1) would simply fall to the wayside if the same behavior was governed by another, broader statute requiring a lessened burden of proof and if that statute was preferred by courts and prosecutors.<sup>198</sup>

The jurisdictions requiring no knowledge of the principal's status never addressed this point in their analyses.<sup>199</sup> This is particularly so in the Ninth Circuit's decision in *United States v. Graves*, which criticized its own precedent for its lack of analysis, stating, "Although we acknowledge that *Canon* decided the question [of] whether an aider and abettor is required to know of the principal's status as a felon, we have serious reservations regarding the soundness of that determination. In particular, we . . . [see] no analysis in support of its conclusion."<sup>200</sup> The Ninth and Eleventh Circuits—the two standing rulings requiring no proof of knowledge of the principal's status<sup>201</sup>—may have found that § 922(g)(1) had no requirement of knowledge for the possessor, but they did not search elsewhere in the statute to find other provisions relating to this particular statute that *did* create a knowledge element relative to that offense or aiding and abetting that offense. In fact, neither of those courts nor the *Moore* court even mentioned the statutory scheme of which § 922(g)(1) was a part.<sup>202</sup>

While these courts may argue that the facts of the cases in front of them may not have involved selling or even disposing of weapons to a prohibited party, the application of the law to those who aided or abetted in a manner other than to sell or dispose of firearms is dependent on the application of the law as it relates to sellers and disposers. The *Canon* and *Lesure* courts failed to mention § 922(d)(1), which, like § 922(g)(1), was enacted as part of the Gun Control Act of 1968 and amended as part of the Firearm Owners

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197. See *Xavier*, 2 F.3d at 1286.

198. See *id.*

199. See *United States v. Lesure*, 262 F. App'x 135, 141-43 (11th Cir. 2008) (finding that the district court did not commit plain error and therefore refused to address the issue); *United States v. Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993) (finding that "no greater knowledge requirement applie[d]" but failing to discuss impact on § 922(d)(1)).

200. *United States v. Graves*, 143 F.3d 1185, 1188 n.3 (9th Cir. 1998).

201. While *Moore* has not been overruled, it is clear that *Samuels* controls in the Seventh Circuit on this issue. See *United States v. Samuels*, 521 F.3d 804 (7th Cir. 2008).

202. See *Lesure*, 262 F. App'x 135; *Canon*, 993 F.2d 1439. It is also notable that the Seventh Circuit did not mention the statutory scheme in either *Samuels* or *Moore*. See *Samuels*, 521 F.3d 804; *United States v. Moore*, 936 F.2d 1508 (7th Cir. 1991).

Protection Act.<sup>203</sup> To ignore this provision was error and causes an illogical, inconsistent application of the law.

Further, legal tradition maintains that in a case of ambiguity, it is important to interpret a criminal statute in such a manner as to favor the defendant.<sup>204</sup> Unlike the jurisdictions in which no knowledge requirement exists,<sup>205</sup> the courts requiring knowledge as an element read the criminal statute narrowly and require a higher standard of proof placed on the prosecutor.<sup>206</sup> If Congress meant otherwise, it must amend the statute. Citizens should not be punished for a congressional failure to clarify. The appellate courts in the Ninth and Eleventh Circuits instead chose the broadest and harshest interpretation of the statute.<sup>207</sup> Broadly reading a statute that results in a ten-year prison sentence<sup>208</sup> is to ignore this canon of construction and is fundamentally unfair.

While there appears to be at least some ambiguity as to its purpose, the legislature certainly acted with *some* purpose in creating and later amending § 922(d)(1). It is inappropriate to read a statute in such a manner so as to assume that Congress has created a redundancy.<sup>209</sup> In a situation such as this, where the legislative history has led the courts down many paths and Congress has left the public with no clear window into its mindset, it is up to the courts to interpret the text as best they can to further consistency and logic in the law. For these reasons, it appears that the minority jurisdictions have concluded a far more thorough and conclusive discussion of the subject matter and come to a more practicable and logical result.

Several hypothetical situations demonstrate the soundness of the jurisdictions that require knowledge of the principal's status and the weakness of those jurisdictions that do not. It is important to

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203. See *Lesure*, 262 F. App'x 135; *Canon*, 993 F.2d 1439.

204. ESKRIDGE, *supra* note 170, at 324 (discussing canons of construction); see also *United States v. Kozminski*, 487 U.S. 931, 952 (1988) ("By construing § 241 and § 1584 to prohibit only compulsion of services through physical or legal coercion, we adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be resolved in favor of lenity.").

205. See *Lesure*, 262 F. App'x at 140-43; *Canon*, 993 F.2d at 1441-42; *Moore*, 936 F.2d at 1524-28.

206. *United States v. Xavier*, 2 F.3d 1281, 1286 (3d Cir. 1993).

207. See *supra* Part III.A.

208. 18 U.S.C. § 924(a)(2) (2006).

209. See ESKRIDGE, *supra* note 170, at 324 app.; see also *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion of Scalia, J.) ("Thus, Justice Stevens' concurrence's construction violates the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.").

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view the outcomes of these fact patterns not in the context of the individual matters in front of the courts, but as they relate to future defendants and the legal system in general.

### 5. Alleged Aider Advises Principal on Obtaining Firearm

In this example, assume that the alleged aider is not a licensed dealer but merely an acquaintance of the principal offender. The principal, knowing that as a convicted felon he is unlikely to be able to purchase a gun legitimately, asks the acquaintance—without revealing why he cannot legitimately purchase a firearm—if the acquaintance has a gun that he can buy. Now assume that the acquaintance does not have a gun to give the defendant but tells the defendant he knows where one can be found.<sup>210</sup> The acquaintance gives the principal directions to a location where he can procure a gun along with the name and phone number of the person who will sell it to him. The principal uses that information to obtain the firearm. Subsequently the principal is arrested and charged with possessing the gun as a felon. When asked how he came into possession of the gun, the principal claims that the acquaintance told him where he could obtain it. While it may be difficult to find that the acquaintance sold or disposed of the gun to the principal because he never personally handled the weapon, he certainly played a part in the principal's acquisition of the gun. Under the "counsel" prong of aiding and abetting,<sup>211</sup> the acquaintance is charged under 18 U.S.C. § 2(a). In the jurisdictions not requiring knowledge, there is no discussion of whether the acquaintance knew that the principal was a convicted felon. Without a finding that he knew of the principal's status, the jury convicts because the acquaintance knowingly counseled the principal. This may or may not seem like an unjust result (given that the aider was seemingly involved in the illegal firearm trade, he is not likely a sympathetic defendant), but the problem with the reasoning underpinning this ruling comes when we consider the fate of the person who actually handed the gun to the principal.

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210. While this hypothetical may implicate other potential crimes, including aiding and abetting in the possession of an unregistered firearm, for the purposes of this discussion, it is important to focus only on the charge of aiding and abetting a felon in possession of a firearm.

211. The full text of 18 U.S.C. § 2(a) reads, "Whoever commits an offense against the United States or aids, abets, *counsels*, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. § 2(a) (emphasis added).

## 6. Alleged Aider Hands Firearm to Principal

In another scenario, assume that when the principal approaches the acquaintance, the acquaintance does have a gun and gives it to the principal.<sup>212</sup> Following the same steps as existed in the preceding scenario, when the principal is arrested he names the person who gave him the gun. Noting that this action constitutes “disposing” of a weapon to a convicted felon, the prosecutor charges this defendant with a violation of § 922(d)(1).<sup>213</sup> Because the standard for § 922(d)(1) requires that the acquaintance be aware that the principal is a felon, the burden of proof is higher for the prosecutor.<sup>214</sup> The prosecutor is not required to prove a state of mind when proving that the acquaintance told the principal where he could find a gun.<sup>215</sup> However, now that the acquaintance actually placed the gun in the felon’s hands, the prosecutor must prove that the acquaintance knew of the principal’s status as a felon.<sup>216</sup>

Perhaps, as a matter of public policy, *both* of these characters should be punished, but is it likely that Congress intentionally created a statutory provision that creates a lower prosecutorial burden for someone who tells a convicted felon where he may find a firearm than for someone who actually hands the convicted felon the gun? That seems unlikely considering the level of participation is greater when one puts another physically in possession of a firearm than when one merely gives advice on where to acquire a weapon. But, alas, if one reads the plain language of § 922(d)(1) to require knowledge, but applies § 2(a) to the counseling offense, this would be the result.

A counter to this argument would be that Congress *did* intend a distinction on these matters. Perhaps Congress presumed that the transactions covered by § 922(d) only referred to transactions that, besides being conducted with a convicted felon, were otherwise legal. However, the actions are so closely linked that if this is what Congress intended, the statute should state that fact. As presently stated, this approach does not appear sustainable. Therefore, the

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212. While one may ponder other potential crimes committed in this act, including aiding and abetting in the possession of an unregistered firearm, for the purposes of this discussion, it is important to focus only on the charge of aiding and abetting a felon-in-possession of a firearm.

213. 18 U.S.C. § 922(d)(1).

214. *See id.*

215. *Id.* § 2(a).

216. *Id.* § 922(d)(1).

approach of the Third and Sixth Circuits offers the superior rationale.

C. *Flaws in the Cases Requiring Knowledge of the Principal's Status*

The Courts of Appeals for the Third, Sixth, and Seventh Circuits, ruling that the aider must have known or should have known of the felon status of the principal offender, provide a much more in-depth analysis than their counterparts. The Third and Sixth Circuits appear to have considered numerous canons of construction and explored, in a text-based manner, the statutory scheme and the consequences of their rulings from a logical point of view.<sup>217</sup> It appears that the rulings of those courts have a good deal of support from traditional canons of construction. However, this does not mean those courts' analyses were flawless.

The Seventh Circuit apparently did not consider the rulings of its sister circuits—it did not even mention the other decisions or the existence of a circuit split, including its own ruling in *Moore*.<sup>218</sup> Further, the Seventh Circuit seemed to casually assume that in order to satisfy the requirement that a defendant knowingly participated in an offense, he must be aware of each element.<sup>219</sup> For this proposition, the circuit cites case law that does not explicitly make this claim.<sup>220</sup> The Seventh Circuit notes that “[t]o be guilty of aiding and abetting, an individual must have knowledge of the underlying illegal activity and a desire to assist in the success of the activity, and provide an act of assistance,”<sup>221</sup> and that the “[m]ere presence at the time of the crime is insufficient to support a conviction for [aiding and abetting].”<sup>222</sup> These passages do not conclusively indicate that the aider knows any more than that the principal possessed the weapon. In fact, it is on the basis of similar language that the courts not requiring knowledge of the principal's status based their opinions.<sup>223</sup> Further, it is impossible to determine

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217. See *supra* Part III.B.

218. See *United States v. Samuels*, 521 F.3d 804 (7th Cir. 2008).

219. *Id.* at 811-12.

220. *Id.* at 811 (citing *United States v. Serrano*, 434 F.3d 1003, 1004 (7th Cir. 2006); *United States v. Stott*, 245 F.3d 890, 904 (7th Cir. 2001)).

221. *Samuels*, 521 F.3d at 811.

222. *Id.* (second alteration in original) (quoting *United States v. Bounty*, 383 F.3d 575, 579 (7th Cir. 2004)); see also *Stott*, 245 F.3d at 904 (“To be convicted as an aider and abettor, it must be shown that Mr. Ford associated himself with the activity at issue and that he tried to make the activity succeed.”).

223. See *supra* Part III.A.

whether the Seventh Circuit considered § 922(d) as there is no mention of it in its decision.<sup>224</sup> Perhaps they view this section as redundant or perhaps they never considered its implications in this area. Thus, while the Seventh Circuit has reached a practicable solution and seemingly overturned or at least clarified its ruling in *Moore*, *Samuel's* lack of support and failure to address alternative arguments prevent it from controlling on this matter.

One criticism of the analyses of the Third and Sixth Circuit Courts of Appeals is that the courts used statutory construction canons exclusively.<sup>225</sup> Heavy reliance on canons of construction may be easy to manipulate,<sup>226</sup> which is why some jurisdictions ignore them and leave Congress the responsibility of resolving ambiguities.<sup>227</sup> In this case, however, so many key canons of construction—which hold together the logic of the Code—fall into place that it is difficult to accuse these courts of selective reading. This is particularly so considering that the elements regarding restricted classes of firearm possessors mentioned in § 922(g)(1) are similarly mentioned in § 922(d)(1).<sup>228</sup> It would be irresponsible to ignore this language when Congress connected the two passages by reference.<sup>229</sup>

A far more significant criticism of these courts involves the intent of Congress as seen through the legislative history of 18 U.S.C. § 922. Using legislative history in statutory interpretation is a controversial practice and is considered by some as an inappropriate judicial exercise.<sup>230</sup> However, for the purposes of this discussion, it is important to analyze whether the courts' analyses are in line with congressional intent, as this is where the rationale of the Courts of Appeals for the Third and Sixth Circuits can be called into question. The original language of § 922(d)(1) only required knowledge of *licensed* dealers of firearms.<sup>231</sup> In the Firearms Owners' Protection Act, the term "licensed" was dropped.<sup>232</sup> It is important to discuss why this change was made, as it may give the courts gui-

224. See *Samuels*, 521 F.3d 804.

225. See *United States v. Gardner*, 488 F.3d 700, 714-15 (6th Cir. 2007); *United States v. Xavier*, 2 F.3d 1281, 1286 (3d Cir. 1993).

226. See Llewellyn, *supra* note 184 at 401-06.

227. See MIKVA & LANE, *supra* note 192, at 30-31.

228. 18 U.S.C. § 922(d)(1), (g)(1) (2006).

229. *Id.* § 922(d)(1), (g)(1); see *Xavier*, 2 F.3d at 1286.

230. See MIKVA & LANE, *supra* note 192, at 29-33.

231. Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213, 1220.

232. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986) (codified as amended at 18 U.S.C. § 922(d)(1)).

dance as to the purpose of § 922(d). None of the courts that have ruled on this matter addressed the issue of legislative history. As discussed earlier, the license requirement was thought to have created a loophole for offenders who were not licensed.<sup>233</sup> In eliminating this requirement, it seems that Congress intended one of three possibilities.

The first possibility is that Congress did not understand the aiding and abetting law or its application. The House Report states that there was “an existing loophole whereby qualified purchasers have acquired firearms from licensees on behalf of prohibited persons.”<sup>234</sup> Considering that even after the amendment broadened the statute courts still find that 18 U.S.C. § 2 applies to this offense,<sup>235</sup> it is hard to fathom that a loophole existed that allowed non-licensees to dispose of guns to prohibited classes without facing an aiding and abetting charge. In fact, no case law supports this charge.

Considering the rationales of the post-1986 courts, it seems far more plausible that the burden of proof for prosecuting a non-licensed provider was lower *before* the statute was amended. If § 922(d)(1), as enacted in 1968, specified that it only referred to licensees, it would not be unreasonable to assume that all others who aided a felon in possession of a firearm were subject to some other statute, in which case they would almost certainly be prosecuted under 18 U.S.C. § 2. This Note argues that great inconsistencies would result under the modern language if a knowledge element was not required; there would be no such problem in the pre-1986 version of the statute, however, because a distinction could be made between licensees and non-licensees. In a case with the same facts as *Samuels*, *Gardner*, or *Xavier*, a court could reasonably say that because Congress did not include non-licensees under § 922(d)(1), they were not meant to have the same required mens rea as a licensee. Because they were not granted this right, it could follow that they are subject to the same mens rea as the principal. Thus, it may have been that Congress did not understand this avenue or prosecutors chose not to employ it.

Second, it is also possible that Congress saw § 922(d) as *the* aiding and abetting statute for a felon-in-possession charge and thus

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233. H.R. REP. NO. 99-495, at 17 (1986), as reprinted in 1986 U.S.C.C.A.N. 1327, 1343. The House Report included an ATF report that addressed the loophole. See *supra* notes 90-92 and accompanying text.

234. H.R. REP. NO. 99-495, at 17.

235. See *supra* Part III.A.

wanted to include all possible circumstances under that provision. While there is no discussion in the legislative history of the inclusion of a knowledge element, it is possible that Congress assumed that knowledge of the underlying crime was necessary for all aiders and abettors in violation of § 922(g)(1) and thus wanted to be sure that all potential offenders were covered by this provision. However, if this were the case, it would follow that Congress would not only have broadened the classifications of persons covered by § 922(d)(1) but also the conduct. Perhaps rather than “sell or otherwise dispose” it could have stated, “aid or abet in any way.” However, because Congress changed only the class of person included in the statute,<sup>236</sup> we are left with an unclear understanding of its motives on this topic.

A third possible reason for a congressional amendment would be to ensure that all aiders and abettors of a felon in possession of a firearm to whom the knowledge element did not apply would now have that protection. There is no evidence of this in the legislative history, but, considering the tradition of including or allowing a court to read a knowledge requirement into a statute, it is entirely possible that this was on the minds of at least some members of Congress.<sup>237</sup> This may be especially true considering the substantial penalty associated with this crime.<sup>238</sup>

The counterargument could be that Congress may have intentionally created a distinction. While this appears unlikely based on the language of § 922(d), which includes the word “dispose,”<sup>239</sup> and the legislative history, which seems to show an intent to strengthen the law against those who do sell or dispose a firearm, it is of course possible that through its silence on the matter, Congress intended to punish the counselor more than the procurer. If this was Congress’s intent—to create a distinction—then that body should include language to such effect in the statute. At present, there is no such language in either the statute or the legislative history.

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236. 18 U.S.C. § 922(d)(1).

237. Margaret Shaw, Note, *Criminal Enforcement of Environmental Laws: Relevance of the Public Welfare Doctrine in Determining Culpability*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 349-50 (2001) (acknowledging that the harshness of a penalty may affect the level of mens rea required).

238. *Id.*; see 18 U.S.C. § 924(b).

239. 18 U.S.C. § 922(d)(1).

## CONCLUSION

This Note has demonstrated the ambiguous nature of aiding and abetting law, particularly as it relates to the felon in possession of a firearm statute. Decisions favoring an interpretation not requiring the aider to have knowledge of the principal's offense may be on the decline. The Court of Appeals for the Seventh Circuit—formerly thought to favor this approach—now offers a practicable solution.<sup>240</sup> The Court of Appeals for the Ninth Circuit appears dubious of—if not yet ready to overturn—its ruling on this matter.<sup>241</sup> And the Court of Appeals for the Eleventh Circuit issued its opinion only after acknowledging that due to the split it could not overrule the district court as plain error (possibly placing its opinion in the realm of dicta).<sup>242</sup> However, the Ninth and Eleventh Circuits still employ the “no knowledge of the principal's status” standard. And even those courts that require the government to prove knowledge of the principal's felon status—the Courts of Appeals for the Third and Sixth Circuits, along with the Seventh Circuit, concurring in result—can only guess as to Congress's intentions.

Congress ultimately has the ability to resolve this matter. The courts may offer different interpretations of the meaning of the Firearms Owners' Protection Act<sup>243</sup> as it relates to aider and abettor law, but Congress, with one pen stroke, could end the ambiguity by clarifying any of the possible reasons for the 1986 amendments mentioned above or by providing any other clear solution it so chooses. Congress need merely speak in § 922(d)(1) to exactly which acts are to be covered by the provision. Congress should either clarify that 18 U.S.C. § 922(d)(1) is intended to cover all areas of aiding and abetting for a violation of § 922(g) or more specifically describe what behavior it covers. While it may seem that the behavior described by § 922(d)(1) is covered by general aiding and abetting law, the statute does not cover such issues as “counsel and

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240. See *United States v. Samuels*, 521 F.3d 804, 811-12 (7th Cir. 2008).

241. “Although we acknowledge that *Canon* decided the question whether an aider and abettor is required to know of the principal's status as a felon, we have serious reservations regarding the soundness of that determination. In particular, we [see] no analysis in support of its conclusion . . . .” *United States v. Graves*, 143 F.3d 1185, 1188 & n.3 (9th Cir. 1998)

242. *United States v. Lesure*, 262 F. App'x 135, 142 (11th Cir. 2008) (“[I]t is notable to observe at the outset that ‘[w]hen neither the Supreme Court nor [we have] resolved an issue, and other circuits are split on it, there can be no plain error in regard to that issue.’” (quoting *United States v. Evans*, 478 F.3d 1332, 1338 (11th Cir. 2007))).

243. Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986).

command” like § 2.<sup>244</sup> Are these issues then to be decided separately? Congress, after eighteen years, chose to amend the Gun Control Act of 1968 in an attempt to focus the language of the statute. As noted earlier, it took many years and several attempts before Congress successfully amended that statute. While similar hurdles are likely to exist should further clarification be attempted, this is a task that must be undertaken. Political difficulties do not provide an adequate excuse for leaving the statute as presently constructed.

Perhaps certiorari should be requested, but even a Supreme Court review would leave certain questions unanswered. For example, neither of the two most recent cases addressed the issue of counsel and command. The burden in this instance is on Congress.

Aiding and abetting a felon in possession of a firearm is accompanied by strict punishment.<sup>245</sup> Existing law dictates that an act punishable by up to a ten-year prison sentence in one jurisdiction may bring no penalty at all in another.<sup>246</sup> The Third and Sixth Circuits have provided a well-reasoned, logical ruling on the statute as it stands. However it is not preferable to have courts choosing between statutes and guessing at congressional rationale when Congress could amend this law and considerably clarify this area of the criminal code.

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244. 18 U.S.C. § 922(d).

245. *Id.* § 924(b)(1).

246. *Id.*