

# ***Rosemond*, Mens Rea, and the Elements of Complicity**

KIT KINPORTS\*

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## I. INTRODUCTION

The criminal statutes governing accomplice liability are among the most frequently invoked by state and federal prosecutors in this country.<sup>1</sup> In 2014, in *Rosemond v. United States*,<sup>2</sup> the Supreme Court issued its first major pronouncement on the reach of complicity liability in almost thirty-five years.<sup>3</sup> The case arose in the context of another widely used federal statute, 18 U.S.C. § 924(c), which imposes a mandatory minimum sentence when a firearm is used or carried “during and in relation to” a violent or drug trafficking offense.<sup>4</sup> In its opinion, the Court addressed the actus reus and mens rea required to convict an accessory in a § 924(c) prosecution.

The law surrounding accomplice liability—in particular its mens rea requirements—has been described as “vexing,”<sup>5</sup> “inescapably complex,”<sup>6</sup> and “a disgrace.”<sup>7</sup> Despite the regularity with which these issues arise in criminal cases, the rules governing mens rea and complicity remain surprisingly unresolved and have sparked little scholarly interest in recent years.<sup>8</sup> The law is particularly “sparse and conflicting” for crimes requiring proof of some attendant circumstance.<sup>9</sup>

In attempting to fill this gap in the law and academic literature, the remainder of this Article proceeds in four parts. After the elements of complicity are sketched out briefly in Part II, Part III describes the Court’s ruling in *Rosemond* and the weapons offense that served as its focus. Parts

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1. See Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 732 (1983) (describing complicity as “[t]he most important source of criminal liability, excluding the offense definition”); 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, 1346 (2002) (observing that the federal law governing accomplices is “probably invoked more frequently than any other federal criminal statute”).

2. 134 S. Ct. 1240 (2014).

3. The Court’s last significant ruling on accomplice liability came in *Standefer v. United States*, 447 U.S. 10, 25–26 (1980), which allowed the conviction of an accessory despite the principal’s acquittal in an earlier trial.

4. 18 U.S.C. § 924(c)(1)(A)(i) (2012).

5. Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 228 (2000).

6. Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 369 (1997).

7. Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 428 (2008).

8. See *id.* at 429 (observing that complicity has “received relatively little scholarly attention” in this country since the mid-1980s); Weisberg, *supra* note 5, at 222 (pointing out that “scant attention” has been given to accomplice liability since publication of the Model Penal Code).

9. Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1160 (1997).

IV and V then examine in turn two competing interpretations of § 924(c): first, that it simply prohibits certain conduct, and second, that it contains both a conduct and a circumstance element. Using *Rosemond* as the backdrop, these two Parts also analyze the mens rea implications of each alternative reading of the statute.

Moving beyond the confines of *Rosemond*, this Article recommends that accomplice liability require proof of purpose with respect to every conduct element of a crime. For criminal offenses that also involve an attendant circumstance, the Article proposes that the purpose requirement likewise extend to those circumstance elements if the actus reus of a crime is narrowly construed as limited to the defendant's willed movements and all other elements of the crime are deemed attendant circumstances. On the other hand, if criminal law draws the line between conduct and circumstance elements such that conduct is more broadly conceived, an accessory should be criminally liable as long as she shared the mens rea vis-à-vis any circumstance elements necessary to convict the principal. The Article concludes that this approach appropriately limits accessory liability to those demonstrating sufficient culpability with respect to the gravamen of the crime and thus preserves the rationales underlying complicity's imposition of a relatively onerous mens rea burden on the prosecution.

## II. COMPLICITY THEORY

Complicity is a theory of criminal liability, a method by which a defendant is convicted of an offense actually committed by someone else.<sup>10</sup> Although accomplice liability is not itself a separate crime, the prosecution must prove an actus reus and mens rea just like in any criminal trial.<sup>11</sup>

In order to satisfy the actus reus requirement, the accomplice must have aided or encouraged the crime.<sup>12</sup> The accomplice's act, like that of any

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10. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.02[A][2], at 458 (6th ed. 2012).

11. See 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2, at 337 (2d ed. 2003).

12. See *id.* § 13.2(a), at 337–39. An omission contrary to legal duty also suffices in many jurisdictions. See *id.* at 341–42. In addition, the Model Penal Code includes an unsuccessful attempt to aid on the theory that separating “attempted complicity” and “effective complicity” is “unnecessary where the crime has been committed.” MODEL PENAL CODE § 2.06 cmt. at 314 (Official Draft and Revised Comments 1985).

criminal defendant, must have been a voluntary, willed movement.<sup>13</sup> But any voluntary act of aid or encouragement, no matter how trivial, suffices. The prosecution is not required to establish that the crime would not have occurred but for the accessory or that the accomplice contributed a substantial amount of assistance.<sup>14</sup> Rather than basing liability on the theory that the accomplice caused the crime, the accomplice is convicted because her voluntary association with the offense makes her blameworthy.<sup>15</sup>

Despite the relative ease with which the government is able to prove an actus reus, the mens rea half of the equation can pose a more difficult hurdle. Technically, complicity requires evidence of “dual intents”: intent to assist the principal and intent regarding the target crime.<sup>16</sup> Although the word *intent* is “quite ambiguous”<sup>17</sup> and in some contexts encompasses both purpose and knowledge,<sup>18</sup> here it connotes purpose. The first mens rea is typically—though not inevitably—implicit in proof of the act of assistance or encouragement.<sup>19</sup> The second mens rea—the accomplice’s intent vis-à-vis the crime committed by the principal—is a more complicated matter.

The “canonical” articulation<sup>20</sup> of this second mens rea requirement was set forth by Judge Learned Hand in *United States v. Peoni*, where the Second Circuit held that Peoni could not be convicted of possessing counterfeit money on the theory that he was an accomplice to the individual who purchased the counterfeit bills from the middleman who had bought them from Peoni.<sup>21</sup> Reasoning that all the actions that make one an accomplice—“even the most colorless, ‘abet’—carry an implication of purposive attitude,” the court ruled that an accomplice must “associate

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13. See DRESSLER, *supra* note 10, § 9.02[A], at 87. *But cf.* Weiss, *supra* note 1, at 1348–49 (describing this requirement in mens rea terms).

14. See, e.g., *State ex rel. Martin v. Tally*, 15 So. 722, 738–39 (Ala. 1894); MODEL PENAL CODE § 2.06 cmt. at 314 (Official Draft and Revised Comments 1985).

15. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 354–55 (1985); Weisberg, *supra* note 5, at 225–26; Daniel Yeager, *Helping, Doing, and the Grammar of Complicity*, CRIM. JUST. ETHICS, Winter/Spring 1996, at 25, 31. *But cf.* Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 402–20 (2007) (rejecting the premise that accomplices play no causal role in crime).

16. DRESSLER, *supra* note 10, § 30.05[A], at 469.

17. *United States v. Bailey*, 444 U.S. 394, 408 (1980); see also MODEL PENAL CODE § 5.01 cmt. at 305 (Official Draft and Revised Comments 1985) (observing that “the concept of ‘intent’ has always been an ambiguous one”).

18. See 1 LAFAVE, *supra* note 11, § 5.2, at 340.

19. See *Hicks v. United States*, 150 U.S. 442, 449 (1893) (mandating that “the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting”; “the actual effect” of encouragement is insufficient).

20. *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014).

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

himself with the venture, . . . participate in it as in something that he wishes to bring about, . . . seek by his action to make it succeed.”<sup>22</sup> On the facts before it, the court found insufficient evidence that Peoni intended that his buyer would in turn sell the counterfeit bills to a third person. “[I]t was of no moment” to Peoni, the court explained, whether his buyer “passed them himself, and so ended the possibility of further guilty possession, or whether he sold them to a second possible passer.”<sup>23</sup>

The Supreme Court subsequently endorsed the *Peoni* standard in *Nye & Nissen v. United States*,<sup>24</sup> and it has been adopted in a majority of jurisdictions.<sup>25</sup> Criminal offenses typically call for proof of a mens rea less culpable than purpose,<sup>26</sup> and the law has therefore imposed a relatively onerous mens rea burden in cases involving accomplices. Insisting on evidence of purpose compensates for complicity’s minimal actus reus requirement and ensures that those who may have committed minor or equivocal acts of assistance are not held responsible for crimes they did not intend to facilitate.<sup>27</sup> Even an individual who knowingly aided a crime is not deemed culpable enough for fear that a “pall would be cast on ordinary activity if we had to fear criminal liability for what others might do simply because our actions made their acts more probable.”<sup>28</sup>

In assessing how the various components of complicity theory fit together, consider the following scenario: Police responding to a report of

22. *Id.* at 402.

23. *Id.* at 402–03. *But cf.* Weisberg, *supra* note 5, at 236 n.40 (arguing that Peoni may have wanted the counterfeit bills sold to a third person, particularly if he was aware that his buyer “generally served as middleman in counterfeit transactions”).

24. 336 U.S. 613, 619 (1949); *see also* *Rosemond*, 134 S. Ct. at 1248 (noting that the Supreme Court “appropriated” the *Peoni* standard).

25. *See* Robinson & Grall, *supra* note 1, at 738–39 & nn.258 & 260; *see also* MODEL PENAL CODE § 2.06(3)(a) (Official Draft and Revised Comments 1985) (requiring that an accomplice act “with the purpose of promoting or facilitating the commission of the offense”). *But cf.* John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 380–81 (2008) (arguing that only a minority of jurisdictions actually follow this approach, given the sparse and inconsistent case law in some states and the prevalence of the natural and probable consequences doctrine described *infra* at note 60).

26. *See* MODEL PENAL CODE § 2.02 cmt. at 234 (Official Draft and Revised Comments 1985); DRESSLER, *supra* note 10, § 10.04[A][1], at 121.

27. *See* MODEL PENAL CODE § 2.06 cmt. at 312 & n.42, 314–19 (Official Draft and Revised Comments 1985); R.A. Duff, ‘Can I Help You?’ *Accessory Liability and the Intention to Assist*, 10 LEGAL STUD. 165, 166 (1990); Kadish, *supra* note 15, at 353.

28. Kadish, *supra* note 15, at 353. For alternative views, *see infra* note 145 and accompanying text.

an armed robbery in progress at a post office observe an individual blocking the entrance to the building. As a result, the officers' entry into the post office is delayed, and the robber is able to escape through the back exit. The individual the police encountered finds herself charged in federal court with robbing a post office. If the defendant was asleep or was pushed in front of the door by someone else, the assistance she provided the robber did not constitute a voluntary act and therefore does not satisfy complicity's actus reus requirement.

If the defendant was blocking the entrance to the post office because she was carrying a load of packages to be mailed and was hoping someone would open the door for her, her presence at the scene was the result of a voluntary act on her part. Her assistance was unintentional, however, and therefore the first mens rea requirement is missing—and, by definition, the second is as well. If the robber, posing as a gas company employee, had asked the defendant to stop anyone from entering the building because of a gas leak, the defendant purposefully assisted the principal but did not intend for the crime of robbery to succeed and therefore lacks the second mens rea. If, on the other hand, the defendant had agreed to act as a lookout for the robber in return for a percentage of the proceeds, it can at least be inferred that she had the requisite purpose for the crime to occur. And that conclusion would not change even if her motive for participating was to feed her children<sup>29</sup> and even if she would have preferred to fulfill her family obligations through less unsavory means.<sup>30</sup>

Assuming the defendant intended to assist a robbery, is the government's mens rea burden now satisfied? Or must the prosecution establish some state of mind regarding the jurisdictional requirement that the items taken in the robbery were "mail matter . . . or other property of the United States"?<sup>31</sup> If the prosecutor also brings charges under 18 U.S.C. § 924(c), which imposes an enhanced sentence on any person who "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking crime," must the defendant have harbored some mens rea regarding the

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29. See, e.g., Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 931, 943 (2000) (distinguishing "conscious object[s]" from "ultimate object[s]").

30. See Alexander & Kessler, *supra* note 9, at 1147 (observing that a defendant acts purposefully even if he "hoped that he could have achieved his ends legally . . . and . . . may truly regret that such options were not available"); Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 658 (1917) (noting that intent can exist even where the defendant "would have been glad to avoid it"); Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 481 n.64 (1992) (pointing out that "sometimes one intends to act in a certain way only as a regrettable means to a larger end"); J.C. Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 427 n.4 (1957) (arguing that consequences can be intended "whether desired or not").

31. 18 U.S.C. § 2114 (2012).

robber's use of a weapon?<sup>32</sup> As discussed in the following Part, that last question reached the Supreme Court in *Rosemond v. United States*.<sup>33</sup>

### III. SECTION 924(C) AND *ROSEMOND*

Section 924(c), originally enacted as part of the Gun Control Act of 1968, accounts for the greatest number of weapons charges filed by federal prosecutors.<sup>34</sup> It has been the subject of numerous Supreme Court opinions and congressional amendments, as over time Congress has “repeatedly . . . ratcheted up the penalties” prescribed by the statute.<sup>35</sup> In its current form, § 924(c) provides that anyone who “uses or carries a firearm” “during and in relation to any crime of violence or drug trafficking crime,” or “possesses a firearm” “in furtherance of” any such offense, must serve a mandatory five-year minimum sentence to run consecutively with any other prison term imposed for the underlying predicate crime.<sup>36</sup> The mandatory minimum increases to seven years if the weapon “is brandished” and ten years if it “is discharged.”<sup>37</sup> In addition, the statute creates further enhanced penalties for particularly dangerous weapons and repeat violations.<sup>38</sup>

The Supreme Court's most recent pronouncement on § 924(c) came last year in *Rosemond*. *Rosemond* was one of two men accompanying a woman who was attempting to sell a pound of marijuana. When the would-be buyers absconded with the drugs, one of the men fired at them with a semiautomatic handgun. In support of the § 924(c) charge, the Government argued in the alternative that *Rosemond* was either the

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32. 18 U.S.C. § 924(c)(1)(A) (2012).

33. *Rosemond v. United States*, 134 S. Ct. 1240, 1243 (2014).

34. See Sara Sun Beale, *The Unintended Consequences of Enhancing Gun Penalties: Shooting Down the Commerce Clause and Arming Federal Prosecutors*, 51 DUKE L.J. 1641, 1665–66 (2002). Despite the high number of § 924(c) prosecutions, the statute is still underutilized. See *id.* at 1676–80; Paul J. Hofer, *Federal Sentencing for Violent and Drug Trafficking Crimes Involving Firearms: Recent Changes and Prospects for Improvement*, 37 AM. CRIM. L. REV. 41, 53–57 (2000).

35. Beale, *supra* note 34, at 1668.

36. 18 U.S.C. §§ 924(c)(1)(A)(i), 924(c)(1)(D)(ii) (2012).

37. 18 U.S.C. § 924(c)(1)(A)(ii)–(iii) (2012); see also 18 U.S.C. § 924(c)(4) (2012) (defining the term “brandish” as “display[ing] all or part of the firearm, or otherwise mak[ing its] presence . . . known . . . in order to intimidate [another] person”); *Dean v. United States*, 556 U.S. 568, 577 (2009) (holding that the ten-year enhancement applies even if the weapon is discharged accidentally).

38. See 18 U.S.C. § 924(c)(1)(B)–(C) (2012).

shooter or the other man's accomplice.<sup>39</sup> The federal aiding and abetting statute, 18 U.S.C. § 2, punishes "as a principal" anyone who "aids, abets, counsels, commands, induces or procures [the] commission" of a federal crime.<sup>40</sup> The question before the Court was what sort of act and mental state were required to convict Rosemond as an accomplice to a § 924(c) violation.

The Court unanimously agreed that the Government had proved the *actus reus* component of accomplice liability. Although Rosemond insisted that he aided only the drug offense and "took no action with respect to any firearm," the Court held that complicity's *actus reus* requirement is met by "facilitat[ion of] any part—even though not every part—of a criminal venture."<sup>41</sup> "[E]very little bit helps," Justice Kagan's majority opinion explained, and "a contribution to some part of a crime aids the whole."<sup>42</sup> As applied to § 924(c), then, the Court thought it sufficient that an accessory "facilitated one component" of the offense—"either the drug transaction or the firearm use (or of course both)."<sup>43</sup>

The Court was more divided on the *mens rea* issue. Citing both *Peoni* and *Nye & Nissen* with approval, the majority took the position that an accomplice must "intend[] to facilitate" "the specific and entire crime charged" and not "some different or lesser offense."<sup>44</sup> Here, therefore, the Government was required to establish that Rosemond's intent extended to both drug trafficking and the use of a firearm.<sup>45</sup> Despite ostensibly requiring proof of purpose, however, the Court went on to say that one who "actively participates in a criminal venture with full *knowledge* of the circumstances constituting the charged offense" can be convicted as an accomplice.<sup>46</sup> Then equating knowledge and intent, the Court observed that a defendant who "actively participates in a criminal scheme *knowing* its extent and character *intends* that scheme's commission."<sup>47</sup> Continuing in the same vein, the Court reasoned that an "active participant" in a drug sale who "*knows* that one of his confederates will carry a gun . . . has decided to join in the criminal venture . . . with full awareness of its

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39. See *Rosemond v. United States*, 134 S. Ct. 1240, 1243–44 (2014) (noting that the verdict did not specify which theory the jury adopted).

40. 18 U.S.C. § 2 (2012).

41. *Rosemond*, 134 S. Ct. at 1246. *But cf.* Weiss, *supra* note 1, at 1347 n.14 (citing conflicting federal case law on this point).

42. *Rosemond*, 134 S. Ct. at 1246.

43. *Id.* at 1247.

44. *Id.* at 1248; *see also id.* at 1251 n.10 (quoting with approval *Peoni*'s "distinctive intent standard").

45. *See id.* at 1248.

46. *Id.* at 1248–49 (emphasis added). For analysis of the case law Justice Kagan cited in support of this point, see *infra* notes 88–128 and accompanying text.

47. *Rosemond*, 134 S. Ct. at 1249 (emphases added).



scope,” “has chosen . . . to align himself with the illegal scheme in its entirety,” and therefore “*intended* the commission of . . . an armed drug sale.”<sup>48</sup>

Concurring in part and dissenting in part, Justices Alito and Thomas expressed some understandable uncertainty concerning the mens rea burden imposed by the majority opinion. The two Justices pointed out that the majority “refer[red] interchangeably” to both purpose and knowledge, and they traced this confusion to “some tension” in earlier Supreme Court cases as to which of those two mental states is necessary for accomplice liability.<sup>49</sup>

Although Justices Alito and Thomas have a point that the Court’s decision in *Rosemond* “leaves our case law in the same, somewhat conflicted state that previously existed,”<sup>50</sup> the majority did settle on a fairly explicit mens rea rule for § 924(c) prosecutions: “active participation in a drug sale” combined with “prior knowledge of the gun’s involvement.”<sup>51</sup> In the end, Justices Alito and Thomas seemed to agree

48. *Id.* (emphases added). Although this language, like the rest of the opinion, refers to the “carrying” of a weapon, *Rosemond* was actually sentenced under the portion of § 924(c) prohibiting the “discharge” of a firearm. See *infra* notes 79–83 and accompanying text.

49. *Rosemond*, 134 S. Ct. at 1253 (Alito, J., concurring in part and dissenting in part) (contrasting *Nye & Nissen v. United States*, 336 U.S. 613 (1949), with *Bozza v. United States*, 330 U.S. 160 (1947), and *Pereira v. United States*, 347 U.S. 1 (1954), which are discussed *infra* at notes 89–123 and the accompanying text); see also *Loughrin v. United States*, 134 S. Ct. 2384, 2398 (2014) (Alito, J., concurring in part and concurring in the judgment) (taking the position that bank fraud requires only that “the objective of the scheme as a whole is to obtain bank property” and that an accomplice can be convicted on proof of knowledge even if she does not share that purpose).

50. *Rosemond*, 134 S. Ct. at 1253 (Alito, J., concurring in part and dissenting in part). For an exhaustive discussion of the “hopelessly muddled” state of the federal law governing mens rea and complicity, see Weiss, *supra* note 1, at 1373.

51. *Rosemond*, 134 S. Ct. at 1251. The Court, in a footnote that Justice Scalia chose not to join, declined to reach cases involving accessories who only “incidentally facilitate” a crime, giving as an illustration a store owner who sells a weapon to the principal “knowing but not caring how the gun will be used.” *Id.* at 1249 n.8. While the Court’s distinction between “incidental” and “active” participation is likely to create line-drawing difficulties, the footnote focused on the amount of assistance an accessory provides (the *actus reus*) and left the requisite mens rea open only for cases involving minor participants. See *id.* But cf. Rory Little, *Opinion Analysis: Justice Kagan Writes a Primer on Aiding and Abetting Law*, SCOTUSBLOG (Mar. 6, 2014, 9:04 AM), <http://www.scotusblog.com/2014/03/opinion-analysis-justice-kagan-writes-a-primer-on-aiding-and-abetting-law/> [<http://perma.cc/V6K4-YW92>] (taking the position that while *Rosemond* “comes close to deciding” whether an accessory must have “‘knowledge’ or ‘purpose’ to facilitate the crime,”

with the majority that if *Peoni* and *Nye & Nissen* represent the “exclusive” mens rea standard for accomplice liability, they only require that the prosecution show the accessory’s “conscious object” was that “the hypothetical drug sale (which, as the defendant knew, included the carrying of a gun by one of the participants) go forward to completion.”<sup>52</sup>

Justices Alito and Thomas clearly parted company with the Court, however, when it admonished that an accomplice must have “advance knowledge” of the weapon, a prerequisite that the two Justices in the minority called “seriously misguided.”<sup>53</sup> But the majority was reluctant to convict a defendant who “knows nothing of a gun until it appears at the scene,” at which point the defendant may have already completed her role in the scheme or may no longer have a “realistic opportunity to quit the crime.”<sup>54</sup> Therefore, the majority cautioned, the accomplice must have “advance knowledge” of the gun, that is, “knowledge at a time the accomplice can do something with it—most notably, opt to walk away.”<sup>55</sup>

This requirement of prior knowledge can be satisfied even for a defendant who first learns of a weapon at the scene of the crime, the Court observed, so long as the defendant “continues to participate . . . after [the] gun [is] displayed or used by a confederate.”<sup>56</sup> In such cases, the Court thought a jury may “permissibly infer” the accomplice had the requisite advance knowledge from her “failure to object or withdraw,” but it rejected the Government’s proposed rule that “continu[ing] any act of assisting the drug transaction” after finding out a confederate has a weapon suffices.<sup>57</sup> Leaving itself vulnerable to line-drawing challenges,<sup>58</sup> the Court expressed the fear that under some circumstances simply walking away in the middle of a crime “might increase the risk of gun violence,” in which case awareness of the weapon “comes too late for [the accomplice] to be reasonably able to act upon it.”<sup>59</sup> The Court therefore reversed Rosemond’s conviction because the trial judge’s instructions did not require the jurors to find Rosemond had advance knowledge of the weapon and would have allowed the jury to convict even if Rosemond

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it does not “clearly answer[.]” that question and interpreting footnote 8 as “leav[ing] that murky”).

52. *Rosemond*, 134 S. Ct. at 1255 (Alito, J., concurring in part and dissenting in part).

53. *Id.* at 1253 & n.1. For an analysis of the disagreement within the Court on this point, see Stephen P. Garvey, *Reading Rosemond*, 12 OHIO ST. J. CRIM. L. 233, 247–50 (2014).

54. *Rosemond*, 134 S. Ct. at 1249.

55. *Id.* at 1249–50.

56. *Id.* at 1250 n.9.

57. *Id.* at 1250 & n.9 (emphasis added).

58. *See id.* at 1253–54 (Alito, J., concurring in part and dissenting in part).

59. *Id.* at 1251 (majority opinion).

first became aware of the gun “when it was fired” and “took no further action” after that point “to advance the crime.”<sup>60</sup>

The persuasiveness of the Court’s reasoning in *Rosemond* turns on the proper classification of the various elements of § 924(c). As discussed above in Part II, every criminal offense requires evidence of an actus reus and therefore includes a conduct element.<sup>61</sup> But some crimes also call for proof that the defendant’s act caused a particular result or was committed under certain circumstances.<sup>62</sup> Like many criminal statutes, § 924(c) is susceptible to two different interpretations. It can be viewed, as the Court did in *Rosemond*, as a crime that simply prohibits certain conduct. Alternatively, it can be read to include both a conduct and a circumstance element. The following two Parts of this Article explore these two contrary constructions of § 924(c) and their implications for the mens rea burden the criminal law should impose in cases involving accomplices.

#### IV. PURE CONDUCT CRIMES

One plausible reading of § 924(c), adopted by the Supreme Court in *Rosemond*, treats the crime as one defined solely in terms of prohibited conduct. This Part of the Article makes the argument that although this interpretation is supported by precedent as well as the statute’s language and purpose, it undermines the Court’s holding that an accomplice can be convicted on a showing she merely had advance knowledge a weapon would be involved in the predicate offense. Instead, accomplice liability should be limited to accessories who acted purposefully with respect to all of a crime’s conduct elements, including, therefore, the use of the

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60. *Id.* at 1251–52. The majority left unresolved whether a § 924(c) conviction might in some cases be predicated on the natural and probable consequences doctrine. *See id.* at 1248 n.7 (another footnote Justice Scalia did not join); Weiss, *supra* note 1, at 1428–32 (citing conflicting lower court case law on this question). Another alternative route to a § 924(c) conviction is the *Pinkerton* doctrine, which allows members of a conspiracy to be convicted of substantive crimes committed by their coconspirators. *See* Weiss, *supra* note 1, at 1432 n.421 (citing cases); *see generally* *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946) (permitting coconspirator’s conviction for foreseeable offenses committed in furtherance of the conspiracy). Neither of these options would be available under the Model Penal Code. *See* MODEL PENAL CODE § 2.06 cmt. at 307, 312–13 & n.42 (Official Draft and Revised Comments 1985).

61. *See supra* note 13 and accompanying text.

62. *See* MODEL PENAL CODE § 1.13(9) (Official Draft and Revised Comments 1985) (listing three types of “element[s] of an offense”: “conduct,” “attendant circumstances,” and “a result of conduct”).

firearm here. Finally, the maxim that knowledge may lead to an inference of purpose cannot be used to justify the Court’s ruling in *Rosemond*.

A. *Interpreting § 924(c)*

With the exception of one isolated reference to *circumstances*, which is addressed below in Part V.A, the Court in *Rosemond* quite clearly viewed § 924(c) as a crime defined purely in terms of prohibited conduct—in fact, as consisting of two conduct elements. The majority referred repeatedly to the “compound nature” of this “double-barreled crime,” which requires proof of “two separate acts.”<sup>63</sup> Both the acts constituting the predicate violent or drug trafficking offense and the use of a firearm are “essential conduct element[s]” of § 924(c), the Court observed.<sup>64</sup>

Moreover, *Rosemond*’s characterization of the elements of § 924(c) cannot be dismissed as anomalous or off-the-cuff. In discussing the proper venue for § 924(c) trials in *United States v. Rodriguez-Moreno*, the Supreme Court described the charge as having “two distinct conduct elements”—using or carrying a weapon, and committing an underlying predicate offense.<sup>65</sup> Rejecting the “verb test” applied by the court of appeals as “unduly limit[ing] the inquiry into the nature of the offense,” the Court came to this conclusion despite the fact that the statute’s reference to a predicate crime is “embedded in a prepositional phrase and not expressed in verbs.”<sup>66</sup> Likewise, in *Dean v. United States*, the Court observed that a defendant who commits a § 924(c) violation is “guilty of unlawful conduct twice over.”<sup>67</sup>

Accordingly, although the language of § 924(c) could plausibly be interpreted as containing a conduct element (“uses or carries a firearm”) and a circumstance element (“during and in relation to any crime of violence or drug trafficking crime”),<sup>68</sup> the Court has declined to give the statute that reading. In fact, *Rodriguez-Moreno* expressly distinguished § 924(c) from the federal money laundering statute on the ground that the latter contains a circumstance element (“[t]he existence of criminally

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63. *Rosemond*, 134 S. Ct. at 1245, 1248.

64. *Id.* at 1247 (quoting *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999)).

65. *Rodriguez-Moreno*, 526 U.S. at 280 (holding that venue lies in a jurisdiction where either act occurred).

66. *Id.*

67. *Dean v. United States*, 556 U.S. 568, 576 (2009); *see also* *Castillo v. United States*, 530 U.S. 120, 126 (2000) (pointing out that the predicate violent or drug offense is “not the basic crime here at issue” given that using or carrying a firearm is “itself a separate substantive crime”).

68. For the argument that the statute can be read as including a circumstance element, *see infra* notes 149–72 and accompanying text.

generated proceeds”) and therefore is not defined simply in terms of “proscribed conduct.”<sup>69</sup>

In addition to being faithful to precedent, the *Rosemond* Court’s construction of § 924(c) is consistent with the statute’s language and purpose. Given that even simple possession qualifies as an actus reus under criminal law,<sup>70</sup> the more active behaviors also covered by § 924(c)—using, carrying, brandishing, and discharging a firearm—ought to likewise be deemed part of the prohibited conduct. And if the “verb test” is not controlling, then the simultaneous commission of a predicate violent or drug offense is also a conduct element of the crime. Unlike the money laundering statute distinguished in *Rodriguez-Moreno*, which the Court found to be directed at something other than “the anterior criminal conduct that yielded the funds allegedly laundered,” § 924(c) is meant to prohibit both the use of a weapon and the predicate offense.<sup>71</sup> In fact, the underlying impetus for the statute was Congress’s desire to inflict a heightened penalty on those who pose the special danger to the public occasioned by both acts.<sup>72</sup> Interpreting § 924(c) as consisting of two independent conduct elements is thus supported by Congress’s intent that both clauses be treated as “a critical part”<sup>73</sup> of a “combination crime.”<sup>74</sup>

### *B. Assessing the Mens Rea Implications*

If the Court has accurately interpreted § 924(c) as a statute comprising two prohibited acts, then under the rule set out in *Peoni*—and endorsed in *Nye & Nissen* as well as *Rosemond* itself<sup>75</sup>—an accomplice’s purpose

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69. *Rodriguez-Moreno*, 526 U.S. at 280 n.4 (citing precedent holding that venue for that charge is proper only where the money laundering itself occurred).

70. See DRESSLER, *supra* note 10, § 9.03[C], at 96.

71. *Rodriguez-Moreno*, 526 U.S. at 280 n.4 (quoting *United States v. Cabrales*, 524 U.S. 1, 7 (1998)).

72. See *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014) (observing that § 924(c) “punishes the temporal and relational conjunction of two separate acts, on the ground that together they pose an extreme risk of harm”); *Muscarello v. United States*, 524 U.S. 125, 132 (1998) (pointing out that the statute’s “basic purpose” was “to combat the ‘dangerous combination’ of ‘drugs and guns’” (quoting *Smith v. United States*, 508 U.S. 223, 240 (1993))).

73. *Rodriguez-Moreno*, 526 U.S. at 281 n.4 (referring to § 924(c)’s predicate offense clause); see *Castillo v. United States*, 530 U.S. 120, 126–27 (2000) (describing the weapons portion of statutes like § 924(c) as “the element lying closest to the heart of the crime”).

74. *Rosemond*, 134 S. Ct. at 1248.

75. See *supra* notes 24, 44 and accompanying text.

must extend to each of those conduct elements. Suppose, to borrow a hypothetical suggested in Justice Scalia's dissent in *Rodriguez-Moreno*, a criminal statute prohibits stealing a cookie and eating it.<sup>76</sup> A defendant could be convicted as an accessory to that crime only if she wanted the cookie both pilfered and consumed. If her purpose extended only to the act of stealing because she planned to shellac the cookie and display it as an objet d'art, she would be an accomplice to theft—a “different or lesser offense”—and not, as the *Rosemond* majority required, to the “specific and entire crime charged.”<sup>77</sup> So, too, a defendant who purposefully facilitated a drug deal but did not intend for the principal to carry a gun is guilty of complicity in a narcotics offense but not the “separate, freestanding” crime prohibited by § 924(c).<sup>78</sup>

Given the rationales underlying complicity's traditional mandate that accessories must act purposefully with respect to the principal's crime, that mens rea should apply to every conduct element of the charge. In a § 924(c) prosecution, then, that mental state requirement would attach to both the commission of the predicate offense and the specific action with respect to the weapon that triggered the sentencing enhancement—using, carrying, brandishing, or discharging the firearm, or possessing it in furtherance of the predicate crime.<sup>79</sup> Although the *Rosemond* opinion is written in terms of “using or carrying,”<sup>80</sup> essentially treating § 924(c) as a unitary crime, the Court ignored the fact that *Rosemond* actually received

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76. See *Rodriguez-Moreno*, 526 U.S. at 283–84 (Scalia, J., dissenting).

77. *Rosemond*, 134 S. Ct. at 1248; see also MODEL PENAL CODE § 2.06 cmt. at 310–11 (Official Draft and Revised Comments 1985) (taking the position that a defendant “must have the purpose to promote or facilitate the particular conduct that forms the basis for the charge, and thus he will not be liable for conduct that does not fall within this purpose”).

78. See *Rosemond*, 134 S. Ct. at 1247–48. For another illustration, see the discussion of common law burglary *infra* at notes 206–12 and accompanying text. But cf. Garvey, *supra* note 53, at 241–47 (arguing that *Rosemond* and *Peoni* can be reconciled if Judge Hand's purpose requirement applies only to “non-aggravating elements” of a crime or only to “incidental facilitators”).

79. 18 U.S.C. § 924(c)(1)(A)(i)–(iii) (2012). But cf. Eric A. Johnson, *Does Criminal Law Matter? Thoughts on Dean v. United States and Flores-Figueroa v. United States*, 8 OHIO ST. J. CRIM. L. 123, 147 n.200 (2010) (arguing that the language in § 924(c) imposing a ten-year sentence “if the firearm is discharged” could be classified as a conduct, result, or circumstance element); Tyler B. Robinson, Note, *A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under § 924(c)*, 96 MICH. L. REV. 783, 798–809 (1997) (agreeing that an accomplice's awareness that the principal was “carrying” a weapon is inadequate to satisfy complicity's mens rea burden, but maintaining that knowledge should suffice in cases where the firearm was “used,” at least where that use was integral rather than incidental to the predicate crime).

80. See *Rosemond*, 134 S. Ct. at 1243, 1245, 1247, 1249.

a ten-year sentence for the “distinct and aggravated” charge<sup>81</sup> that arises when a firearm is discharged during a predicate crime.<sup>82</sup> Under the approach outlined in this Article, therefore, the Government should have been expected to establish that Rosemond’s purpose extended to the firing of the weapon, even though such intent is not necessary to convict a principal.<sup>83</sup>

Requiring proof that an accomplice acted purposefully with respect to each of a crime’s conduct elements would not, as the *Rosemond* Court seemed to fear, create a loophole for the accessory who would not “have planned the identical crime” “if all had been left” to her.<sup>84</sup> The Court’s hypothetical accomplice who initially had “misgivings” about a crime, or was “formerly indifferent or even resistant” to it, would nevertheless have the requisite purpose precisely because she did “eventually accede[.]” and agree to go along with her colleagues.<sup>85</sup> And, just as in the robbery of a post office hypothesized above in Part II,<sup>86</sup> a finding that the defendant acted purposefully would not be foreclosed regardless of what ultimately motivated her to change her mind or whether she chose to participate “with a happy heart or a sense of foreboding.”<sup>87</sup>

In rejecting this approach, the *Rosemond* majority cited judicial interpretations of several other federal criminal statutes.<sup>88</sup> But those cases do not obviously support the Court’s requirement of only knowledge rather than purpose in § 924(c) prosecutions of accomplices. Moreover, the Court’s discussion of those offenses—liquor tax violations, interstate transportation of stolen goods, mail fraud, and armed bank robbery—demonstrates that the confusion surrounding complicity and mens rea is not restricted to § 924(c).

81. See *Alleyne v. United States*, 133 S. Ct. 2151, 2162–63 (2013) (describing the portion of § 924(c) that applies when a firearm “is brandished”).

82. See *United States v. Rosemond*, 695 F.3d 1151, 1153, 1156 (10th Cir. 2012), *vacated and remanded*, 134 S. Ct. 1240 (2014).

83. See *Dean v. United States*, 556 U.S. 568, 577 (2009) (holding that the ten-year enhancement applies even if the weapon is accidentally discharged). Interestingly, *Dean* is not cited by the Court in *Rosemond*.

84. *Rosemond*, 134 S. Ct. at 1250.

85. *Id.* (describing an accomplice who preferred to rob a convenience store but eventually went along with a bank robbery).

86. See *supra* text accompanying notes 29–30.

87. *Rosemond*, 134 S. Ct. at 1250; *cf. id.* at 1255 (Alito, J., concurring in part and dissenting in part) (accusing the majority of “confus[ing] . . . intent and motive”).

88. See *id.* at 1248–49 (majority opinion).

Initially, the *Rosemond* Court's reliance on the discussion of the federal liquor tax laws in *Bozza v. United States* is misplaced.<sup>89</sup> The charge at issue there was operating a distilling business "with intent wilfully to defraud the United States" of the federal liquor taxes.<sup>90</sup> In finding sufficient evidence that the defendant had the mens rea necessary for accomplice liability, the Supreme Court observed that he "acted with *knowledge* that the distillery business was carried on with an intent to defraud the Government of its taxes."<sup>91</sup> Given the secrecy with which the still was operated, the Court found it reasonable for a jury to infer that "a person who actively helps to operate a secret distillery *knows* that he is helping to violate Government revenue laws."<sup>92</sup> Although there is also language connoting purpose in the opinion—the Court noted that the jury could "draw[] inferences as to fraudulent *purposes* from these circumstances" and commented that violating the federal liquor tax laws is "a well known *object* of an illicit distillery"—the Court's opinion seemed to suggest that Bozza could be convicted without finding he entertained that purpose so long as he was aware the principal had that intent.<sup>93</sup> The dissenters therefore had a point when they criticized the majority for failing to require proof that Bozza "promoted the fraud, or . . . furthered the unlawful scheme, or in fact had some interest in the project."<sup>94</sup>

But whatever the merits of the Court's ruling in *Bozza*, the inquiry there did not involve the conduct element of the crime. Rather, intent to defraud is another mens rea requirement, making Bozza's offense a specific intent crime.<sup>95</sup> Certainly, it seems odd to interpret "intent to defraud" to require a mens rea lower than purpose for either the principal or the accomplice. Accessories cannot be convicted under similarly worded criminal statutes—drug offenses that require possession with intent to distribute or larceny charges that require intent to permanently deprive owners of their property—if they did not share the principal's specific intent and instead planned to use the drugs themselves or borrow the property and then return it.<sup>96</sup> Although *Bozza* therefore seems misguided, it does not speak

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89. See *id.* at 1249 (citing *Bozza v. United States*, 330 U.S. 160, 165 (1947)).

90. *Bozza*, 330 U.S. at 162 (quoting 26 U.S.C. § 2833(a) (1946)).

91. *Id.* at 164 (emphasis added).

92. *Id.* at 165 (emphasis added).

93. *Id.* (emphases added).

94. *Id.* at 167–68 (Douglas, J., dissenting); see also Weiss, *supra* note 1, at 1372 (observing that the *Bozza* Court "did not seem to be the least bit concerned" that the crime was a specific intent offense and "[i]n effect . . . held the aider and abettor guilty on a less culpable mental state than that required of the principal").

95. See DRESSLER, *supra* note 10, § 10.06, at 138–39.

96. See *id.* § 30.05[B][1], at 471–72; 2 LAFAYE, *supra* note 11, § 13.2(c), at 346 & n.74.



to the mens rea burden the prosecution must shoulder in complicity cases like *Rosemond* that involve the conduct element of a crime.

Whether the decision in *Rosemond* can find support in *Pereira v. United States*<sup>97</sup> is a closer question. The defendants in *Pereira*, there were charged with mail fraud and the interstate transportation of stolen goods.<sup>98</sup> The Supreme Court interpreted these two federal statutes as requiring at most a mens rea of knowledge with respect to the use of the mail and the interstate movement of the stolen property.<sup>99</sup> In a mail fraud prosecution, for example, the Court thought it was enough that the principal “does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended.”<sup>100</sup> The Court’s discussion of the codefendant’s accomplice liability was brief, but in finding the evidence sufficient to sustain his conviction, the Court did not suggest that any greater mens rea was required of the accessory.<sup>101</sup> And in upholding both defendants’ convictions of conspiring to violate the two statutes, the Court observed that the jury could infer that the accomplice “shared [the principal’s] knowledge and agreed with him as to the use of the only appropriate means of collecting the money.”<sup>102</sup>

The three dissenters discussed accomplice liability at greater length, concluding that the Government had not established the codefendant’s complicity in the substantive offenses. Although these Justices cited both *Peoni* and *Nye & Nissen*, they did not suggest that an accessory must act purposefully with respect to the use of the mails or the crossing of state lines.<sup>103</sup> Rather, they borrowed the mens rea requirement applicable to principals, maintaining that accomplices can be convicted if they had “reason to foresee the use of the mails or interstate commerce.”<sup>104</sup> The dissenters thought that standard had not been met, however, finding no evidence that the codefendant in *Pereira* “actually knew or had reason to

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97. *Pereira v. United States*, 347 U.S. 1 (1954).

98. *Id.* at 3.

99. *Id.* at 9.

100. *Id.* at 8–9; *see also id.* at 9 (noting with respect to the stolen property charge that “[it] is common knowledge that [out-of-state] checks must be sent to the drawee bank for collection, and it follows that [the principal] intended the . . . bank to send this check across state lines”).

101. *See id.* at 10–11.

102. *Id.* at 12 (emphasis added).

103. *See id.* at 14 (Minton, J., concurring in part and dissenting in part).

104. *Id.* at 15.

believe that a check . . . would be drawn on an out-of-town bank, necessitating its being placed in the mails for collection.”<sup>105</sup>

The federal stolen goods statute at issue in *Pereira* prohibits “transport[ing] . . . in interstate . . . commerce” certain goods, “knowing the same to have been stolen . . . or taken by fraud.”<sup>106</sup> Although the interstate nature of the transportation could be viewed as part of the crime’s actus reus, it is often considered a circumstance element.<sup>107</sup> Moreover, the crossing of state lines is the factor that gives the federal courts jurisdiction over certain thefts, and jurisdictional elements generally carry little or no mental state requirement.<sup>108</sup> If the component of this offense that sanctions a mens rea lower than purpose is a circumstance element rather than part of the prohibited conduct, it has less weight in evaluating the mens rea prerequisites for a criminal statute like § 924(c), which the Court interpreted as composed exclusively of conduct elements.

Classifying the elements of *Pereira*’s mail fraud charge is more complicated. The federal mail fraud statute makes it a crime for one who, “having devised or intending to devise any scheme . . . to defraud,” mails a letter or “knowingly causes [a letter] to be delivered by mail” “for the purpose of executing” the fraudulent scheme.<sup>109</sup> The structure of the statutory language suggests that using the mail is the actus reus of the crime.<sup>110</sup> This reading is confirmed by Supreme Court precedent

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105. *Id.*

106. 18 U.S.C. § 2314 (2012).

107. See MODEL PENAL CODE § 5.03 cmt. at 409 (Official Draft and Revised Comments 1985); Lisa Rachlin, Comment, *The Mens Rea Dilemma for Aiding and Abetting a Felon in Possession*, 76 U. CHI. L. REV. 1287, 1291 n.24 (2009); see also Paul Ohm, *The Myth of the Superuser: Fear, Risk, and Harm Online*, 41 U.C. DAVIS L. REV. 1327, 1349 n.91 (2008) (describing the federal child pornography statute in similar terms).

108. See *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975) (observing that “the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor”); MODEL PENAL CODE § 1.13 cmt. at 211 (Official Draft and Revised Comments 1985) (explaining that mens rea is typically “irrelevant” with respect to a jurisdictional element because it has “no bearing on the actor’s fault”); 1 LAFAVE, *supra* note 11, § 5.1(b), at 336 n.13. For competing definitions of jurisdictional elements, see *infra* note 191.

109. 18 U.S.C. § 1341 (2012).

110. See Julie R. O’Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC 23, 42 (Mar. 24, 2010), <http://www.vanderbiltlawreview.org/articles/2010/03/OSullivan-Honest-Services-Fraud-63-Vand.-L.-Rev.-En-Banc-23-20101.pdf> [<http://perma.cc/P5TP-W9PV>] (giving the statute this interpretation); cf. C.J. Williams, *What Is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287, 307–14 (2014) (noting that courts have construed other federal laws that are modeled after the mail fraud statute but contain somewhat different sentence structures as focused on fraudulent schemes rather than use of mail or interstate commerce).

characterizing use of the mail as the “gist” of the statute<sup>111</sup> and providing that every individual letter can give rise to a separate mail fraud charge.<sup>112</sup> Admittedly, if use of the mail in fact constitutes the crime’s conduct element, then *Pereira* provides support for *Rosemond*’s decision to attach a mens rea less culpable than purpose to § 924(c)’s actus reus requirement.

On the other hand, despite its wording, the focus of the mail fraud statute today is on punishing fraudulent schemes that happen to involve the mail. Although the original version of the statute, enacted in 1872, required proof of intent to use the mail,<sup>113</sup> Congress eliminated that language long ago,<sup>114</sup> and as noted above, *Pereira* required only that the involvement of the mail was something the defendant was aware of or reasonably could have foreseen.<sup>115</sup> The Court has also ruled that defendants can be convicted of this offense even though the mail was not “an essential element of the scheme.”<sup>116</sup> Rather, mail fraud is an appropriate charge so long as the mail was “incident to an essential part of the scheme” or “a step in [the] plot,”<sup>117</sup> and even through the letters in question were “routine and innocent” and did not themselves contain any misrepresentation.<sup>118</sup> Moreover, the mail—like interstate movement—is the factor that creates federal jurisdiction over certain frauds,<sup>119</sup> and the *Pereira* Court did not draw any distinction between the two statutes at issue in the case and their corresponding jurisdictional elements.<sup>120</sup> Given

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111. United States v. Young, 232 U.S. 155, 159 (1914).

112. See *Ex parte Henry*, 123 U.S. 372, 374 (1887); see also Williams, *supra* note 110, at 293 & n.44 (reporting that every federal court of appeals has endorsed this practice).

113. See *Young*, 232 U.S. at 160–62; *Stokes v. United States*, 157 U.S. 187, 188–89 (1895).

114. See Williams, *supra* note 110, at 295–96 (describing 1909 amendment that replaced language requiring that the defendant “open[ed] or intend[ed] to open correspondence” with language allowing conviction on proof that the defendant “caused” the mails to be used (quoting Act of Mar. 4, 1909, Pub. L. No. 60-350, ch. 321, § 215, 35 Stat. 1088, 1130)).

115. See *Pereira v. United States*, 347 U.S. 1, 8–9 (1954).

116. *Schmuck v. United States*, 489 U.S. 705, 710 (1989).

117. *Id.* at 711 (quoting *Badders v. United States*, 240 U.S. 391, 394 (1916)).

118. *Id.*

119. See Weiss, *supra* note 1, at 1464 (calling mail fraud “unusual” because the jurisdictional element is not a matter of strict liability).

120. But cf. *id.* (distinguishing mail fraud from the interstate transportation of stolen property on the grounds that the mail fraud statute is designed “to prevent the use of the mails to facilitate schemes to defraud” whereas the stolen goods statute “is aimed at the

the ways the mail fraud provision has been amended and interpreted over the years, it now “bears only a vague resemblance to its ancestor”; it has instead become a “general federal fraud statute” and “abuse of the United States mails no longer forms the core of the crime.”<sup>121</sup> As a result, it is unsurprising that some commentators refer to the use of the mail as a circumstance element of mail fraud, making it less relevant in assessing the mens rea prescribed for a pure conduct crime.<sup>122</sup>

A final potential interpretation of the mail fraud statute is that it, like the *Rosemond* Court’s version of § 924(c), consists of two conduct elements: mailing and defrauding. But that seems the least credible reading given that mail fraud is an inchoate crime and requires only an intent to come up with a fraudulent scheme rather than an already fully actualized plan.<sup>123</sup>

By contrast, armed bank robbery—the final crime cited by the *Rosemond* majority—more plausibly consists of two conduct elements. Federal law defines bank robbery as taking or attempting to take “by force and violence, or by intimidation,” property belonging to certain financial institutions.<sup>124</sup> Defendants commit the aggravated offense of armed bank robbery when they “assault[] any person, or put[] in jeopardy the life of any person by the use of a dangerous weapon or device,” while committing the crime of bank robbery.<sup>125</sup> As the *Rosemond* Court noted, some circuit courts have upheld accomplice liability for armed bank robbery on a finding that the accessory knew one of the robbers “would use weapons in carrying out the crime.”<sup>126</sup> Note, however, that there is no Supreme Court precedent on this point and other federal courts disagree, requiring proof of purpose for an accomplice even though a principal’s conviction can rest on mere knowledge.<sup>127</sup> More important, some courts and commentators view armed robbery as a crime consisting of a conduct element (robbery) and a circumstance element (while armed).<sup>128</sup>

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evils of theft [and] fraud,” rather than “the regulation of interstate transportation” and therefore its jurisdictional element is merely “a means to an end” (quoting *United States v. Lennon*, 751 F.2d 737, 741 (5th Cir. 1985))).

121. Williams, *supra* note 110, at 288–89.

122. See MODEL PENAL CODE § 5.03 cmt. at 409 (Official Draft and Revised Comments 1985); 2 LAFAVE, *supra* note 11, § 12.2(c)(4), at 282–83 & n.150.

123. See Peter T. Barbur, Note, *Mail Fraud and Free Speech*, 61 N.Y.U. L. REV. 942, 945 (1986) (pointing out that mail fraud’s “first element does not focus on conduct, but rather on a scheme or state of mind”).

124. 18 U.S.C. § 2113(a) (2012).

125. 18 U.S.C. § 2113(d) (2012).

126. *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014).

127. See Weiss, *supra* note 1, at 1381–82.

128. See 2 LAFAVE, *supra* note 11, § 13.2(b), at 344 n.64 (citing state and federal cases).

Thus, if the *Rosemond* majority correctly classified § 924(c) as a crime that simply prohibits certain conduct, the only controlling precedent that lends support to the Court's holding is *Pereira*, and it does so only on the assumption that the mail and interstate movement are considered part of the actus reus of the mail fraud and stolen goods statutes. If, on the other hand, § 924(c) requires proof of both conduct and an attendant circumstance, attaching a mens rea less culpable than purpose to its circumstance element may be more justifiable. Before exploring this alternative reading of the statute, the subpart that follows considers whether *Rosemond*'s holding can be defended on the ground that knowledge may lead to an inference of purpose.

### *C. Inferring Purpose from Knowledge*

Admittedly, a defendant's awareness can be used to infer purpose, and the ruling in *Rosemond* would have been unexceptionable had it been limited to that rationale.<sup>129</sup> But purpose requires more than mere knowledge, and more than even the advance knowledge called for by *Rosemond*. As the Supreme Court has previously acknowledged, knowledge and purpose are distinct mental states, and the two therefore cannot automatically be equated.<sup>130</sup>

In *Direct Sales Co. v. United States*, for example, the Court discussed the analogous mens rea questions that arise in conspiracy cases in determining whether a coconspirator had the necessary purpose to promote the target offense.<sup>131</sup> There, narcotics conspiracy charges were filed against a pharmaceutical manufacturer that conducted a mail-order business and sold controlled substances to a doctor who then illegally distributed them.

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129. See, e.g., MODEL PENAL CODE § 2.06 cmt. at 316 (Official Draft and Revised Comments 1985) (observing that "often, if not usually, aid rendered with guilty knowledge implies purpose since it has no other motivation").

130. See *United States v. Bailey*, 444 U.S. 394, 404 (1980) (calling the distinction between purpose and knowledge "esoteric," but equating purpose with "'conscious[] desire[], . . . whatever the likelihood of that result'" and knowledge with awareness of a "'practical[] certain[ty], . . . whatever [the defendant's] desire may be as to that result'" (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978))); see also *Simons*, *supra* note 30, at 476 (commenting that "[m]ental states of belief and mental states of desire are fundamentally different").

131. *Direct Sales Co. v. United States*, 319 U.S. 703, 709 (1943) (referring to "becom[ing] a party to a conspiracy by aiding and abetting it"); see also *United States v. Falcone*, 311 U.S. 205, 207 (1940) (noting that a coconspirator is "in substance the same thing" as an accomplice).

The Court noted that the conspiracy offense at issue required proof that the company not only was aware the doctor was illegally distributing the drugs but also had the requisite “intent,”—that is, that “by the sale [the corporation] intend[ed] to further, promote and cooperate in” the target crime.<sup>132</sup> Thus, “knowledge,” “acquiescence,” or “indifference” as to how its product was being used was insufficient; rather, intent required proof of “informed and interested cooperation, stimulation, instigation.”<sup>133</sup> On the facts before it, the Court found that standard satisfied: the drug manufacturer not only was cognizant of how its products were being used, but also had the necessary intent because the doctor was purchasing such an unusually large quantity of drugs that it was making “profits which it knew could come only from its encouragement of [the doctor’s] illicit operations.”<sup>134</sup> Therefore, the Court concluded, “[t]he step from knowledge to intent and agreement” could be made in *Direct Sales*.<sup>135</sup>

The Court, however, distinguished its previous decision in *United States v. Falcone*, which found insufficient evidence to sustain conspiracy charges brought against distributors who sold sugar, yeast, and, cans, knowing that some of their customers were using the products to illegally manufacture liquor.<sup>136</sup> That case was different, the *Direct Sales* Court reasoned, because the items sold there were “articles of free commerce” that were not “incapable of further legal use except by compliance with rigid regulations.”<sup>137</sup> Thus, the defendants’ knowledge in *Falcone* could not support an inference of purpose.

In line with these precedents, the prosecution in a § 924(c) trial could ask the jury to infer that an accomplice who was aware her confederate was carrying a gun must also have intended for the gun to be on the scene—just as the *Rosemond* majority observed that a jury may “permissibly infer” the accomplice had the requisite advance knowledge from her “failure to object or withdraw” once the gun was “displayed or used by a confederate.”<sup>138</sup> In some cases, however, the inference of

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132. *Direct Sales*, 319 U.S. at 711.

133. *Id.* at 713; *see also* *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (finding insufficient evidence of mens rea where “it was of no moment” to the accomplice whether or not the principal committed the crime).

134. *Direct Sales*, 319 U.S. at 713; *see also id.* at 706–07 (noting that the doctor eventually purchased enough drugs to dispense in one day what the average physician dispensed in a year and that the corporation’s quantity-sales discounts “attracted . . . a disproportionately large group” of customers who were doctors convicted on narcotics charges).

135. *Id.* at 713; *see also* MODEL PENAL CODE § 5.03 cmt. at 404 (Official Draft and Revised Comments 1985) (allowing an inference of purpose in similar circumstances).

136. *See Falcone*, 311 U.S. at 209–11.

137. *Direct Sales*, 319 U.S. at 710.

138. *Rosemond v. United States*, 134 S. Ct. 1240, 1250 n.9 (2014).

purpose is not a reasonable one. For example, weapons are not involved in most sales of small quantities of marijuana. As the *Rosemond* majority observed, “no one contends that a § 924(c) violation is a natural and probable consequence of simple drug trafficking.”<sup>139</sup>

By way of illustration, suppose a small-time marijuana dealer routinely partners with a colleague who habitually carries a weapon. The dealer has advance knowledge of the gun but may have no reason to foresee that it will play any role in their business. If the confederate unexpectedly draws or displays the weapon one day, it is difficult to argue the dealer intends for the weapon to be used. In fact, her purpose may be precisely the opposite. In a case with *Rosemond*’s facts, for instance, the dealer might try to talk her colleague out of drawing or firing the weapon when their would-be buyers attempt to steal the narcotics, taking the position that the small quantity of drugs at stake is not worth risking injury, attracting the attention of the police, or facing prosecution on more serious charges.<sup>140</sup> This defendant’s culpability vis-à-vis the weapon is not very different from the accomplice the *Rosemond* Court would have exempted from liability, who learns about a gun “at the scene” at a point when it is too late for her to do anything with that information.<sup>141</sup>

Although knowledge can therefore lead to an inference of purpose in some cases, that is clearly not what the *Rosemond* Court had in mind. In settling for proof of “active participation in a drug sale” combined with “prior knowledge of the gun’s involvement,” the majority not only expressly declined to require proof that a § 924(c) accomplice “affirmatively desire[]” the use of a weapon but also went further.<sup>142</sup> The majority additionally rejected the defendant’s position that juries may infer purpose from knowledge but must also be allowed to “draw the opposite conclusion”—to find that on some facts a defendant with advance knowledge of a weapon

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139. *Id.* at 1248 n.7; see also U.S. SENTENCING COMM’N, 2013 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.39, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table39.pdf> [<http://perma.cc/5KF2-XWHF>] (reporting that weapons were involved in ten percent of federal marijuana cases in 2013).

140. *But cf. Synopsis for We’re the Millers (2013)*, IMDb, [http://www.imdb.com/title/tt1723121/synopsis?ref\\_=tt\\_stry\\_pl](http://www.imdb.com/title/tt1723121/synopsis?ref_=tt_stry_pl) [<https://perma.cc/2PDT-S8AV?type=image>] (last visited Feb. 22, 2015) (describing movie in which a marijuana dealer is robbed of his supply of marijuana and then forced by his distributor to import a load of marijuana from Mexico in order to repay the debt).

141. *Rosemond*, 134 S. Ct. at 1249.

142. *Id.* at 1250–51.

lacks the necessary purpose for accomplice liability.<sup>143</sup> That defendant may have had knowledge and may have substantially assisted the predicate offense. (Note that, according to the Court's actus reus ruling, the defendant need not have facilitated the weapon at all.<sup>144</sup>) Although basing accomplice liability on a standard resembling *Rosemond*'s—knowledge and substantial assistance—has some academic support,<sup>145</sup> it does not constitute purpose. As a result, it cannot satisfy the mens rea requirement that is prescribed by *Peoni* and a majority of state legislatures and that the *Rosemond* Court purported to apply.

Thus, the Court's holding that *Rosemond* could be convicted as an accomplice without proof that his purpose extended to the firearm does not find solid support either in precedent or in the maxim that purpose can be inferred from knowledge. *Rosemond*'s insistence on requiring knowledge rather than purpose may be more defensible, however, if § 924(c) is viewed as a crime that includes a circumstance as well as a conduct element. That alternative interpretation of the statute is addressed in the following Part.

## V. CONDUCT PLUS CIRCUMSTANCE CRIMES

Notwithstanding the clear tenor of the opinion in *Rosemond*, treating § 924(c) as a pure conduct crime is not the only plausible construction of the statute. As discussed below, the statute cannot be read to require proof of a result, but it can arguably be interpreted as including a circumstance element. Assuming the statute is classified in that way, the requisite mens rea for the circumstance element ought to depend on where criminal law

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143. *Id.* at 1250.

144. *See supra* notes 41–43 and accompanying text.

145. *See* MODEL PENAL CODE § 2.06 cmt. at 314–15 (Official Draft and Revised Comments 1985) (describing an earlier draft that would have made knowledge plus substantial facilitation a sufficient basis for accomplice liability); *see also* Scales v. United States, 367 U.S. 203, 225 n.17 (1961) (quoting this provision with approval); *cf.* Alexander, *supra* note 29, at 944–47 (advocating that the law of complicity reduce the requisite mens rea to recklessness in cases of substantial assistance); Dressler, *supra* note 7, at 446–48 (endorsing accomplice liability based on substantial participation for accessories who caused the crime to occur); Kadish, *supra* note 6, at 378–79, 388 (proposing that recklessness and substantial assistance suffice for felonies that require only a mens rea of recklessness). Some jurisdictions have instead enacted criminal facilitation statutes making it a separate offense to knowingly and substantially facilitate a crime. *Compare* MODEL PENAL CODE § 2.06 cmt. at 318–19 (Official Draft and Revised Comments 1985) (calling such an approach “a sensible accommodation of the competing considerations”), and Duff, *supra* note 27, at 168 (endorsing these statutes), with 2 LAFAVE, *supra* note 11, § 13.2(d), at 350 (hypothesizing that the Model Penal Code's earlier draft was rejected because of vagueness concerns), and Weisberg, *supra* note 5, at 270 (concluding that such statutes are an “inadequate solution,” in part because of “ill-coordination with complicity laws”).



draws the line between conduct and attendant circumstances. If the concept of actus reus is a narrow one, restricted to the defendant's willed movements, then the circumstance elements constitute the essence of the offense and complicity's purpose requirement should be extended to them. Alternatively, if conduct is more broadly defined, the same mens rea rule for attendant circumstances should govern both principals and accomplices.

#### *A. Interpreting § 924(c)*

Identifying the result elements of a criminal offense is comparatively straightforward; results are “physical circumstances that the actor changes or has the power to change.”<sup>146</sup> Although criminal statutes typically do not require evidence that the defendant's act precipitated a particular result, there are some exceptions.<sup>147</sup> Most notably, the defendant must have been the cause of the victim's death in order to support a homicide conviction.<sup>148</sup>

Like most offenses, however, § 924(c) does not contain a result element. The crime is completed once the defendant uses or carries a firearm during and in relation to a predicate offense. Neither the weapon nor the underlying crime needs to have led to any further consequence.

Defining and identifying a crime's circumstance elements is a more formidable task. The Model Penal Code contains no formal definition of attendant circumstances,<sup>149</sup> although the comments accompanying the provision on the crime of attempt mention that circumstances “refer to the objective situation that the law requires to exist, in addition to the

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146. Simons, *supra* note 30, at 535; *see also* R.A. Duff, *The Circumstances of an Attempt*, 50 CAMBRIDGE L.J. 100, 104 (1991) (defining results as “events which occur only because the action is done—which are caused by the action”); Robinson & Grall, *supra* note 1, at 724 (suggesting as the definition “circumstance[s] changed by the actor”). *But cf.* MODEL PENAL CODE § 5.01 cmt. at 304 (Official Draft and Revised Comments 1985) (making the somewhat surprising assertion that “criminally obtaining property” is a crime with a result element); Robinson & Grall, *supra* note 1, at 723 (arguing it can be “difficult” to distinguish result elements from circumstance elements).

147. *See* DRESSLER, *supra* note 10, § 14.01[A], at 182. *But cf.* Moore, *supra* note 15, at 397 (arguing that offenses typically viewed as pure conduct crimes do have “causal requirements”).

148. *See* DRESSLER, *supra* note 10, § 14.01[A], at 182.

149. *See* MODEL PENAL CODE § 1.13(5) (Official Draft and Revised Comments 1985) (defining only the “conduct” element); *see also* Robinson & Grall, *supra* note 1, at 706 (calling the Model Penal Code's “failure to define adequately” and “distinguish” the elements of an offense a “major defect”).

defendant's act or any results that the act may cause."<sup>150</sup> Criminal law scholars have proposed that circumstance elements encompass everything other than the pure conduct element of a crime—that attendant circumstances include “all other physical conditions, apart from the actor's own conduct.”<sup>151</sup> Commonly accepted illustrations of circumstance elements are the age of the victim in a statutory rape prosecution, the victim's official status in a case involving assault of a federal official, and common law burglary's requirement that the illicit entry occur at night.<sup>152</sup>

Nevertheless, separating crimes that simply bar certain conduct from those that also require proof of an attendant circumstance has proven to be notoriously difficult.<sup>153</sup> Often, the language of a criminal statute can be interpreted as containing an act and circumstance element or alternatively “only a single elaborate conduct requirement.”<sup>154</sup> For example, is the victim's lack of consent in a rape prosecution an attendant circumstance or part of the prohibited conduct? The answer to that question turns on whether the *actus reus* for rape is simply “sexual intercourse” or instead “non-consensual sexual intercourse”; the difference thus “depends on, and varies with, the various descriptions we might offer of an action.”<sup>155</sup> Even if a jurisdiction has adopted the Model Penal Code's suggestion and defined rape in terms of “compel[ing]” the victim “to submit by force or by threat,”<sup>156</sup> the verb *compel* can be viewed as a pure conduct element or as “combin[ing] both conduct and circumstance elements.”<sup>157</sup>

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150. MODEL PENAL CODE § 5.01 cmt. at 301 n.9 (Official Draft and Revised Comments 1985).

151. Simons, *supra* note 30, at 535; *see also* Duff, *supra* note 146, at 104 (observing that circumstances “exist *independently* of the action, and provide the context in which it is done”); Arnold N. Enker, *Mens Rea and Criminal Attempt*, 1977 AM. B. FOUND. RES. J. 845, 868 (equating circumstances with “present” facts and results with “future” facts); Johnson, *supra* note 79, at 148 (observing that a circumstance element is a “condition or event” the prosecution “need not prove that the defendant caused”); Robinson & Grall, *supra* note 1, at 719–20 (distinguishing a defendant's conduct, or “actual physical movement,” from the circumstances or “*characteristics* of conduct,” that is, the “nature of conduct”); *cf.* Smith, *supra* note 30, at 424–25 (drawing a distinction between “pure circumstances,” which are elements of the crime though “not essential to the occurrence of the consequences,” and “consequential circumstances,” which are “essential to the occurrence of the consequences” but “not necessarily required by the definition of the crime”).

152. *See, e.g.*, MODEL PENAL CODE § 5.01 cmt. at 301–03 & n.9 (Official Draft and Revised Comments 1985); 2 LAFAVE, *supra* note 11, § 11.3(c), at 217–18 & nn.43–45; Enker, *supra* note 151, at 876–77.

153. *See* MODEL PENAL CODE § 2.02 cmt. at 240 (Official Draft and Revised Comments 1985); Enker, *supra* note 151, at 869.

154. Robinson & Grall, *supra* note 1, at 708.

155. Duff, *supra* note 146, at 104–05.

156. MODEL PENAL CODE § 213.1(1)(a) (Official Draft and Revised Comments 1985).

157. Robinson & Grall, *supra* note 1, at 709.

The concept of conduct could be defined quite narrowly, by whittling down the definition of the offense until only the bare-bones description of the defendant's willed movements remains.<sup>158</sup> This constricted view of the actus reus would make it "a relatively unspecific and unimportant aspect of an offense"; instead, the crime's circumstance and, where applicable, result elements would become its "most significant" components.<sup>159</sup> In any sex offense prosecution, for example, the defendant's sexual act would be the prohibited conduct and everything else—any of the victim's characteristics,<sup>160</sup> the failure to consent<sup>161</sup>—would be considered an attendant circumstance. Similarly, the actus reus for every possession offense would simply be the act of obtaining some tangible property, and everything about that item—what it was (for example, as a controlled substance,<sup>162</sup> a weapon,<sup>163</sup> or obscene material<sup>164</sup>); who owned it;<sup>165</sup> whether it was lost

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158. See Duff, *supra* note 146, at 108 (suggesting that conduct consist of "the narrowest action-description which still specifies part of th[e] actus reus," with circumstances including "all other aspects of the actus reus"); Smith, *supra* note 30, at 424 (proposing that the actus reus be identified by "eliminating the various circumstances required by the definition of the crime until only the basic event remains"); see also MODEL PENAL CODE § 5.01 cmt. at 301 n.9 (Official Draft and Revised Comments 1985) (providing examples that implicitly endorse a similar approach).

159. Robinson & Grall, *supra* note 1, at 720–21.

160. See MODEL PENAL CODE § 5.01 cmt. at 301 n.9 (Official Draft and Revised Comments 1985); Duff, *supra* note 146, at 108–11; Robinson & Grall, *supra* note 1, at 742 n.269.

161. See MODEL PENAL CODE § 2.02 cmt. at 231–32 (Official Draft and Revised Comments 1985); DRESSLER, *supra* note 10, § 30.05[B][4], at 474; 2 LAFAVE, *supra* note 11, § 11.3, at 36–37 (Supp. 2013); Duff, *supra* note 146, at 100. *But cf.* Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 BUFF. CRIM. L. REV. 577, 615 n.47 (2006) (implying that nonconsent is part of the actus reus).

162. See DRESSLER, *supra* note 10, § 10.04[B], at 128. *But see* MODEL PENAL CODE § 5.03 cmt. at 407 (Official Draft and Revised Comments 1985) (suggesting that "the sale of narcotics" is a pure conduct crime); Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen's Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 733 (2009) (likewise including "controlled substance" with the actus reus).

163. See Garvey, *supra* note 53, at 240; Johnson, *supra* note 79, at 151. *But see* Jeffrey P. Kaplan & Georgia M. Green, *Grammar and Inferences of Rationality in Interpreting the Child Pornography Statute*, 73 WASH. U. L.Q. 1223, 1250 (1995) (classifying a machine gun's ability to fire automatically as part of the actus reus).

164. See 1 LAFAVE, *supra* note 11, § 5.2(a), at 342 & n.7; Ohm, *supra* note 107, at 1349 n.91.

165. See MODEL PENAL CODE § 2.02 cmt. at 250 (Official Draft and Revised Comments 1985); Duff, *supra* note 146, at 100, 111; Smith, *supra* note 30, at 424.

or stolen;<sup>166</sup> and where the possession occurred (near a school,<sup>167</sup> for example)—would qualify as a circumstance element.

There is nothing inherently objectionable about this approach, although it does run counter to our commonsense inclination that circumstance elements do not constitute the crux of a criminal offense.<sup>168</sup> Perhaps for that reason, this narrow definition of conduct elements is not followed religiously; in fact, a tremendous amount of variation can be found in how the *actus reus* of criminal offenses is described.<sup>169</sup>

As discussed above in Part IV.A, *Rosemond* explicitly classified § 924(c) as a pure conduct crime, an interpretation that accords with both the statute’s language and legislative purpose, as well as with precedent endorsing that treatment of the charge and denying that it includes a circumstance element. Nevertheless, at one point the term *circumstances* appears in the *Rosemond* opinion in a context that could refer to attendant circumstance elements of crimes. Specifically, in introducing the paragraph described in Part IV.B that cited judicial interpretations of other federal statutes, the majority observed, “[w]e have previously found th[e] intent requirement [for accomplice liability] satisfied when a person actively participates in a criminal venture with full knowledge of the *circumstances* constituting the charged offense.”<sup>170</sup> The Court did not make any further reference to circumstance elements, instead treating § 924(c) as limited to twin conduct requirements. As noted above, however, several of the criminal statutes relied on in this portion of the *Rosemond* opinion arguably consist of a conduct and a circumstance element.<sup>171</sup>

If the Court in fact intended this sentence to suggest that § 924(c) includes a circumstance element, the most natural reading of the statutory language supports the conclusion that “uses or carries a firearm” is the conduct element and “during and in relation to any crime of violence or drug trafficking crime” is the circumstance element. Just like “at night” in the common law’s definition of burglary, the attendant circumstance describes when the forbidden conduct must occur. Under that interpretation, however, the Court was wrong to absolve the prosecution from the

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166. See MODEL PENAL CODE § 2.01 cmt. at 224 (Official Draft and Revised Comments 1985); Robinson & Grall, *supra* note 1, at 742 n.269; Smith, *supra* note 30, at 428.

167. See 2 LAFAVE, *supra* note 11, § 13.2(b), at 345 n.64.

168. See *United States v. Rodriguez-Moreno*, 526 U.S. 275, 280 n.4 (1999) (implicitly distinguishing circumstance elements from the “critical part” of a crime).

169. For illustrations of more expansive definitions of conduct, see, for example, 2 LAFAVE, *supra* note 11, § 13.2(f), at 355 & n.130 (characterizing the “filing of a false financial statement” and “charging an unlawful price” for a house as the *actus reus* of those crimes); see also *supra* notes 158–167 and accompanying text.

170. *Rosemond v. United States*, 134 S. Ct. 1240, 1248–49 (2014) (emphasis added).

171. See *supra* notes 97–128 and accompanying text.

obligation of proving that Rosemond's purpose extended to the weapon (the conduct element).

On the other hand, in an effort to justify *Rosemond's* holding, § 924(c) could be said to prohibit the commission of a violent or drug trafficking crime (the conduct element) under the circumstances where a firearm is used or carried. That interpretation, though counter to the structure of the statutory language, corresponds with the way armed robbery laws are sometimes viewed.<sup>172</sup> As discussed in the subpart that follows, this reading of the statute could potentially support convicting an accomplice whose mens rea vis-à-vis the weapon did not rise to the level of purpose.

### *B. Assessing the Mens Rea Implications*

If, contrary to *Rosemond's* interpretation of § 924(c), the statute consists of both a conduct and a circumstance element, the mental state required of an accomplice vis-à-vis the crime's attendant circumstance is a matter of some controversy. Very little attention has been paid in the courts and legislatures to the question of complicity's mens rea for circumstance elements, and the judges who have addressed it have reached conflicting conclusions.<sup>173</sup> Even the drafters of the Model Penal Code declined to take a position, opting instead for "deliberate ambiguity" that "left [the issue] to resolution by the courts."<sup>174</sup>

If criminal law accepts the distinction between conduct and circumstance elements endorsed by some scholars and defines the actus reus of a crime very narrowly,<sup>175</sup> the purpose traditionally required for complicity liability ought to be extended to the attendant circumstances as well. Stripping the conduct element down to a bare-bones description of the defendant's willed movements means that the prohibited conduct becomes a generic, colorless action—possessing or selling something, engaging in sex—and the circumstance elements do all the work. Excusing the prosecution from the burden of establishing the accessory's purpose with respect to the gravamen of the crime undermines the justifications for imposing a high

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172. See *supra* note 128 and accompanying text. But see Garvey, *supra* note 53, at 243 (arguing that this reading of § 924(c) "just doesn't fit").

173. See Alexander & Kessler, *supra* note 9, at 1160–61; Robinson & Grall, *supra* note 1, at 741 n.268.

174. MODEL PENAL CODE § 2.06 cmt. at 311 n.37 (Official Draft and Revised Comments 1985).

175. See *supra* notes 158–67 and accompanying text.

mens rea for complicity in the first place and thereby threatens to unduly expand accomplice liability to those who did not intentionally associate themselves with the offense.

Attaching a mens rea of purpose to attendant circumstances may well mean that accomplices must entertain a more culpable mens rea than the principal with respect to those elements.<sup>176</sup> But that same discrepancy occurs with a crime's conduct elements, given that most criminal statutes do not call for proof that the defendant acted purposefully.<sup>177</sup> If the circumstance elements constitute the essence of the crime, the rationale for requiring proof of purpose with respect to the actus reus applies equally to the attendant circumstances. As explained above, complicity laws deliberately set a high bar for accomplice liability when it comes to mens rea, both to compensate for the minimal actus reus requirement and to ensure that minor participants are sufficiently culpable to be held criminally responsible for offenses committed by others.<sup>178</sup>

Despite imposing a greater mens rea burden when charges are brought against an accessory instead of the principal, requiring proof of purpose vis-à-vis attendant circumstances does not signify that the accomplice must necessarily have intended for those circumstances to exist. The Model Penal Code defines purpose as applied to a circumstance element to mean that the defendant either was "aware of the existence" of the circumstance or "believe[d] or hope[d]" that it existed.<sup>179</sup> Unfortunately, the relationship between purpose and knowledge in this context is not entirely clear. The Code defines knowledge in reference to circumstances as simple awareness<sup>180</sup> and does not further clarify the terms *believe* and *hope*. Although at one point the drafters equate purpose and knowledge with respect to circumstance elements,<sup>181</sup> the comments accompanying

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176. See Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2179–80 (1988) (raising this objection).

177. See MODEL PENAL CODE § 2.02 cmt. at 234 (Official Draft and Revised Comments 1985); DRESSLER, *supra* note 10, § 10.04[A][1], at 121.

178. See *supra* notes 27–28 and accompanying text.

179. MODEL PENAL CODE § 2.02(2)(a)(ii) (Official Draft and Revised Comments 1985). *But cf.* 1 LAFAVE, *supra* note 11, § 5.2(b), at 344 n.17 (observing that this provision has not been widely adopted).

180. MODEL PENAL CODE § 2.02(2)(b)(i) (Official Draft and Revised Comments 1985) (providing that a defendant acts knowingly with respect to attendant circumstances if she is "aware . . . that such circumstances exist").

181. See MODEL PENAL CODE § 250.9 cmt. at 415 n.14 (Official Draft and Revised Comments 1985) (noting that "purpose with respect to an attendant circumstance of the actor's conduct means knowledge").

the Code's mens rea provision indicate that purpose, as the more culpable state of mind, encompasses knowledge.<sup>182</sup>

As a theoretical matter, however, one can erroneously, and even unreasonably, believe in the existence of some circumstance or can entertain a far-fetched hope that it exists and therefore seemingly satisfy the Model Penal Code's literal definition of purpose but not knowledge.<sup>183</sup> Whatever the intent of the Code's drafters, an accessory who falls into any of these categories is sufficiently blameworthy to support accomplice liability. As other scholars have recognized, individuals act intentionally with respect to circumstances if they either know that the circumstances exist or "hope[] that they exist," even if the "odds" are "very great" that they do not.<sup>184</sup> Defendants who intentionally aid a principal, knowing that an attendant circumstance exists or hoping or believing it does, cannot complain that they lack the requisite culpability regarding the gravamen of the crime.

Hoping is arguably distinguishable from believing, however, and some might have reservations about criminalizing unrealistic hopes on the grounds that one who hopes a circumstance exists "may be marginally more culpable" than one who knows it exists yet not "sufficiently dangerous to merit punishment" "[a]bsent a belief" in its existence.<sup>185</sup> Nevertheless, parties to a crime often vary considerably in the roles they play in the

182. See MODEL PENAL CODE § 2.02 cmt. at 233 (Official Draft and Revised Comments 1985) ("Knowledge that the requisite external circumstances exist is a common element in both conceptions.").

183. See DRESSLER, *supra* note 10, § 10.04[B], at 128 (equating knowledge of an attendant circumstance with a "correct belief"); cf. Alexander, *supra* note 29, at 942–43 (defining purpose to require not just "desire" but also a "belie[f] that [one's] conduct increases the risk of harm, even if the increase is very slight"); Simons, *supra* note 30, at 476–77 (associating beliefs with knowledge and desires with purpose, and commenting that "purpose and intention," in contrast to "wishes and hopes," are "desires that the actor believes she has some power to effectuate"). But cf. MODEL PENAL CODE § 5.02 cmt. at 371 (Official Draft and Revised Comments 1985) (noting that whether the mens rea of purpose is satisfied by hoping a crime will be committed raises "a question of fact").

184. Smith, *supra* note 30, at 426–27 (quoting JOHN W. SALMOND, JURISPRUDENCE 379 (Glanville L. Williams 10th ed. 1947)); see also JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 89 (J.H. Burns & H.L.A. Hart eds., Methuen & Co. 1982) (1789) (noting that circumstances are "objects of the understanding only" and not "objects of the will"); 1 LAFAVE, *supra* note 11, § 5.2(a), at 342 (observing that "knowledge rather than desire is most significant as to attendant circumstances"); Cook, *supra* note 30, at 657 (equating intent with circumstances "which I know or believe to exist (quoting JOHN W. SALMOND, JURISPRUDENCE 337 (4th ed. 1913))).

185. Simons, *supra* note 30, at 500.

offense, from the mastermind who sits at home calling the shots<sup>186</sup> to the audience members who encourage an illegal performance by politely applauding.<sup>187</sup> The law of complicity has elected to resolve the competing interests at stake by adopting a one-size-fits-all model that holds every party to a crime equally responsible and then takes any differences in their culpability into account at sentencing.<sup>188</sup> Here, too, the accomplice who contributed to an offense is “sufficiently dangerous” to be criminally liable when the crime was actually committed and the circumstance she hoped for, but considered a long shot, turned out to have been true.

Another possible objection to extending complicity’s purpose requirement to circumstance elements surrounds the difficulty of establishing a defendant’s state of mind with respect to an attendant circumstance. Our actions are arguably “more likely to disclose our purposes rather than our beliefs,” and therefore a defendant’s conduct may not “tell us very much, or for that matter anything at all, about his state of mind with respect to the circumstance” elements of a crime.<sup>189</sup> This concern may be especially pronounced with respect to circumstances that contain no “moral” component.<sup>190</sup>

Certainly, an exception could be made for a crime’s purely jurisdictional elements, with the same mens rea requirement attaching to both principals and accomplices for that category of attendant circumstances. But diluting the mens rea requirement for material elements that have a substantive relationship to the definition of the offense risks convicting minor participants on charges they did not intentionally facilitate.<sup>191</sup> Moreover, adopting the definition of purpose advocated here, which is satisfied by proof of an accomplice’s awareness of the attendant circumstance, would ease the prosecution’s evidentiary burden.

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186. See, e.g., *People v. Manson*, 132 Cal. Rptr. 265, 279–80 (Ct. App. 1976).

187. See, e.g., *Wilcox v. Jeffery*, (1951) 1 All E.R. 464, at 464 (K.B.).

188. See MODEL PENAL CODE § 2.06 cmt. at 299 (Official Draft and Revised Comments 1985); DRESSLER, *supra* note 10, § 30.04[B][2][b], at 468–69; see also GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* § 8.5.3, at 644–45 (1978) (observing that the Anglo-American approach differs from the one taken by German and Soviet law); cf. Moore, *supra* note 15, at 448–52 (calling for elimination of the principal-accomplice distinction given the wide variation in accomplices’ culpability).

189. Enker, *supra* note 151, at 871.

190. See Smith, *supra* note 30, at 429 (using common law burglary’s nighttime requirement as an illustration).

191. See MODEL PENAL CODE § 1.13(10) (Official Draft and Revised Comments 1985) (defining a material element as one that is not purely procedural or jurisdictional but rather is related to “the harm or evil . . . sought to be prevented by the law defining the offense”); cf. *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975) (maintaining that a jurisdictional element is not necessarily “outside the scope of the evil Congress intended to forestall,” but instead means “merely that the existence of the fact that confers federal jurisdiction need not be one in the mind of the actor at the time” of the crime).



Some scholars have advanced an alternative proposal for the mens rea that ought to govern circumstance elements in complicity cases. Rather than requiring proof of purpose, they advocate that the same mens rea needed to convict the principal should extend to any accessories as well.<sup>192</sup> This position is defended on the ground that the policy considerations underlying the mental state requirement chosen for a particular circumstance element are identical for all parties to the crime.<sup>193</sup>

The Model Penal Code and some academics have endorsed that approach for the crime of attempt,<sup>194</sup> and in *United States v. Feola* the Supreme Court likewise adopted it for conspiracy—at least for circumstance elements that are jurisdictional in nature.<sup>195</sup> If the practice of borrowing the substantive crime’s mens rea for circumstance elements is followed for inchoate offenses like attempt and conspiracy, then it is arguably even more justifiable in complicity cases where a completed crime in fact occurred under all the required attendant circumstances.<sup>196</sup>

Nevertheless, imposing the same mental state requirement vis-à-vis circumstances on both the principal and accomplice makes sense only if the actus reus of a crime is defined broadly and circumstance elements are

192. See, e.g., DRESSLER, *supra* note 10, § 30.05[B][4], at 474; Kadish, *supra* note 6, at 385–86; Robinson & Grall, *supra* note 1, at 742–43; Mueller, *supra* note 176, at 2191.

193. See Kadish, *supra* note 6, at 385–86; Robinson & Grall, *supra* note 1, at 742.

194. See MODEL PENAL CODE § 5.01(1) cmt. at 303 (Official Draft and Revised Comments 1985) (“allowing the policy of the substantive offense to control with respect to circumstance elements” because the defendant “has sufficiently established his dangerousness” and “poses the type of danger to society that the substantive offense is designed to prevent”); Duff, *supra* note 146, at 100; Smith, *supra* note 30, at 434–35; cf. Enker, *supra* note 151, at 871, 874–75, 879 (advocating this position for circumstance elements requiring a mens rea of at least recklessness).

195. See *United States v. Feola*, 420 U.S. 671, 696 (1975) (concluding that conspiracy to assault a federal officer does not require proof that the defendants were aware of the victim’s identity). But cf. MODEL PENAL CODE § 5.03 cmt. at 409, 411 (Official Draft and Revised Comments 1985) (acknowledging that a conspirator might be sufficiently culpable in such situations, but ultimately leaving the question unresolved because “[t]he fact that conspiracy is defined in terms of an agreement produces difficulties” in cases where the attendant circumstance “neither existed nor was in the contemplation of the parties”).

196. Cf. MODEL PENAL CODE § 5.03 cmt. at 404 (Official Draft and Revised Comments 1985) (commenting that mens rea “considerations are the same” for conspiracy and complicity); Enker, *supra* note 151, at 869–70 (making a similar argument in advocating that a mens rea of purpose should not govern circumstance elements in attempt prosecutions). But cf. 2 LAFAVE, *supra* note 11, § 13.2(d), at 348 n.90 (suggesting that a lower mens rea might be appropriate for conspiracy, especially where it carries a lesser sentence).

construed narrowly.<sup>197</sup> Under that model, accomplice liability remains properly restricted to those who acted purposefully with respect to the gravamen of the crime. If, however, criminal law views the distinction between conduct and circumstance elements differently, with a contracted conception of the actus reus, applying the same mens rea vis-à-vis circumstance elements risks expanding complicity liability to those whose purpose extended only to a blameless action committed by the principal (possessing, selling, engaging in sex) and whose culpability with respect to the essence of the charge was merely knowledge, recklessness, or even lower.<sup>198</sup>

The Model Penal Code's recommendation that the same state of mind rules should govern both principals and accomplices for the *result* elements of crimes does not call for a contrary conclusion.<sup>199</sup> In an involuntary manslaughter prosecution, for example, the Model Penal Code would convict an accessory on a showing that she had the same criminally negligent mens rea vis-à-vis the victim's death required to convict the principal.<sup>200</sup> Result elements, which are generally restricted to homicide charges,<sup>201</sup> are distinguishable from circumstance elements, however, because an accessory who had the requisite purpose regarding the actus reus (the conduct that proved fatal) has demonstrated sufficient culpability to be guilty of homicide. That accomplice therefore cannot object that her intent did not extend to the gravamen of the crime.

A final alternative is the one adopted by the drafters of the Model Penal Code, who declined to recommend a "rigid formula" governing the mens rea required vis-à-vis circumstance elements in all complicity cases and instead delegated the question to the courts.<sup>202</sup> While this position has the

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197. Cf. Alexander & Kessler, *supra* note 9, at 1166 (warning that the same mens rea requirement for circumstance elements should not apply to both principals and accomplices where the accessory's assistance was not in "close temporal and spatial proximity" to the crime).

198. See, e.g., MODEL PENAL CODE § 5.01 cmt. at 301–02 (Official Draft and Revised Comments 1985) (describing strict liability circumstance elements).

199. See MODEL PENAL CODE § 2.06(4) (Official Draft and Revised Comments 1985); see also MODEL PENAL CODE § 2.06 cmt. at 321 (Official Draft and Revised Comments 1985) (explaining that "[t]his formulation combines the policy that accomplices are equally accountable within the range of their complicity with the policies underlying those crimes defined according to results").

200. See, e.g., *People v. Abbott*, 445 N.Y.S.2d 344, 346–47 (App. Div. 1981). But cf. 2 LAFAVE, *supra* note 11, § 13.2(e), at 353 & n.120 (citing conflicting cases and noting that few state legislatures have adopted the Model Penal Code's approach).

201. See DRESSLER, *supra* note 10, § 14.01[A], at 182.

202. See MODEL PENAL CODE § 5.03 cmt. at 414 (Official Draft and Revised Comments 1985). The only two alternatives apparently envisioned by the drafters, however, were the ones addressed in the text: to apply the purpose requirement to circumstance elements and to use the same mens rea rule for both principal and accomplice. See MODEL PENAL CODE

advantage of providing an opportunity to account for the wide variation in circumstance elements, both in their nature and their centrality to the essence of the crime,<sup>203</sup> it also opens the door to ad hoc and unprincipled decisionmaking.<sup>204</sup> Accordingly, it is preferable to follow one consistent approach in choosing the mens rea attached to attendant circumstances.<sup>205</sup>

To illustrate the impact of the mens rea regime recommended in this Article, consider the crime of common law burglary. Burglary was defined by common law as breaking and entering into another person's dwelling at night with the intent to commit a felony.<sup>206</sup> This description of the offense contains two distinct conduct elements, both of which are required. Assume, for example, the principal intended to throw a rock through the glass door in the back of a home, enabling her to unlock the door, enter the house, and steal the family jewels. If an accessory supplied the rock, thinking it would be used to break a window as a cruel prank, the accessory's purpose would extend to the breaking but not the entering. Likewise, an accomplice who thought the plan was to enter the home through the open front door would have the purpose to enter but not to break.<sup>207</sup> Under this Article's suggested approach, complicity would require proof of purpose regarding each conduct element so that neither of these defendants would be guilty of burglary on an accomplice liability

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§ 2.06 cmt. at 311 n.37 (Official Draft and Revised Comments 1985). Note that the Model Penal Code likewise left unresolved the mental state required vis-à-vis circumstance elements to support a conviction for solicitation and conspiracy. *See* MODEL PENAL CODE §§ 5.02 cmt. at 371 n.23, 5.03 cmt. at 409–14 (Official Draft and Revised Comments 1985).

203. *See* MODEL PENAL CODE § 5.03 cmt. at 414 (Official Draft and Revised Comments 1985) (reasoning that “[t]oo many variations, many of which cannot be foreseen with any confidence, [can] be expected to arise”).

204. *Cf.* MODEL PENAL CODE § 2.02 cmt. at 240 (Official Draft and Revised Comments 1985) (acknowledging the temptation to create “artificial constraints on the concept of conduct” in order to “yield sensible conclusions as a matter of penal policy”).

205. *See* Robinson & Grall, *supra* note 1, at 739 (calling the Model Penal Code's ambiguity on this issue the “greatest flaw” in its accomplice provision).

206. *See* EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 63 (William S. Hein & Co. photo. reprint 1986) (1797); DRESSLER, *supra* note 10, § 27.02[F], at 377. *But cf.* MODEL PENAL CODE § 221.1 (Official Draft and Revised Comments 1985) (defining burglary to require simply an unlicensed entry into a building in order to commit a crime, with the gravity of the offense increased if, for example, the defendant entered a residence at night or was armed with a deadly weapon).

207. *See* MODEL PENAL CODE § 221.1 cmt. at 68 (Official Draft and Revised Comments 1985).

theory.<sup>208</sup> The first would have the requisite intent for a property damage offense and the second for trespass, but neither would have the purpose to assist the crime of burglary.

In addition, common law burglary arguably has three circumstance elements: (1) that the building was a dwelling, (2) belonging to another person, and (3) that the entry into the dwelling occurred at night.<sup>209</sup> All three of these circumstances are material elements of the crime. Although they may vary in terms of their importance in measuring a defendant's culpability, none of them are purely procedural or jurisdictional.<sup>210</sup> Rather, each is grounded in substance—the judgment that unlawfully entering a residence is a greater intrusion on privacy and security than doing so in a place of business and that entering is more dangerous and frightening at night than during the day.<sup>211</sup>

Under the proposal set forth in this Article, the mens rea an accomplice must have with respect to these three facts would turn on the distinction between a crime's conduct and circumstance elements. If criminal law defines the actus reus of crimes narrowly, as encompassing simply the acts of breaking and entering for burglary, the mens rea of purpose would apply to both the conduct and the circumstance elements. The prosecution would therefore be required to establish that the accessory wanted the principal to break and enter, and also knew, believed, or hoped that the entry would occur at night in the home of another person.

If the line between conduct and circumstance elements is drawn differently, however, such that the actus reus of burglary is viewed more broadly as breaking and entering into another person's residence, then the purpose requirement would extend only to the conduct element and the accomplice could be convicted on the same mens rea showing vis-à-vis the circumstance element needed to convict the principal. The jury would therefore have to find the entry in fact happened at night<sup>212</sup> and the accomplice wanted the principal to break and enter into another person's dwelling.

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208. The prosecution would additionally need to satisfy the specific intent requirement (intent to commit a felony) for each party to the crime. See *supra* note 96 and accompanying text.

209. See DRESSLER, *supra* note 10, § 9.10[D][3], at 114–15; Simons, *supra* note 30, at 469 n.13.

210. For a discussion of the distinction between material and jurisdictional elements, see *supra* note 191 and accompanying text.

211. See MODEL PENAL CODE § 221.1 cmt. at 67, 80 (Official Draft and Revised Comments 1985).

212. See Enker, *supra* note 151, at 876 (explaining that the time of day was a matter of strict liability at common law). This element could likewise be included in the description of the prohibited conduct, although it is considered one of the standard illustrations of an attendant circumstance. See *supra* note 152 and accompanying text.

Returning full circle to *Rosemond* and taking the Court at its word that § 924(c) consists of two conduct elements, complicity liability should require proof that the accessory's purpose extended to both the predicate offense and the use of a firearm. Under that interpretation of the elements of the crime, then, the Court erred in allowing a conviction based simply on the accomplice's prior knowledge that a weapon would be involved in a violent or drug trafficking offense. That knowledge could be used to infer purpose but in and of itself should not be a sufficient basis to sustain a conviction.

If, on the other hand, § 924(c) is viewed as consisting of a conduct and a circumstance element, the prosecution's mens rea burden would depend on two factors: which part of the statute actually states the circumstance element, and how broadly or narrowly a crime's actus reus is conceived. The ruling in *Rosemond* would be justifiable, as an initial matter, only if the statute is read in a counter-textual fashion such that "during and in relation to" the predicate offense is the conduct element and "uses or carries a firearm" is the attendant circumstance. Then, second, if criminal law defines the actus reus broadly—selling drugs, for example—the approach advocated here would lead to an outcome comparable to *Rosemond* because knowledge is the mental state vis-à-vis a firearm necessary to convict a principal of violating § 924(c).<sup>213</sup> If, however, the conduct element is viewed narrowly—simply selling—this Article would extend the mens rea of purpose to the circumstance elements as well and therefore would call for proof that the accomplice knew, believed, or hoped that a firearm would be involved in the sale of narcotics.

## VI. CONCLUSION

Given the frequent role that complicity plays in criminal trials across this country, the confusion surrounding its mens rea requirements is both surprising and indefensible. The Court's decision in *Rosemond* did help resolve the issues arising in § 924(c) prosecutions, calling for proof of "active participation in a drug sale" coupled with "prior knowledge of the gun's involvement."<sup>214</sup> To be sure, the Court left questions for future litigation: where to draw the line between active and incidental participants in the predicate offense; whether a different rule governs § 924(c) cases

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213. See Weiss, *supra* note 1, at 1382; Robinson, *supra* note 79, at 785.

214. *Rosemond v. United States*, 134 S. Ct. 1240, 1251 (2014).

charging that a firearm was brandished or discharged, as opposed to used or carried; and when an accessory's awareness of a firearm "comes too late" to qualify as "advance knowledge."<sup>215</sup>

Nevertheless, *Rosemond* made clear that, despite purporting to adhere to *Peoni*'s requirement that accomplices must exhibit purpose with respect to the principal's crime, the Court was content with proof of knowledge—not that knowledge of a weapon could lead to an inference of purpose, but that it was sufficient in and of itself. Combined with the Court's holding that complicity's actus reus requirement is satisfied by showing a § 924(c) accessory provided assistance only to the predicate offense, even if she did nothing to facilitate the weapon, *Rosemond* expands § 924(c) liability to defendants who displayed a striking absence of culpability with respect to the firearm.

Moving beyond the confines of *Rosemond*, although the Supreme Court provided answers to some of the questions plaguing the courts in § 924(c) cases, the larger issues surrounding mens rea and complicity remain unresolved, particularly for crimes that require proof of some attendant circumstance. In order to fulfill the promise of *Peoni* and ensure that accomplices acted intentionally with respect to the gravamen of the crime, the mens rea of purpose should attach to each conduct element of the offense.

For crimes that contain circumstance elements, the requisite mens rea should turn on how criminal law conceives the distinction between conduct and circumstances. If conduct is defined narrowly, limited to the defendant's willed movements, then the requirement of purpose should extend to the attendant circumstances as well—meaning that the prosecution must establish the accessory knew, believed, or hoped that the circumstances existed. If conduct is viewed more broadly, the accomplice need only share the same mens rea vis-à-vis the circumstance elements necessary to convict the principal. This approach preserves the rationales underlying the law of complicity's traditional mandate that accessories must act purposefully and thereby appropriately limits accomplice liability to those who are sufficiently culpable with respect to the essence of the underlying crime.

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215. *Id.* For a discussion of these open questions, see *supra* notes 51, 58, & 79–83 and accompanying text.