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To Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense: A Critique to Federal Aiding and Abetting Principles

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TO "AID, ABET, COUNSEL, COMMAND, INDUCE, OR PROCURE THE COMMISSION OF AN OFFENSE": A CRITIQUE OF FEDERAL AIDING AND ABETTING PRINCIPLES

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I. INTRODUCTION

Federal aiding and abetting law, which has been spinning out of control for quite some time, has now spun totally out of control. 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.[1]

The problem has several dimensions. First, misapplication of aiding and abetting principles invariably results in an improper easing of the requisite mens rea requirements for conviction. As a result, the integrity of the criminal justice process is fundamentally compromised.

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This Article uses male pronouns to refer to federal criminal defendants. The majority of federal criminal defendants are male, although the percentage of female defendants is increasing. *See* UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2002 417 (2003) (noting that males constituted 85.4 % of all convicted federal defendants in 2000). This Article uses female pronouns to refer to legal counsel. Females make up 48 % of currently enrolled law students in ABA-approved law schools. ABA 2004 Enrollment Statistics, Letter by David Rosenlieb, Data Specialist for Office of the Consultant on Legal Education and Admissions to the Bar, Jan. 12, 2005 (copy on file with the author). *See also* Claire G. Schwab, *A Shifting Gender Divide: The Impact of Gender on Education at Columbia Law School in the New Millennium*, 36 COLUM. J.L. & SOC. PROBS. 299, 310 (2003) (noting the enrollment trends of the past two decades indicate women will constitute a majority of all law students around 2005).

1. A recent article noted the multiple approaches to mens rea standards for federal criminal offenses and concluded that federal aiding and abetting law is in a state of "chaos." Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1355 (2002).

Second, there is confusion on what constitutes aiding and abetting. The common shorthand term "aider and abettor" connotes some lesser actor—not the individual who actually commits the offense—but the individual who offers assistance to the primary actor. In this context, the primary actor is generally considered the more culpable actor. While this paradigm is true in many circumstances, it is incomplete and misleading in several critical respects.

Most importantly, doctrinal confusion results when the principal is systematically considered the more culpable actor. The connotation of aider and abettor often ignores the other aspect of the concept: the individual who commands, induces, or procures another to actually commit the offense. In this context, the "commander or inducer" is the leader and, in many cases, is more culpable than the principal. In modern legal terminology, the term "principal" means the person who physically commits the offense; it does not denote relative culpability in the criminal hierarchy. Accordingly, in this scenario, the aider, abettor, commander, or inducer who is the more culpable actor should receive a more severe sentence. To cover this eventuality, federal aiding and abetting law makes the aider, abettor, commander, or inducer punishable as a principal and thus eligible for the same punishment as the individual who commits the actual offense.[2]

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2. 18 U.S.C. § 2(a) (2000) provides, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

In most doctrinal areas, the aider and abettor is punishable as a principal and thus subject to identical punishment as the principal. *See, e.g.*, United States v. Simpson, 979 F.2d 1282, 1285 (8th Cir. 1992) (holding the aiding and abetting statute applies to the entire criminal code); United States v. Pino-Perez, 870 F.2d 1230, 1233 (7th Cir.) (en banc) (noting that "every time Congress has passed a new criminal statute the aider and abettor provision has automatically kicked in and made the aiders and abettors . . . punishable as principals"). This approach is in contrast to common law distinctions such as accessory before the fact and accessory after the fact—designations that denoted distinct and relatively less serious offenses compared with the actual commission of the offense. Federal law, in line with most modern criminal law, eliminates those arcane distinctions and, with regard to the range of punishment, does not generally distinguish between those charged as principals and those charged as aiders and abettors. *See* Standefer v. United States, 447 U.S. 10, 15–19 (1980).

In a few doctrinal areas, aiders and abettors may be subject to a different, lesser punishment than the principal. Also, legislative intent may dictate extending aiding and abetting principles to reach only high-level operatives. *See* Reves v. Ernst & Young, 507 U.S. 170, 186 (1993) (holding no civil liability for a RICO violation under aiding and abetting principles); United States v. Joyner, 201 F.3d 61, 69 (2d Cir. 2000) (noting that no aiding and abetting liability exists under 21 U.S.C. § 848, the federal drug kingpin statute); United States v. Viola, 35 F.3d 37, 41 (2d Cir. 1994) (extending the *Reves* rationale to criminal liability), *abrogated on other grounds by* Salinas v. United States, 522 U.S. 52 (1997). *But see Pino-Perez*, 870 F.2d at 1231–37 (holding that aiding and abetting liability exists under 21 U.S.C. § 848). For a discussion on the use of aiding and abetting liability as a way to avoid impact of the *Reves* doctrine, see NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 68–71 (3d ed. Supp. 2005).

In the recent prosecution of one of the notorious District of Columbia-area snipers, Virginia prosecutors successfully sought the death penalty against John Allen Muhammad. Jon Ward, *Muhammad Request for New Trial Rejected*, WASH. TIMES, Feb. 21, 2004, at A09. The trial court rejected the defense that the applicable Virginia death penalty statute (VA. CODE ANN. § 19.2-264.2 (2004)) exclusively applied only to the actual triggerman. Matthew Cella, *No Dallying on Executions: Virginia Offers Shortest Wait for Prisoners on Death Row*, WASH. TIMES, Nov. 23, 2003, at A02. The prosecution argued the statute should be interpreted to permit the death penalty for all individuals who "actively participat[ed] in the deaths that they caused." Josh White, *Triggerman Provision Weighed*

Third, there is debate over the requisite mens rea for an aider and abettor. Aiding and abetting seems to be a specific intent offense—meaning an individual must knowingly intend to assist in the commission of the actual offense. A lower mens rea requirement, even for general intent offenses, may cast too broad a net to impose criminal liability.[3]

Fourth, the federal aiding and abetting statute, codified at 18 U.S.C. § 2, is representative of most modern aiding and abetting statutes. These modern statutes replaced the complex and arcane common law rules concerning accessories to a crime—individuals who do not actually commit the completed offense. The federal aiding and abetting statute makes an individual who aids and abets punishable as a principal.[4] Thus, the statute, instead of setting forth a separate crime, delineates a theory of legal complicity like the *Pinkerton* conspiracy doctrine,[5] which imposes liability on individuals for particular federal offenses who do not physically commit those offenses.[6]

In addition to the incomplete connotation of aiding and abetting, which omits the commands or induces concept, many of the flexible aiding and abetting principles are often mischaracterized. As a result, several oft-stated generalizations ignore critical subtleties and are therefore subject to misapplication.[7] These subtleties concern the proper scope of prosecutorial flexibility and consistency of theory, including the use of uncharged and alternative theories of guilt, whether juror unanimity is required as to a defendant's status as the principal or the aider and abettor, and related issues arising from evidence of joint criminal participation.

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in Sniper Case: State May Not Need to Prove Who Fired, WASH. POST, Apr. 7, 2003, at B5. The Virginia Supreme Court rejected Muhammad's "actual triggerman" argument, and the court affirmed the two convictions and death sentences at issue in that appeal. Muhammad v. Commonwealth, 611 S.E.2d 537, 546, 554–558 (Va. 2005). The Virginia legislature recently considered amending the death penalty statute to make clear that eligibility for the death penalty is not limited to the actual triggerman. Michael D. Shear, *Bill Would Extend Death Penalty to Accomplices*, WASH. POST, Dec. 21, 2004, at B5. In a related matter, the United States Supreme Court recently held that the Eighth Amendment prohibits the execution of individuals who were juveniles when they committed the crime. *See* Roper v. Simmons, 125 S. Ct. 1183, 1200 (2005). As a result, Muhammad's accomplice, Lee Boyd Malvo, who was a minor when the murder spree occurred, cannot be executed.

3. For example, the Nevada Supreme Court recently overturned precedent that had adopted the natural and probable consequences doctrine of accomplice liability for specific intent offenses. *See* Sharma v. State, 56 P.3d 868, 871–72 (Nev. 2002). The prosecution now must establish a higher standard—that a defendant charged with aiding and abetting a specific intent crime took action to aid another "with the intent that the other person commit the charged crime." *Id.* at 872.

4. 18 U.S.C. § 2 (2000).

5. Pinkerton v. United States, 328 U.S. 640 (1946). *Pinkerton* liability cannot serve as an after-the-fact justification to save a conviction. Liability under this theory may be upheld on appeal only if the judge gave the *Pinkerton* instruction at trial. *See* Nye & Nissen v. United States, 336 U.S. 613, 618 (1949); United States v. Spudic, 795 F.2d 1334, 1339 (7th Cir. 1986).

6. *See Pinkerton*, 328 U.S. at 645–48.

7. For simplicity's sake, this Article uses the shorthand vernacular of "aiding and abetting" to refer to 18 U.S.C. § 2(a), with full recognition that the statute encompasses the commander and inducer concept as well.

Few commentators seriously question the utility of most modern federal aiding and abetting principles. Properly applied, these principles reflect the societal judgment that an aider and abettor is as morally culpable as the principal offender and should thus suffer the same type of conviction and potential punishment as the principal. However, some applications of aiding and abetting liability are problematic and raise constitutional questions. This Article analyzes modern federal aiding and abetting liability and attempts to establish its proper boundaries. A multi-defendant criminal prosecution or a prosecution of one defendant involving multi-party criminality[8] is not simply a game of musical chairs—and courts must take care to give appropriate jury instructions and to correlate those instructions to the evidence presented as to each defendant. Otherwise, the necessarily broad and flexible aiding and abetting concepts, vital to the fair administration of justice, will be exposed as abusive in application and thus subject to necessary doctrinal retrenchment. This reevaluation of aiding and abetting doctrine complements other emerging criminal law developments concerning prosecutorial overreaching, which is similarly in need of reevaluation and refinement.[9]

Part II of this Article analyzes the current state of federal aiding and abetting doctrine and further details the concerns noted above. Most significantly, this Article contends that if the government proceeds on alternate legal theories that a defendant was either the principal or an aider and abettor, due process requires juror unanimity, at least in situations where the evidence would establish the defendant as an accessory before the fact at common law. This doctrinal adjustment would reinvigorate the increasingly ignored requirement of juror unanimity in criminal cases and eliminate much of the present doctrinal confusion and potential unfairness.

Part III of this Article provides a study of *United States v. Thompson*, a recent case that illustrates the unfortunate yet predictable result of overreaching and misapplication of current aiding and abetting doctrines.[10] *Thompson* serves as an

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8. The most common example of a one-defendant trial concerning multiparty criminality is an indictment charging more than one defendant, but all of the defendants, except one, pled guilty prior to trial. *See* CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA 4.02 (4th ed. 1993) [hereinafter D.C. RED BOOK]. The *D.C. Red Book* provides in bracketed language, "It is not necessary that all the people who committed the crime be caught or identified." *Id.* The accompanying commentary states that this instruction "should be given in cases in which the principal offender is not on trial with the defendant." *Id.* at 4.02 cmt.

9. *See, e.g.*, Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423 (2001) (arguing that the prosecution's use of irreconcilable theories at separate proceedings violates defendants' due process rights); Peter A. Joy & Kevin C. McMunigal, *Should Prosecutors Use Inconsistent Arguments?*, CRIM. JUST., Winter 2005, at 47 (asserting that prosecutors should generally refrain from pursuing inconsistent theories of guilt).

10. 279 F.3d 1043 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 904 (2002). In the interest of full disclosure, the author served as appellate counsel for the defendant and as counsel of record for the unsuccessful filing of the petition for writ of certiorari.

object lesson and a catalyst for the necessary doctrinal reevaluation and refinement. Part IV offers the conclusion that a reinvigorated and more concrete unanimity requirement when the prosecution seeks to prove criminal liability as an aider and abettor comports with contemporary notions of due process. This modest proposed doctrinal adjustment represents a positive development for federal criminal law in the twenty-first century.

II. THE PROBLEMS WITH FEDERAL AIDING AND ABETTING DOCTRINE

The federal aiding and abetting statute, 18 U.S.C. § 2(a), provides, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."[11] This statute, enacted in its original form in 1909, reflects the modern view that an aider and abettor is punishable as a principal. The statute constituted a rejection of the old common law rules for felonies, where, among other things, the guilt of the accessory depended on the established guilt of the principal offender.[12]

Under the modern statutory formulation embodied in § 2(a), the principal is the principal offender, a term long understood to refer to the person who physically commits the offense.[13] In application, § 2(a) does not mean that the aider and abettor is the principal. Despite the general observation that modern federal aiding and abetting doctrine maintains no distinction between the principal and the aider and abettor and despite the Supreme Court's inartful pronouncement that "[w]ith the enactment of [18 U.S.C. § 2], all participants in conduct violating a federal criminal

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11. 18 U.S.C. § 2(a) (2000). In 1909, Congress enacted this aiding and abetting statute intending to revamp early Anglo-American accomplice law, which "was intricate and frequently illogical." Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 94 (1985). At common law, parties to a crime were divided into four discrete categories. These categories were largely created to mitigate the harshness of a felony conviction, which often resulted in a death sentence. *See* Standefer v. United States, 447 U.S. 10, 15 (1980) (providing citations to sources discussing common law principles concerning principals and accessories). Federal aiding and abetting doctrine has been a part of federal criminal law since the first federal criminal code of 1790. Act of Apr. 30, 1790, § 2, 1 Stat. 112 (1790). However, aiding and abetting liability was separately set forth in individual statutes and was governed by the then-applicable limits and procedures of common law. *See, e.g., id.* § 10, 1 Stat. at 114 (separating liability for accessories before the fact for crimes of murder, robbery, or piracies from liability for other crimes).

18 U.S.C. § 2(b) (2000) discusses the "causer": an individual who acts through an innocent instrumentality and is thus a principal. Congress added this provision to the Federal Criminal Code in 1948. Act of June 25, 1948, ch. 645, 62 Stat. 684. The § 2(b) "causer" is analytically different from the aider and abettor, in that the latter shares the criminal culpability with the principal actor. *See infra* notes 107–11 and accompanying text.

12. *See Standefer*, 447 U.S. at 15–20.

13. *See id.* at 15–18; WILLIAM BLACKSTONE, 4 COMMENTARIES *34; 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 233 (photo. reprint 1971) (1736).

statute are 'principals,'"[14] the concept of an aider and abettor is not blithely interchangeable with the concept of a principal.

This observation is significant. Congress added the present "punishable as a principal" language to the federal aiding and abetting statute in 1951, replacing the original 1909 "is a principal" language to "eliminate all doubt that in the cases of offenses whose prohibition is directed at members of specified classes . . . 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."[15] 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. The subtle but substantial modification of the statutory language underscored the point that the concept of an aider and abettor was not synonymous with the concept of a principal.

Thus, it is ironic when present-day prosecutors too often proceed as if it does not matter whether they convict a particular defendant as a principal or as an aider and abettor.[16] This common prosecutorial attitude is not surprising if courts regularly, but nonetheless improperly, treat the terms as synonymous in all respects. This attitude can also be explained if one misconstrues the proper contours of the "no distinction" rule and only focuses on the narrow concept that the aider and abettor is punishable as a principal.

Many of these problems are inherent in modern federal aiding and abetting instructions. The Ninth Circuit's model criminal aiding and abetting instruction is representative of instructions routinely given in federal district courts throughout the nation. The instruction provides:

> [1] A defendant may be found guilty of [*crime charged*], *even if the defendant personally did not commit the act or acts*

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14. *Standefer*, 447 U.S. at 20. *Standefer* actually resolved a separate disputed issue unrelated to whether the principal is indistinguishable from the aider and abettor. *Standefer* resolved a circuit split and held that the conviction of the principal is not essential for a conviction of the aider and abettor. *Id.* The Court's similar pronouncement in *Nye & Nissen v. United States* that aiding and abetting "makes a defendant *a principal* when he consciously shares in any criminal act," 336 U.S. 613, 620 (1949) (emphasis added), is not nearly as egregious because the Court decided the case in 1949 when the pertinent statutory language read "is liable as a principal," § 2, 62 Stat. at 684, and was decided prior to the 1951 amendment, which substituted the present language, Act of Oct. 31, 1951, ch. 655, 65 Stat. 717. The language in *Nye & Nissen* is still confusing, however, because courts today often cite the case as authority supporting the current aiding and abetting instruction. *See* 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 11.01, at 11-4 to -7 (2005).

15. *Standefer*, 447 U.S. at 18–19 n.11 (citation omitted).

16. *See, e.g.*, United States v. Moye, 422 F.3d 207 (4th Cir. 2005). In *Moye*, the government argued that "because aiding and abetting is implicit in all indictments" the district court properly instructed the jury on that charge. *Id.* at 214. In a 2-1 decision, the Fourth Circuit reversed the conviction on one count because no evidence supported the aiding and abetting instruction. *Id.* at 213–15. The dissenting judge argued for the more common outcome: that the conviction should be upheld based on the harmless error doctrine. *Id.* at 217–21 (Hamilton, J., dissenting).

> constituting the crime but aided and abetted in its commission. To prove a defendant guilty of aiding and abetting, the government must prove beyond a reasonable doubt:
> [2] First, [*crime charged*] was committed by someone;
> [3] Second, the defendant knowingly and intentionally aided, counseled, commanded, induced or procured that person to commit [*crime charged*];[17] and
> [4] Third, the defendant acted before the crime was completed.
> [5] It is not enough that the defendant merely associated with the person committing the crime, or unknowingly or unintentionally did things that were helpful to that person, or was present at the scene of the crime.
> [6] The evidence must show beyond a reasonable doubt that the defendant acted with the knowledge and intention of helping that person commit the [*crime charged*].
> [7] The government is not required to prove precisely which defendant actually committed the crime and which defendant aided and abetted.[18]

Similarly, the authoritative *Sand and Siffert, Modern Federal Jury Instructions—Criminal*, provides the following aiding and abetting instruction in relevant part:

> Under the aiding and abetting statute, it is not necessary for the government to show that a defendant himself physically committed the crime with which he is charged in order for the government to sustain its burden of proof. A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.
>
> Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proven that another person actually committed the offense with which the defendant is charged, and that the

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17. As will be discussed later, for this instruction to be appropriate as to a particular defendant, the "someone" referred to in the second paragraph is a person other than the defendant, and the defendant referred to in the third paragraph is different from "that person," who is the "someone" other than the defendant. While this observation may seem self-evident, failure to strictly adhere to this differentiation may create a situation where a defendant faces an aiding and abetting instruction when there is no evidence that another party actually committed the offense.

18. COMM. ON MODEL JURY INSTRUCTIONS WITHIN THE NINTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 5.1 (2003 ed.) [hereinafter NINTH CIRCUIT INSTRUCTIONS] (brackets in original).

> defendant aided or abetted that person in the commission of the offense.
>
> As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place.[19]

Lastly, the *Criminal Jury Instructions for the District of Columbia*, commonly referred to as the *Red Book*,[20] provides model jury instructions often used in federal criminal trials in the District of Columbia.[21] Instruction 4.02, the pertinent aiding and abetting instruction, provides:

> You may find the defendant guilty of the crime charged in the indictment without finding that s/he personally committed each of the acts that make up the crime or that s/he was present while the crime was being committed. Any person who in some way intentionally participates in the commission of a crime aids and abets the principal offender. S/he therefore is as guilty of the crime as s/he would be if s/he had personally committed each of the acts that make up the crime.
>
> To find that the defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated herself/himself with the person(s) who committed the crime, that s/he participated in the crime as something that s/he wished to bring about, and that s/he intended by her/his actions to make it succeed.
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> . . . .
>
> [It is not necessary that all the people who committed the crime be caught or identified.]
>
> It is sufficient if you find beyond a reasonable doubt that the crime was committed by someone and that the defendant knowingly and intentionally aided and abetted the principal offender[s] in committing the crime.[22]

Model jury instructions themselves often perpetuate confusion. Of the three model instructions disclosed above, only the Ninth Circuit's instruction includes the

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19. SAND ET AL., *supra* note 14, ¶ 11.01, at 11-4.

20. D.C. RED BOOK, *supra* note 8.

21. *See, e.g.*, United States v. Mason, 233 F.3d 619, 622 (D.C. Cir. 2000) (citing a *Red Book* instruction); United States v. Washington, 106 F.3d 983, 992 (D.C. Cir. 1997) (same).

22. D.C. RED BOOK, *supra* note 8, 4.02 (brackets in original).

statute's command or induce term. The other two model instructions do not set forth or otherwise expressly address the command or induce concept.[23]

Also, only the District of Columbia's *Red Book* instruction specifically uses the traditional common law term "principal offender."[24] However, all three formulations clearly embody that concept. Sand and Siffert refer to the person who "physically committed the crime."[25] Similarly, the Ninth Circuit's model instruction refers to the person who "personally . . . commit[ted] the act or acts constituting the crime" charged.[26] Thus, all three formulations distinguish the primary actor from the aider and abettor.[27] This distinction reinforces the notion that the principal is not synonymous or interchangeable with the aider and abettor.

Under all three model instructions, to convict an individual using an aiding and abetting theory, the evidence must establish, either alternatively or independently, that the aider and abettor assisted a principal offender in committing the completed offense.[28] As used in this context, the principal offender is the one who physically commits all the elements of the offense. Amplifying these general principles, several interpretive principles have developed, all of which are favorable to the prosecution.

Generally, the following principles are fair and reasonable when properly applied. However, given the lax manner in which prosecutors can utilize aiding and

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23. In an effort to make the instruction more understandable, the *Red Book* commentary states that the "command and induce" language "has been eliminated in favor of 'intentionally participates'" but recognizes that "[i]n some cases, the facts will call for use of a more precise term . . . and the Committee recommends use of the appropriate term in those cases. For example, where the aider and abettor orders the criminal act, the judge should use 'command.'" D.C. RED BOOK, *supra* note 8, 4.02 cmt. *Cf.* United States v. Thompson, 279 F.3d 1043, 1049–50 (D.C. Cir. 2002) (stating that, under the circumstances, the commander who did not physically commit the offense could be the principal), *cert. denied*, 537 U.S. 904 (2002). See Part III for a critique of *Thompson*.

24. The Supreme Court in *Standefer* noted that Congress enacted an aiding and abetting statute in 1901 which referred to the "principal offender" to abrogate the common law for the District of Columbia, and that statute is still in force today. Standefer v. United States, 447 U.S. 10, 18 & n.10 (1980) (citing Act of Mar. 3, 1901, ch. 854, § 908, 31 Stat. 1337 (now codified as amended at D.C. CODE ANN. § 22-1805 (Lexis Nexis 2001))). The *Red Book* instruction originates from that statute. *See* D.C. RED BOOK, *supra* note 8, 4.02.

25. SAND ET AL., *supra* note 14, ¶11.01, at 11-4.

26. NINTH CIRCUIT INSTRUCTIONS, *supra* note 18, 5.1.

27. Likewise, the pertinent Fifth Circuit pattern instruction for aiding and abetting does not refer to a principal offender, but instead refers to agency principles to distinguish the aider and abettor from "some [other] person" that the jury finds beyond a reasonable doubt to have committed "every element of the offense." COMM. ON PATTERN JURY INSTRUCTIONS, FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS: CRIMINAL CASES 2.06 (2001 ed.).

28. An individual can also aid and abet an attempted offense if substantive federal law criminalizes the attempted offense. *See, e.g.*, 18 U.S.C. § 1113 (2000) (criminalizing attempted murder or manslaughter); 18 U.S.C. § 2113(a) (2000) (proscribing bank robbery and attempted bank robbery); *see also* United States v. Samuels, 308 F.3d 662, 666–68 (6th Cir. 2002) (discussing aiding and abetting in the context of an attempt to possess with the intent to distribute cocaine). No general federal attempt statute exists. *Cf.* MODEL PENAL CODE § 5.01 (1962) (providing a general criminal attempt statute).

abetting theory, the principles can be overdrawn and extended to impermissible situations. Giving an aiding and abetting instruction in those impermissible situations is unwarranted and should constitute reversible error.

The general danger of a jury's receipt of an improper aiding and abetting instruction must be recognized. An improper instruction, when unsupported by the evidence, may direct a jury to convict a defendant even if it is not clear that the defendant possessed the requisite intent. This problem arises because aiding and abetting instructions specifically provide criminal liability where the defendant did not actually commit all elements of the offense and where the aider and abettor's actions, in the abstract, may be wholly innocent. For example, if a defendant concedes that he committed all of the crime's physical acts (and would thus seem to be the principal), contesting only intent, the jury may misinterpret the aiding and abetting instruction as providing for guilt even where one element—the mental element—is not proven. The prosecution finds aiding and abetting liability attractive because, like conspiracy liability, its expansive nature permits aiding and abetting liability to be established upon a finding that the defendant did not actually commit all elements of the offense. However, precisely because of its potentially broad sweep, aider and abettor liability's utility must be carefully scrutinized.

To guard against the danger of abuse, federal courts have imposed various procedural safeguards to protect against indiscriminate and improper use of conspiracy instructions.[29] Despite similar potential for abuse, no comparable concern regarding the use of aiding and abetting instructions exists.

As noted above, modern federal complicity doctrines eliminated most, but not all, of the legal distinctions between a principal and an aider and abettor. This development has led to the somewhat sloppy and overly broad notion of the no distinction rule.

Many current aiding and abetting doctrines reflect the proper application of the no distinction rule. First, under federal law, an aiding and abetting theory is implied in every charge. This pro-prosecution principle permits the government to receive an aiding and abetting instruction and to argue for conviction under that theory even without specifically alleging 18 U.S.C. § 2 in the indictment.[30]

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29. *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 175–81 (1987) (discussing requirements for admitting a co-conspirator's out-of-court statement under the Federal Rules of Evidence); *see also* United States v. James, 590 F.2d 575, 582 (5th Cir. 1979) (observing that the district court should generally require a "showing of a conspiracy" before admitting a co-conspirator's declarations but noting that "the court may admit the statement subject to being connected up" in certain circumstances); United States v. Paredes, 176 F. Supp. 2d 183, 188–89 (S.D.N.Y. 2001) (allowing admission of a co-conspirator's statement before proving a conspiracy although the government must ultimately prove its existence or risk mistrial).

30. *See, e.g.*, United States v. Vaandering, 50 F.3d 696, 702 (9th Cir. 1995) (stating that "the district court did not err in failing expressly to connect the aiding and abetting instruction to a specific count . . . of the indictment"); United States v. Galiffa, 734 F.2d 306, 312 (7th Cir. 1984) (providing the rule that an "aiding and abetting charge . . . 'need not be specifically pleaded and a defendant indicted for a substantive offense can be convicted as an aider and abettor' upon a proper demonstration of proof so long as no unfair surprise results" (quoting United States v. Tucker, 552 F.2d 202, 204 (7th

Notwithstanding the no distinction rule, aiding and abetting doctrine is generally accepted without much controversy, even when aggressively applied. Related legal theories of accessorial criminal liability that are favorable to the government, particularly conspiracy law, do not ordinarily receive such lenient treatment.[31]

Although an aiding and abetting theory may be implied in every charge, an aiding and abetting instruction is not proper in every case of multi-party criminality. Proper application of aiding and abetting theory means the judge may give the instruction if the instruction is supported by the evidence, even when the indictment does not allege aiding and abetting liability.[32]

The above-stated principle demonstrates long-established hornbook federal criminal law. Nonetheless, its application invokes significant due process and fair notice issues, which courts should consider when applying aiding and abetting principles.[33] A competent federal defense lawyer must know that every charge implies an aiding and abetting theory. A defense attorney would be remiss if she went to trial on an indictment that made no reference to § 2 and then argued for dismissal or acquittal on the ground that the indictment failed to allege an offense under 18 U.S.C. § 2 if the prosecution introduced evidence that the defendant aided and abetted someone else in the commission of the charged offense.

The practical fairness rationale for such a rule is evident: a trial is not a game. Many situations warrant an aiding and abetting instruction when sufficient evidence exists to support a finding that the defendant was the principal offender and sufficient, albeit conflicting, evidence also exists to support a finding that the same defendant was an aider and abettor and someone other than the defendant was the principal offender. If indicted as a principal, a defendant should not be able to exploit what is in effect a musical chairs defense by arguing for acquittal on the

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Cir. 1977))). Under current doctrine, due process may prevent giving an aiding and abetting instruction if the defendant can establish unfair surprise. However, unfair surprise is exceedingly difficult to establish. SAND ET AL., *supra* note 14, ¶ 11.01, at 11-3 (citing cases uniformly rejecting unfair surprise claims). Similar due process and fair notice concepts underlie the Model Penal Code's consolidated theft provisions. *See* MODEL PENAL CODE § 223.1(1) (1976).

31. For example, criminal liability under the *Pinkerton* doctrine can be upheld only if a *Pinkerton* instruction was actually given to the jury. *See* Nye & Nissen v. United States, 336 U.S. 613, 618 (1949); United States v. Spudic, 795 F.2d 1334, 1339 (7th Cir. 1986).

32. *See supra* note 30. The judge must also tailor the instruction to each particular defendant. For example, suppose an indictment charges *A* and *B* together, and all of the evidence establishes that *A* was the principal offender and *B* was the aider and abettor. Then, if *B* pleads guilty and *A* stands trial alone, an aiding and abetting instruction would be inappropriate at *A*'s trial, despite evidence of joint participation. *See* United States v. Martin, 747 F.2d 1404, 1408 (11th Cir. 1984); Brooks v. United States, 599 A.2d 1094, 1100–03 (D.C. 1991).

33. Sand and Siffert note, "The courts are agreed that an aiding and abetting instruction is not appropriate when it unfairly surprises the defendant, although that standard appears to be extraordinarily difficult to satisfy." SAND ET AL., *supra* note 14, ¶ 11.01, at 11-3; *see also* United States v. Moye, 422 F.3d 207 (4th Cir. 2005) (holding an aiding and abetting instruction on felon in possession of a firearm charge improper where no evidence was presented that alleged principal offender).

grounds that the evidence establishes that he was an aider and abettor, or vice versa.[34]

Second, the seventh paragraph of the Ninth Circuit's aiding and abetting instruction reflects the related legal principle that the government does not have to prove precisely who was the principal and who was the aider and abettor.[35] Properly applied in a limited context, this legal principle is also unobjectionable. For example, this rule is applicable when some evidence suggests that a particular defendant was the principal offender but other evidence suggests that the same defendant was an aider and abettor. This rule is sensible because, as noted above, two defendants could otherwise defend on the grounds that the one charged as the aider and abettor is not guilty because he was the principal, while the one charged as the principal is not guilty because he was the aider and abettor. Again, this general rule is sound if the evidence supports that both defendants could have been either the principal or the aider and abettor. The law should not permit a defendant to escape liability under a musical chairs or shell game theory based on lack of proof.[36]

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34. *See generally* Commonwealth v. Ryan, 30 N.E. 364 (Mass. 1892) (affirming defendant's embezzlement conviction, rejecting his argument that the evidence established larceny).

35. *See* NINTH CIRCUIT INSTRUCTIONS, *supra* note 18, 5.1. Compare this language with *Red Book* Instruction 4.02, which provides in the penultimate paragraph that "[i]t is not necessary that all the people who committed the crime be caught or identified." D.C. RED BOOK, *supra* note 8, 4.02. However, the relevant commentary states that this language should be given (in a case against an aider and abettor) when "the principal offender is not on trial with [defendant]" aider and abettor. *Id.* Thus, the *Red Book* instruction and comment serve to implicitly limit the flexibility and alternatives set forth in this paragraph and support the proposition that the instruction should not be given in a single-defendant case when the principal offender is not on trial with the aider and abettor. For a misapplication of this instruction, see *infra* Part III for an analysis of *Thompson*.

36. A classic example is when two assailants viciously attack a victim with a knife but only one assailant actually administers the single, fatal blow. It would be ludicrous in such a situation to permit acquittal of both defendants because of the uncertainty surrounding which assailant actually administered the fatal blow. *See* United States v. Horton, 921 F.2d 540, 544–45 (4th Cir. 1990). This "uncertainty" principle is also useful in drug and gun possession cases, where, coupled with constructive possession principles, a gun found in a glove compartment may be attributed to persons in the car. *Cf.* United States v. Shephard, 439 F.2d 1392 (1st Cir. 1971) (rejecting defendant's argument that the jury could not determine he was in possession of a firearm beyond a reasonable doubt when it may have belonged to other passengers in the car); *see also* Bayer v. United States, 651 A.2d 308 (D.C. 1994) (holding when the government proceeds against defendant as principal but then, at close of evidence, successfully requests aiding and abetting instruction, no reversal is warranted where there is sufficient evidence that the defendant was present and participating in the crime). This principle is conceptually far more problematic when the aiding and abetting evidence is removed from the actual commission of the offense. For example, in an arson prosecution, where one defendant purchases the gasoline and the other douses the house with gasoline, it is difficult to conclude that it does not matter which defendant did what and permit the jury to convict without a unanimous decision as to which defendant provided the gasoline and which defendant started the fire. In this scenario, the gasoline's purchaser performed an act that was wholly innocent in the abstract; thus, allowing the patchwork mixing and matching of principal and aiding and abetting theories may impermissibly reduce the government's burden of proof on the intent issue. *See generally* James J. McGuire, Note, Schad v. Arizona: *Diminishing the Need for Verdict Specificity*, 70 N.C. L. REV. 936 (1992) (lamenting the

However, this rule should not apply in all cases. The rule should only apply in situations, such as a homicide prosecution, where two assailants are present at the scene, but the evidence does not conclusively prove which attacker actually administered the fatal blow. In this context, both actors are, in effect, principals;[37] it is not necessary to require the government to establish the precise roles of each defendant. This concept is fair, sensible, and easily understood. That conclusion, however, does not hinge on aiding and abetting doctrine and does not directly address whether the jury must unanimously agree on one of the alternate theories.

The Ninth Circuit's instruction reflects another, more troublesome dimension of current aiding and abetting doctrine. As presently applied, the instruction permits a guilty verdict if, for example, six jurors conclude that the defendant was the principal offender and six conclude that he was the aider and abettor (thereby determining that someone else actually committed the offense).[38] That principle seems to apply even if the acts of aiding and abetting are far removed in space and time from the actual commission of the offense and is thus outside the musical chairs or shell game scenario of joint participants discussed above.[39] This situation requires a different rule and may necessitate reimposition of the old common law category of accessory before the fact.[40] The current practice of permitting a conviction where the jury is not unanimous on whether the defendant is a principal

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reduced importance of the juror unanimity requirement).

37. *See supra* note 36. At common law, this scenario would not implicate aiding and abetting or accessorial concepts—both actors would be principals in the first degree. *See* 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 30, at 185 (15th ed. 1993) ("Where two persons engage in criminal conduct together, as where they participate in striking and killing another, each participant is a principal in the first degree in the homicide.").

38. *See Horton*, 921 F.2d at 545; United States v. Eagle Elk, 820 F.2d 959, 961 (8th Cir. 1987); United States v. Peterson, 768 F.2d 64, 67 (2d Cir. 1985); Greer v. United States, 600 A.2d 1086, 1088 n.4 (D.C. 1991); Tyler v. United States, 495 A.2d 1180, 1182 (D.C. 1985); *see also* United States v. Harris, 8 F.3d 943, 945 (2d Cir. 1993) (holding that the judge does not need to instruct the jurors that they must unanimously determine whether the defendant is an aider and abettor or a principal); *see generally* Tim A. Thomas, Annotation, *Requirement of Jury Unanimity as to Mode of Committing Crime Under Statute Setting Forth the Various Modes by Which Offense May be Committed*, 75 A.L.R. 4th 91 (1990) (discussing cases where juries do not have to unanimously agree on how the defendant violated a criminal statute).

Under federal law, it is immaterial in an aider or abettor's trial if the principal was acquitted in another proceeding, before a different jury. *See* Standefer v. United States, 447 U.S. 10, 22 n.16 ("Nothing in the Double Jeopardy Clause or the Due Process Clause forecloses putting petitioner on trial as an aider and abettor simply because another jury has determined that his principal was not guilty of the offenses charged." (citing Ashe v. Swenson, 397 U.S. 436 (1970)). In some jurisdictions, if the jury acquits the principal, the jury may not convict the aider and abettor in the same trial. *See* Donald M. Zupanec, Annotation, *Acquittal of Principal, or His Conviction of Lesser Degree of Offense, as Affecting Prosecution of Accessory, or Aider and Abettor*, 9 A.L.R. 4th 972 (1981).

39. *See supra* note 36. The rule should not apply in a prosecution where certain evidence shows one defendant provided the materials while other evidence shows the same defendant actually started the fire.

40. *See* TORCIA, *supra* note 37, § 32, at 193 ("At common law, an accessory before the fact is a person who aids, abets, procures, commands, counsels, or otherwise encourages another to commit a crime, but is not present when the crime is committed.").

or an aider and abettor raises significant due process, verdict specificity, and jury unanimity concerns.[41]

Surprisingly, there have been relatively few constitutional challenges to the validity of this patchwork theory of guilt. For almost a century, federal courts, without adequate legal and historical analysis, have simply viewed the elimination of the distinctions between a principal and an aider and abettor as also dispensing the need for jury unanimity in virtually all cases. As one recent commentator summarized, under longstanding doctrine, "A jury may convict, even if some jurors determine that the defendant is a principal, and others determine that he or she is an aider and abettor."[42] Significantly, the few courts that have addressed the issue, even tangentially, do not analytically distinguish between the two following fact patterns: (1) where conflicting evidence exists as to the identity of a principal and an aider and abettor when all parties were present at the crime's commission, and (2) where an aider and abettor allegedly provided assistance but was not present at the crime's commission.[43] The former scenario involves two principals at common law, whereas the latter involves a common law accessory before the fact.

The leading case standing for the proposition that the jury does not need to unanimously agree on the identities of the principal and the aider and abettor is *United States v. Horton*.[44] However, *Horton* involved the classic two-principal situation where two persons actively participated in a fatal assault.[45] Accordingly,

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41. Due process requires that the prosecution prove every element of the offense beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 361–62 (1970). The Supreme Court has determined that the Due Process Clause prevents legislatures from defining particular offenses too broadly but permits some flexibility in both defining alternative routes to satisfy an element and prescribing alternative factual courses of conduct that do not require unanimity. *See* Schad v. Arizona, 501 U.S. 624, 634–35 (1991) (rejecting the Sixth Amendment conceptual groupings analysis endorsed in *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977) and *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987)). See *infra* notes 71–92, 98–103, 110 and accompanying text for a discussion of the *Schad* decision.

42. Weiss, *supra* note 1, at 1364 & n.103.

43. Virtually all cases involve situations where multiple accomplices are present during the commission of the offense, and the defense attempts to sow the seeds of confusion by asserting a purportedly insoluble problem of proof between the multiple actors as to who struck the fatal blow. Notably, none of these cases involve situations in which common law would have characterized one of the parties as an accessory before the fact. *See infra* note 45.

44. 921 F.2d 540 (4th Cir. 1990).

45. *Id.* at 544. The cases cited in *Horton* are of similarly dubious value. *Horton* cited *United States v. Eagle Elk* for the misleading proposition that "'[e]ven if the jury was divided on whether Eagle Elk committed the principal crime or aided and abetted in its commission, there can be no question that the illegal act was murder.'" *Id.* at 545 (quoting *Eagle Elk*, 820 F.2d 959, 961 (8th Cir. 1987)). *Eagle Elk* was an appeal from a denial of a petition for writ of habeas corpus. *Id.* at 960. The opinion did not fully set forth the pertinent facts, but the facts stated in the underlying direct appeal establish that Eagle Elk admitted he was present and fired the shotgun, although he claimed to have missed. *See* United States v. Elk, 658 F.2d 644, 646 (8th Cir. 1981). Thus, *Eagle Elk* similarly concerns a scenario where all of the actors were principals, thus implicating the musical chairs scenario where unanimity as to theory should not be required. *Eagle Elk* is therefore distinguishable from the true accessory situation where unanimity as to theory should be required.

the case did not involve any actor who would have been characterized as an accessory before the fact at common law. As a result, the court's analysis did not concern the distinct concept of an aider and abettor or whether one can blithely interchange culpability as an aider and abettor with culpability as a principal. Thus, the pertinent legal and historical inquiry is virtually one of first impression.

Nothing in the 1909 act that created modern federal aiding and abetting law clearly supports the conclusion that juror unanimity as to theory is no longer required. As noted above, this statute eliminated the arcane common law distinctions which classified those who offered pre-crime assistance to the commission of a felony as guilty of a separate crime and whose liability depended on the principal's established guilt. As the Supreme Court noted in *Standefer*, the common law rule of "special relevance" was "the rule that an accessory could not be convicted without the prior conviction of the *principal offender*."[46] The *Standefer* Court also recognized that the common law rules were developed to shield accessories because all parties to a felony were subject to the death penalty at early common law.[47] The prospect of a rampant, indiscriminately applied death penalty was no longer viable, even at the dawn of the twentieth century. The 1909 federal enactment, which became 18 U.S.C. § 2, thus reflected a modern policy judgment that an aider and abettor is as morally blameworthy as the principal and thus punishable as a principal without regard to the principal's established guilt.[48]

However, the change did not speak, even indirectly, to the unanimity requirement. Moreover, under common law rules of pleading for felonies, unanimity

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The *Horton* court also cited *United States v. Peterson*, 768 F.2d 64 (2d Cir. 1985). In *Peterson*, the Second Circuit upheld a narcotics possession conviction by properly applying constructive possession principles where an undercover officer purchased heroin from two brothers who were acting in concert and standing next to each other. *Id.* This situation again implicates the musical chairs scenario and in reality concerns co-principals. After *Horton*, the Second Circuit held in *United States v. Harris*, 8 F.3d 943, 945 (2d Cir. 1993) that unanimity of theory is not required in a narcotics case where the prosecution offers evidence that the defendant either attempted or aided and abetted another in the attempt to possess cocaine. This scenario affects other theories of inchoate criminal liability that are not controlling here.

46. Standefer v. United States, 447 U.S. 10, 15 (1980) (emphasis added) (citing HALE, *supra* note 13, at 623–24).

47. *Id.*

48. *See* S. REP. NO. 59-4825, pt. 1, at 11 (1907). One commentator has summarized this policy in the following way:

> Ordinarily a person is held criminally responsible for his own actions. However, when an accomplice chooses to become a part of the criminal activity of another, she says in essence, "your acts are my acts," and forfeits her personal identity. We euphemistically may impute the actions of the perpetrator to the accomplice by "agency" doctrine; in reality, we demand that she who chooses to aid in a crime forfeits her right to be treated as an individual. Thus, moral distinctions between parties are rendered irrelevant. We pretend the accomplice is no more than an incorporeal shadow.

Dressler, *supra* note 11, at 111.

as to theory was required with respect to principals and accessories.[49] The common law rules of pleading provided that a jury could convict a defendant charged as a principal in the first degree upon proof that he was a principal in the second degree. However, a jury could not convict a defendant charged as a principal if the evidence established that he was an accessory, and vice versa.[50] *Wharton's Criminal Law* summarizes the pertinent common law procedures:

> At common law, a principal in the second degree could be tried and convicted before the trial and conviction of the principal in the first degree; he could even be tried and convicted after the trial and acquittal of the principal in the first degree. But, in order to convict the principal in the second degree for aiding and abetting, the commission of the prohibited act by the principal in the first degree had to be proved. Although under certain circumstances the principal in the second degree could be guilty of a higher or lower degree or grade of crime than the principal in the first degree, in the ordinary case the principal in the first degree and the principal in the second degree were treated as equally guilty and subject to the same punishment.
>
> An accessory before or after the fact could not be tried before the principal. Indeed, a conviction of the principal was a prerequisite to a conviction of the accessory. Although the principal and accessory could be joined in the same charge and tried jointly, the jury had to be instructed to inquire first as to the guilt or innocence of the principal and, only if the principal were found guilty, could the jury inquire whether or not the accessory was also guilty. If the principal died, was acquitted, was pardoned, or was never apprehended, the accessory could not be prosecuted even though his guilt was clear and easy to prove.
>
> The principal and accessory were treated as equally guilty and subject to the same punishment, and the accessory could not be guilty of a higher degree or grade of crime than the principal. *A person charged in an indictment as a principal could not be convicted on evidence showing that he was merely an accessory;*

49. In addition, early common law did not generally permit multiple-count indictments. However, such joinder did not invalidate the indictment. Instead, the prosecution was compelled to elect the single charge under which it would proceed. 1 MARK S. RHODES, ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 8:20, at 665 (2d ed. 1985). Thus, there was no issue of whether a court could simultaneously try a defendant as an aider and abettor in one count and as a principal in another count. Multi-count indictments in federal prosecutions became prevalent in the mid-twentieth century.

50. WAYNE R. LAFAVE, CRIMINAL LAW § 13.1(d)(2) (4th ed. 2003).

> *and, conversely, a person charged as an accessory could not be convicted on evidence showing that he was a principal.*[51]

Moreover, as the Supreme Court noted in *Standefer*, at common law a jury could not convict an accessory in felony cases without first convicting the principal offender.[52] Since the principal offender's prior conviction was a prerequisite to the prosecution of the alleged aider and abettor, it was a procedural impossibility for the prosecution to proceed against a felony defendant by using alternative theories (one as principal and one as accessory), let alone obtain a conviction where the jury was divided on whether the defendant was a principal or an aider and abettor.[53]

Congress unquestionably intended the 1909 enactment of the federal aiding and abetting statute to eliminate the common law rules and distinctions concerning parties to a crime.[54] However, nothing in the statute or in the legislative history suggests that Congress's rejection of the common law rules also meant to eliminate the unanimity of theory principle, which rested on a distinct, core constitutional obligation to establish guilt beyond a reasonable doubt. Rather, the clear import of the 1909 enactment was to make felony and misdemeanor prosecutions procedurally similar to the extent that "all participants were deemed principals, [and] a prior acquittal of the actual perpetrator did not prevent the subsequent conviction of a person who rendered assistance."[55]

The genesis of the modern federal aiding and abetting statute can be traced to a mid-nineteenth century act of Parliament that, as interpreted, "permitted an accessory to be convicted 'although the principal be acquitted.'"[56] Parliament's 1848 act was the model for Congress's enactment of a similar provision of local applicability for the District of Columbia, which in turn served as the basic model for the 1909 federal aiding and abetting statute.[57]

The *Standefer* Court succinctly observed, "[The] clear intent [was] to permit the conviction of accessories to federal criminal offenses despite the prior acquittal of the actual perpetrator of the offense. It gives general effect to what had always been the rule for second-degree principals and for all misdemeanants."[58] However, whether common law misdemeanor prosecutions permitted pursuit of alternative

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51. TORCIA, *supra* note 37, § 34, at 199–202 (emphasis added) (citations omitted).

52. *See Standefer*, 447 U.S. at 15.

53. The prosecution could use alternative theories to the extent it sought to establish that a person was actually or "'constructively present' so as to be a second degree principal." *Id.* at 16 (citing BLACKSTONE, *supra* note 13, at *34). However, this avenue of liability only covers a small category of actors liable under § 2(a). Section 2(a) also encompasses a large category of actors that could have only been characterized as accessories before the fact at common law and those who aided and abetted or induced the crime but were not in physical proximity to the crime at the time of its commission.

54. *See supra* notes 11–15 and accompanying text.

55. *Standefer*, 447 U.S. at 16.

56. *Id.* (quoting Regina v. Hughes, 169 Eng. Rep. 1245, 1248 (Q.B. 1860)).

57. Standefer v. United States, 447 U.S. 10, 16–18 & n.10 (1980).

58. *Id.* at 19.

theories, and more specifically, whether a conviction could be supported by multiple theories, thereby not requiring juror unanimity as to the identity of the principal or the aider and abettor, was never uniformly or clearly established.

At early common law, an individual could not be convicted as an aider and abettor if charged with a felony as a principal. As a corollary, the law required the accessory's guilt to be based on the established guilt of the principal. As noted above, these limitations largely developed to limit the applicability of capital punishment as a penalty.

Early common law treated misdemeanors differently than felonies. Misdemeanants were not subject to the death penalty. Rules to distinguish a principal from an aider and abettor in misdemeanor prosecutions were therefore unnecessary in order to limit the imposition of the death penalty. The penalties for misdemeanors were relatively small, so an elaborate, graduated culpability scheme was not required because there was no substantial concern that a purported aider and abettor whose objective conduct appeared innocent may actually be innocent, yet put to death. Accordingly, the general principle that all parties to a misdemeanor were of equal culpability and were all considered principals was logical and fair. The blackletter common law for misdemeanors hence drew no distinction between a principal and an aider and abettor.[59]

However, what this principle meant and how far it extended is ambiguous. Clearly, the accessory's guilt could be established without first establishing the guilt of the principal. But even if courts construed this principle to mean that a defendant could be charged as a principal but convicted on proof that he was an aider and abettor (or vice versa), it did not necessarily follow that jury unanimity whether the defendant was a principal or an aider and abettor was not required. The prosecution commonly identified the parties as principals or as accessories first and then proceeded under one consistent theory, thus requiring unanimity as to a specific theory for a conviction.[60]

In most reported misdemeanor prosecutions, the indictment charged the defendant as a principal, and then the prosecution chose to pursue one consistent

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59. BLACKSTONE, *supra* note 13, at *36.

60. The Supreme Court has never directly addressed this issue. In *Standefer*, the Court cited the general common law rule that "all parties to a misdemeanor, whatever their roles, were principals." 447 U.S. at 15. However, as noted above, *Standefer* did not address, in neither its opinion nor dicta, the unanimity of theory requirement.

Also, the cases cited by the *Standefer* court do not address this issue either. *United States v. Hartwell*, 26 F. Cas. 196 (C.C.D. Mass. 1869) (No. 15,318), states the general common law rule, but the government's exclusive theory in that case was that the defendants were "confederates" of the principal. *Id.* at 199. *United States v. Dotterweich*, 320 U.S. 277 (1943), involved corporate criminality and strict liability, and the Court simply noted that "the historic conception of a 'misdemeanor' makes all those responsible for it equally guilty." *Id.* at 281 (citing United States v. Mills, 32 U.S. (7 Pet.) 138, 141 (1833)). *Mills* similarly states the misdemeanor general common law rule, but the government's allegations and evidence was exclusively based on the single theory that the defendant advised, procured, and assisted the principal to commit the offense. 32 U.S. at 140–41. The *Standefer* court also cited Blackstone, who stated the common law misdemeanor rule without discussing whether unanimity of theory was required. *See Standefer*, 447 U.S. at 15 (citing BLACKSTONE, *supra* note 13, at *33).

evidentiary theory that the defendant was either a principal or an aider and abettor. As such, courts often confronted the issue of whether a defendant charged as a principal could be convicted as an aider and abettor.[61] The common law rule for misdemeanors, unlike felonies, permitted this approach. However, even misdemeanors did not allow the jury to be divided on whether the defendant was a principal or an aider and abettor.[62] On the contrary, most cases implied that, even in misdemeanor cases, courts required unanimity of theory, or verdict specificity.[63]

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61. *See* Rollin M. Perkins, *Parties to a Crime*, 89 U. PA. L. REV. 581 (1941). *Standefer* cites to this article, which is authored by a famous law professor. *See* 447 U.S. at 15. The article cites but does not discuss several of the misdemeanor cases that are most directly on point. *See* Perkins, *supra*, at 586 & n.31, 593 & n.97.

Stone v. State, 112 S.W.2d 465 (Tex. Crim. App. 1937), is representative of such a case. In *Stone*, the defendant was charged as a principal for the misdemeanor assault of a school teacher, but all of the evidence established that the defendant only aided and abetted his wife in the assault. The court instructed the jury on both principal and aider and abettor theories, but the instruction implied that unanimity beyond a reasonable doubt as to either theory was required. The defendant appealed his conviction solely on the ground that he was indicted as a principal but convicted on variant proof that he aided and abetted his wife in committing the offense. The court of appeals upheld the conviction, citing the common law rule for misdemeanors that all parties are principals. *Id.* at 465–66. The case does not support the proposition that a conviction will be upheld even if the jury was split on whether the defendant was a principal or aider and abettor.

In *State v. Garzio*, 175 A. 98 (N.J. 1934), the defendant was indicted for unlawfully and willfully burning a building. In that case, there was uncontroverted evidence that established the defendant was not physically present at time of the explosion and that he only supplied the materials for the explosion. Regardless, the defendant was convicted and the court later upheld his conviction by citing the general rule that all parties to a misdemeanor are properly charged as principals. *Id.* at 99–100. *See also* Commonwealth v. Jaffas, 188 N.E. 263, 264 (Mass. 1933) (restating the common law rule for misdemeanors and upholding the defendants' misdemeanor convictions despite the indictment's failure to allege they were principals).

62. *See supra* note 61. However, some old misdemeanor cases may be read to support the proposition that it was not necessary for the jury to be unanimous as to theory. *See, e.g.*, Kemp v. State, 6 S.E.2d 196, 197 (Ga. Ct. App. 1939) (providing the rule that a "'defendant accused . . . of having committed [a] misdemeanor may be convicted by proof either that he directly and personally enacted the criminal transaction, or that he procured, counseled, commanded, aided, or abetted the criminal transaction as to another, who was the direct and immediate actor'" but furnishing no discussion on whether alternative theories require jury unanimity (quoting Loeb v. State, 64 S.E. 338 (Ga. Ct. App. 1909))).

In *Cole v. State*, 166 So. 58 (Ala. Ct. App. 1936), the defendant was tried separately for his participation in a joint assault. There was conflicting evidence on who shot, pistol whipped, and held the victim. *Id.* at 59. The court of appeals described the evidence as being "in sharp conflict." *Id.* The defendant was convicted and the court later upheld the conviction by citing the common law rule that all persons criminally concerned in the commission of a misdemeanor are principals. *Id.* However, *Cole* concerned the musical chairs scenario where there is a question of who, among all defendants present at the scene, inflicted the fatal blow. In other words, *Cole* did not involve a situation where, had the charge been a felony, there would have been accessories before the fact.

In any event, the practice of permitting convictions in misdemeanor cases when the jury was not unanimous on whether the defendant was a principal or an aider and abettor was far from clear or uniform, and no misdemeanor case directly holds that a split of theory could be maintained where the aider and abettor was not physically present and thus an accessory before the fact at common law.

63. *See supra* notes 60–62 and accompanying text.

Historical practice has simply uncritically assumed this change, thus permitting federal felony prosecutions to proceed to convictions without requiring jury unanimity of theory on whether a particular defendant was a principal or an aider and abettor. However, as noted above, the common law was not clear or uniform that an individual charged with a misdemeanor could be prosecuted or convicted in this manner. Thus, allowing this approach in present-day felony prosecutions, at least in the context of defendants who would have been accessories before the fact at common law, is therefore questionable.

That courts have accepted this practice for almost a century does not make this practice immune from present-day challenge. Today, verdict specificity is largely and somewhat controversially viewed as a due process inquiry into the government's obligation to establish every element of the offense beyond a reasonable doubt and whether not requiring specificity as to means offends fundamental principles of justice.[64]

The Supreme Court has held that historical inquiry is central in determining the constitutionality of a particular criminal procedure practice.[65] Most prominently, in *United States v. Gaudin*, the Supreme Court held that the Constitution requires a jury to decide the issue of materiality.[66] For decades, federal courts often construed

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64. With respect to the due process requirement that the prosecution unanimously establish every element beyond a reasonable doubt, see *In re Winship*, 397 U.S. 358, 364 (1970) and Federal Rule of Criminal Procedure 31(a). With respect to due process measured by fundamental fairness, see *Schad v. Arizona*, 501 U.S. 624, 642 (1991). For a critique of the *Schad* decision, where the Court upheld the defendant's conviction despite uncertainty as to whether the jury was unanimous regarding the theory of conviction, see McGuire, *supra* note 36.

65. The few cases addressing the constitutional dimension of this issue involved assaults by multiple actors where the court was satisfied that the alternative acts, the fatal and non-fatal blows, were sufficiently similar to avoid violating the unanimity requirement. *See, e.g.*, United States v. Horton, 921 F.2d 540, 545–46 (4th Cir. 1990) ("[A] reviewing court can conclude with confidence that the verdict represented the unanimous view of the jurors that [the defendant's] role in [the victim's] murder was, at a minimum, that of an active and knowing participant."). As such, those cases did not address the scenario where the government presents evidence both that a defendant was the principal offender and that he was what would have constituted an accessory before the fact at common law. Even the *Horton* court left open the possibility that a unanimity instruction might be required where "the theories of guilt are substantially different." *Id.* at 546 n.2. But it did not undertake any historical analysis concerning whether alternate theories of guilt were permitted in misdemeanor cases at common law. Moreover, these cases that somewhat addressed the constitutional dimension of this issue all preceded *Schad*, 501 U.S. 624. For a discussion of other related cases, see *supra* notes 34–44 and accompanying text. For an excellent discussion concerning the constitutional limits of jury fact-finding and factual divergence in criminal cases, see Scott W. Howe, *Jury Fact-Finding in Criminal Cases: Constitutional Limits on Factual Disagreements Among Convicting Jurors*, 58 MO. L. REV. 1 (1993). Professor Howe concluded that all of the Justices in *Schad* "obscured the underlying [constitutional] interests implicated by factual nonconcurrence claims" and that "[d]ue process should require at least the same number of jurors to concur on the factual foundation for guilty verdicts as the number due process requires on the verdicts themselves." *Id* at 6, 19. Howe briefly addressed the aiding and abetting factual nonconcurrence scenario in his article. *See id.* at 44–46.

66. 515 U.S. 506, 522–23 (1995).

materiality as a legal issue for the court to decide as opposed to a fact for the jury to decide,[67] a practice eliminated by *Gaudin*.

The *Gaudin* court focused on the historical use of the practice to determine its constitutionality. In rejecting the government's argument that having the court determine materiality in perjury prosecutions was an uncontroverted, longstanding historical exception, the Court observed that this practice was "neither as old, nor as uniform, as the Government suggest[ed]."[68] More importantly, the Court stated that "there was . . . no clear practice of having the judge determine the materiality question at the time the Bill of Rights was adopted."[69] In the end, the Court found no consistent historical tradition supporting the practice that the court decide materiality issues and refused to endorse one.

Applying the *Gaudin* Court's historical inquiry method of analysis, abrogation of the unanimity requirement as to whether a defendant is a principal or an aider and abettor in federal felony prosecutions is suspect. Having no unanimity requirement was not the common law rule for felonies, nor was it the law at the time the Bill of Rights was adopted. Moreover, abrogation of the unanimity requirement in common law misdemeanor prosecutions was unclear and far from uniform. Also abrogation of unanimity in federal prosecutions only dates to 1909. Thus, the federal courts' abrogation of the unanimity requirement is likely incorrect and unsupported by a clear historical tradition.[70]

The Supreme Court's emphasis on common law historical practice as informative on the constitutionality of certain criminal procedural practices was also evident in *Schad v. Arizona*.[71] *Schad* is the Court's most recent and thorough exposition of the constitutional boundaries of verdict specificity and the permissible abrogation of the unanimity requirement in criminal cases. *Schad*, decided four years prior to *Gaudin*, similarly emphasized common law and historical practice when considering a due process challenge to a first-degree murder conviction where

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67. *See id.* at 517–18.

68. *Id.* at 515.

69. *Id.* at 516.

70. *See* Montana v. Egelhoff, 518 U.S. 37 (1996). In *Egelhoff*, a plurality of the Court undertook a similar historical inquiry to determine whether a state's elimination of the use of voluntary intoxication as a mitigating factor of intent violated due process. To determine whether there was a violation of due process, the Court focused on whether the state's action violated rules "'so [deeply] rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 47 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)). The plurality determined that history did not support the notion that an intoxication defense was fundamental and held that the state statute, which eliminated considering intoxication on the mens rea issue, did not violate due process. *Id.* at 56. The *Egelhoff* Court's inquiry largely focused on historical records from the time the Fourteenth Amendment was adopted because the issue in the case was whether the state statute in question violated due process. *Id.* at 48. Inquiry into whether a federal criminal practice violates due process implicates the Due Process Clause of the Fifth Amendment. Accordingly, historical inquiry into the unanimity requirement focuses on the time of the ratification of the Bill of Rights. *See generally* Richardson v. United States, 526 U.S. 813, 820 (1999) (recognizing that Congress's power to define crimes must comport with fundamental fairness due process requirements).

71. 501 U.S. 624 (1991).

the relevant state procedure did not require the jury to agree on one of the two alternative theories of criminal liability offered by the prosecution.

In *Schad*, the defendant was convicted of first-degree murder in Arizona state court and sentenced to death. During his trial, the prosecution advanced both premeditated and felony-murder theories. The trial court rejected the defendant's argument that due process required the jury to unanimously agree on a single theory of first-degree murder. The Arizona Supreme Court affirmed the conviction. On certiorari to the United States Supreme Court, the Court addressed the issue of whether it was a violation of the Due Process Clause to permit the jury to reach one verdict based on any combination of the alternative findings.[72]

A fractured Supreme Court upheld the conviction with a four Justice plurality opinion and separate concurrence by Justice Scalia, who provided the necessary fifth vote to uphold the conviction.[73] All of the Justices agreed that the established general rule is that jurors did not need to unanimously agree on the mode of commission of a crime when various possibilities exist.[74] Justice Scalia, in his lone concurrence, observed that the "rule is not only constitutional, [but] it is probably indispensable in a system that requires a unanimous jury verdict to convict."[75]

However, the general rule allowing a verdict based on a combination of alternative findings is not boundless. Common law crimes lacked the multiple subparts, broad multiple objects, and general complexity of many modern federal criminal statutes. As such, even where a criminal statute derived from the common law proscribed several conjunctive acts, any one of which could be the proper basis of a conviction, the range of variance was inherently circumscribed. With that history, the *Schad* plurality framed the due process issue as one involving "the permissible [legislative] limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions, not one of juror unanimity."[76] The plurality stated that the conviction of a defendant under legislation criminalizing "any [generic] combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering" would violate due process, a proposition on which all of the Justices seemed to agree.[77] The due process inquiry, grounded in fundamental fairness, must serve to measure the level of definitional and verdict specificity permitted by the Constitution.[78]

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72. *See id.* at 627–29, 633 n.4. By framing the issue in this manner, the Court rejected several courts' resolution of the issue, who based their decisions on whether the alternative theories constituted distinct conceptual groupings. All of the appellate cases that analyzed the unanimity issue as applied to aiders and abettors and to principals used this pre-*Schad* conceptual groupings analysis. *See id.* at 634–35. Also see cases cited *supra* note 41.

73. *See Schad*, 501 U.S. at 627, 648.

74. *Id.* at 641 (plurality opinion); *id.* at 649 (Scalia, J., concurring); *id.* at 652–53 (White, J., dissenting).

75. Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., concurring).

76. *Id.* at 631 (plurality opinion).

77. *Id.* at 633.

78. *Id.* at 632.

The plurality determined that, as a constitutional matter, the jury must unanimously find that the prosecution established every element of the offense beyond a reasonable doubt. However, as to a statutory element setting forth factual alternatives, a jury does not need to always unanimously decide which of several possible brute facts constitute a particular element. As the plurality stated, "'[T]here is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'"[79] The *Schad* plurality further held that due process does not require the jury to unanimously agree on one of the alternative theories of first-degree murder.[80]

The plurality substantially relied on historical practice to support its holding. The plurality stated that "it is significant that Arizona's equation of the mental states of premeditated murder and felony murder as species of the blameworthy state of mind required to prove a single offense of first-degree murder finds substantial historical and contemporary echoes" going back to the common law.[81] The plurality also noted that Arizona's statutory formulation of first-degree murder was identical in all relevant respects to the first American statute defining murder by degree, which was passed by the Pennsylvania legislature in 1794, and concluded:

> [T]here is sufficiently widespread acceptance of the two mental states as alternative means of satisfying the *mens rea* element of the single crime of first-degree murder to persuade us that Arizona has not departed from the norm.
>
> Such historical and contemporary acceptance of Arizona's definition of the offense and verdict practice is a strong indication that they do not "'offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . .'"[82]

The plurality also relied on moral relativity in holding that the two factual theories of first-degree murder, murder by deliberation and murder during the course of a felony, carry the same degree of moral equivalence.[83] As such, the plurality held the two theories are alternate means to establish the same statutory element, and since due process does not require unanimity of means, there is no due process violation.[84] The plurality stated the following:

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79. *Id.* (quoting McKoy v. North Carolina, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring) (footnote omitted)).

80. *Id.* at 641–42.

81. Schad v. Arizona, 501 U.S. 624, 640 (1991).

82. *Id.* at 642 (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)).

83. *Id.* at 644.

84. *Id.* at 644–45.

> Whether or not everyone would agree that the mental state that precipitates death in the course of robbery is the moral equivalent of premeditation, it is clear that such equivalence could reasonably be found, which is enough to rule out the argument that this moral disparity bars treating them as alternative means to satisfy the mental element of a single offense.[85]

Notably, *Schad* concerned alternative means of satisfying the requisite statutory mental state element. Thus, the case involved a situation where the prosecution unanimously proved all of the actus reus elements to the jury beyond a reasonable doubt. Regardless, the plurality saw no distinction between using alternative theories to satisfy the actus reus element and using alternative theories to satisfy the mens rea element.[86] However, there may be no significant due process problems when a dispute concerns whether a defendant charged with a typical breaking and entering crime used a screwdriver or a wrench, but analyzing moral equivalence may be difficult when the charge is more complex and the factual alternatives are more disparate.

In his concurrence, Justice Scalia categorically rejected the plurality's reliance on a subjective notion of moral equivalence.[87] Instead, Justice Scalia asserted that the due process inquiry relies exclusively on historical analysis, stating:

> Submitting killing in the course of a robbery and premeditated killing to the jury under a single charge is not some novel composite that can be subjected to the indignity of "fundamental fairness" review. It was the norm when this country was founded, was the norm when the Fourteenth Amendment was adopted in 1868, and remains the norm today. Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is "due."[88]

Justice Scalia added that he would have likely joined the dissent if he did not believe the above statement.[89] The four dissenting Justices argued that permitting a jury to return a generic verdict following a prosecution on two separate murder theories with different elements was analytically indistinguishable from a "freakish" composite jury verdict based on alternative facts as disparate as embezzlement or

85. *Id.*
86. *Id.* at 632.
87. Schad v. Arizona, 501 U.S. 624, 651 (1991) (Scalia, J., concurring).
88. *Id.*
89. *Id.*

reckless driving,[90] which the plurality and Justice Scalia effectively conceded would be so disparate as to violate due process.[91]

Because *Schad* is a plurality opinion, its precedential effect is inherently problematic. In any event, after *Schad*, the "fundamental fairness" due process line was imprecisely drawn at the point of not requiring unanimity or verdict specificity for elements that were "not too diverse"—an inquiry strongly influenced by whether such procedures were consistent with the common law. However, under this due process framework, prosecutions for freakish, hypothetical umbrella crimes such as "robbery or failure to file a tax return" would likely violate due process if courts did not require verdict specificity and unanimity of theory. Moreover, Justice Scalia's express rejection of the plurality's moral equivalence analysis as support to allow juries to convict without a specific verdict or unanimous theory makes it improbable that moral equivalence will influence the constitutional analysis.[92]

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90. *Id.* at 656 (White, J., dissenting). The plurality made specific reference to a crime containing a "freakish definition . . . that finds no analogue in history." *Id.* at 640 (plurality opinion).

91. *Id.* at 640 & n.4 (plurality opinion); *id.* at 650–51 (Scalia, J., concurring).

92. *See* Schad v. Arizona, 501 U.S. 624, 650–51 (1991) (Scalia, J., concurring). Since *Schad,* the Court's composition has changed substantially, and it is difficult to determine whether the rationale of the *Schad* plurality would today command a majority of the Court. With the death of Chief Justice Rehnquist and the announcement of Justice O'Connor's retirement prior to the commencement of the October 2005 Term, only two members of the four-Justice *Schad* plurality, Justices Souter and Kennedy, will remain on the Court. Chief Justice Roberts's comments at his confirmation hearing suggest that *Schad* is not the type of decision that has created such overwhelming societal expectations that overturning precedent would be unlikely. Chief Justice Roberts stated:

> I do think that it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough that you may think the prior decision was wrongly decided. That really doesn't answer the question; it just poses the question. And you do look at these other factors like settled expectations, like the legitimacy of the court, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments.

All Things Considered: Roberts Resists Specifics in Senate Session (NPR radio broadcast Sept. 13, 2005).

In addition, Justices Thomas, Ginsburg, and Breyer joined the Court, while three of the dissenting Justices left. Justice Thomas would likely agree with Justice Scalia's emphasis on history as the exclusive means for resolving due process inquiries. *See* White v. Illinois, 502 U.S. 346, 361–66 (1992) (Thomas, J., concurring) (expressing the importance of common law history in resolving constitutional questions). Justice Ginsburg provided a critical concurring vote and endorsed a historical analysis in the fundamental fairness inquiry in *Montana v. Egelhoff*, 518 U.S. 37, 58–59 (1996) (Ginsburg, J., concurring). Justice Breyer authored the majority opinion in *Richardson v. United States*, 526 U.S. 813 (1999), *see infra* notes 93–96 and accompanying text, which sidestepped the requirement of juror unanimity as a constitutional issue but ultimately endorsed the requirement of juror unanimity via a legislative history approach. *Id.* at 824. Justice Breyer's analysis implies a reinvigorated emphasis on juror unanimity in criminal cases. Revisiting *Schad* would increase the likelihood that the Court would undertake a focused inquiry of the factual nonconcurrence, non-unanimity of theory issues addressed in this Article that were largely obscured in *Schad*. Indeed, *Schad* could meet the same fate as the constitutional criminal procedure case of *Grady v. Corbin*, 495 U.S. 508 (1990), which the court overruled three years later in *United States v. Dixon*, 509 U.S. 688 (1993). In *Dixon*, the Court noted that the *Grady* test had little historical support and had proved unworkable. 509 U.S. at 703–12.

Since *Schad* the Supreme Court has not provided any further guidance on how to determine under what circumstances the Constitution requires juror unanimity and verdict specificity in a criminal case. Eight years after *Schad*, the Court sidestepped this constitutional issue in *Richardson v. United States* by holding that the disputed statutory term in question was, as a matter of statutory interpretation and not a matter of constitutionality, an element requiring jury unanimity.[93]

In *Richardson*, a six member majority held that in a narcotics prosecution under 21 U.S.C. § 848, jurors must not only unanimously agree that the defendant committed some "continuous series of violations," but they must also unanimously agree on which specific violations the defendant committed.[94] The Court analyzed the statute's language and its pertinent legislative history and held that Congress intended the term "series of violations" to constitute a statutory element, which required unanimous jury agreement; Congress did not intend the term to be a mere means of satisfying a particular element.[95] Justice Breyer, writing for the majority, distinguished *Schad* and noted:

> Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.[96]

A question remains as to what side of the *Schad*, or *Schad-Richardson*, due process line a prosecutor's presentation of alternate theories of guilt as either a principal or an aider and abettor falls. This inquiry is not easy. At first blush, it is tempting to conclude that a situation like *Schad*—where the dispute concerns only the means of commission and unanimity regarding the theory of commission is not required—is analytically indistinguishable from a situation in which the jury is split on a defendant's particular avenue of guilt as a principal offender or aider and abettor since aiding and abetting is merely a theory of liability. Under this view, verdict specificity requires nothing more than a general guilty verdict.

Certainly, if the issue can be resolved by utilizing the moral equivalence inquiry endorsed by the plurality in *Schad*, then unanimity of theory should not be required.

Although the due process theory proposed here is probably consistent with *Schad* however so interpreted, a reinvigorated due process standard resulting from a reexamination of *Schad* in an appropriate case would only strengthen and clarify the constitutional due process concepts articulated in this Article.

93. 526 U.S. 813, 817–19 (1999).

94. *Id.* at 815.

95. *Id.* at 815, 818.

96. *Id.* at 817 (citing McKoy v. North Carolina, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)).

The federal aiding and abetting statute reflects a clear legislative judgment by Congress that the aider and abettor is of equal moral culpability as the principal offender.[97] In this regard, as between a principal and a party that would have been an accessory before the fact at common law, the aiding and abetting "divergence of means" inquiry seems far easier to resolve in favor of not requiring unanimity than under the situation at issue in *Schad*, where the Court also ultimately resolved in favor of not requiring unanimity.[98]

But that superficial alignment belies its complexity. As noted above, three centuries of venerable common law history that uniformly drew no distinction between the alternative means of satisfying the mental element of first-degree murder influenced the *Schad* plurality. The *Schad* plurality approvingly cited the common law, which defined murder as "the unlawful killing of another human being with 'malice aforethought.' The intent to kill and the intent to commit a felony were alternative aspects of the single concept of 'malice aforethought.'"[99] The plurality further noted that even when American jurisdictions divided murder into degrees starting in 1794, most of the resulting statutes retained premeditated murder and felony murder as alternate means of satisfying the mental element of first-degree murder.[100] Moreover, as also noted above, the fact that the law at the time of the founding of the republic did not require unanimity of means in first-degree murder prosecutions substantially influenced Justice Scalia, who authored the crucial fifth-vote concurrence in *Schad*.[101]

On the other hand, the modern federal aiding and abetting principles embodied in 18 U.S.C. § 2 that apply to virtually all federal crimes are modern in a relative sense—dating back only to 1909. The principles are less than a century old and thus not nearly as old and established as the common law principles the plurality used in *Schad* to support its holding that unanimity of means was not necessary. Moreover, the aiding and abetting principles in 18 U.S.C. § 2, as applied to felonies, reflect a specific rejection of certain common law rules thought to be arcane. The *Schad* plurality specifically cautioned against such a scenario:

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97. *See* 1 FINAL REPORT OF THE COMMISSION TO REVISE AND CODIFY THE LAWS OF THE UNITED STATES at 118-119 (1906) (revisor's notes); 60 CONG. REC. H586 (1908) (statement of Rep. Moon). Congress's judgment presumably also applies to all aiders and abettors who would have been considered accessories before the fact at common law, even if the proof adduced at trial was disparate and conflicting regarding whether a particular defendant provided assistance before the fact (by purchasing gasoline) or actually committed the offense (by burning the building).

98. As noted above, the four dissenting Justices in *Schad* stated that a killing during the course of robbery and premeditated murder were not morally equivalent acts. Schad v. Arizona, 501 U.S. 624, 658 (1991) (White, J., dissenting).

99. *Id.* at 640 (plurality opinion) (citing 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 21–22 (1883)).

100. *Id.* at 640–41.

101. *Id.* at 651 (Scalia, J., concurring).

> We note, however, the perhaps obvious proposition that history will be less useful as a yardstick [in determining whether due process is violated if unanimity is not required] in cases dealing with modern statutory offenses lacking clear common-law roots than it is in cases, like [*Schad*], that deal with crimes that existed at common law.[102]

Again, Justice Scalia did not join the plurality in all respects; he specifically rejected any reliance on general notions of moral equivalence, instead relying on history and tradition as the exclusive reason why the Arizona statute did not violate due process.[103]

This proposition should not be misunderstood as asserting that any legislative attempt to change the common law violates due process. Such a position would not only be untenable, but plainly absurd.[104] Due process is violated when the legislature makes a change so extreme and aberrant that it violates fundamental fairness principles enshrined in the concept of due process.

Abrogation of a unanimity requirement in this context is no trivial matter. Congress, in adopting modern aiding and abetting principles, clearly intended to abrogate the old felony rules concerning verdict consistency by replacing them with the clear rules that had always been applicable to misdemeanants and felony second-degree principals at common law. Accordingly, in *Standefer*, the Supreme Court had no difficulty in holding that the legislative elimination of the verdict consistency requirement in federal felony prosecutions was constitutional.[105]

On the other hand, the common law absolutely prohibited abrogation of verdict specificity, or otherwise eliminating the requirement of unanimity of theory as between an aider and abettor and a principal, for felonies—and did not clearly permit abrogation of verdict specificity and unanimity for misdemeanors. Congress did not contemplate that verdict specificity would be abrogated by the federal enactment of the modern aiding and abetting statute and it is unlikely that Congress ever contemplated the topic at all.[106] More significantly, verdict specificity and juror unanimity requirements impact contemporary core due process principles and are

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102. *Id.* at 640 n.7 (plurality opinion).

103. *Id.* at 651–52 (Scalia, J., concurring).

104. Interestingly, Justice Stevens, concurring in a recent opinion abolishing the death penalty for those who were juveniles at the time of the crime's commission, criticized Justice Scalia's view of the Bill of Rights as irrationally static: "If the meaning of [the Eighth] Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today." Roper v. Simmons, 125 S. Ct. 1183, 1205 (2005) (Stevens, J., concurring) (citing Stanford v. Kentucky, 492 U.S. 361, 368 (1989)).

105. *See* Standefer v. United States, 447 U.S. 10, 21–25 (1980) (refusing to apply nonmutual collateral estoppel in federal criminal cases).

106. The most authoritative compilations summarizing the goals of modern aiding and abetting reform do not generally include abrogating the unanimity requirement among those goals. *See, e.g.*, LAFAVE, *supra* note 50, § 13.1(e) (discussing legislative reform to aiding and abetting principles).

not generally thought to present obstacles to justice or to constitute obsolete relics of arcane common law procedures.[107] Thus, it is not unjustifiable to conclude that the purported legislative abrogation of the unanimity requirement in the context of current interpretations of 18 U.S.C. § 2 is extreme, has scant historical support, and violates due process.[108]

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107. In *Standefer*, the Court rejected the defendant's contention that "Congress did not view that rule as an 'obstacle to justice'" because the legislative history did not specifically mention the common law rule that the prior acquittal of the principal barred conviction of an accessory. *See Standefer*, 447 U.S. at 20 n.12. However, that application does not control here. In the present situation, the proposed abrogation of unanimity did not clearly reflect the rules for misdemeanors that it was purportedly replacing. Moreover, there is no history of general criticism that the discrete concept of juror unanimity posed an obstacle to justice. Instead, the general thought was that juror unanimity was one of the hallmarks of Anglo-American justice. *See* BLACKSTONE, *supra* note 13, at *414; *see also* JOHN PROFFATT, A TREATISE ON TRIAL BY JURY § 77, at 112–13 (1877) ("The unanimity of . . . the jury is [an] essential attribute of a trial jury. . . . [T]he practice is so ancient and so long sanctioned, that the idea of unanimity becomes inseparably connected in our minds with a verdict."). For a case discussing the heightened importance of criminal jury decision making as instructive of contemporary due process principles, see *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

108. *See supra* note 107. Somewhat ironic is that this analysis in effect partially resurrects the old common law distinctions between an accessory before the fact and a second-degree principal. If the prosecution proceeds on alternative theories that a defendant was either a principal or an aider and abettor in an accessory before the fact situation, due process should require juror unanimity as to theory. Thus, in an arson prosecution, the jury would have to be unanimous as to whether the defendant bought the gasoline or actually lit the match that burned the building.

This conclusion would not alter the existing requirements in "artificial" aiding and abetting situations like *United States v. Horton*, 921 F.2d 540 (4th Cir. 1990), which are more properly characterized as second-degree principal or co-principal cases. The *Horton* situation involves a prosecution where evidence is presented that both assailants were present at the scene, and depending on the nature of the charge, insoluble proof problems exist as to who actually did the act constituting the element of the offense, such as who administered the fatal blow in a homicide prosecution. *See id.* at 541–43. In these situations, due process should not require verdict specificity where some evidence suggests that more than one actor was a principal and where the defendants would not have been accessories before the fact at common law.

Several practical points should be recognized. First, courts may have to define the parameters of when unanimity is required to satisfy due process. For example, many federal statutes criminalize causating an event, which makes many actors principals by definition. Revised 18 U.S.C. § 1341 (2000), concerning fraud schemes using interstate private carriers, provides the following:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon . . . shall be fined under this title or imprisoned not more than five years, or both.

See also United States v. Knoll, 16 F.3d 1313, 1322–23 (2d Cir. 1994) (discussing defendant's guilt as a principal for causing the filing of a false financial statement). As the text of the statute indicates, in addition to devising a scheme to defraud through the mail system, the actual mailing of a letter constitutes the actus reus of mail fraud. Thus, individuals who do not actually mail the letter or otherwise "cause" the mailing but are involved in the fraudulent scheme are aiders and abettors. Allowing a defendant to create ambiguity and set up a musical chairs acquittal by offering evidence that

Construing aiding and abetting liability as an alternative theory requiring unanimity is not inconsistent with the *Schad* holding. Aiding and abetting as an alternate theory of liability is not merely an alternative means of committing the actus reus of the offense (for example, whether the perpetrator committed the assault with a gun or a knife) or even an alternate means of satisfying mens rea (like in *Schad*). Rather, at least with respect to a substantial category of aiders and abettors under current federal law who would have been accessories before the fact at common law, the aiding and abetting theory of liability obviates the prosecution from having to prove that a particular defendant was the principal who committed all of the other elements of the offense. This permits a wholesale substitution of one set of facts establishing the commission of an offense for another.[109] In this context, the contention that a guilty verdict may rest on a general verdict where, for example, five jurors believe the defendant was the principal offender but the other seven believe he aided and abetted some other person who was the principal offender is unsettling. Moreover, aiding and abetting as an alternative theory of liability can be placed on the same footing as the disparate hypothetical umbrella crimes that the entire *Schad* Court agreed would require jury unanimity of theory and verdict specificity in order to comport with due process. That should be the result here as well.

Nevertheless, aiding and abetting is not quite a distinct statutory element that fits into the *Richardson* mold either. Whether the aiding and abetting theory of

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he actually mailed the letter—when all of the government's evidence suggests otherwise—makes little sense. Under this analysis, some cases will be easy to resolve. As the caselaw develops, in cases where unanimity of theory is not clearly required, perhaps the defendant should have the burden of establishing unfairness if the government asserts that it is not required to establish unanimously that a defendant was a principal or an aider and abettor. Such an approach is properly the subject of a separate article. *See generally* Howe, *supra* note 65, at 82 (recognizing that "[i]t is impossible to articulate a bright-line rule that defines an appropriate level of factual specificity . . . in all circumstances").

Most post-*Schad* decisions reflect the lack of difficulty courts have in requiring the prosecution to prove one theory or another to the unanimous satisfaction of the jury. For example, in *United States v. Davis*, 306 F.3d 398, 412–14 (6th Cir. 2002), *cert. denied*, 537 U.S. 1208 (2003), the defendant cited *Richardson* in arguing that the jury was required to unanimously agree on which specific acts constituted aiding and abetting. The Sixth Circuit rejected this argument, however, because the trial court specifically charged the jury that it had to be unanimous in finding the defendant was an aider and abettor. *See id.* at 414. *United States v. Samuels*, 308 F.3d 662 (6th Cir. 2002), is similar—the sole theory of liability the jury considered was an aiding and abetting theory. *Id. But see* United States v. Yousef, 327 F.3d 56, 160–61 (2d Cir. 2003) (finding no plain error in instructing the jury that it could find the defendant guilty as a principal or an aider and abettor and citing *United States v. Peterson*, 768 F.2d 64, 67 (2d Cir. 1985), for the proposition that the jury need not unanimously agree on whether the defendant was a principal or an aider and abettor); *Knoll*, 16 F.3d at 1322–23 (acknowledging that the evidence was insufficient to establish guilt as an aider and abettor but stating the record was unclear as to which role the jury used as its basis for conviction).

109. For example, the defendant might purchase the materials (acts that in the abstract appear wholly innocent and connote no moral blameworthiness) or actually set the fire five days later. *See* United States v. Petty, 132 F.3d 373, 377 (7th Cir. 1997) ("In a sense, the essential elements of aiding and abetting serve as a substitute for the defendant's actual physical participation in the crime.").

liability requires juror unanimity is not a statutory interpretation question that can be conclusively resolved by resorting to 1909 legislative history. Aiding and abetting does not define a distinct offense, so legislative history cannot be parsed with an inquiry into Congress's intent with respect to a particular statutory element. Rather, it is an alternative route of liability that applies to virtually all federal criminal offenses. In this regard, the 1909 enactment was a sui generis creature of the law not easily pigeonholed on either side of the *Richardson* legislative intent or *Schad* due process dividing line.

That said, *Schad* instructs that the inquiry ultimately becomes a due process issue, grounded on whether the particular legislative enactment that does not require verdict specificity violates fundamental fairness. In his lone concurrence, Justice Scalia, agreeing with the plurality, noted the following with respect to jury unanimity:

> [I]t has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission. That rule is not only constitutional, it is probably indispensible in a system that requires a unanimous jury verdict to convict. . . . [I]t is also true . . . that one can conceive of novel "umbrella" crimes . . . where permitting a 6-to-6 verdict would seem contrary to due process.
>
> The issue before us is whether the present crime falls into the former or the latter category.[110]

The dissenting Justices in *Schad* easily concluded that a composite guilty verdict where six jurors believed the murder was premeditated and six believed the killing took place during the course of an enumerated felony violated due process because proof of these two crimes involved such divergent elements.[111] Applying this formulation, whether a particular defendant provided some off-site assistance to another or physically committed the offense presents a factual combination of jury findings far more divergent than those at issue in *Schad*. This alternative factual combination of findings is thus more akin to the novel umbrella crimes that even the *Schad* plurality acknowledged required unanimity.

Outside the *Horton* situation, which implicates other legal concerns unrelated to aiding and abetting liability, the alternative aiding and abetting and principal offender theories require substantially divergent factual paths to convict, which seems to run afoul of the principles of the *Schad* dissent. To the extent Justice Scalia based his critical fifth vote on due process principles grounded in a clear historical approval of the procedure at issue, aiding and abetting history comes up at least a century short.

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110. Schad v. Arizona, 501 U.S. 624, 649–50 (1991) (Scalia, J., concurring).
111. *See id.* at 656 (White, J., dissenting).

Ultimately, the due process inquiry of whether proof of a particular fact or element in a criminal case requires unanimity depends on whether the operative legal principle offends some fundamental fairness principle of justice. Applying the *Schad* plurality's amorphous test, in which history and general notions of moral equivalence weigh in the balance, both ingredients are not satisfied with respect to not requiring aiding and abetting unanimity. Under any and all of the *Schad* permutations, due process generally should require jury unanimity for aiding and abetting; aiding and abetting liability cannot be characterized as a single crime that can be committed in various ways where the jurors need not be unanimous upon the mode of commission. Thus, a violation of due process should occur where a criminal defendant is convicted without requiring unanimity as to whether he was a principal offender or an aider and abettor. To the extent that current applications of 18 U.S.C. § 2(a) effectively infuse every federal crime with divergent statutory elements, courts should interpret due process to require sufficient verdict specificity and juror unanimity as to theory, even if evidence in the record supports both theories.[112]

This conclusion has several important practical consequences. First, the modest invigoration of juror unanimity as a component of due process is a positive development. As the complexity of modern federal criminal law reaches beyond common law constructs, the toleration of non-unanimous findings of mere means has reached a breaking point. Special interrogatories and more detailed verdicts are slowly becoming more common in federal criminal trials.[113] Second, requiring unanimity of theory would increase the "cost" of the prosecution's request for an aiding and abetting instruction. In cases where the instruction is not supported by the evidence, its inclusion could no longer improperly disguise a non-unanimous, patchwork conclusion hidden by a general verdict, which is largely protected by

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112. This approach does not require the government to elect one theory over the other, but it only requires the existence of some evidence to support a conviction on both a direct principal theory and a theory of aiding and abetting for the government to receive an aiding and abetting instruction. If the government presents both theories to the jury, verdict specificity (where applicable) will then require the government to establish a unified theory unanimously beyond a reasonable doubt. Moreover, requiring unanimity as to theory by the prosecution does not affect a defendant's ability to have the jury instructed on inconsistent defenses. *See* Mathews v. United States, 485 U.S. 58, 63–65 (1988). At least with respect to case-in-chief defenses, the defense has no burden of proof, and thus its option to pursue inconsistent defenses does not create improper or asymmetrical obligations of proof.

113. *Cf.* Adam H. Kurland, *Providing a Federal Criminal Defendant With a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 334 (1993) (discussing the relationship between federal criminal law's complexity and the decline of juror unanimity requirements). With respect to the interpretation of individual federal criminal statutes, the Supreme Court, as it did in *Richardson*, has again shown its desire to interpret particular statutes to require jury unanimity as to particular facts. *See* Arthur Anderson, LLP v. United States, 125 S. Ct. 2129 (2005) (reversing conviction where, *inter alia*, the jury instruction did not require the jury to agree on one particular proceeding that defendant allegedly obstructed and interpreting the particular statute to require specific nexus between the obstructive act and a particular proceeding). *See generally* Griffin v. United States, 502 U.S. 46, 60–61 (1991) (Blackmun, J., concurring) (endorsing the use of special interrogatories in complex criminal cases).

favorable appellate standards of review.[114] Thus, prosecutors would be far less inclined to ask for an aiding and abetting instruction when not warranted by the evidence. Third, when the evidence supports an aiding and abetting instruction, even when coupled with alternative evidence that the defendant was the principal offender, the jury will have to be unanimous as to one theory to convict.

Fourth, the conclusion is consistent with existing analogous caselaw. For example, the Sixth Circuit held that if the prosecution proceeds on alternative theories that a particular defendant was either an aider and abettor or a causer under § 2(b), the jury must be unanimous as to theory.[115] The rationale for requiring unanimity of theory must be that each theory requires a substantially different set of factual findings with respect to the actor who physically committed the offense. As an aider and abettor, the defendant must be found to share the criminal intent of the other actor—the principal. As a causer under 18 U.S.C. § 2(b),[116] the other actor is usually an innocent instrumentality.[117] As such, the causer is a principal.[118] Thus, proceeding under these two alternate theories presents a fairly substantial divergence of means and requires unanimity of theory.[119] Similar logic underlies the unanimity requirement as between a principal and an aider and abettor, which concerns an equivalent, if not greater, factual divergence of means. Moreover, because no long, consistent common law pedigree exists for permitting non-unanimity as to theory in these types of felony prosecutions, requiring unanimity as a matter of due process is consistent with *Schad*.

Fifth, as noted above, requiring unanimity for aiders and abettors who would have been traditional accessories at common law—but not requiring unanimity in the joint assault scenario (when the actors are both principals)—avoids the spectacle of possible musical chairs or shell game acquittals, when codefendants each acknowledge they were complicit in the offense but each argue that he was the principal and the other the aider and abettor, or vice versa.[120] This result is harmonized with Justice Scalia's concern that it would be absurd to set a defendant free where a woman's charred body has been found in a burned house, and six

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114. *See* United States v. Knoll, 16 F.3d 1313, 1322–23 (2d Cir. 1994) (upholding a conviction despite the legal inadequacy of the aiding and abetting theory and the unclear record as to whether the jury convicted the defendant as a principal or an aider and abettor).

115. United States v. Keefer, 799 F.2d 1115, 1125 (6th Cir. 1986).

116. 18 U.S.C. § 2(b) (2000) provides in relevant part that "[w]hoever willfully causes an act to be done which if directly performed by him . . . would be an offense against the United States, is punishable as a principal."

117. The addition of § 2(b) "removes all doubt that one who puts in motion or assists in the illegal enterprise or causes the commission of an indispensable element of the offense by an innocent . . . instrumentality, is guilty as a principal even though he intentionally refrained from the direct act constituting the completed offense." 18 U.S.C. § 2 hist. n. (2000).

118. According to *Wharton's Criminal Law*, "a crime is deemed committed by the actor's own hand when he procures and sends an innocent agent, an insane person, or an infant to engage in the criminal conduct for him." TORCIA, *supra* note 37, § 30, at 184.

119. *See Keefer*, 799 F.2d at 1125.

120. *See supra* notes 36–39, 43, 45 and accompanying text.

jurors believed the defendant strangled her to death and accidentally caused the fire in his hasty escape while six others believed he left her unconscious and set the fire to kill her.[121]

The above analysis amplifies the importance of respecting the core principle, discussed at the outset, that a trial court must undertake careful scrutiny to ensure that it does not give an aiding and abetting instruction when evidentiary support is lacking. If that straightforward principle is honored, and not confused with other related but distinct aiding and abetting principles, many of the difficult ancillary issues concerning the unanimity of theory requirement can be avoided. In other words, if no evidence suggests that a particular defendant aided and abetted the offense, then no aiding and abetting instruction should be given. Presumably, the jury's receipt of an improper aiding and abetting instruction, where there is no evidence that a defendant aided and abetted another, should result in reversal. As demonstrated below, reversal is not always the result.[122]

Lastly, in a related vein, federal aiding and abetting principles clearly establish that, where the evidence warrants, an aiding and abetting instruction may be given in a one-defendant case in the appropriate circumstances. For example, suppose two defendants are indicted for a drug deal: one actually delivered the drugs and the other stood as lookout. If Defendant *A*, the principal who actually delivered the drugs, obtains severance or pleads guilty and Defendant *B* then proceeds to trial as the sole defendant, an aiding and abetting instruction is appropriate as to Defendant *B* because it will be consistent with the adduced proof that *B* aided someone else to complete the offense.[123]

However, this uncontroverted principle does not mean that an aiding and abetting instruction is appropriate in every one-defendant case where evidence of joint participation exists. Rather, as explained above, an aiding and abetting instruction is only appropriate if there is evidence that the defendant who is standing trial aided and abetted the completed offense. The two situations are not the same. Evenhanded application of these aiding and abetting principles should all be so simple.

III. AIDING AND ABETTING RUN AMOK: A CASE STUDY

None of the flexible, pro-prosecution aiding and abetting principles—some of dubious constitutionality—should trump the basic and overarching evidentiary principle that an aiding and abetting instruction may be given only when supported

121. Schad v. Arizona, 501 U.S. 624, 650 (1991) (Scalia, J., concurring).

122. *See infra* Part III. For a relatively uncommon example where receipt of an improper aiding and abetting instruction resulted in reversal, see *United States v. Moye*, 422 F.3d 207 (4th Cir. 2005). The dissenting judge in *Moye* would have affirmed based on harmless error. *Id.* at 220 (Hamilton, J., dissenting).

123. See *supra* note 8 for a discussion of the relevant *Red Book* instruction applicable to this scenario.

by the evidence. In other words, the aiding and abetting principles discussed above are only applicable where some evidence in the record supports criminal liability of a particular defendant as an aider and abettor, regardless of whether the record could also support the defendant's conviction as a principal.

These aiding and abetting principles exist in a legal environment where prosecutors are not always required to present a consistent and unified evidentiary theory. Consequently, this loose environment creates opportunities to overstep legal boundaries. Further, the prosecution too often suffers no cost for requesting, and receiving, an aiding and abetting instruction, even when the evidence does not support the instruction.

Many cases stand for the correct proposition that "'while a defendant may be charged and convicted as the principal even though the proof is that he was only an aider and abettor . . . . , *there must be evidence that someone other than the defendant was the principal whom the defendant aided and abetted.*'"[124] Unfortunately, the forgiving and flexible aiding and abetting principles are too strong to resist and are too easily improperly applied. Thus, mandating juror unanimity as to theory as a constitutional requirement takes on greater urgency. If unanimity is constitutionally required, giving the instruction is less likely to be misapplied, and even if the judge improperly gives the instruction, it would ultimately cause less damage and confusion. If the government must unanimously prove a single theory, the jury may not unanimously agree on any one theory. But, where the jurors are unanimous, the verdict would clearly reflect upon which theory the jurors relied.[125] Requiring unanimity would facilitate appellate review and expose various unjustified presumptions that would otherwise be invoked to support a harmless error determination. These benefits are substantial.

This discussion leads to the analysis of *United States v. Thompson*,[126] a case recently decided by the United States Court of Appeals for the District of Columbia Circuit. The District of Columbia Circuit, often referred to as the most influential intermediate federal appellate court in the nation,[127] effectively held that an aiding and abetting instruction can be presented without evidentiary support if mere evidence of joint criminal activity exists. The court also held that a particular defendant who physically committed all elements of the offense may be considered an aider and abettor if someone else principally committed the offense but was not

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124. Brooks v. United States, 599 A.2d 1094, 1099 (D.C. 1991) (alterations and emphasis in original) (quoting Payton v. United States, 305 A.2d 512, 513 (D.C. 1973)).

125. In this regard, the jury verdict would be in the form of a special verdict, akin to special findings under the Federal Rule of Criminal Procedure 23(c). Both special verdicts and special findings serve to facilitate appellate review.

126. 279 F.3d 1043 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 904 (2002).

127. The District of Columbia Circuit often serves as an audition for the Supreme Court. Chief Justice Roberts and Justices Ginsburg, Scalia, and Thomas were formerly on the District of Columbia Circuit. Additionally, this circuit hears many cases of national significance involving federal agencies. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 273, 292 (1990) (referencing this court as second most important court in the nation).

the principal offender.[128] The decision represents a grossly incorrect extension of aiding and abetting principles.

The facts of *Thompson* are not complicated. On October 23, 1997, various law enforcement agencies set up a sting operation to arrest Mitchell Douglas, a suspected drug dealer.[129] An undercover officer was prepared to videotape a drug transaction with Douglas.

At the appointed time, surveillance spotted Douglas nearby, but an unknown person, later identified as Michael Thompson, arrived to deliver a Burger King paper cup.[130] The undercover officer (Officer Dessin) attempted to get Thompson into the front seat of the car so that the police could surreptitiously tape the transaction without obstruction to help establish, *inter alia*, that the deliverer (Thompson) could see what was in the cup when Dessin opened it. However, Thompson got in the back seat.[131]

Dessin and Thompson exchanged the cup for $1500 cash.[132] According to the testimony at trial, Dessin peeped inside the cup by slightly opening the lid, but the government was unable to offer any testimony that Thompson, sitting in the back seat directly behind Dessin, ever saw what was inside the cup.[133] The surveillance operation recorded the brief conversation between Dessin and Thompson. This conversation consisted of vague and cryptic statements, which were subject to conflicting interpretations and speculation at trial. The entire conversation consisted of the following:

> DEFENDANT [D] Hey sir? You Rob's boy?
> UNDER COVER OFFICER DESSIN [UC] Huh?

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128. *See Thompson*, 279 F.3d at 1049–50 & n.6. Until *Thompson*, no reported decision ever held that an aiding and abetting instruction can be presented without adequate evidentiary support simply because of the possibility of joint criminal activity. A representative sampling of several District of Columbia Circuit cases that rejected challenges of the jury's receipt of an aiding and abetting instruction demonstrates that sufficient, albeit sometimes conflicting, evidence existed in the record to support the aiding and abetting instruction as to each particular defendant. Also, the reviewing courts made no unusual attempts to contort established doctrine in order to uphold the jury's receipt of these instructions. *United States v. Richardson*, 817 F.2d 886 (D.C. Cir. 1987) is representative. There, defendant Richardson was properly convicted under an aiding and abetting theory because the court concluded that the government introduced ample evidence from which the jury could have inferred, consistent with the aiding and abetting instruction, that another individual was guilty as the principal in the crimes for which Richardson was convicted. *Id.* at 888. *See also* United States v. McKinley, 70 F.3d 1307, 1311, 1314 (D.C. Cir. 1995) (holding that the aiding and abetting instruction was proper based on evidence that characterized appellant's role in the drug distribution as "assisting"); United States v. Oliphant, 525 F.2d 505, 508 (9th Cir. 1975) (stating that "sufficient evidence [existed] to permit the jury to find that appellant aided and abetted others").

129. *Thompson*, 279 F.3d at 1046.

130. *Id.*

131. *Id.*

132. *Id.*

133. United States v. Thompson, 279 F.3d 1043, 1048–49 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 904 (2002).

D- You Rob's boy?
UC- Yeah.
D- He just told me to give this to you.
UC- Come on this side man. Come on in. Let him in front.
[Defendant gets in rear passenger seat]
UC- You got that joint?
D- Yeah.
D-What's this?
UC- Fifteen.
D- Are you straight?
UC- I'm straight.[134]

Subsequent laboratory analysis established that the substance in the Burger King cup was cocaine.[135] Thompson and Douglas were later indicted on various federal narcotics charges.[136] Douglas was originally charged in all four counts of a four count indictment that alleged "two separate acts of distribution and two telephone facilitation counts."[137] Thompson was charged only in count four, "which charged both Thompson and Douglas with unlawful distribution of more than fifty grams of cocaine base" in violation of 21 U.S.C. § 841(a)(1).[138]

The appellate court's own characterization of the evidence established that, as between Douglas and Thompson, Douglas (the target of the undercover operation) was the far more culpable of the two.[139] Douglas pled guilty prior to trial. Thereafter, Thompson proceeded to trial as the sole defendant on count four of the indictment—the lone count for which he was indicted.[140] All of the government's evidence adduced at trial sought to establish that Thompson was the sole principal offender who actually committed the principal offense of knowingly distributing cocaine to the undercover officer. Based on this single act of drug distribution, the government presented evidence that Thompson was the principal offender as that term is universally understood in federal criminal law.[141] No evidence was presented that Thompson aided and abetted the sole act of distribution for which he was charged. Thus, the case fit the model where the least culpable actor was the

134. *Id.* at 1046; Transcript of Proceedings (Aug. 29, 2000) at 16–30, United States v. Thompson, Cr. No. 00-016 (D.D.C. Nov. 14, 2000).

135. *Thompson*, 279 F.3d at 1046.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See* United States v. Thompson, 279 F.3d 1043, 1049–50 (D.C. Cir. 2002) (describing Douglas as, *inter alia*, the original target, the one who "set up the transaction," and the one who provided narcotics to Thompson, who acted as Douglas's agent), *cert. denied*, 537 U.S. 904 (2002).

140. *Id.* at 1046.

141. For a discussion of the common law definition and lineage of the term "principal offender," see *supra* note 13 and accompanying text. *See also* Perkins, *supra* note 61, at 581 (stating that a principal is the "actual perpetrator of the felonious deed").

principal offender, and the more culpable actor, had he proceeded to trial, would have been liable for the act of drug distribution by virtue of 18 U.S.C. § 2(a) as a procurer, commander, or inducer.[142]

At trial, Douglas did not testify on behalf of the government, and the government was unable to present any direct evidence that Thompson knew what was inside the cup or that he otherwise possessed the requisite criminal knowledge.[143] Thompson testified at trial where he denied criminal intent, stating he never saw what was inside the cup and that Douglas told him the cup contained a wad of cash to pay off a gambling debt.[144] Thus, Thompson conceded that he committed all of the physical acts—he actually delivered the cup containing the cocaine. He only contested whether he possessed the requisite criminal intent.[145]

Accordingly, the only valid theory of liability against Thompson was that of a principal offender, not an aider and abettor. The government did not introduce any evidence to support Thompson's liability for the one act of distribution for which he was charged on an aiding and abetting theory. No evidence was introduced, as an alternative theory or otherwise, that anyone other than Thompson actually committed the completed offense. Nevertheless, over defense objection, the court instructed the jury on the aiding and abetting theory based on 18 U.S.C. § 2(a).[146]

In its closing argument, the government aggressively exploited the aiding and abetting instruction by arguing that Thompson should be convicted on an aiding and abetting theory because Douglas, who was not a defendant in the case, had the requisite intent to knowingly distribute drugs and Thompson "facilitated" the drug transaction by delivering the cup in exchange for money.[147] The jury convicted Thompson on the one count. The United States Court of Appeals for the District of

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142. This scenario is not novel. Over fifty years ago, Professor Perkins noted the following:

> One of the greatest social menaces of the present day is the man who would be termed an accessory before the fact by the common law but in lay language is referred to as the "brains" of a crime ring.... The guilt of his terrified underlings, who carry out his [criminal] commands because they dare not disobey, is certainly no greater than his. And it will not promote the general scheme of social discipline to handicap the prosecution of such an offender by unreasonable obstacles.

Perkins, *supra* note 61, at 620.

143. *Thompson*, 279 F.3d at 1046–47.

144. *Id.*

145. *See id.* at 1046–47, 1049.

146. Transcript of Proceedings (Aug. 30, 2000) at 124–25, United States v. Thompson, Cr. No. 00-016 (D.D.C. Nov. 14, 2000). The government sometimes mistakenly submits an aiding and abetting instruction for consideration when the aider and abettor in a multiple-defendant case pleads guilty on the eve of trial and the government simply forgets to remove it from its previously compiled requested instructions. However, given the manner in which the government aggressively utilized the instruction in its closing argument in *Thompson*, the instruction's submission cannot be characterized as a mistake.

147. *Id.* at 93.

Columbia Circuit upheld the conviction, determining that the trial court properly gave the aiding and abetting instruction.[148]

As earlier noted, the improper tender of an aiding and abetting instruction may confuse the jury, leading the jury to convict a defendant without finding the requisite criminal intent. The principle that an aiding and abetting instruction may be given when warranted by the evidence, even when the aiding and abetting statute is not charged in the indictment, is not being challenged. Also, the principle that one charged as a principal can be convicted as an aider and abettor, provided the evidence warrants this result, is not being challenged. However, the non-unanimity of theory principle, where the jury can convict even if some jurors find the defendant was a principal while other jurors find he was an aider and abettor, is being challenged. The concept, implicitly endorsed in *Thompson*, that an aiding and abetting instruction is proper even when no evidence supports the instruction, is also being challenged. In *Thompson*, had a unanimity of theory instruction been required, that unanimity instruction, coupled with a special verdict, would have removed any doubt concerning whether the jury properly found the requisite intent beyond a reasonable doubt.[149]

Thompson substantially altered settled caselaw concerning the scope and proper application of the key aiding and abetting instruction as reflected in 18 U.S.C. § 2(a). *Thompson* goes far beyond even some of the unchallenged but nonetheless questionable aiding and abetting principles and is fundamentally at odds with the caselaw in every other circuit.[150]

As noted above, the undisputed facts established that Thompson committed all of the physical acts constituting the narcotics distribution offense. He only contested mens rea.[151] Therefore, the government's only valid theory of criminal liability against Thompson was that he was a principal offender who committed an offense against the United States. In these circumstances, a jury instruction that Thompson might also be guilty as one who aided and abetted in committing a crime was improper as a matter of law.

Application of 18 U.S.C. § 2(a), where appropriate, permits imposition of criminal liability when a defendant has not personally committed every act or

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148. United States v. Thompson, 279 F.3d 1043, 1046–50 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 904 (2002). The court also held that, even assuming error, the error was harmless. *Id.* at 1050. Although appellate issues are noted in passing, see *infra* notes 187–98 and accompanying text, this Article does not comprehensively address issues concerning how improper jury instructions should be evaluated on appeal.

149. Had the trial court not given the aiding and abetting instruction, a guilty verdict would have established beyond a reasonable doubt that the jury found Thompson had the requisite criminal intent, thereby rejecting his lack of mens rea defense. If the court gave the aiding and abetting instruction, coupled with a unanimity of theory instruction, a verdict based on liability as a principal would be valid as set forth above. On the other hand, a unanimous verdict based on an aiding and abetting theory would expose that the jury was misled and ought to result in reversal based on insufficient evidence to support the verdict.

150. *See infra* note 170 and accompanying text.

151. *Thompson*, 279 F.3d at 1046–47.

element of the offense. Read in its entirety, § 2(a) reveals that it does not merely apply to underlings who aided and abetted more culpable actors in committing a criminal offense. Rather, it also applies to the kingpins and ringleaders, because these "higher-ups" counsel, command, procure, or induce their underlings to actually commit the criminal acts.[152]

The aiding and abetting instruction may be given only when the evidence warrants because it instructs the jury that it may convict a defendant even when the evidence does not establish that a defendant personally committed every element of the offense.[153] This rule must be scrupulously adhered to because the instruction carries enormous potential for jury confusion when it is given where it is not warranted.

As noted above, Thompson proceeded to trial as the sole defendant on one narcotics distribution count.[154] The evidence was uncontroverted that Thompson physically delivered a Burger King cup containing a small amount of cocaine to an undercover officer.[155] The sole disputed issue was Thompson's intent to distribute narcotics and knowledge that he was doing so. In the rubric of the jury instructions and 18 U.S.C. § 2, Thompson's guilt, if he was guilty, was that of a principal offender—one who, according to 18 U.S.C. § 2, actually "commit[ted] an offense against the United States." The government presented no evidence that Thompson aided and abetted another person who committed the completed offense. Thompson was the only person who could have actually committed the completed offense of actually distributing the narcotics.[156]

Operating in a legal environment of almost unbridled flexibility in the application of aiding and abetting concepts, the District of Columbia Circuit mistakenly and needlessly contorted the venerable and heretofore straightforward concept of a principal offender. As previously discussed, "principal offender" is a common law term of art specifically recognized by the Supreme Court in *Standefer* as denoting the party who physically committed the offense; the principal is distinguished from other actors who aided and abetted the principal offender in the commission of the offense but did not physically commit the offense themselves.[157] The pertinent District of Columbia *Red Book* instruction uses this "principal offender" terminology.[158] This instruction was directly derived from a 1901 local District of Columbia aiding and abetting statute enacted by Congress, which predated Congress's enactment of what ultimately became 18 U.S.C. § 2 by a few

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152. *See* Perkins, *supra* note 61, at 620.

153. The *Thompson* jury was so instructed. *See* Transcript of Proceedings, *supra* note 146, at 124–25.

154. *Thompson*, 279 F.3d at 1046.

155. *Id.* at 1046–47.

156. Again, the original codefendant Douglas pled guilty prior to trial. *Id.* at 1046.

157. Standefer v. United States, 447 U.S. 10, 15 (1980) (citing to common law principle that an accessory could not be convicted without the prior conviction of the principal offender).

158. D.C. RED BOOK, *supra* note 8, 4.02.

years.[159] The *Thompson* district court gave an aiding and abetting instruction, similar to the *Red Book*'s instruction, that referred to a principal offender.[160]

However, the District of Columbia Circuit misconstrued the law in several respects when it concluded that "based on the evidence before it, . . . Thompson aided and abetted Douglas, the principal, in the distribution of cocaine base to [undercover Officer] Dessin. Thompson is under the misconception that because he *physically* handed the drugs to Dessin, he is the only person who could be a principal."[161] This contention is a non sequitur and is incorrect because Thompson did not argue that because he physically delivered the drugs he was the only person who could be the principal. The court's statement reflects its unnecessary insistence with characterizing Douglas, the crime boss or non-underling, as some sort of principal offender, constructive or otherwise, no matter the doctrinal cost.[162] Moreover, even if Douglas, who was not a party to the trial, could somehow be classified as a principal on these facts, that classification would only establish that both Douglas and Thompson were principals, not that Thompson was an aider and abetter. In other words, even if two principals exist, the underling principal is not automatically an aider an abettor.

The aiding and abetting instruction given in *Thompson*, derived from 18 U.S.C. § 2(a), provided in pertinent part:

> If you find that another person may have been involved, *you may also find the defendant guilty of the crime charged in the indictment without finding that he personally committed each of the acts that make up the crime.* Any person who in some way intentionally participates in the commission of a crime, aides and abets the principal offender.[163]

The instruction thus informed the jury that it could convict the defendant even if he did not do every act constituting the offense.[164] Here, the instruction was improper and misleading because Thompson conceded he committed all of the physical

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159. *See Standefer*, 447 U.S. at 17–20. Recognition of this lineage explains why the term principal offender appears in the pertinent District of Columbia *Red Book* instruction. It also provides support for an explanation why other popular model federal jury instructions, which are used in other circuits that do not derive from this statutory lineage, do not rely on the specific term. *See supra* text accompanying notes 23–26 (noting that other model instructions use similar terms).

160. *See id.* at 1050 n.9 (providing the district court's jury instruction).

161. *Id.* at 1049.

162. The court essentially characterized Douglas as what would have been a principal in the second degree at common law. *See* TORCIA, *supra* note 37, § 31, at 186–89. Whether Douglas was "constructively present" is debatable but unnecessary and irrelevant under modern aiding and abetting principles. *See infra* note 202 and accompanying text.

163. Transcript of Proceedings, *supra* note 146, at 124 (emphasis added).

164. *See generally* Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (endorsing the general principle that an aiding and abetting instruction is proper where evidence shows that the defendant aided and abetted another to actually commit the offense).

acts—he only contested the element of requisite mental intent. Thus, the improper instruction could serve but one purpose—to confuse the jury so as to abrogate the government's burden of proof. Because intent was the only factual element at issue, the instruction permitted the jury to find Thompson guilty even if it was not convinced beyond a reasonable doubt that he had the requisite mental intent.[165]

Under § 2(a), a person is punishable as a principal if he "aids, abets, counsels, *commands, induces or procures*" another to "commit[] an offense."[166] Thus Douglas, who pled guilty prior to trial, may properly be classified as one punishable as a principal because he commanded, procured, or induced Thompson to commit the offense. However, that Douglas may be punishable as a principal does not mean an aiding and abetting instruction was proper as to Thompson. The court of appeals' opinion confuses the concept that there may be more than one principal with the legally incorrect conclusion that if Douglas is a principal (or even punishable as a principal) then Thompson must *ipso facto* be an aider and abettor.[167]

The court's conclusion dangerously misapplies recognized principles. As noted above, an aiding and abetting theory is implied in every charge under federal law.[168] However, implying aiding and abetting theory in every charge does not mean an aiding and abetting instruction is proper in all cases. Rather, it means that an aiding and abetting instruction may be given even when not alleged in the indictment, assuming the evidence supports the instruction.

Again, Thompson committed all of the physical acts constituting the charged offense. Thus, there was no evidentiary basis to support an instruction that he aided and abetted the completed offense in some manner other than actually committing the offense himself. Nevertheless, the District of Columbia Circuit held that even though Thompson committed the actual offense, he was still properly charged and convicted as an aider and abettor simply because Douglas was the more culpable actor.[169] This result is legally incorrect and contrary to the law of other circuits.[170]

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165. That concern was magnified here because of the emphatic and improper manner in which the prosecution relied on this instruction in its closing argument. *See supra* notes 146–47 and accompanying text.

166. 18 U.S.C. § 2(a) (2000) (emphasis added).

167. *See* United States v. Thompson, 279 F.3d 1043, 1049–50 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 904 (2002).

168. *See supra* note 30 and accompanying text.

169. *See Thompson*, 279 F.3d at 1049–50.

170. *See* United States v. Moye, 422 F.3d 207, 214 (4th Cir. 2005) (holding aiding and abetting instruction improper on felon in possession of a firearm charge where there is no evidentiary foundation that alleged principal who possessed firearm was a felon); United States v. Petty, 132 F.3d 373, 377 (7th Cir. 1997) (stating the evidence must establish that the defendant intentionally helped someone else commit the crime; "[T]he essential elements of aiding and abetting serve as a substitute for the defendant's actual physical participation in the crime."); United States v. Clark, 980 F.2d 1143, 1146 (8th Cir. 1992) (holding there is no need to prove the principal's identity in order to obtain an aiding and abetting conviction if the evidence shows the underlying crime was actually committed); United States v. Langston, 970 F.2d 692, 705 (10th Cir. 1992) ("The proof [of aiding and abetting] must establish the commission of the offense by someone *and the aiding and abetting by the defendant so charged.*" (emphasis added) (quoting White v. United States, 366 F.2d 474, 476 (10th Cir. 1966)));

The fatal flaw in the court of appeals' reasoning is its implicit, mistaken legal assumption that aiding and abetting liability is reserved solely for relative underlings like Thompson, even if the underling actually commits the completed offense. The court's analysis effectively ignored the commander and inducer component of § 2(a), thus distorting the proper application of the statute.

The District of Columbia Circuit's flawed logic is even more apparent in its ultimate legal conclusion that "[u]nder these circumstances, the jury could have reasonably found that Thompson aided and abetted the distribution committed principally by Douglas."[171] This ultimate conclusion is convoluted and nonsensical because it misconstrues a well-understood legal term of art and unnecessarily creates a new and fatally flawed concept—the concept of one who "principally commits" an offense. This new concept is not synonymous with the time-honored and recognized concept of a principal offender, the one who actually commits the offense.[172] Through this new concept, the court attempted to classify the more culpable actor as some sort of principal even though modern aiding and abetting principles rendered that effort unnecessary. In the context of the *Thompson* case, the only rationale for creating this new concept was to uphold the receipt of the aiding and abetting instruction where such instruction was not warranted under existing law.[173]

The District of Columbia Circuit's conclusion injects chaos, not clarity, into the law. As noted above, 18 U.S.C. § 2(a) clearly covers ringleaders if they command, procure, or induce underlings to actually commit the offense and thus renders the underling a principal offender. Thompson actually delivered the cup containing cocaine to the undercover officer. Thus, if Thompson had the requisite knowledge and intent, then his criminal liability is exclusively that of a principal offender. Douglas's liability with respect to the distribution, although he may be the far more culpable actor, would be as an aider, abettor, commander, or inducer via 18 U.S.C. § 2(a). *Thompson* unnecessarily justified the aiding and abetting instruction by creating the new and convoluted concept that Douglas "principally committed" the

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United States v. Martin, 747 F.2d 1404, 1407 (11th Cir. 1984) (holding that an instruction is appropriate only when warranted by the evidence—"[o]ne cannot aid or abet himself"); United States v. Damsky, 740 F.2d 134, 140 (2d Cir. 1984) ("A trial court may give an aiding and abetting charge where . . . the prosecution makes known that it intends to pursue an aiding and abetting theory and when the evidence warrants such a charge."); Feldstein v. United States, 429 F.2d 1092, 1095 (9th Cir. 1970) (stating that an aiding and abetting conviction is proper even if the identity of the principal is not established).

171. *Thompson*, 279 F.3d at 1049–50.

172. *See* Standefer v. United States, 447 U.S. 10, 15–20 (1980); SAND ET AL., *supra* note 14, ¶ 11.01, at 11-7 & n.8.

173. The corollary rationale is that the new concept provides a basis to denominate the most culpable actor as a principal. Although the "principally commits" label may be linguistically and even psychologically appealing, it is doctrinally unnecessary. In any event, from a doctrinal standpoint, because Douglas was not a party to the trial, the holding's precedential value will be its effect on complicity doctrines with respect to the party before the court. For an example of a misinterpretation of *Thompson*'s holding, see *infra* note 206 and accompanying text.

distribution when the undisputed evidence showed that Thompson—and Thompson alone—was the principal offender who physically committed the act of distribution that constituted the charged offense. The court's decision therefore turns aiding and abetting principles on their heads by effectively transforming every principal into an aider and abettor—and vice versa—without any supporting evidence whatsoever. That logic represents the ultimate overreaching application of the flexible aiding and abetting principles set forth in Part II that before now had been uncritically accepted for the most part. Left unchallenged, *Thompson* stands for the ludicrous, indeed radical, proposition that an aiding and abetting instruction can never be improper in any case involving multi-party criminality.[174]

Moreover, to recognize fully the subtle allure and inevitable overextension of current aiding and betting principles, one must note the District of Columbia Circuit's efforts in attempting to provide legal justification for its conclusion in *Thompson*. In Pandora's box-like fashion, these efforts serve largely to sow unnecessarily seeds of confusion into other doctrinal areas.

First, the *Thompson* court correctly noted that the law does not prohibit classifying two offenders as principals.[175] For example, if two individuals go into a bank to rob it, both holding guns and demanding money, they would both be principals and may be convicted as principals without an aiding and abetting instruction. But this proposition was never at issue and is irrelevant in this discussion. The best that can be said for the court's analysis is that it strained—for no good reason—to establish that Douglas, who was not even a defendant in the trial, may have been a principal even though he did not actually deliver the drugs.

Second, the court's unremitting determination to extend aiding and abetting principles was evident in its efforts to apply constructive transfer principles. Again, by resorting to these principles, which the parties did not present or argue at trial, the District of Columbia Circuit needlessly strained to transform the more culpable participant, who was not even a defendant at trial, into the principal offender. The court did not do this because Douglas's criminal liability depended on such a characterization or to resolve an insoluble proof problem of the *Horton* variety.[176]

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174. To further illustrate the point, suppose a Mafia Don orders a hit and instructs an underling hitman to actually commit the murder. The hitman shoots and kills the victim. If the hitman is tried separately for the murder, the hitman is the principal offender; an aiding and abetting instruction is inappropriate even though the prosecution may present evidence that the hitman was acting on orders from the Mafia Don and in the ranks, the hitman is a "little fish" or underling in relation to the Don.

On the other hand, at his separate trial, the Mafia Don is punishable as a principal under 18 U.S.C. § 2(a) because he commanded and induced the offense. The Don's liability as a principal does not make the hitman an aider and abettor.

However, because the Don principally committed the offense, a court applying *Thompson* would hold that making the hitman an aider and abettor and giving an aiding and abetting instruction is appropriate even when the hitman is tried separately.

175. *See Thompson*, 279 F.3d at 1049.

176. For a discussion of *Horton*, see *supra* notes 44–45, 65, 108 and accompanying text. Note that *Thompson* did not present a *Horton* conundrum, where the court deemed it necessary and appropriate to resort to an aiding and abetting instruction and not require unanimity of theory to address

Rather, the sole purpose of transforming Douglas into a type of principal offender was to transform Thompson into an aider and abettor and thus justify the aiding and abetting instruction.

The District of Columbia Circuit relied on *United States v. Waller*,[177] a seldom-cited thirty-year-old opinion. In *Waller*, the defendant challenged her drug distribution conviction because she did not physically deliver the drugs to the informant.[178] The defendant commanded her young daughter to get the drugs and bring them to her.[179] Her daughter left the room and returned with six bags containing heroin and handed the drugs to the informant without further instruction from her mother.[180] The Seventh Circuit found sufficient evidence that the defendant "constructively transferred" the drugs because of her close contact with her daughter and exercise of complete control over the situation where a minor child, who may well have been an innocent conduit, undertook the physical transfer.[181]

While *Waller* applied concepts of constructive transfer to impose liability as a principal upon a non-physical transferor, the case does not speak to the central issue in *Thompson*: whether the trial court properly instructed the jury that Thompson could be liable as an aider and abettor. Further, Thompson was not a minor, and the government did not argue the concept of constructive transfer at trial or on appeal. In short, whatever principle *Waller* may yield regarding how Douglas (a non-party) may be characterized, the case does not state a legal principle applicable to whether the jury was properly instructed that Thompson's guilt could be found as an aider and abettor or whether the jury should have only considered whether Thompson's guilt could be established as a principal offender who actually committed an offense against the United States.[182]

The court of appeals' further elucidation of constructive transfer principles and reliance on the district court's opinion in *United States v. Edmonds* fare no better.[183]

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the musical chairs scenario of two assailants and inconclusive proof as to which particular actor administered the fatal blow.

177. 503 F.2d 1014 (7th Cir. 1974). *Thompson* cites *Waller*. *See Thompson*, 279 F.3d at 1050 n.7.

178. *Waller*, 503 F.2d at 1015.

179. *Id.*

180. *Id.*

181. *Id.* at 1015–16.

182. In addition, *Waller* was a bench trial where Waller's liability was also clearly established as a causer via an innocent instrumentality based on 18 U.S.C. § 2(b) (2000). Because the case was tried to the court, the conviction may be upheld under § 2(b) in the absence of an instrumentality instruction at trial if the evidence supports the judgment below. *See generally* 2 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 374, at 471 & n.13 (3d ed. 2000) (citing cases where appellate courts, in the absence of special findings, reviewed the facts to find the evidence supported the judgment). Thus, *Waller* in no way supports the legal conclusion that an aiding and abetting instruction was proper as to Thompson.

183. *See* United States v. Thompson, 279 F.3d 1043, 1049–50 (D.C. Cir. 2002) (citing United States v. Edmonds, 765 F. Supp. 1112 (D.D.C. 1991), *rev'd in part on other grounds*, 69 F.3d 1172 (D.C. Cir. 1995)), *cert. denied*, 537 U.S. 904 (2002).

Edmonds involved a lengthy prosecution of an enormous drug distribution network,[184] but offers no support that the aiding and abetting instruction was proper in *Thompson*. In addition to the same general critique of the constructive transfer theory discussed above—namely that using the constructive transfer principle to make someone a principal does not automatically turn the person who actually committed the physical act into an aider and abettor—the aiding and abetting instruction in *Edmonds* was deemed appropriate because "[i]n the alternative, there [was] ample evidence from which the jury could find beyond a reasonable doubt that Edmonds aided and abetted the distribution of drugs . . . . [and] that someone [else] committed the crime of distribution."[185]

This evidence is precisely the type that did not exist in *Thompson*. As noted above, the undisputed evidence established that if Thompson possessed the requisite mens rea, he was liable as a principal offender as the one who actually committed an offense against the United States. The government presented no alternative evidence that he aided and abetted someone else in the commission of the offense. No one other than Thompson—neither Douglas nor anyone else—could have actually committed the completed offense. Thus, the aiding and abetting instruction tendered at trial was unsupported by the evidence and was erroneous. As a result, the District of Columbia Circuit's opinion concluding that the aiding and abetting instruction was proper represents a radical and incorrect departure from the uniform case law of every circuit.[186]

United States v. Martin,[187] an Eleventh Circuit decision, illustrates the proper analysis finding harmful error in tendering an improper aiding and abetting instruction. *Martin* is analytically similar to *Thompson*—the defendant was charged with attempt to possess a controlled substance.[188] In *Martin*, the affirmative inclusion of the aiding and abetting charge was problematic because no person other than Martin was charged with the commission of the principal offense, and the

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184. *Edmonds*, 765 F. Supp. at 1114–16.

185. *Id.* at 1117.

186. *See supra* note 170. *United States v. Martin*, 747 F.2d 1404, 1407 (11th Cir. 1984) and the other cases previously noted set forth the controlling principle that an aiding and abetting instruction is proper only when warranted by some evidence in the record that the defendant aided and abetted someone else who actually committed the criminal offense. *Thompson*'s favorable and purportedly controlling reference to *United States v. Yost*, 24 F.3d 99 (10th Cir. 1994), in no way undermines the argument set forth here. *See Thompson*, 279 F.3d at 1049 n.6. *Yost* merely restates the uncontroverted propositions that an aiding and abetting instruction is inappropriate only if there is evidence that one person was involved in the offense but is appropriate if there is evidence that the defendant aided someone else in committing the crime. *See Yost*, 24 F.2d at 104. To limit *Martin* as holding that an aiding and abetting instruction is improper only if the evidence fails to indicate the commission of the offense by a principal is a far too narrow interpretation. *See* SAND ET AL., *supra* note 14, ¶ 11.01, at 11-8 & nn.14–15 (correctly stating the multiple propositions of *Martin*). In any event, even the most limited interpretation of *Yost* is inapposite here because Thompson alone committed the physical acts constituting the offense—he did not aid Douglas or anyone else who actually committed the offense.

187. 747 F.2d 1404 (11th Cir. 1984).

188. *Id.* at 1405–06.

questioned jury instruction referred to aiding and abetting "other persons" even though the evidence was undisputed that no person other than Martin committed the principal offense.[189]

The Eleventh Circuit held that the aiding and abetting instruction constituted reversible error because, based on the undisputed evidence, the instruction "in effect[] told [the jury] that it could convict Martin for aiding or abetting Girst or Norwood" when neither Girst nor Norwood committed any principal offense.[190] In other words, the conviction was infirm because the jury was improperly instructed on an aiding and abetting theory that effectively let the jury convict without clearly finding that the defendant committed every element of the offense beyond a reasonable doubt.[191] The Eleventh Circuit concluded that "[w]e cannot exclude the possibility that the jury convicted Martin of offenses alleged improperly, not cured by jury instructions, and not supported by the evidence."[192]

Similarly, *Russell v. United States*[193] applies the correct analysis, finding an improper instruction and plain error. In *Russell*, the sole defendant was charged with destruction of property and possession of a Molotov cocktail.[194] Despite the complete lack of evidence that anyone other than the defendant actually committed the offense, the trial court failed to intervene *sua sponte* when the prosecution argued in the alternative that the defendant's guilt could also be premised on an aiding and abetting theory.[195] Although the defense did not make a timely objection, thus necessitating plain error review, the District of Columbia Court of Appeals held the improper aiding and abetting instruction, coupled with the improper argument, constituted plain error.[196]

Thompson, another plain error case, cannot be justified as mandated by the strictures of plain error review.[197] *Russell* demonstrates that even within the strictures of plain error review, convictions based on improper aiding and abetting instructions require reversal in appropriate circumstances.

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189. *Id.* at 1407.

190. *Id.* at 1408.

191. *See id.* (reversing the conviction based on an improper aiding and abetting instruction, concluding that the jury instructions compounded the deficiencies in the indictment and the jury, "unable to find all elements of the principal offense, [improperly relied on the] aiding or abetting [instruction], which need not include all elements of the principal offense").

192. *Id.* at 1408.

193. 701 A.2d 1093 (D.C. 1997).

194. *Id.* at 1094.

195. *Id.* at 1095–98.

196. *Id.* at 1098–1100.

197. At trial, defense counsel objected to the aiding and abetting instruction on somewhat related grounds. Controlling authority could have supported a more defense-favorable standard of review under the circumstances. *See* United States v. Purvis, 21 F.3d 1128, 1130 (D.C. Cir. 1994); United States v. Pennington, 20 F.3d 593, 599 n.5 (5th Cir. 1994). But the appellate court in *Thompson* chose to only review for plain error. *See* United States v. Thompson, 279 F.3d 1043, 1049 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 904 (2002).

Why does all this matter? Just as one jurist, over a half-century ago, questioned the wisdom of contorting hearsay doctrine to convict a small-time bookmaker,[198] it is similarly not worth contorting already strained aiding and abetting principles to convict an alleged small-time drug dealer. *Thompson* illustrates that the uncritical acceptance of what are now considered basic aiding and abetting principles simply invites overreaching to the point of doctrinal poison.

An improperly tendered aiding and abetting instruction works to confuse the jury on the cardinal issue of the government's obligation to prove intent beyond a reasonable doubt. The improper instruction directs the jury to consider guilt based on actions that do not constitute the complete offense, actions which may be wholly innocent in the abstract.

Many courts have eloquently recognized the seminal importance of mens rea as a first among equals, even under the heightened appellate strictures of plain error review. For example, in *United States v. Sturm*, the First Circuit stated the following:

> Ordinarily, we do not consider issues that were not raised at trial. Nevertheless, we retain the power to consider such issues, even on our own initiative, to prevent a "clear miscarriage of justice." This case meets that exacting standard. Jury instructions that allow a conviction even though the jury may not have found that the defendant possessed the mental state required for the crime constitute plain error. Furthermore, the sacred status that our system of criminal law accords *mens rea* mandates that such an error cannot be treated as harmless.[199]

Similarly, in the famous case of *Morissette v. United States*, the Supreme Court reversed a conviction based on an improper jury instruction concerning criminal intent although there was sufficient evidence to support the conviction.[200] Justice Jackson recognized the cardinal importance of proper jury instructions and wryly observed:

> Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges. [The jury] might have concluded [that the

198. People v. Barnhart, 153 P.2d 214, 219 (Cal. Dist. Ct. App. 1944) (Doran, J., concurring) (arguing that placing of bets over the phone by anonymous declarants constitutes hearsay and stating that "[t]o relax the [hearsay rule] just to uphold the conviction of a bookmaker, or for any other purpose, is nothing short of judicial stupidity.").

199. United States v. Sturm, 870 F.2d 769, 776–77 (1st Cir. 1989) (citations omitted).

200. 342 U.S. 246, 273–76 (1952). This case often appears in first year criminal law casebooks as illustrative of basic mens rea principles. *See, e.g.*, PHILLIP E. JOHNSON & MORGAN CLOUD, CRIMINAL LAW: CASES, MATERIALS AND TEXT 37–44 (7th ed. 2002) (providing *Morisette* in Chapter 1, "Basic Culpability Doctrines").

> defense's evidence raised a reasonable doubt of guilt and]. . . [t]hey might have refused to brand [the defendant a criminal]. Had they done so, that too would have been the end of the matter.[201]

As in *Morissette* and *Sturm*, the jury instruction error in *Thompson* adversely affected the bedrock principle of the government's burden of establishing mens rea beyond a reasonable doubt. As such, *Thompson* calls into question long-recognized and well-settled aiding and abetting principles that—along with conspiracy law—have served as the cornerstones of criminal liability for those actors who do not actually commit the completed offense. Again, the focus must be on first developing fair, comprehensible, and coherent doctrines and then on properly limiting the instruction.

Many of the problems created by *Thompson* could be substantially mitigated if due process is interpreted to require juror unanimity where the government proceeds on both principal and aiding and abetting theories as to a particular defendant or defendants.[202] Such a procedural requirement would result in a clear determination of which theory the jury relied on, thus making it easier to identify whether an improper instruction influenced the verdict.[203]

Consider the somewhat analogous context of a prosecution based on alternative theories of guilt as either an aider and abettor or a causer under § 2(b). In that situation, the Sixth Circuit has held that jury unanimity as to theory is required.[204] Although the Sixth Circuit's decision predates *Schad*, its logic is consistent with the

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201. *Morissette*, 342 U.S. at 276.

202. Due process should at least be interpreted to require unanimity in non-*Horton* situations where the evidence of aiding and abetting comports with what would have been considered an accessory before the fact at common law. That would, to some degree, reinstate some of the common law problems of fighting over the characterization of one constructively present and therefore a principal in the second degree not requiring juror unanimity of theory with the characterization of one as an accessory before the fact requiring juror unanimity where alternative theories of guilt as either a principal or an accessory are presented. While recognizing this characterization may be difficult in some cases, *see, e.g.*, Howe, *supra* note 64, at 82 (recognizing that "[i]t is impossible to articulate a bright-line rule that defines an appropriate level of factual specificity . . . in all circumstances"), it would not have presented a problem in *Thompson*. There was no dispute whether Thompson was present or not, constructive or otherwise—he physically committed the offense and should have received instructions on his liability as a principal, not as an aider an abettor.

203. *See* United States v. Knoll, 16 F.3d 1313, 1322–23 (2d Cir. 1994) (affirming conviction although the record was unclear regarding whether the jury relied on an improper aiding and abetting theory); *cf.* Griffin v. United States, 502 U.S. 46, 59–60 (1991) (stating that the jury is presumed to find the proper factual scenario over a factual theory not supported by the evidence). The jury is the factfinder. Presuming that a jury properly found the facts is one thing. But this presumption does not lead to the presumption that a jury would ignore and not apply an improper instruction tendered by the judge with all the imprimatur of a correct instruction. Indeed, to assume the jury will ignore an instruction is tantamount to jury nullification. *Griffin* did not implicate these concerns. *See* Yates v. United States, 354 U.S. 298, 327 (1957) (invalidating the general verdict when one of the possible bases of conviction was legally inadequate).

204. *See* United States v. Keefer, 799 F.2d 1115, 1125 (6th Cir. 1986); *see also* Weiss, *supra* note 1, at 1364 & n.103.

constitutional due process argument set forth in Part I that courts should require juror unanimity of theory as to true accessories before the fact.[205]

Not surprisingly, commentators have confused and contorted the principles drawn from *Thompson*. For example, a leading treatise cites *Thompson* for the proposition that "[a] classic case for an aiding and abetting instruction is one in which the defendant's participation in the commission of the crime is established, but the identity of the principal is unclear."[206] *Thompson* and *Horton* are cited as the sole authority for that proposition.[207]

It was far from inevitable and represents an ironic triumph of legal absurdity that *Horton* and *Thompson* are "joined at the hip." Viewing *Horton* and *Thompson* as analytically similar is ludicrous. As previously explained, *Horton* involved the classic case of two participants, both principals involved in a fatal assault, but where it is unclear which one struck the fatal blow.[208] *Thompson*, on the other hand, presents an entirely different conceptual framework, where Thompson was the sole defendant and clearly the one principal.[209] Therefore, resorting to an aiding and abetting analysis to resolve an otherwise insoluble *Horton*-type "musical chairs" proof conundrum was unnecessary. Unfortunately but predictably, *Thompson* is ultimately mischaracterized as upholding the receipt of the aiding and abetting instruction as to Thompson "because [the] jury could have concluded that defendant aided and abetted the principal in the distribution of cocaine base[,] rejecting defendant's claim that he was the principal."[210]

How can anyone seriously dispute Thompson's contention that if he was criminally liable, it could only be as a principal (and therefore the aiding and abetting instruction as to him was improper)? If *Thompson* stands for the proposition that Thompson was not a principal in the lone, simple, one-count drug distribution charge where he was videotaped handing the cup containing the drugs to the undercover officer, and where Douglas was nowhere in sight, then *Thompson* has fatally contorted the concepts of principal and aider and abettor beyond the point of no meaning and to the point of no return. Thus, the time has come to reevaluate federal aiding and abetting doctrine. Regardless of whether other flexible aiding and abetting principles remain unchanged, requiring unanimity as to theory between a principal and an aider and abettor, which would have, in all likelihood, at least exposed the inherent incongruity of the *Thompson* decision, is a small but necessary first step.

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205. *See supra* text accompanying notes 38–41.

206. 26 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 630.32[6], at 630–69 & n.47 (3d ed. 1997).

207. *See id.* For a discussion of *Horton*, see *supra* notes 44–45, 65, 108 and accompanying text.

208. United States v. Horton, 921 F.2d 540, 541–42 (4th Cir. 1990).

209. United States v. Thompson, 279 F.3d 1043, 1046 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 904 (2002).

210. MOORE ET AL., *supra* note 206, § 630.32[6], at 630–69 n.47.

IV. CONCLUSION

The District of Columbia Circuit's decision in *United States v. Thompson* cannot be reconciled with recognized federal criminal law aiding and abetting principles. The decision represents an unfortunate but predictable culmination of the essentially limitless toleration of pro-prosecution aiding and abetting doctrines that have been left critically unexamined for far too long.

Thompson serves as both an object lesson and as an impetus to reexamine several supposedly well-settled aiding and abetting doctrines. Regardless of any other doctrinal developments concerning the parameters of alternative theories of guilt and juror unanimity, the further blurring of the distinction between a principal and an aider and abettor only adds needless confusion to the law. As a modest first step, unanimity as to theory should be constitutionally required, at least where evidence is adduced as to alternate factual theories as either principal or aider and abettor.

This requirement should result in a positive step towards commencing a reevaluation of federal criminal law accessorial liability doctrines. Too few systemic reevaluation opportunities exist to reign in disproportionately pro-prosecution doctrines. Indeed, the trend over the last three decades has been almost entirely in the opposite direction—where the legal environment has been seemingly dedicated to making it easier for the government to obtain convictions.

Whether this reexamination of aiding and abetting doctrines will result in any substantial doctrinal changes that harm prosecutorial theories in any measurable manner is of course far too soon to determine. Nevertheless, given the current state of the law, it is difficult to see how any reexamination will result in aiding and abetting doctrines that are more favorable to the prosecution. The imposition of a due process requirement of juror unanimity when alternative principal and aiding and abetting theories are presented would constitute a small but important step toward the doctrinal fairness that underlies the concept of due process in any criminal case. Any modest movement toward a constitutional reinvigoration of a more concrete juror unanimity requirement in criminal cases is welcome, long overdue, and consistent with recent Supreme Court trends in reshaping due process requirements in the context of a criminal trial. In an era of increased regulatory criminal liability and expansive criminal liability theories in general, a reinvigorated focus on many previously well-settled doctrines thought to be largely beyond reexamination would be a positive development for federal criminal law in the twenty-first century.