

1986

Joint Criminal Participation: Establishing Responsibility, Abandonment

Paul Marcus

William & Mary Law School, pxmarc@wm.edu

Repository Citation

Marcus, Paul, "Joint Criminal Participation: Establishing Responsibility, Abandonment" (1986). *Faculty Publications*. 571.
<https://scholarship.law.wm.edu/facpubs/571>

Copyright c 1986 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/facpubs>

Joint Criminal Participation: Establishing Responsibility, Abandonment

*Paul Marcus**

INTRODUCTION

In the United States, three principal means are available to establish criminal responsibility in cases involving joint defendant participation: attempt, aiding and abetting or accessory liability, and conspiracy. The three have very different roots, tracing back to the English common law. In today's world, they are prosecuted and applied in very distinct fashions. In this article I will explore both the basis for these crimes and the withdrawal from them, discuss the elements present for each, and analyze the way that they differ in today's world.

While the backgrounds and elements for these three criminal theories are quite different, the test for withdrawal or abandonment from them are quite similar. In essence, we ask whether a criminal defendant may ever be able to withdraw from liability under these theories. If we allow such abandonment, we must then ask what proof must be offered, and by whom. We turn first, though, to establish viability.

ESTABLISHING RESPONSIBILITY

Attempt

The crime of attempt has been an important part of the approach taken by prosecutors in dealing with acts of individual criminals as well as multiple criminals. It was developed in order to detect and deter crime at an early stage. Recognize, however, that enough must be demonstrated in order to make clear that the individuals truly planned to commit an anti-social act. Throughout the United States the two key elements of the offense are identical: a high state of mind, and an act taken to effectuate the object of that state of mind. New York law provides: "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such

* Dean and Professor of Law, University of Arizona College of Law.

crime.”¹

Before exploring these two elements of act and intent, it is worth noting that there is no distinct crime of attempt as such. There are only attempted substantive offenses. For instance, a defendant may be held responsible for attempted murder or attempted robbery or attempted kidnapping. Thus, it is important to bear in mind that in addition to the elements of intent and act, the government must also demonstrate a clear state of mind with respect to a completed crime which is the goal of the attempted conduct. Typically, however, that completed crime is self-evident in the goals of the actor. Thus, the two chief questions surround the necessary state of mind to be shown as well as the act in furtherance of it.

Most states require that a very high state of mind be satisfied before the defendant can be held responsible for an attempt. Whatever the state of mind for the completed offense, most courts will require the government to demonstrate a “specific intent” for the attempt. The rationale for this is that with so little action necessary for the attempt, the prosecution should demonstrate unquestionably a culpable state of mind. Thus, while the crime of rape in most states is classified as a “general intent” crime not requiring any high degree of proof regarding the defendant’s mental state, attempt to commit rape “is commonly referred to as a specific-intent crime, since it requires proof of intent other than the mere doing of an act.”²

The states of mind at common law were denominated specific intent and general intent; in today’s world most jurisdictions are somewhat more precise in defining these mental states. Thus, in many jurisdictions the “highest” mental state required is that of intent (as opposed to knowledge, recklessness, or negligence). This intent requirement establishes the need to demonstrate a particular goal or purpose in addition to knowledge of consequences. In most states, the mental state required for an attempt is intent. This point is extremely important, for individuals may be held responsible for *completed* criminal acts involving less than intent, but can only be held for the attempted crime with a showing of this high state of mind, intent. For example, in *Moore v. Alabama*,³ the court raised the following famous question:

[I]f one from a house-top recklessly throw[s] a billet of wood upon the side-walk where persons are constantly passing, and it fall[s] upon a person passing by and kill[s] him, this would be, by the common law, murder. But if instead

1. New York Penal Law § 110.00.

2. *Sanchez v. Wyoming*, 567 P.2d 270, 275 (1977).

3. 18 Ala. 532, 534 (1851).

of killing him, it inflicts only a slight injury [could the party be convicted of attempted murder].

The answer to the question raised in *Moore* is clear. An individual can be held responsible for common law murder without intent being shown, under the traditional implied malice standard of recklessness (conscious disregard of a substantial risk). That same individual could not, however, be found guilty of attempted murder if the victim were not killed, because the necessary mental state for attempted murder would be an intent to kill, not present in the case put forth by the court.

Most litigation in the attempt area has surrounded the question of the type of act required for the crime. In earlier days, courts referred to relatively minor acts which could satisfy the requirement so long as a showing of intent was present. Indeed some states continue to apply this rule, in statutory form. For example, in Nevada, by state law, an attempt is an act done for the purpose of committing an offense, "intending but failing to accomplish it."⁴ Most states have, however, recognized the need for a greater showing of an act requirement even with the high state of mind element. The prevailing view today is the definition suggested by the American Law Institute's Model Penal Code. Section 5.01 of the Code provides, in material part, that the necessary element is "an act . . . constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

While numerous cases arise in which the chief question is whether the step taken is a substantial one, typically these become issues of fact for the trier of fact and are disposed of as with other evidentiary questions. See, for example, a recent Arizona case in which the defendants approached the victim and asked him for help in starting their car. The victim accompanied them to a distant parking lot where one of them said "All we want is that wallet in your back pocket. If I hit you, I'll kill you." The victim then ran away and found a police officer who arrested the defendants. The court held that the statements made by the defendants were sufficient to constitute a substantial step and affirmed their convictions for attempted robbery.⁵

Aiding and Abetting

Attempts and conspiracy are crimes to which criminal penalties attach. The doctrine of aiding and abetting, sometimes referred to as accessory liability or accountability, is quite different. It is no crime to be an aider and abettor or an accessory. Rather, aiding and

4. Nevada Revised Statutes § 208.070.

5. *Arizona v. Dale*, 590 P.2d 1379 (1979).

abetting is a theory of criminality which allows the government to impose liability for crimes which have been completed because this defendant assisted others in such completion. At common law, this system was well established with three distinct categories for such parties to the crime. A principal in the first degree was the person at the scene of the crime who committed one of the elements of the criminal offense. A principal in the second degree was also at the scene of the crime; she, however, did not commit the crime, she assisted in the commission of the crime such as by acting as lookout. Finally, an accessory before the fact provided aid to the principals but this person was not at the scene of the crime and often was the key person who engaged in the planning prior to the event.

These categories of parties were well settled for centuries in both England and in the United States. In modern times these categories raised difficult substantive questions in one primary area, inconsistent verdicts. That is, if the defendant was charged with aiding and abetting another person in the commission of a crime what would the result be if that other person were found not guilty of the crime. The point was finally settled by the United States Supreme Court in 1980.

In *Standefer v. United States*⁶ one defendant, a public official, was acquitted of the crime of receiving a bribe from Standefer. Standefer was then convicted, in a separate trial, of aiding and abetting the unlawful receipt of a gift by that public official. The public official, of course, was the very same person who had been found not guilty of the crime of receiving those same gifts.⁷ The defendant relied on a line of cases which indicated that "where the only potential principal has been acquitted, no crime has been established and the conviction of an aider and abettor cannot be sustained."⁸ The Supreme Court, however, dismissed this argument. The Court recognized the intellectually attractive idea of consistency, but rejected it in a system which gave great weight to individual jurors in separate cases.

This case does no more than manifest the simple, if discomfoting, reality that "different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." While symmetry of results may be intellectually satisfying, it is not required.⁹

Within the last twenty years, many states have rejected the

6. 447 U.S. 10 (1980).

7. *Id.* at 13.

8. *United States v. Shuford*, 454 F.2d 772, 779 (4th Cir. 1971).

9. 447 U.S. at 25.

common law classifications of various principals and accessories. They instead have focused on two chief elements in determining whether an individual ought to be held responsible for assisting another in the commission of a crime. As in the area of attempt, a high state of mind is required along with some specific act. The recently proposed revised federal criminal code provides, in part, that a defendant can be "convicted of an offense based on the conduct of another person if . . . with intent that the offense be committed, the defendant knowingly commands or aids . . . that other person to engage in conduct." Thus, once again, the courts are faced with the twin dilemmas already presented in attempt: has the prosecution demonstrated a high "specific" intent, and what short of act is required for the crime.

It is not enough for the government to demonstrate that the defendant was aware of an ongoing criminal activity and knowingly provided aid to that activity. Rather, the standard is a more difficult one. The government must prove, beyond a reasonable doubt, that it was the defendant's goal or purpose—her intent—to have that crime committed. This point was made clear in *Washington v. Gladstone*.¹⁰ The defendant there knew that a friend of his was in the business of selling marijuana. An undercover police officer came to the defendant and asked him where he could buy marijuana. The defendant simply directed this officer to his friend's home. When the sale was made the defendant was convicted of aiding and abetting the sale of marijuana from the friend. The Supreme Court of Washington reversed the conviction finding that there was no proof of an aiding and abetting. Quoting the famous judge, Learned Hand, the court noted that for a conviction in this area to be affirmed it must be shown that the defendant "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it."¹¹

In many cases in which responsibility is based upon an aiding and abetting theory, there is little question but that the defendant has provided sufficient aid. The individual who supplies plans, weapons, or vehicles, clearly intends to provide support and has given very material assistance. In some cases, however, the difficult aid question is put at issue. For instance, in a federal case the only evidence against the defendant in connection with a counterfeiting scheme was that he accompanied the counterfeiter to the printing shop on several occasions. The court there noted that such evidence

10. 474 P.2d 274 (1970).

11. *Id.* at 278.

was not clearly sufficient to impose liability and that the jury would have to be instructed "with extreme precision" so that a finding of guilty would not be based upon mere presence and knowledge on the part of the defendant.¹² In some cases, however, mere words may be sufficient to sustain a conviction under an aiding and abetting theory. In a number of the tax resistance cases only words were established. That is, in these cases, individuals counseled, advised, and encouraged other individuals to falsely report information on income tax returns so as to cripple the Internal Revenue Service. The courts rather consistently hold that such activity is sufficient as demonstrating a culpable intent and as providing important support to those filing improper tax returns.¹³

One final point should be raised in connection with the theory of aiding and abetting. If the defendant has been shown to have intentionally provided aid to another in the commission of a possible crime, the defendant will be found guilty of the *same* offense for which the other individual can be found guilty. If, however, that other defendant commits some other crime—different from the one intended by the defendant—the defendant may in some cases also be found guilty of that crime. See, for instance, *Michigan v. Poplar*¹⁴ where the government demonstrated quite clearly that the defendant and his friends intended to break into a recreation building. In connection with the entry the manager of the building was shot by one of the defendant's friends. The defendant during this period stayed outside the building acting as a lookout. He argued that he should not be found guilty of the crime of assault with intent to commit murder for he had not intentionally provided aid for *that* crime; instead his aid only went to the breaking and entering. The court rejected the defendant's argument in applying standard American law. It decided that the jury, under the circumstances, "could properly conclude that the use of the gun was fairly within the scope of the common unlawful enterprise and that the defendant was criminally responsible for the use by his confederates of the gun."¹⁵

Conspiracy

In the United States the most popular way of establishing joint criminal participation is through the use of the conspiracy charge. Conspiracy is both a common and an unusual crime. It is common at every stage of the criminal prosecution and in virtually all jurisdictions. It is unusual because it is often charged even when a principal

12. *United States v. Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962).

13. See, e.g., *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978).

14. 173 N.W.2d 732 (1969).

15. *Id.* at 735, 736.

crime has been attempted, or where the defendant could otherwise be held responsible either for a completed crime or for aiding and abetting another in the crime. Indeed, it will even be charged where multiple defendant liability creates unduly complex problems for the trier of fact. Many reasons have been offered as to the popularity of conspiracy. For many practitioners in the criminal justice system, however, the reasons for the prevalence of the charge can be linked directly to the great advantages created for the government in charging conspiracy. That is, in a conspiracy case, multiple defendants and multiple charges can be joined in one prosecution. Under a broad view of venue, the case can be brought in any jurisdiction in which any conspirator took any act in furtherance of the conspiracy. Finally, evidentiary advantages may be present in a conspiracy setting which would be particularly important to the government, such as the admission of declarations made by co-conspirators in furtherance of the conspiracy.

The crime of conspiracy serves two distinct purposes. One is to allow early intervention by the government into criminal endeavors, much the rationale given for the crime of attempt. In addition, it allows the government to intervene in dangerous joint criminal activities because "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts."¹⁶

As with both attempt and the theory of accomplice liability, the government must demonstrate an act in furtherance of a very high mental state. The crime of conspiracy is denominated a "specific intent" crime; in modern terminology it is viewed as a crime requiring the government to prove that the defendant intended the crime. What is different about conspiracy, however, is that this state of mind is broken into two very different parts. First, the defendant must intend to enter into an agreement with other individuals. Second, the defendant must intend that—with the other defendants—a particular crime shall be committed. In some cases, it is very difficult for the government to prove that both portions of this state of mind requirement have been satisfied. See, for instance, *Illinois v. McChristian*,¹⁷ where the defendants were gang members in the city of Chicago. A rival gang drove by and someone shouted something about "getting them." After shots were fired and members of the rival gang were injured, the defendants were charged with conspiring to murder members of that gang. The court concluded that no intent had been shown to enter into an agreement. Even more importantly, no sufficient evidence had been brought forth to demonstrate

16. *Callanan v. United States*, 364 U.S. 587, 593 (1961).

17. 309 N.E.2d 388 (1974), *aff'd*, 322 N.E.2d 804.

that the defendants intended to murder the victims as part of that agreement.

The heart of the crime of conspiracy is the agreement. Without an agreement at common law there could be no conspiracy. Nevertheless, in many cases it is extremely difficult for the government to prove by direct evidence that an agreement was formed. Hence, courts consistently allow jurors to infer from circumstantial evidence that an agreement was reached. This is important both as to the proof of the agreement and the scope of the plan. For instance, in *Direct Sales Co. v. United States*¹⁸ a pharmaceutical manufacturer was convicted of conspiring with a doctor to distribute drugs unlawfully. There was no evidence of any specific agreement, but officers in the company knew that the doctor was distributing far more narcotics (which he bought from the company) than he could lawfully distribute. The court concluded that the jury could well find that the officers in the company intended to participate in this unlawful enterprise and that the sale of the drugs was itself an agreement. See also the famous case of *United States v. Bruno*¹⁹ where multiple parties were charged with conspiring to import, sell and possess narcotics. Some of the defendants were the importers, some were the "wholesalers", some were the "retailers" of the drugs. In essence, they argued that they had never agreed with all of the other parties to distribute the narcotics and hence could not be joined together in a single conspiracy prosecution. The court rejected this view finding that each member of the conspiracy knew that the success of the entire agreement was dependent upon the participation of various individuals. Even though the defendants did not know the identity of each and every individual, they knew such persons had to be present and thus were responsible for their activities.

A recent trend in the United States would expand the liability for an individual under conspiracy theory even when no true agreement is present. This is referred to as the unilateral approach to conspiracy and is best illustrated by a Minnesota case. In that case the defendant conspired with his cousin to kill his mother. The cousin, however, had no true intention of committing the murder and was simply acting as a spy for the police. The Supreme Court of Minnesota nevertheless found that the defendant was guilty of conspiracy because *he* intended to agree with the cousin to commit the murder and *he* believed that an agreement had in fact been reached.²⁰ Therefore, under the unilateral approach to conspiracy, the court focused attention only on the defendant's state of mind

18. 319 U.S. 703 (1943).

19. 105 F.2d 921 (2d Cir. 1939), *rev'd on other grounds*, 308 U.S. 281.

20. *Minnesota v. St. Christopher*, 232 N.W.2d 798 (1975).

and ignored the question of whether a true agreement had been shown.

The scope of the crime of conspiracy is quite broad, particularly when the crime which is the object of the agreement has been completed. In many jurisdictions, if the crime is completed the defendant may be convicted of both the completed crime and the crime of conspiracy and may be given consecutive sentences for these two offenses. This is in sharp contrast to the crime of attempt which is typically said to "merge" into the completed offense. In the situation in which the attempt is satisfied as well as the completed crime, the government must normally choose which of the two offenses to charge. In the conspiracy setting, however, the crimes are viewed as distinct, because of the uniquely dangerous aspect of group criminal behavior in the agreement. As in the area of aiding and abetting, the conspirator may also be held responsible for crimes committed by others even if those crimes were not discussed or intended by the defendant as part of the agreement. In the important case of *Pinkerton v. United States*,²¹ the United States Supreme Court held that all conspirators could be found criminally liable for all crimes committed by co-conspirators, so long as those crimes could "be reasonably foreseen as a necessary or natural consequence of the unlawful agreement."²²

WITHDRAWAL FROM CRIMINAL PARTICIPATION

Two very different questions must be raised in connection with the abandonment or withdrawal by criminals in connection with illegal activity. The first is whether the defendant can withdraw after she has taken sufficient act to constitute a crime. For example, will the defendant be responsible once a substantial step has been taken when that step would satisfy the act element of an attempt. The second question is whether the withdrawal by the defendant will limit the scope of responsibility under aiding and abetting and conspiracy theories. At common law, the answers to both of these questions were clear.

The traditional rule has been that once the elements of the crime have been satisfied no withdrawal is permitted. In *California v. Staples*²³ the defendant took a number of steps in an attempt to commit burglary of a bank. He rented a room above the bank, purchased tools for drilling, and actually began drilling through the ceiling in an attempt to enter the bank. Prior to any detection by others, however, the defendant—a mathematician—realized that his

21. 328 U.S. 640 (1946).

22. *Id.* at 648.

23. 85 Cal. Rptr. 589 (1970).

plan was "absurd" and stopped all efforts to complete the burglary. The court, nevertheless, upheld his conviction for attempted burglary. The traditional view on this point was stated by the court.

Once that attempt is found there can be no exculpatory abandonment. One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime.²⁴

The rule was applied similarly in aiding and abetting and conspiracy settings. So long as the government demonstrated the elements of the offense, the crime was complete and no abandonment was possible. While, as we shall see, the rule has changed in recent times, that traditional rule has always been in contrast with that of the responsibility for other completed offenses. In the situation involving conspiracy in which an agreement was reached and sometime after the agreement another crime was completed, the defendant could be relieved of responsibility for that other crime if it was shown that he had withdrawn from the conspiracy. This rule makes sense because there would be no aid under the accomplice theory, or agreement under the conspiracy, if the defendant was no longer present when that completed crime was shown. Hence, in these situations, the defendant could still be liable for the underlying crime, but could not be held responsible for crimes committed after the withdrawal.

Many jurisdictions today reject the traditional view that one cannot withdraw from the attempt, the aiding and abetting, and the conspiracy when all the elements for proof of the crime have been satisfied. These legislatures and courts take the view that we ought to encourage the withdrawal of defendants and that the affirmative defense of abandonment is needed to promote that encouragement. Typical of this view is a recent draft of the proposed revised federal criminal code.

It is an affirmative defense to a prosecution under the title for attempt that, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, the defendant avoided the commission of the crime attempted . . .

In all three settings—attempt, aiding and abetting, and conspiracy—many courts today allow for the effective withdrawal of responsibil-

24. *Id.* at 594.

ity. The difficult question then relates to the proof which the defendant must offer in order to sustain the burden of showing voluntary withdrawal. It is clear that in most cases it will not be enough for the defendant to prove that he simply decided not to engage in criminal behavior any longer. Especially when other criminal participants are involved, the burden on the defendant is greater.

Most cases hold that the defendant's withdrawal burden is a two-fold responsibility. First, the defendant must act in a timely fashion so that others who might continue to participate in the criminal activity will be advised of his withdrawal and may themselves be encouraged to withdraw. Second, the defendant cannot simply advise other participants that he is no longer engaged in the activity. Instead, he must "take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation."²⁵ In addition, the defendant must demonstrate that his motives for abandonment or withdrawal were proper. Thus, it is not enough to demonstrate withdrawal when the police find out of the activity, or the officers are in hot pursuit of the defendant. Similarly, the abandonment would not be successful "when the defendant fails to consummate the attempted offense after deciding to postpone the criminal conduct until another time or to substitute another victim or another but similar objective."²⁶

The basic point of allowing withdrawal is to encourage the elimination of crime where governmental detection is not yet possible. Therefore, the modern rule allowing withdrawal as a defense is sound. Even though the necessary elements of these crimes may have been completed, if the defendant *voluntarily* withdraws out of a sense of remorse, his culpability has been eliminated, his criminal responsibility should also be eliminated. The traditional view of not allowing abandonment for attempt, aiding and abetting, and conspiracy may soon become the minority rule, and properly so.

CONCLUSION

In the United States, it is quite common to see criminal prosecutions for attempt, aiding and abetting, or conspiracy where there are several participants in the commission of a crime. The elements of these three theories are quite different, though in some cases all three crimes can be shown. Each imposes responsibility for a particular intended crime in itself; in addition, in many cases other crimes may be attributable to the defendant because of his guilt as an aider and abettor or a conspirator. While courts have been reluctant in

25. *Harris v. United States*, 377 A.2d 34, 38 (D.C. Ct. App. 1977).

26. *Michigan v. Kimball*, 311 N.W.2d 343, 349 (1981).

the past to allow withdrawal from responsibility for attempt, aiding and abetting, and conspiracy that view is changing rapidly. In today's world, in an effort to encourage abandonment of criminal efforts, more and more judges and legislators are viewing the defense of withdrawal as an important aid in the fight against crime.