

# The Mens Rea Dilemma for Aiding and Abetting a Felon in Possession

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## INTRODUCTION

Under 18 USC § 922(g)(1), convicted felons may not possess firearms, and violators can be punished with up to ten years in prison.<sup>1</sup> Congress's intent in prohibiting the possession of firearms by felons was to "eliminate firearms from the hands of criminals, while interfering as little as possible with the law abiding citizen."<sup>2</sup> An individual who aids and abets a felon's firearm ownership<sup>3</sup> can be charged as an accomplice to the felon-in-possession offense, pursuant to 18 USC § 2(a).<sup>4</sup>

The circuit courts currently are split over whether a defendant charged with aiding and abetting a felon under § 922(g)(1) can be held strictly liable for knowing the principal's status as a convicted felon. While the Ninth Circuit applies a strict liability standard, the Third and Sixth Circuits insist that the defendant must possess knowledge or "reasonable cause to believe" that the principal is a convicted felon for the defendant to be convicted as an accomplice under § 922(g)(1).

This Comment argues that courts should apply the knowing or "reasonable cause to believe" standard; at the same time, concurrent felonious activity should trigger a rebuttable presumption that the defendant possessed "reasonable cause to believe" that the principal was a convicted felon. This Comment defines "concurrent felonious activity" as occurring when the defendant aides the principal's violation of § 922(g)(1) in order to further a *separate* felony offense engaged in by the defendant and the principal.

This Comment's solution would make the mens rea standard harder to evade in cases where the defendant actually possesses

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<sup>1</sup> See 18 USC § 922(g)(1); 18 USC § 924(a) (providing the penalty for violations of § 922(g)(1)).

<sup>2</sup> *United States v Weatherford*, 471 F2d 47, 51 (7th Cir 1971) (indicating that the congressional intent behind 18 USC § 922(g)(1) is "crystal clear"). See note 15 and accompanying text.

<sup>3</sup> In this Comment, a felon who possesses a firearm in violation of § 922(g)(1) is referred to as the principal.

<sup>4</sup> 18 USC § 2(a) (stating that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"). In this Comment, the terms "aider and abettor" and "accomplice" are used interchangeably.

awareness of the principal's felon status, and is therefore an improvement over the current application of the "reasonable cause to believe" standard. Even when the defendant does not possess such knowledge, however, the solution can be justified on the grounds that the separate felonious activity puts the defendant "on notice" to expect firearms regulation. Once criminal activity is involved, the firearm is no longer being used solely to pursue innocent endeavors, and therefore the defendant should expect heightened regulation. In addition, the principal's engagement in a concurrent felony indicates a sixfold increase in the probability that the principal committed a past felony, as compared to the general adult population,<sup>5</sup> thus supporting the defendant's assumption of the burden in such circumstances.

Unlike strict liability, however, this solution preserves the consonance between § 922(g)(1) and 922(d)(1), another provision aimed at keeping firearms from convicted felons. Section 922(g)(1) proscribes *possession* of a firearm by a felon, while § 922(d)(1) proscribes the *sale* or *disposal* of a firearm to a felon. When § 922(g)(1) is coupled with accomplice liability, there is the potential for significant overlap with § 922(d)(1). In contrast to § 922(g)(1), however, § 922(d)(1) contains the mens rea of knowledge or "reasonable cause to believe" with respect to the possessor's status as a felon. Adopting strict liability for the felon's status in § 922(g)(1), therefore, could create the potential for prosecutors to circumvent the mens rea provided by Congress in § 922(d)(1). This Comment, therefore, adopts the more legally defensible standard of knowledge or "reasonable cause to believe," while combining this standard with a rebuttable presumption that captures some policy benefits better served by strict liability.

The Comment proceeds as follows: Part I explores the background and text of § 922(g)(1) and provides a brief overview of principal and accomplice liability under the provision. Part II examines the split between the circuit courts regarding the correct mens rea for the principal's felon status in the context of aiding a felon in possession under § 922(g)(1). Part III discusses the advantages and drawbacks inherent in the competing sides of the circuit split, and ultimately concludes that the knowledge or "reasonable cause to believe" standard must be retained for the sake of preserving congressional intent with respect to § 922(d)(1). Part IV proposes that the knowledge or "reasonable cause to believe" standard would be improved if coupled with a rebuttable presumption that the defendant had "reasonable cause to believe" the principal was a felon in circumstances

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<sup>5</sup> See note 165 and accompanying text.

where the § 922(g)(1) offense was committed in furtherance of separate felonious activity.

#### I. BACKGROUND: THE TEXT AND HISTORY OF 18 USC § 922(G)(1) IN THE CONTEXT OF PRINCIPAL AND ACCOMPLICE LIABILITY

This Part begins with a brief history of congressional attempts to regulate the possession of firearms by convicted felons. Part I.B discusses § 922(g)(1), which was enacted as part of the Firearms Owners' Protection Act of 1986. The remainder of Part I describes the mens rea issues that have arisen in the context of both principal and accomplice liability under § 922(g)(1).

##### A. Historical Overview

The United States has a long history of restricting the ability of convicted felons to obtain firearms.<sup>6</sup> One of the first federal firearms statutes, the Federal Firearms Act of 1938,<sup>7</sup> banned receipt of a firearm by individuals previously convicted of a “crime of violence.”<sup>8</sup> This prohibition was expanded in the coming decades until it eventually applied to all felons.<sup>9</sup> The next major overhaul of firearms legislation occurred with the passage of the Omnibus Crime Control and Safe Streets Act of 1968.<sup>10</sup> The Act made it unlawful to “sell or otherwise dispose of any firearm” to a convicted felon.<sup>11</sup> Nearly two decades later, the Firearms Owners' Protection Act of 1986<sup>12</sup> (FOPA) was passed, despite intense lobbying by the firearms industry.<sup>13</sup>

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<sup>6</sup> See generally David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 *Cumb L Rev* 585 (1987).

<sup>7</sup> Federal Firearms Act, 15 USC §§ 901–10 (1938) (repealed 1968).

<sup>8</sup> See 15 USC § 901 (1938). See also Hardy, 17 *Cumb L Rev* at 598 n 71 (cited in note 6) (comparing the 1938, 1947, and 1961 versions of the Act).

<sup>9</sup> See Hardy, 17 *Cumb L Rev* at 598 n 71 (cited in note 6). In 1947, “crime of violence” was defined to include burglary, housebreaking, and many forms of assault. Act of Mar 10, 1947, 61 Stat 11, codified at 15 USC § 901 (1952). In 1961, the prohibition was extended to all convicted felons. Act of Oct 3, 1961, Pub L No 87-342, 75 Stat 757, codified at 15 USC § 901 (1964).

<sup>10</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub L No 90-351, 82 Stat 197, 225, codified at 18 USC § 901(a)(1) (1970).

<sup>11</sup> *Id.*

<sup>12</sup> The Firearms Owners' Protection Act of 1986, Pub L 99-308, 100 Stat 449, codified as amended at 18 USC §§ 921–29 (1988).

<sup>13</sup> See Hardy, 17 *Cumb L Rev* at 585, 605, 606 & n 115 (cited in note 6) (noting the resistance from the National Rifle Association, which had five full-time federal lobbyists at the time).

## B. The Statute: 18 USC § 922(g)(1)

Section 922(g)(1) was enacted in 1986 as part of FOPA.<sup>14</sup> The provision is a consolidation of portions of three former provisions of Title 18 that regulated possession of firearms by convicted felons.<sup>15</sup> Under the current version of § 922(g)(1), it is

unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.<sup>16</sup>

The reference to a “crime punishable by a term of imprisonment exceeding one year” is simply another way of describing a felony offense.<sup>17</sup> Put more clearly, the elements of § 922(g)(1) can be broken down as follows: (1) the defendant had a previous felony conviction; (2) the defendant possessed a firearm or ammunition; and (3) the firearm or ammunition traveled in or affected interstate commerce.<sup>18</sup> Part I.C discusses the mens rea issues raised by § 922(g)(1).

## C. The Mens Rea for 18 USC § 922(g)(1)

Section 922(g)(1) implicates several mens rea issues, not all of which are resolved by the language of the provision. Part I.C.1 provides a brief description of mens rea for the conduct element of § 922(g)(1), followed in Part I.C.2 by a discussion of mens rea for the circumstance element of § 922(g)(1) in the context of principal liability. Part I concludes with an analysis of mens rea for the circumstance element of § 922(g)(1) in the context of accomplice liability, an issue that has prompted a circuit split.

### 1. The mens rea for § 922(g)(1)’s conduct element.

The predecessor statutes to § 922(g)(1) did not contain any express mens rea requirements.<sup>19</sup> However, courts interpreted these sta-

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<sup>14</sup> See FOPA § 102, 100 Stat at 449.

<sup>15</sup> See *United States v Langley*, 62 F3d 602, 604 (4th Cir 1995). The three former provisions are: § 922(g)(1) (unlawful for convicted felon to ship or transport a firearm in interstate commerce); § 922(h)(1) (unlawful for convicted felon to receive a firearm that has been shipped or transported in interstate commerce); and § 1202(a) (18 USC App) (unlawful for convicted felon to receive, possess, or transport a firearm in or affecting commerce). *Id.*

<sup>16</sup> 18 USC § 922(g)(1).

<sup>17</sup> See *Langley*, 62 F3d at 603 n 1 (noting that the two terms are “used interchangeably”).

<sup>18</sup> *United States v Gardner*, 488 F3d 700, 713 (6th Cir 2007).

<sup>19</sup> See *Langley*, 62 F3d at 604.

tutes to require the defendant to have *knowingly* “received, transported, or possessed” the firearm.<sup>20</sup> In other words, the predecessor statutes were not strict liability offenses with respect to the conduct element of the crime.

Like its predecessor statutes, the current version of § 922(g)(1) contains no explicit mens rea language. When Congress enacted § 922(g) in 1986, however, it amended 18 USC § 924(a)(2)—the penalty provision for § 922—to penalize only *knowing* violations of § 922(g)(1).<sup>21</sup> The result is that § 922(g)(1) does not afford strict liability with regards to the conduct element of the offense—defendants must *knowingly* possess, ship, or transport a firearm in order to be subject to the provision’s penalty.

2. The mens rea for § 922(g)(1)’s circumstance element for principal liability.

The federal criminal code does not provide a mens rea requirement for the statutory element of the defendant’s status as a convicted felon under § 922(g)(1). The text of § 922(g)(1) does not specify a mens rea requirement for the defendant’s criminal history; nor does § 924(a)(2) speak directly to this issue. Though perhaps not obvious, there are circumstances in which a defendant reasonably is unaware of his status as a convicted felon.<sup>22</sup> Courts interpreted the predecessor statutes to § 922(g)(1) such that the defendant could be convicted even if he lacked knowledge of his own felon status.<sup>23</sup> In other words, under the predecessor statutes, the defendant was held strictly liable for his criminal history.

Courts currently disagree as to whether the mens rea term “knowingly” in § 924(a)(2) should extend to the substantive circumstance element of the crime—the defendant’s status as a convicted felon—in the context of § 922(g)(1) principal liability.<sup>24</sup> A substantial majority of

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<sup>20</sup> *Id.*

<sup>21</sup> 18 USC § 924(a)(2) (“Whoever knowingly violates . . . section 922[g] shall be fined as provided in this title, imprisoned not more than 10 years, or both.”). See also *United States v Sherbondy*, 865 F2d 996, 1002 (9th Cir 1988) (“[I]t is highly likely that Congress used section 924(a) simply to avoid having to add ‘willful’ or ‘knowing’ into every subsection of section 922.”).

<sup>22</sup> One such example is when the defendant has been granted a pardon. See, for example, *United States v Laxey*, 2004 WL 413215, \*1 (5th Cir) (affirming the applicability of § 922(g)(1) to a defendant who had been pardoned).

<sup>23</sup> See, for example, *United States v Schmitt*, 748 F2d 249, 252 (5th Cir 1984); *United States v Lupino*, 428 F2d 720, 723–24 (8th Cir 1973).

<sup>24</sup> Although the interstate travel requirement is also a circumstance element, courts distinguish between jurisdictional and substantive elements of a crime. Purely jurisdictional provisions “need not contain the same culpability requirement as other elements of the offense.” *United States v Yermian*, 468 US 63, 68–74 (1984) (holding that proof of actual knowledge of federal

courts continue to hold the defendant strictly liable for his felon status under § 922(g)(1). The Fourth Circuit's decision in *United States v Langley*,<sup>25</sup> which exemplifies the majority approach, interprets the knowledge requirement in § 924(a) as extending only to the conduct element of § 922(g)(1).<sup>26</sup> The *Langley* court determined that Congress did not provide the clear manifestation of contrary intent that would be necessary "to displace the presumption that Congress created the FOPA version of § 922(g)(1) consistent with existing law and the settled judicial understanding of § 922(g)(1)'s predecessor statutes."<sup>27</sup>

However, as *Langley*'s heated partial dissent suggests, some controversy still exists over whether a defendant should be held strictly liable for his own felon status under § 922(g)(1).<sup>28</sup> Those who are critical of the majority position cite Supreme Court precedent to argue that strict liability should not apply to a circumstance element that criminalizes "otherwise innocent" behavior.<sup>29</sup> This line of reasoning advances the so-called "*Morissette* presumption."<sup>30</sup> The *Morissette* presumption requires that "unless statutory language or legislative history evinces a contrary intent, a nonspecific mens rea requirement was intended by Congress to run to each of the statutory elements which criminalize otherwise innocent behavior."<sup>31</sup> Because the courts following the *Morissette* presumption consider possession of a firearm under § 922(g)(1) to

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agency jurisdiction is not required to convict for making a false or fraudulent statement within the jurisdiction of a federal agency).

<sup>25</sup> 62 F3d 602 (4th Cir 1995).

<sup>26</sup> *Id* at 604–05.

<sup>27</sup> *Id* at 606.

<sup>28</sup> See *id* at 609–19 (Phillips concurring in part and dissenting in part) ("Although Congress obviously intended 'knowingly' to impose a knowledge requirement with respect to some of the 'black-letter' elements of the § 922(g)(1) offense . . . the word in context does not plainly indicate which of those elements Congress had in mind.") (citation omitted). See also *Gardner*, 488 F3d at 715 n 2 (acknowledging that the question of mens rea for the principal with respect to his felon status is not fully settled); *United States v Kitsch*, 2008 WL 2971548, \*4 (ED Pa) (expressing agreement with the reasoning of the *Langley* dissent).

<sup>29</sup> See, for example, *Langley*, 62 F3d at 614 (Phillips concurring in part and dissenting in part); *Kitsch*, 2008 WL 2971548 at \*4 (applying the "*Morissette* presumption . . . that mens rea extends to elements that take otherwise lawful conduct and subject it to criminal sanction"). See also *Morissette v United States*, 342 US 246, 271 (1952).

<sup>30</sup> See *Langley*, 62 F3d at 615 (Phillips concurring in part and dissenting in part) (citation and quotation marks omitted). In *Morissette*, the defendant had been convicted by the trial court of converting government bomb casings found on a government target range. 342 US at 247. The Supreme Court reversed the conviction, holding that although no mens rea was specified under the statute for the circumstance element of the crime, the statute required knowledge as to whether the property was abandoned and hence capable of being stolen or converted. *Id* at 275–76.

<sup>31</sup> *Langley*, 62 F3d at 614 (Phillips concurring in part and dissenting in part) (citation omitted). The *Langley* dissent stresses that the *Morissette* presumption "runs not only to those elements that define the core *conduct* proscribed but also to any elements that define *circumstances* upon which criminality of the conduct turns." *Id*.

be “otherwise innocent behavior,” they claim that the knowledge requirement in § 924(a)(2) should extend to the defendant’s felon status.<sup>32</sup>

Although not the main issue of this Comment, the disagreement over the mens rea for principal liability under § 922(g)(1) is relevant to understanding the circuit split over accomplice liability under § 922(g)(1). The Ninth Circuit justifies the application of strict liability to an accomplice on the grounds that the principal is held strictly liable for his own felon status.<sup>33</sup> Were strict liability not applied to the principal, the Ninth Circuit’s reasoning would be undermined. Moreover, the *Morissette* presumption, discussed here in the context of principal liability, has implications for the solution that this Comment offers in Part IV.<sup>34</sup>

3. The mens rea for § 922(g)(1)’s circumstance element for accomplice liability.

Like other federal offenses, a defendant can be charged under § 922(g)(1) as an accomplice rather than as a principal. Under 18 USC § 2(a), “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”<sup>35</sup> When combined with § 922(g)(1), this statute creates accomplice liability in circumstances where the defendant aids and abets a felon’s possession of a firearm. An accomplice to § 922(g)(1) can be punished to the same degree as the principal—in this case, with up to ten years in prison.<sup>36</sup>

The elements that the government traditionally must show to prove aiding and abetting are: (1) an act by a defendant that contributes to the commission of a crime; and (2) the intent to aid in the commission of the crime.<sup>37</sup> Judge Learned Hand famously noted that the terms “aid” and “abet” demand that the defendant “in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.”<sup>38</sup> Judge Hand further suggested that “even the most color-

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<sup>32</sup> See *id.* at 609–19 (Phillips concurring in part and dissenting in part). Judge James Phillips’s partial dissent distinguishes between the “substantive” circumstance element and the “jurisdictional” circumstance element for the purpose of applying the *Morissette* presumption. See *id.* at 618–19 (arguing that the interstate commerce element is not a fact that makes the defendant’s conduct illegal for purposes of applying the presumption). See also note 24 and accompanying text.

<sup>33</sup> See *United States v Canon*, 993 F.2d 1439, 1442 (9th Cir. 1993).

<sup>34</sup> See Part IV.B.3.

<sup>35</sup> 18 USC § 2(a).

<sup>36</sup> 18 USC § 924(a)(2).

<sup>37</sup> See *United States v Lawson*, 872 F.2d 179, 181 (6th Cir. 1989).

<sup>38</sup> *United States v Peoni*, 100 F.2d 401, 402–03 (2d Cir. 1938) (holding that the defendant was not an accessory to possession of counterfeit bills following his sale of the bills to a third party).

less” words used to characterize accomplice liability “carry an implication of purposive attitude towards [the venture].”<sup>39</sup>

It is worth noting that charges of accomplice liability under § 922(g)(1) frequently arise in situations where the principal and the accomplice engaged in additional, concurrently felonious conduct.<sup>40</sup> Defendants rarely are charged *only* with accomplice liability under § 922(g)(1).<sup>41</sup> This may be explained by the fact that the crime is likely to go undetected except in situations where the perpetrators are caught engaging in other criminal activity. Also, prosecutors may have a greater incentive to prosecute § 922(g)(1) violations when additional criminal wrongdoing is involved.

A complication created by accomplice liability under § 922(g)(1) arises from its potential conflict with another provision regulating the possession of firearms by convicted felons: 18 USC § 922(d)(1). Section 922(d)(1) states:

It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person . . . has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.<sup>42</sup>

Broadly speaking, § 922(d)(1) proscribes the *sale* or *disposal* of a firearm to a felon, whereas § 922(g)(1) proscribes the *possession* of a firearm by a felon.

Congress enacted § 922(d) in the Omnibus Crime Control and Safe Streets Act of 1968 due to concern about “a widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce.”<sup>43</sup> Congress further found that “the ease with which any person can acquire firearms other than a rifle or shotgun (*including criminals . . .*) is a significant factor in the prevalence of lawlessness and violent crime

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<sup>39</sup> Id at 402.

<sup>40</sup> See, for example, *Gardner*, 488 F3d at 706 (involving drug charges); *United States v Lombard*, 72 F3d 170, 173 n 1 (1st Cir 1995) (same); *United States v Moore*, 936 F2d 1508, 1511 (7th Cir 1991) (same).

<sup>41</sup> But see *United States v Samuels*, 521 F3d 804, 808 (7th Cir 2008) (involving a defendant charged only with aiding and abetting a felon in possession). In *Samuels*, the defendant gave the principal a firearm immediately prior to a brawl where the defendant and the principal beat a man unconscious. Id at 808–09. It is worth noting that although the defendant was charged only with the § 922(g)(1) offense, he had apparently been engaged in some other *criminal* activity with the principal.

<sup>42</sup> 18 USC § 922(d)(1).

<sup>43</sup> Omnibus Crime Control and Safe Streets Act, § 901, 82 Stat at 225.

in the United States.”<sup>44</sup> Critically, the original version of § 922(d) applied only to licensed federal firearms dealers and manufacturers.<sup>45</sup>

The limitation of the law to federal firearms dealers and manufacturers created a loophole, however, “whereby qualified purchasers . . . acquired firearms from licensees on behalf of prohibited persons.”<sup>46</sup> In other words, a third party would be used to facilitate sales that would otherwise be illegal due to the purchaser’s felon status. To prevent this abuse, Congress amended the statute in 1986 as part of FOPA so that it applied to “any person” rather than just licensed firearms dealers and manufacturers.<sup>47</sup>

Sections 922(g)(1) and 922(d)(1) contain virtually identical language.<sup>48</sup> There are only two relevant differences in the texts of these provisions. First, as stated above, § 922(d)(1) proscribes the *sale* or *disposal* of a firearm to a felon, whereas § 922(g)(1) proscribes the *possession* of a firearm by a felon. Also—crucial to the issue at hand—§ 922(d)(1) establishes a mens rea requirement for the substantive circumstance element of the crime. In order to be convicted, the defendant must have sold or disposed of a weapon to a convicted felon while “knowing or having reasonable cause to believe” that the recipient of the weapon was a convicted felon.<sup>49</sup> As noted above, § 922(g)(1) contains no such mens rea language with regard to the felon’s status. This discrepancy creates the potential for prosecuting defendants as accomplices under § 922(g)(1) rather than as principal violators under § 922(d)(1)—a tempting option if the former provision were to afford strict liability as to the felon’s status.

To summarize the legislative history, Congress passed § 922(d)(1) in 1968 to ban the sale or disposal of firearms to convicted felons.<sup>50</sup> In 1986, Congress consolidated three provisions regulating firearms and convicted felons into the current version of § 922(g)(1), which bans the possession of firearms by convicted felons.<sup>51</sup> At the same time, Congress amended § 922(d)(1) so that it applied to “any person” and not just licensed firearms dealers and manufacturers.<sup>52</sup> Unlike § 922(d)(1), however, § 922(g)(1) does not contain a mens rea requirement for the possessor’s status as a convicted felon. This discrepancy creates the poten-

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<sup>44</sup> Id (emphasis added).

<sup>45</sup> FOPA, HR Rep No 99-495, 99th Cong, 2d Sess, reprinted in 1986 USCCAN 1327, 1343.

<sup>46</sup> Id.

<sup>47</sup> See FOPA, § 102, 100 Stat at 449.

<sup>48</sup> Compare 18 USC § 922(g)(1), with 18 USC § 922(d)(1). In addition, § 922(g)(2) and 922(d)(2) share virtually identical language, as do § 922(g)(3) and 922(d)(3), and so forth.

<sup>49</sup> 18 USC § 922(d)(1).

<sup>50</sup> See notes 10–11, 44–45 and accompanying text.

<sup>51</sup> See notes 12–16 and accompanying text.

<sup>52</sup> See note 47 and accompanying text.

tial for an end run around § 922(d)(1), a possibility that partially motivates the circuit split over accomplice liability under § 922(g)(1).

## II. THE DISAGREEMENT AMONG THE CIRCUIT COURTS

The circuit courts currently are split as to whether a defendant charged with aiding and abetting a felon in possession can be held strictly liable for the principal's status as a convicted felon. The Ninth Circuit has determined that strict liability applies to the principal's status, while the Third and Sixth Circuits have ruled that the defendant must have possessed knowledge or "reasonable cause to believe" that the principal was a convicted felon in order for the defendant to be convicted as an accomplice under § 922(g)(1).

### A. Strict Liability and the Ninth Circuit

The Ninth Circuit has chosen an approach that makes it easier to convict defendants charged with aiding and abetting a felon in possession under § 922(g)(1). In *United States v Canon*,<sup>53</sup> the Ninth Circuit ruled that that an accomplice to § 922(g)(1) need not possess knowledge or "reasonable cause to believe" that the principal is a convicted felon.<sup>54</sup>

*Canon* involved two defendants, Douglas Canon and Robert Delang, who led police on a high-speed chase after the police tried to pull them over for a broken taillight.<sup>55</sup> During the chase, Canon fired at the officers from the passenger window.<sup>56</sup> An officer claimed that he saw Delang give something resembling a firearm to Canon prior to the shooting.<sup>57</sup> Both defendants were convicted felons, and both were charged under § 922(g)(1).<sup>58</sup> Canon was charged as a principal and held strictly liable for his own felon status.<sup>59</sup> Delang was charged as an accomplice to Canon's violation of § 922(g)(1), and the Ninth Circuit also held Delang strictly liable for Canon's status.<sup>60</sup>

The court reasoned that because a principal is strictly liable for his own felon status, "[n]o greater knowledge requirement" should apply to an accomplice.<sup>61</sup> According to the Ninth Circuit, the government needed to prove only that Delang, as an aider and abettor, "associate[d] himself with [Canon's crime], that he participate[d] in it as

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<sup>53</sup> 993 F2d 1439 (9th Cir 1993).

<sup>54</sup> *Id.* at 1442.

<sup>55</sup> *Id.* at 1440.

<sup>56</sup> *Id.* at 1440–41.

<sup>57</sup> *Canon*, 993 F2d at 1440–41.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1442.

<sup>60</sup> *Id.*

<sup>61</sup> *Canon*, 993 F2d at 1442.

in something that he wishe[d] to bring about, [and] that he [sought] by his action to make it succeed.”<sup>62</sup>

In *United States v Graves*,<sup>63</sup> the Ninth Circuit reaffirmed *Canon* by stating, in dicta, that an accomplice can be held strictly liable for the principal’s status under § 922(g)(1).<sup>64</sup> *Graves* involved a man named Shawn Prince who brandished his gun at a naval base party while shouting at his girlfriend.<sup>65</sup> When officers arrived on the scene and arrested Prince, the defendant Lyndon Graves aided Prince in escaping from the patrol car and disposing of his weapon.<sup>66</sup> Prince was a convicted felon, and Graves was later charged under 18 USC § 3 as an accessory after the fact to Prince’s violation of § 922(g)(1).<sup>67</sup> The court distinguished between after-the-fact accessory liability and accomplice liability, holding that only the former requires actual knowledge of the principal’s status as a felon.<sup>68</sup>

The Ninth Circuit noted that strict liability for an accomplice “is consistent with the general rule that knowledge of an aider and abettor need be no greater than the knowledge of the principal.”<sup>69</sup> The court did suggest that § 922(g)(1) might present a “logical exception” to this rule, as “there is no reason an aider and abettor should be presumed to have [ ] knowledge” of the principal’s felon status.<sup>70</sup> The court also expressed “serious reservations” about *Canon* because the opinion “contain[ed] no analysis in support of its conclusion.”<sup>71</sup> Even so, the Ninth Circuit has never revisited its holding in favor of strict liability, and *Canon* remains good law.<sup>72</sup>

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<sup>62</sup> Id. See also *United States v Peoni*, 100 F2d 401, 402 (2d Cir 1938).

<sup>63</sup> 143 F3d 1185 (9th Cir 1998).

<sup>64</sup> Id at 1188 n 3.

<sup>65</sup> Id at 1186.

<sup>66</sup> Id.

<sup>67</sup> *Graves*, 143 F3d at 1186–87. See 18 USC § 3 (“Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.”).

<sup>68</sup> Id at 1189.

<sup>69</sup> Id at 1188 n 3.

<sup>70</sup> Id.

<sup>71</sup> *Graves*, 143 F3d at 1188 n 3.

<sup>72</sup> The Seventh Circuit has also considered the issue several times, but has never firmly decided whether an accomplice to § 922(g)(1) can be held strictly liable for the principal’s felon status. In *United States v Moore*, 936 F2d 1508 (7th Cir 1991), the court indicated implicit support for the Ninth Circuit’s strict liability approach by ruling that an accomplice under § 922(g)(1) need only share the principal’s knowledge that the principal possessed a gun. Id at 1527–28. However, the Seventh Circuit’s position has subsequently become less clear. In *United States v Samuels*, 521 F3d 804 (7th Cir 2008), the Seventh Circuit stated in dicta that “to aid and abet a felon in possession of a firearm, the defendant must *know or have reason to know* that the individual is a felon at the time of the aiding and abetting.” Id at 812 (emphasis added). The court provided no further discussion of the issue and did not reference its previous holding in *Moore*.

B. The Third and Sixth Circuits' Knowledge or "Reasonable Cause to Believe" Standard

In *United States v Xavier*,<sup>73</sup> the Third Circuit explicitly rejected strict liability for an accomplice under § 922(g)(1).<sup>74</sup> Rather, the court held that "there can be no criminal liability for aiding and abetting a violation of § 922(g)(1) without *knowledge or having cause to believe* the possessor's status as a felon."<sup>75</sup>

In *Xavier*, the defendant and his brother were at a grocery store when the defendant spotted an individual, with whom his brother had an ongoing dispute, in the store parking lot.<sup>76</sup> The defendant left the premises by car and quickly returned with a different man, who handed a gun to the defendant's brother.<sup>77</sup> The defendant's brother proceeded to shoot at the victim's car several times.<sup>78</sup> The trial court convicted the defendant of aiding and abetting several of his brother's crimes, including his brother's possession of a firearm in violation of § 922(g)(1).<sup>79</sup> On appeal, the defendant argued that the government never proved he possessed knowledge of his brother's former conviction, which he claimed was an essential element of the crime.<sup>80</sup>

The Third Circuit agreed with the defendant, holding that "[u]nless there is evidence a defendant knew or had cause to believe he was aiding and abetting possession by a convicted felon, [the evidence] has not shown [the] 'guilty mind'" required for accomplice liability.<sup>81</sup> The court also reasoned that the mens rea for accomplice liability under § 922(g)(1) should be consistent with § 922(d)(1).<sup>82</sup> The court stated that "[a]llowing aider and abettor liability under § 922(g)(1), without requiring proof of knowledge or reason to know of the possessor's status, would effectively circumvent the knowledge element in § 922(d)(1)," thus abrogating congressional intent.<sup>83</sup>

In *United States v Gardner*,<sup>84</sup> the Sixth Circuit found the Third Circuit's reasoning in *Xavier* persuasive and agreed that the govern-

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<sup>73</sup> 2 F3d 1281 (3d Cir 1993).

<sup>74</sup> *Id.* at 1286.

<sup>75</sup> *Id.* (emphasis added). The courts use the terms "having cause to believe" and "reasonable cause to believe" interchangeably. This Comment uses "reasonable cause to believe" to mirror the language in § 922(d)(1).

<sup>76</sup> *Id.* at 1284.

<sup>77</sup> *Xavier*, 2 F3d at 1284.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1284–85.

<sup>80</sup> *Id.* at 1286.

<sup>81</sup> *Xavier*, 2 F3d at 1286–87.

<sup>82</sup> *Id.* at 1286.

<sup>83</sup> *Id.*

<sup>84</sup> 488 F3d 700 (6th Cir 2007).

ment must show that the accomplice “knew or had cause to know” that the principal was a convicted felon for liability under § 922(g)(1).<sup>85</sup> The defendant in *Gardner* planned with several other individuals to obtain five kilograms of cocaine by feigning desire to purchase the drugs.<sup>86</sup> Travon Gardner brought two weapons to the transaction, intending initially to steal the drugs at gunpoint, and later to deceive the seller with cut-up magazines disguised to look like stacks of one-hundred dollar bills.<sup>87</sup> In actuality, a federal informant had arranged the deal, and the police arrested the group and seized their weapons at the scene of the deal.<sup>88</sup>

Gardner was charged with one count under § 922(g)(1) because one of his cohorts was a convicted felon, and the jury returned a conviction under an aider and abettor theory.<sup>89</sup> The Sixth Circuit reasoned that for the jury verdict to stand, the government must show “(1) an act by a defendant that contributes to the commission of the crime; and (2) the intent to aid in the commission of the crime.”<sup>90</sup>

Although the defendant clearly assisted the principal’s commission of the offense, the Sixth Circuit held that the defendant did not possess the *intent* to aid the principal’s crime required to trigger § 922(g)(1) accomplice liability.<sup>91</sup> The court discussed the circuit split, commenting that the Ninth Circuit “offer[ed] little reasoning” for its conclusions, in contrast to the Third Circuit’s “well-reasoned” decision.<sup>92</sup> While noting that “a felon who possesses a firearm can be presumed to have known of his status as a felon,” the court stated that the “presumption that a third party has knowledge of the principal’s felonious status is on shakier ground.”<sup>93</sup>

Following the reasoning in *Xavier*, the Sixth Circuit in *Gardner* also observed that strict liability would afford a conviction under § 922(g)(1) in circumstances where a conviction could not be secured under § 922(d)(1) due to the its mens rea requirement.<sup>94</sup> The court concluded that allowing such convictions to stand would write § 922(d) out of the statute.<sup>95</sup>

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<sup>85</sup> Id at 715.

<sup>86</sup> Id at 707–08.

<sup>87</sup> Id at 708.

<sup>88</sup> *Gardner*, 488 F3d at 708.

<sup>89</sup> Id at 713.

<sup>90</sup> Id at 714.

<sup>91</sup> Id at 716.

<sup>92</sup> *Gardner*, 488 F3d at 714–15.

<sup>93</sup> Id at 715.

<sup>94</sup> Id.

<sup>95</sup> Id at 715 n 2.

### III. COMPARING THE SIDES OF THE SPLIT

The circuit courts have provided a starting point to determine the appropriate mens rea under § 922(g)(1) for an accomplice with respect to the principal's felon status. Before exploring any potential solutions to the circuit split, this Part analyzes the benefits and drawbacks of the positions advocated by the respective sides of the debate. The positions are then weighed against each other to determine if either decisively prevails. This Comment concludes in Parts III.C and IV that the "reasonable cause to believe" standard must be adopted for the sake of preserving congressional intent, but that it would be improved significantly if coupled with a rebuttable presumption that advances the policy benefits afforded by strict liability.

#### A. Analysis of the Strict Liability Standard

The strict liability standard, as advanced by the Ninth Circuit, contains a number of practical virtues that support its application. First and foremost, this standard prevents defendants who are actually aware of the principal's felon status from evading liability because knowledge remains very difficult for prosecutors to prove. Furthermore, as is generally the case with strict liability, this standard provides law enforcement benefits based on increased deterrence and incapacitation.<sup>96</sup> Such a standard also constitutes a clear and straightforward rule; thus, the decision costs for courts to apply it in each circumstance are minimal.<sup>97</sup> The policy justifications for strict liability are particularly strong if the accomplice is actually aware of the principal's status in a large majority of the prosecuted cases. In addition to these benefits, strict liability would mirror the standard applied to the principal's mens rea under § 922(g)(1), following the rule established by some courts that "the knowledge of an aider and abettor need be no greater than the knowledge of the principal."<sup>98</sup>

Even so, the application of strict liability to these circumstances raises a number of serious concerns. Strict liability increases the risk of conviction where a defendant lacks the "purposivist" attitude tradi-

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<sup>96</sup> The incapacitation effect suggests that an increase in incarceration leads to a reduction in crime. See William Spelman, *Criminal Incapacitation 2* (Plenum 1994). Although this Comment assumes the existence of an incapacitation effect, it is worth noting that the extent of the "incapacitation effect" has generated considerable debate. See Catherine M. Sharkey, Book Note, *Out of Sight, Out of Mind: Is Blind Faith in Incapacitation Justified?*, 105 Yale L J 1433, 1434 (1996).

<sup>97</sup> See Cass R. Sunstein, *Problems with Rules*, 83 Cal L Rev 953, 972 (1995) ("Rules can, in short, be the most efficient way to proceed, by saving time and effort, and by reducing the risk of error in particular cases.").

<sup>98</sup> *Graves*, 143 F3d at 1188 n 3. But see Part III.A.1.

tionally associated with accomplice liability.<sup>99</sup> Given the high penalty associated with § 922(g)(1), strict liability may be particularly inappropriate in this context. Moreover, strict liability would increase the tension between § 922(g)(1) and 922(d)(1). These concerns raised by strict liability are addressed more fully below.

1. Strict liability for the felon's status may thwart traditional notions of accomplice liability.

Strict liability makes it more likely that defendants will be convicted despite their failure to evince a "purposivist" attitude towards the principal's crime. Traditional notions of accomplice liability suggest it is insufficient for the defendant merely to have associated himself with the venture; rather, the government must prove that he "[sought] by his action to make it succeed."<sup>100</sup>

It is unsurprising, therefore, that some courts interpret aiding and abetting violations as containing an "additional element of specific intent, beyond the mental state required by the principal crime."<sup>101</sup> A specific intent crime is one that requires the government to prove that "a defendant specifically intend[ed] the consequences of his or her acts."<sup>102</sup> In the context of aiding and abetting a violation of § 922(g)(1), a specific intent requirement would suggest that the defendant must have known the principal's felon status in order to intend the consequences of his act, and therefore must have possessed this knowledge in order to be held liable. While not every circuit court agrees that aiding and abetting is a specific intent crime,<sup>103</sup> this notion does correspond to the "purposivist attitude" associated with accomplice liability.

Surprisingly, the Ninth Circuit has adopted such a specific intent requirement for accomplices<sup>104</sup> despite claiming that, in the context of § 922(g)(1), strict liability for the felon's status "is consistent with the general rule that the knowledge of an aider and abettor need be no greater than the knowledge of the principal."<sup>105</sup> Perhaps the Ninth Circuit believes the standards should be identical with regard to the *circumstance* element of the crime, but that there is a higher standard for the accomplice with regard to the *conduct* element of the crime.

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<sup>99</sup> See *United States v Peoni*, 100 F2d 401, 402–03 (2d Cir 1938).

<sup>100</sup> *Id* at 402.

<sup>101</sup> *United States v Sayetsitty*, 107 F3d 1405, 1412 (9th Cir 1997).

<sup>102</sup> *United States v Gruttadauro*, 818 F2d 1323, 1328 (7th Cir 1987).

<sup>103</sup> See, for example, *United States v Roan Eagle*, 867 F2d 436, 445 (8th Cir 1989) (indicating that aiding and abetting is not a specific intent crime, and that conviction requires only sharing the general requisite intent of the underlying offense).

<sup>104</sup> See *Sayetsitty*, 107 F3d at 1412.

<sup>105</sup> *Graves*, 143 F3d at 1188 n 3. See also *United States v Torres-Maldonado*, 14 F3d 95, 103 (1st Cir 1994); *United States v Powell*, 929 F2d 724, 727–28 (DC Cir 1991).

In any event, even where the defendant is aware that he is assisting the principal in securing a weapon, he may be unaware that he is assisting a *felon* in securing a weapon. In such a case, it is difficult to claim that the defendant evinced a purpose to commit the crime. Because only the existence of the circumstance element makes the defendant's assistance criminal, strict liability for the felon's status would risk punishing defendants who did not demonstrate a specific purpose to violate § 922(g)(1), thereby frustrating traditional notions of accomplice liability.

2. The application of strict liability presents unique concerns in the context of § 922(g)(1), particularly given the significant penalty for violations of the provision.

The concerns raised in applying strict liability to accomplices are only heightened by the high penalty associated with the § 922(g)(1) offense—as much as ten years in prison.<sup>106</sup> The Supreme Court has suggested that strict liability should generally apply to offenses where the “penalties commonly are relatively small.”<sup>107</sup> In fact, in *Staples v United States*,<sup>108</sup> the Court rejected the application of strict liability to a circumstance element of a weapons offense, in part because the penalty for the offense was ten years in prison.<sup>109</sup>

The Third Circuit expressed a related concern in *Xavier*, noting that strict liability would be an unusually low mens rea standard because the criminality of § 922(g)(1) “depends on the status of the person possessing the firearm.”<sup>110</sup> The criminality of many felonies, of course, turns on the existence of a circumstance element. There are three aspects of § 922(g)(1) accomplice liability, however, that make the application of strict liability particularly problematic. First, in the United States, gun ownership is a very common<sup>111</sup> and often legally

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<sup>106</sup> It should be noted that the strict liability concerns in the context of accomplice liability addressed in Part III.A.1 and III.A.2 are equally germane to principal liability under § 922(g)(1). In the context of principal liability, however, courts generally have concluded that the principal is overwhelmingly likely to possess knowledge of his felon status, thus diminishing the problems raised in Part III.A.1 and III.A.2. See Part I.C.2. In contrast, courts are less confident about inferring knowledge on the part of an accomplice. See Part I.C.3.

<sup>107</sup> *Morissette*, 342 US at 256.

<sup>108</sup> 511 US 600 (1994).

<sup>109</sup> *Id.* at 616–19 (holding that the “potentially harsh penalty attached to violation of § 5861(d)” requires proof that the defendant knew that a weapon’s characteristics brought it within the statutory definition of a machine gun).

<sup>110</sup> *Xavier*, 2 F3d at 1286.

<sup>111</sup> See *Staples*, 511 US at 613–14 (“Roughly 50 percent of American homes contain at least one firearm of some sort.”).

innocent endeavor.<sup>112</sup> Because guns have been widely accepted as lawful possessions in the United States, the Supreme Court has made clear that their destructive potential alone is insufficient to put gun owners on notice as to the likelihood of regulation, and therefore strict liability is inappropriate for the circumstance element of certain weapons offenses.<sup>113</sup> Second, the circumstance element may be very difficult for a third party to ascertain. Where the defendant is not a firearms vendor, and therefore does not have access to a background check system, it could be extremely burdensome for a third party to obtain information regarding the principal's felon status. Finally, as discussed above, a convicted accomplice to § 922(g)(1) can receive as much as ten years in prison for the offense. Thus, while conviction for unintentional behavior is an essential feature of strict liability, the substantial penalty triggered by violating § 922(g)(1) cautions against applying strict liability to the felon's status.

3. Strict liability for the felon's status creates a tension with 18 USC § 922(d)(1).

Perhaps the strongest critique of applying strict liability in this context, however, is that it leads to statutory inconsistency. As noted by the Third Circuit in *Xavier*, the application of strict liability to an accomplice for the principal's status under § 922(g)(1) would create significant tension with § 922(d)(1).<sup>114</sup> Section 922(d)(1) proscribes the *sale* or *disposal* of a firearm to a felon, whereas § 922(g)(1) proscribes the *possession* of a firearm by a felon. Whenever an individual sells a firearm to a felon, that individual is potentially an accomplice to the firearm possession as well. If strict liability is applied to accomplices under § 922(g)(1), then prosecutors could "effectively circumvent" the mens rea requirement in § 922(d)(1) by charging defendants under § 922(g)(1) instead.<sup>115</sup> The *Xavier* court reasoned that such maneuvering would abrogate congressional intent by dispensing with the clear mens rea requirement provided in § 922(d)(1).<sup>116</sup>

The tension between the provisions raises the following question: is accomplice liability under § 922(g)(1) wholly superfluous in relation to § 922(d)(1), in which case the specific mens rea standard provided by Congress in § 922(d)(1) would arguably predominate? At first blush, accomplice liability under § 922(g)(1) might appear entirely unneces-

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<sup>112</sup> See *id.* at 610 ("[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country."):

<sup>113</sup> See *id.* at 612.

<sup>114</sup> See 2 F3d at 1286.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* See also *Gardner*, 488 F3d at 715.

sary because such activity is covered directly under § 922(d)(1). By proscribing the “sale” or “disposal” of weapons to felons, § 922(d)(1) would include many cases in which individuals aid the possession of firearms by convicted felons. Since the statute now applies to all individuals rather than just firearms vendors,<sup>117</sup> it is not immediately apparent if § 922(g)(1) accomplice liability adds anything to § 922(d)(1).<sup>118</sup>

Upon closer examination, it becomes clear that the two provisions do not perfectly overlap. While all activity that would trigger principal liability under § 922(d)(1) would also trigger accomplice liability under § 922(g)(1), the opposite does not hold true. An example from the Third Circuit illustrates the point. In *Xavier*, the defendant drove to pick up a third party in order for that individual to bring a gun to the defendant’s brother.<sup>119</sup> These circumstances would suffice for accomplice liability under § 922(g)(1), assuming that the defendant satisfied the court’s mens rea test, since the defendant aided his brother’s violation of § 922(g)(1). The defendant in *Xavier* could not, however, be held liable as a principal under § 922(d)(1). The defendant neither “sold” nor “dispose[d]” of a firearm to his brother, as required for principal liability under § 922(d)(1).<sup>120</sup> Rather, it appears the defendant never even touched the gun.<sup>121</sup> This discrepancy, though narrow, suggests that accomplice liability under § 922(g)(1) is not superfluous.

Moreover, the case law suggests that § 922(d)(1) has been applied almost exclusively to commercial transactions.<sup>122</sup> In contrast, firearms vendors have rarely, if ever, been prosecuted as accomplices under § 922(g)(1). The different realms of application are not circumscribed by the statutory language; prosecutors theoretically could take advantage of strict liability under § 922(g)(1) to circumvent the mens rea requirement in § 922(d) provided by Congress. Thus, applying the strict liability standard to § 922(g)(1) would create a troubling increase in tension between the two provisions.

At the same time, it should be noted that § 922(d)(1) is superfluous in light of accomplice liability under § 922(g)(1). Anytime an

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<sup>117</sup> See notes 45–47 and accompanying text.

<sup>118</sup> Although § 922(d)(1) could be eliminated instead of accomplice liability under § 922(g)(1), the former is a clear and direct expression of congressional will. Because accomplice liability under § 922(g)(1) is derivative, this offense could more justifiably be eliminated by courts than principal liability under § 922(d)(1).

<sup>119</sup> See *Xavier*, 2 F3d at 1284.

<sup>120</sup> See 18 USC § 922(d)(1).

<sup>121</sup> See *Xavier*, 2 F3d at 1284.

<sup>122</sup> See, for example, *United States v Rose*, 522 F3d 710, 712 (6th Cir 2008) (affirming the conviction of a defendant charged with selling a firearm to a felon under § 922(d)(1)); *United States v Haskins*, 511 F3d 688, 690 (7th Cir 2007) (same); *United States v McConnel*, 464 F3d 1152, 1154, 1164 (10th Cir 2006) (same).

individual “sells” or “disposes” of a firearm to a convicted felon, that individual is aiding and abetting that felon’s commission of the § 922(g)(1) offense. An argument therefore could be made that the mens rea provided in § 922(d)(1) should carry little weight because the provision is swallowed by accomplice liability under § 922(g)(1).

It would be unsound, however, to ignore the difficulties posed by the mens rea language in § 922(d)(1) when considering § 922(g)(1) based on the reasoning that the former is technically superfluous in light of the latter. The mens rea in § 922(d)(1) demonstrates a specific expression of congressional will that should not lightly be disregarded. Congress simply may not have considered derivative liability with respect to § 922(g) when it drafted § 922(d), in which case ignoring the § 922(d) mens rea language would risk eviscerating congressional intent. The Third and Sixth Circuits therefore highlight a significant problem with adopting strict liability for the felon’s status in prosecutions for accomplices under § 922(g)(1).

**B. Analysis of the Knowledge or “Reasonable Cause to Believe” Standard**

The Third and Sixth Circuits offer compelling reasons for applying the knowledge or “reasonable cause to believe” standard with respect to the principal’s felon status for § 922(g)(1) accomplice liability. This standard preserves consistency between § 922(g)(1) and 922(d)(1), avoiding the potential for a loophole to prosecute firearms vendors in a manner contrary to congressional intent.<sup>123</sup> Moreover, the heightened mens rea requirement helps ensure that a defendant lacking the criminal mind for the offense does not receive significant prison time and also preserves traditional notions of purposivism in accomplice liability.<sup>124</sup>

This standard also contains a number of drawbacks. First, there is no reason to believe that Congress intended the mens rea standard in § 922(d)(1) to alter accomplice liability under § 922(g)(1), weakening the case for a strict application of the former’s mens rea to the latter provision. Second, the “reasonable cause to believe” standard provides less clarity than strict liability, thus requiring greater resources at the point of judicial application. Finally, the knowledge or “reasonable cause to believe” standard may be too easy for defendants to circumvent, thereby serving to underdeter potential criminals and thwart effective law enforcement. Each of these arguments against the knowledge or “reasonable cause to believe” standard is addressed in turn.

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<sup>123</sup> See Part III.A.3.

<sup>124</sup> See Part III.A.1–2.

1. Congress likely did not intend to affect § 922(g)(1) when it passed § 922(d)(1).

Contrary to the arguments of the Third and Sixth Circuits,<sup>125</sup> the presence of § 922(d)(1) may cut *against* applying the “reasonable cause to believe” standard to § 922(g)(1). A textualist interpretation would suggest that Congress knew precisely how to include a mens rea requirement for the felon’s status, as it had previously decided to include such a standard in § 922(d)(1). Congress was certainly aware of the existence of § 922(d)(1) when it passed the current version of § 922(g)(1), as § 922(d)(1) was amended when Congress consolidated § 922(g)(1) in its present form.<sup>126</sup> Application of the *expressio unius* canon<sup>127</sup> would indicate, therefore, that Congress deliberately chose to omit a mens rea requirement for the felon’s status in § 922(g)(1).

But even if Congress did not specifically intend to omit a mens rea requirement in § 922(g)(1), it is worth noting that Congress likely did not *mean* to implicate § 922(g)(1) when it enacted § 922(d)(1).<sup>128</sup> As noted above, Congress originally intended § 922(d)(1) to apply only to firearms dealers and manufacturers.<sup>129</sup> Congress broadened the language to “any person” to encompass situations where a third party would be used to facilitate these “vendor-type” transactions.<sup>130</sup>

If Congress had not broadened the language of § 922(d)(1)—for reasons *irrelevant* to § 922(g)(1)—strict liability for § 922(g)(1) accomplices would not disturb § 922(d)(1). A prosecutor who attempted to charge a vendor under § 922(g)(1) would likely fail because the activity would be directly covered under the more specific “vendor” provision, and normally a specific and “carefully drawn” statute prevails over a more general one.<sup>131</sup> When Congress broadened the language of § 922(d)(1) beyond dealers and manufacturers, this alteration increased the tension with § 922(g)(1) because the former was no longer significantly narrower than the latter. As such, a defendant could potentially be charged under either provision.<sup>132</sup> However, Con-

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<sup>125</sup> See Part II.B.

<sup>126</sup> See notes 14 and 47 and accompanying text.

<sup>127</sup> The canon *inclusio unius est exclusio alterius* means “[t]he inclusion of one thing suggests the exclusion of all others.” William N. Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U Chi L Rev 671, 674 (1999). But consider *United States v Vonn*, 535 US 55, 65 (2002) (noting that this canon of construction should only be used as a “guide”).

<sup>128</sup> At the time that § 922(d)(1) was enacted, the predecessor statutes to the current version of § 922(g)(1) were operative. See note 15 and accompanying text.

<sup>129</sup> See note 45 and accompanying text.

<sup>130</sup> See note 47 and accompanying text.

<sup>131</sup> See *Morales v Trans World Airlines, Inc.*, 504 US 374, 384–85 (1992).

<sup>132</sup> For vendor-type transactions, § 922(d)(1) remains slightly narrower than § 922(g)(1) because § 922(d)(1) specifically refers to the “sale” of weapons. This discrepancy likely is not

gress's reasons for broadening the language of § 922(d)(1) appear to have been wholly unrelated to prosecutions under § 922(g)(1).

Thus, it is not so obvious that courts should read § 922(d)(1)'s mens rea requirement into § 922(g)(1), especially since it is highly unlikely that Congress intended in amending § 922(d)(1) to make it *harder* to prosecute accomplices under § 922(g)(1). To the contrary, Congress passed § 922(d)(1) to make it *easier* to combat firearm transfers to convicted felons.<sup>133</sup> Therefore, although the two provisions should remain consistent to avoid a mens rea loophole, the mens rea standard should be tailored, if possible, to better reflect the particular problems that arise in prosecutions under § 922(g)(1).<sup>134</sup>

2. The “reasonable cause to believe” standard lacks the clarity and efficiency of strict liability.

The knowledge or “reasonable cause to believe” standard is more costly for courts to apply than strict liability because it requires a case-by-case determination of the particular facts of each situation. The lengthy discussion of the issue in *Xavier* and *Gardner*, compared to the Ninth's Circuit's brief treatment in *Graves* and *Canon*, bolsters the claim that decision costs for courts differ significantly between the two requirements.

Of course, strict liability generally creates fewer decision costs for courts faced with determining liability for a particular defendant,<sup>135</sup> relative to the difficulties associated with applying a heightened mens rea standard. However, the difference is exacerbated when—as in the instant case—the mens rea requirement is relatively unclear. The mens rea term of “knowledge” is fairly simple: the defendant must possess actual, subjective knowledge, which can include awareness of a high probability of a fact's existence.<sup>136</sup> The meaning of “reasonable cause to believe” is murkier. This language is not commonly employed

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significant enough, however, to bar the use of § 922(g)(1) in vendor-type transactions on the grounds that § 922(d)(1) is more specific. Certainly the Third and Sixth Circuits believe that a vendor potentially could be charged under either provision. See Part II.B.

<sup>133</sup> See text accompanying notes 43–47.

<sup>134</sup> In other words, prosecutions that do not involve a typical vendor situation.

<sup>135</sup> See Sunstein, 83 Cal L Rev at 955, 972–74 (cited in note 97) (noting that while dogmatic application of rules can be problematic, rules in general possess several benefits, including a reduction of informational and political costs when rendering decisions).

<sup>136</sup> Model Penal Code (MPC) § 2.02(7) (ALI 1962) (stating that when “knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist”).

in the federal criminal code; however, the standard is used in other places<sup>137</sup> and has generated additional confusion and disagreement.<sup>138</sup>

Courts have interpreted “reasonable cause to believe” as an objective standard that, when viewed from the standpoint of a reasonable person in the defendant’s position, involves a level of certainty that is practically equivalent to knowledge. In the context of § 922(g)(1), the Eleventh Circuit has stated that having “reasonable cause to believe” means “to have knowledge of facts which, although not amounting to direct knowledge, would cause a reasonable person, knowing the same things, reasonably to conclude that the other person was a convicted felon.”<sup>139</sup> This interpretation suggests that “reasonable cause to believe” is a relatively difficult mens rea requirement for prosecutors to meet. A reasonable person must “conclude” based on the circumstances that the other individual was a convicted felon; a strong probability of this fact would not suffice. Although its objective nature makes it easier to prove than knowledge, the standard is still more stringent than negligence or recklessness, which involve only a “substantial risk” of a fact being present.<sup>140</sup> Furthermore, unlike knowledge, recklessness, or negligence, there is little case law applying the “reasonable cause to believe” standard. The contours of the standard therefore remain particularly unclear, requiring that courts expend effort to determine what the standard *means* before they can even apply it to the particular circumstances of a given case.

3. It is virtually impossible for prosecutors to meet the knowledge or “reasonable cause to believe” standard, even in cases where the defendant possessed knowledge or strong suspicion of the principal’s felon status.

From a law enforcement standpoint, the knowledge or “reasonable cause to believe” standard is almost impossible to establish, even in situations where the defendant had good reason to suspect that the principal was a convicted felon at the time of assisting the § 922(g)(1) violation. While this is a concern with objective mens rea standards in general, the problem is further exacerbated in the realm of § 922(g)(1)

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<sup>137</sup> See, for example, 21 USC § 841(c)(2) (making it illegal for any person to knowingly or intentionally possess or distribute “a listed chemical knowing, or having *reasonable cause to believe*, that the listed chemical will be used to manufacture a controlled substance”) (emphasis added).

<sup>138</sup> See, for example, *United States v Khattab*, 536 F3d 765, 769 (7th Cir 2008) (noting the circuit split over whether “reasonable cause to believe,” in the context of § 841(c)(2), constitutes a wholly objective test, or whether it should be assessed based on the defendant’s state of mind).

<sup>139</sup> *United States v Peters*, 403 F3d 1263, 1269 (11th Cir 2005), quoting Eleventh Circuit Pattern Jury Instruction: Criminal § 34.5 (2003).

<sup>140</sup> See MPC § 2.02(2)(c)–(d).

accomplice liability because accomplices are better able than principals to exploit plausible deniability regarding the felon's criminal history. In most instances, a principal is aware of his own felon status, yet it is less common to know another's criminal history. The stringent interpretation by the Third and Sixth Circuits—which, as discussed above, requires the prosecutor to prove something close to actual knowledge—makes it nearly impossible to achieve a conviction in circumstances where the defendant was likely aware of a significant risk that the principal was a convicted felon.

As an example of the difficulties faced by prosecutors in establishing that the defendant possessed “reasonable cause to believe,” consider *Gardner*, discussed in Part II.B. In that case, the defendant Gardner plotted with three other men to secure a large amount of cocaine in a major drug deal.<sup>141</sup> The leader of Gardner's group, Lorenzo McMillion, set up the transaction. Prior to it transpiring, the men decided to take the drugs by force.<sup>142</sup> The group purchased duct tape and gloves.<sup>143</sup> When the men again left to go to the drug “deal”—which was actually a set-up—Gardner brought two different nine-millimeter weapons for stealing the drugs.<sup>144</sup> The men were apprehended at the scene of the would-be transaction.<sup>145</sup>

McMillion was a convicted felon, and McMillion's conviction under § 922(g)(1) was upheld under a constructive-possession theory because McMillion drove the car with the weapons to the scene.<sup>146</sup> Gardner's conviction as an accomplice to McMillion's violation, however, was overturned on the grounds that the evidence did not show that Gardner possessed knowledge or “reasonable cause to believe” that McMillion had a prior felony conviction.<sup>147</sup>

It appears highly unlikely that Gardner truly lacked any “reasonable cause to believe” that McMillion had a criminal history. At the very least, the fact that McMillion set up a major drug deal should have caused Gardner to strongly *suspect* McMillion had a criminal history. As will be discussed in Part IV, an individual's participation in a felony dramatically increases the probability that the participant previously received a felony conviction.<sup>148</sup> It also makes good policy sense to switch the burden to the defendant in such cases to clarify the

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<sup>141</sup> *Gardner*, 488 F3d at 707.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 708.

<sup>145</sup> *Gardner*, 488 F3d at 708.

<sup>146</sup> *Id.* at 714.

<sup>147</sup> *Id.* at 716.

<sup>148</sup> See Part IV.B.1.

principal's criminal record.<sup>149</sup> Therefore, the “reasonable cause to believe” standard—as currently applied—is potentially too difficult for the prosecution to satisfy, thus underdetering criminals and frustrating reasonable law enforcement objectives.

### C. Weighing the Standards against Each Other

When attempting to resolve this circuit split, one difficulty that arises is that the best *legal* conclusion does not necessarily align with the best *policy* conclusion. While there are persuasive textual arguments in favor of both sides of the circuit split,<sup>150</sup> the extensive congressional debates and lobbying surrounding the passage of § 922(d)(1) caution against allowing § 922(g)(1) to potentially circumvent an explicit mens rea requirement provided by Congress in § 922(d)(1).<sup>151</sup> On the other hand, policy considerations tilt in favor of strict liability, particularly if culpable defendants could frequently evade the “reasonable cause to believe” mens rea requirement.<sup>152</sup>

The most convincing interpretation based on the statutory text must dominate over policy considerations; therefore, this Comment concludes that the knowledge or “reasonable cause to believe” standard must be retained as a baseline for resolving the circuit split. However, the tension between the provisions appears accidental, and the chief reason for applying the knowledge or “reasonable cause to believe” standard is to avoid a loophole for prosecutions under § 922(d)(1).

Section 922(d)(1) was passed primarily to regulate commercial firearms dealers and manufacturers,<sup>153</sup> whereas § 922(g)(1) consolidated several offenses aimed at keeping firearms out of the hands of convicted felons.<sup>154</sup> The Third and Sixth Circuits, in directly transplanting the § 922(d)(1) language to non-vendor situations, have not been sensitive enough to the different contexts § 922(d)(1) and 922(g)(1) were meant to address. Because non-vendor situations—typically prosecuted under § 922(g)(1)—are much less likely to involve criminal history databases, knowledge or even “reasonable cause to believe” becomes significantly more difficult to prove. Furthermore, the Third and Sixth Circuits may be interpreting “reasonable cause to believe” in a more stringent manner than it has typically been used for § 922(d)(1) violations.<sup>155</sup> These courts do not explore whether there is the potential to

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<sup>149</sup> See *id.*

<sup>150</sup> See Part III.A.3 and III.B.1.

<sup>151</sup> See Hardy, 17 *Cumb L Rev* at 595–604 (cited in note 6).

<sup>152</sup> See Part III.B.3.

<sup>153</sup> See note 45 and accompanying text.

<sup>154</sup> See notes 14–15 and accompanying text.

<sup>155</sup> See Part IV.B.2.

preserve statutory consistency while also maintaining the viability of § 922(g)(1) accomplice liability prosecutions.

In cases that do not involve vendor-type transactions, courts should employ flexibility when interpreting the mens rea language, such that it advances the policy considerations better served by strict liability. A critical weakness of the “reasonable cause to believe” standard, when compared with strict liability, is that it may be too hard for prosecutors to prove. The standard should therefore be easier to establish, particularly in those situations where the defendant was likely aware of the principal’s felon status.

It would be nearly impossible, of course, to ascertain every case where the defendant was likely to possess actual knowledge. But in general, actual knowledge is more probable in cases where the defendant and principal were engaged in a separate felonious undertaking during the commission of the § 922(g)(1) offense. Isolating such cases would be preferable to a blanket lowering of the “reasonable cause to believe” standard, however, because the carve-out would only implicate defendants who were “on notice” to expect regulation and who were not engaged in otherwise innocent activity.<sup>156</sup> This Comment’s solution is aimed precisely at creating such a carve-out.

#### IV. THE SOLUTION: “REASONABLE CAUSE TO BELIEVE” AND CONCURRENT FELONIOUS ACTIVITY

This Comment proposes a more careful application of the “reasonable cause to believe” standard, such that the mens rea will be easier to prove when the defendant was likely aware of the principal’s criminal history. Specifically, this Comment advocates that courts *combine* the mens rea standard with a rebuttable presumption that the defendant had “reasonable cause to believe” that the principal was a felon in cases where the § 922(g)(1) offense was committed in furtherance of a separate felonious activity in which the defendant and the principal were jointly engaged.<sup>157</sup>

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<sup>156</sup> See *United States v X-Citement Video, Inc.*, 513 US 64, 72–73 (1994) (explaining that “*Morrisette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct”).

<sup>157</sup> Rebuttable presumptions are not uncommon in criminal law. See, for example, *Rucker v Davis*, 237 F3d 1113, 1126–27 (9th Cir 2001) (noting that when drug-related activity occurs within a tenant’s apartment, there exists a rebuttable presumption that the tenant controls what occurs there); 21 Am Jur 2d, Criminal Law § 34 (discussing the rebuttable presumption in many states that a child between the ages of seven and fourteen is not culpable for criminal activity). In addition, the rebuttable presumption solution advocated in this Part bears some similarity to the *Pinkerton* doctrine in conspiracy. Under *Pinkerton v United States*, 328 US 640 (1946), a party to a conspiracy may be held strictly liable for the substantive offense committed by a co-conspirator

Courts would effectively carve out cases involving concurrent felonious activity by shifting the burden to the defendant in the form of a rebuttable presumption. In cases of concurrent felonious activity, it is more likely that the defendant actually was aware of the principal's felon status. Common sense suggests that two individuals familiar enough to collaborate on such an endeavor are more likely to possess knowledge of each other's past than two strangers engaged in a brief encounter.

Even if the defendant did not possess actual knowledge of the principal's status, there are other justifications for the defendant assuming the burden in this circumstance. The principal's involvement in a current felony makes it much more probable that the principal committed a past felony; thus, the defendant was put on notice that the principal was particularly likely to be a felon. Also, the concurrent felonious activity puts the defendant on notice to expect regulation of the firearm involved in the offense, as the firearm is no longer being used solely for an innocent purpose. The provision of constructive notice therefore supports shifting the burden to the defendant in cases of concurrent felonious activity, regardless of whether the defendant possessed actual knowledge of the principal's status.

Part IV.A begins with an explanation of how the rebuttable presumption would function. Part IV.B explores justifications for the concurrent felonious activity carve-out, demonstrating that this solution is well-grounded in both law and policy. Part IV.C concludes with a discussion of the likely practical effects of the rebuttable presumption.

#### A. An Explanation of the Rebuttable Presumption Solution

The rebuttable presumption would work as follows: If the defendant committed the § 922(g)(1) violation in a manner unconnected with other felonious activity, the knowledge or "reasonable cause to believe" standard would apply; however, if the defendant and the principal committed the § 922(g)(1) offense in furtherance of separate felonious activity, the court would presume that the defendant had "reasonable cause to believe" that the principal was a convicted felon. The defendant would then assume the burden of demonstrating that he was unaware of the principal's criminal history. The defendant could overcome the presumption by presenting evidence that he truly did not possess knowledge or reason to know of the principal's past conviction. For example, if the defendant offered convincing evidence that the principal *misled* the defendant regarding the principal's felon

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in furtherance of the conspiracy, so long as the co-conspirator's act was a reasonably foreseeable consequence of the conspiracy. See *id.* at 647–48.

status, such evidence would relieve the defendant of liability.<sup>158</sup> A third-party witness could also provide such evidence, including an individual involved in the concurrent felonious activity with the defendant and the principal (though, of course, the factfinder would have to make a credibility determination). Another situation in which the presumption could be overcome is if the defendant was present when the principal purchased a firearm from a licensed dealer who conducted a background check. Absent evidence that the defendant knew the principal deceived the vendor regarding his criminal history, the approval of a registered firearms dealer who conducted a legitimate background check should suffice to rebut the presumption.

It is worth stressing two aspects of the rebuttable presumption. First, the presumption would only apply to those cases where the weapon was secured in *furtherance* of a separate felony—mere concurrent felonious activity would not suffice. This feature serves to distinguish those felonies committed at the “spur of the moment” from those that required advanced knowledge on the part of the defendant. Such a distinction helps ensure that prior to supplying the weapon, the defendant was aware of the heightened risk that the principal was a convicted felon.

Another aspect worth noting is that the rebuttable presumption is triggered only when the defendant and the principal were *both* engaged in the concurrent felonious activity. In determining the probability that the principal engaged in past felonious activity, it is the principal’s engagement in current felonious activity that should matter.<sup>159</sup> However, requiring that the defendant also be engaged in the concurrent felonious activity serves two useful goals. First, the court will not be burdened with determining whether the defendant knew the principal was engaged in the additional criminal activity—such knowledge can be presumed through the defendant’s active participation in the criminal venture. Second, the defendant’s purposivist attitude is partially demonstrated by the defendant’s desire to have the secondary criminal activity succeed.<sup>160</sup> These limitations on the rebuttable presumption help ensure that the proposal is both easy for courts to apply and consonant with accomplice-liability principles.

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<sup>158</sup> This solution is distinguishable from a strict liability carve-out, as the presumption would remain fully rebuttable by exculpatory evidence, such as a third-party witness. Even so, it may be difficult for the defendant to secure the evidence that would be required to rebut such a presumption. It could be the case, therefore, that a large percentage of defendants would be convicted when the circumstances surrounding the § 922(g)(1) offense involved concurrent felonious activity, assuming the other requirements for conviction are met.

<sup>159</sup> See Part IV.B.1.

<sup>160</sup> See Part IV.B.4.

## B. Support for the Rebuttable Presumption Solution

This Part explores how the rebuttable presumption solution incorporates advantages from each side of the circuit split, adopting the best legal conclusion while also serving Congress's intention in passing § 922(g)(1) to "eliminate firearms from the hands of criminals, while interfering as little as possible with the law abiding citizen."<sup>161</sup>

1. Participation in concurrent felonious activity significantly increases the probability that the principal previously has been convicted of a felony.

In assessing the implications of concurrent felonious activity, it is useful to ask the following question: how suspicious should the defendant have been regarding the principal's criminal background, given the defendant's knowledge that the principal was presently engaged in or preparing for another felony? The most relevant study, conducted by the Bureau of Justice Statistics, tracked the criminal histories of felons in large urban counties for 2004.<sup>162</sup> This data sheds some light on the following question: given a felony, what is the likelihood that the felony was committed by someone who was already a convicted felon?

The statistics show, unsurprisingly, that a substantial percentage of felony offenders had been previously convicted of a felony offense. For example, given a violent assault (as in *Xavier*), there was approximately a 39 percent likelihood that the perpetrator—the principal—was a convicted felon.<sup>163</sup> Given a drug offense (as in *Gardner*), it was roughly 50 percent likely that the perpetrator—the principal—was a convicted felon.<sup>164</sup>

In addition, data from the Bureau of Justice Statistics suggest that the principal's current participation in a felony indicates that it is roughly *six times* more probable that the principal has a previous felo-

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<sup>161</sup> *United States v Weatherford*, 471 F2d 47, 51 (7th Cir 1971). It is worth noting that some arguments in this Part also apply to principal liability under § 922(g)(1), over which disagreement remains in the circuit courts as to the proper mens rea standard for the felon's status. See Part I.C.2. In particular, the arguments in this Part regarding the expectation of heightened regulation in the context of concurrent felonious activity would apply with equal force to principal violators. See Part IV.B.3. While § 922(g)(1) principal liability is beyond the scope of this Comment, the rebuttable presumption solution could be applied to the mens rea disagreement discussed in Part I.C.2.

<sup>162</sup> Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2004—Statistical Tables, Table 8, Most Serious Prior Conviction of Felony Defendants, by Most Serious Current Arrest Charge* (2004), online at <http://www.ojp.usdoj.gov/bjs/pub/html/fdluc/2004/tables/fdluc04st08.htm> (visited Sept 1, 2009) (including violent offenses, property offenses, drug offenses, and public-order offenses).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

ny conviction.<sup>165</sup> The concurrent felonious activity therefore dramatically increases the likelihood that the principal's possession of a firearm would violate § 922(g)(1).

This probability increase is sufficient to justify transferring the burden to the defendant to learn the principal's felon status. First, it is more likely in such cases that the defendant actually possesses knowledge of the principal's status. The defendant is not only aware of the principal's current involvement in criminal activity, but also knows the principal sufficiently well to collaborate in this activity. Common sense suggests that in such circumstances, defendants will frequently possess actual knowledge of the principal's criminal history.

Even when the defendant did not possess such knowledge, the probability increase, in light of the current felony, supports switching the onus to the defendant in these circumstances. While the defendant is not expected to know the relevant statistics, it makes good policy sense to place a heavier burden on the accomplice to inquire into the principal's past in situations where it is far more likely that the principal has a felony conviction.<sup>166</sup> This observation supports the application of a strong presumption—though rebuttable—that the defendant had “reasonable cause to believe” that the principal was a convicted felon when the defendant committed the offense in furtherance of concurrent felonious activity with the principal.

2. A rebuttable presumption would help achieve convictions in circumstances where the defendant very likely possessed knowledge of the principal's felon status.

Congress likely included the “reasonable cause to believe” language in § 922(d)(1) because knowledge is very difficult for the prose-

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<sup>165</sup> This figure was obtained by first calculating the probability that a person arrested for a felony in the 2004 study already had a felony conviction (approximately 46 percent). That probability was then divided by the probability that a person from the general population was a convicted felon (roughly 7.5 percent in 2004, according to Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 *Annals Am Acad Polit & Soc Sci* 281, 288 (2006)). Note that this figure is subject to several caveats. First, the Table of Felony Defendants tracks individuals in large urban counties, and such individuals may have higher recidivism rates than the overall population. Also, the statistics reflect those defendants *arrested* for a felony in 2004. The number of defendants who were actually convicted is likely smaller (though not by much, given the high rates of conviction for criminal offenses).

<sup>166</sup> A potential objection to the rebuttable presumption is the existence of other factors an accomplice could take into account when assessing the likelihood of a previous felony conviction, such as race or gender. Needless to say, policy considerations cut strongly against applying a rebuttable presumption based on those factors. Predicating a rebuttable presumption on race or gender, as opposed to criminal activity, would punish a defendant based on immutable characteristics rather than prior engagement in crime.

cution to prove. The “reasonable cause to believe” standard remains troubling, however, because it may be too difficult for the prosecution to establish in cases where a reasonable person would be highly suspicious of the principal’s felon status—such as when the principal engaged in separate felonious activity with the defendant. While a reasonable person would not necessarily possess *knowledge* of the principal’s criminal history in these circumstances, a reasonable person would be aware of a significant increase in the *probability* that the principal was a convicted felon.

As the Third and Sixth Circuits have applied the “reasonable cause to believe” standard,<sup>167</sup> defendants in these circumstances usually will not be convicted, despite the fact that they were likely aware of a significant risk that the principal possessed a criminal history. These circuit courts may be applying the standard even *more* stringently than it is typically applied under § 922(d)(1). The Seventh Circuit, for example, affirmed the conviction of a defendant under § 922(d)(1) for selling a firearm to a convicted felon where the defendant “knew [the principal] had been in some [previous] trouble, [but] he did not know the specifics or whether [the principal] had been imprisoned.”<sup>168</sup> As the Third and Sixth Circuits have applied the “reasonable cause to believe” standard, it is unlikely the defendant would have been convicted in analogous circumstances under § 922(g)(1).

Moreover, the desire to effectuate a separate criminal activity may cause the defendant to deliberately avoid knowledge of the principal’s felon status, even though the defendant’s suspicions are raised. A defendant may go so far as to exhibit “deliberate ignorance” or “willful blindness.” The defendant in *Gardner*,<sup>169</sup> for example, likely “saw and experienced enough suspicious activities to raise several red flags” regarding the possibility that the principal was a convicted felon.<sup>170</sup> Such cases may “support[] an inference that [the defendant] consciously chose not to pursue the truth,” as necessary for a willful blindness jury instruction.<sup>171</sup>

While the circumstances will not always rise to the level of willful blindness, they may frequently come very close in the context of concurrent felonious activity planned between the defendant and the

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<sup>167</sup> See Part II.B.

<sup>168</sup> *United States v Haskins*, 511 F3d 688, 691 (7th Cir 2007).

<sup>169</sup> See Part III.B.3.

<sup>170</sup> Consider *United States v Craig*, 178 F3d 891, 896 (7th Cir 1999) (“We have held that the [willful blindness] instruction is proper when the defendant claims a lack of guilty knowledge and there are facts and evidence that support an inference of deliberate ignorance.”) (quotation marks omitted).

<sup>171</sup> *Id.*

principal. A rebuttable presumption that the defendant possessed “reasonable cause to believe” the principal’s felon status in such circumstances presents an effective means of preventing defendants from skirting the “reasonable cause to believe” standard, thus mitigating the problems raised by the standard as currently applied.

3. Concurrent felonious activity should heighten the defendant’s expectation of firearms regulation.

One argument that has been vigorously raised in the context of *principal* liability under § 922(g)(1) is that strict liability for the felon’s status would violate the *Morissette* presumption.<sup>172</sup> The *Morissette* presumption favors a mens rea requirement for each statutory element that criminalizes otherwise innocent conduct.<sup>173</sup> In *Staples*, the Court expanded upon *Morissette* by emphasizing that courts determining the appropriate mens rea standard should consider “the expectations that individuals may legitimately have in dealing with the regulated items.”<sup>174</sup> The *Morissette* presumption further suggests that courts should apply a more stringent mens rea requirement where there is concern of “placing ordinary citizens at risk of criminal prosecution for ‘otherwise innocent conduct.’”<sup>175</sup> *Morissette* and its progeny have indicated that the greater the degree of regulation within an arena, the more reasonable it is to hold the defendant strictly liable for the activity. Because this Comment does not advocate a strict liability standard, it does not directly implicate the *Morissette* presumption. Nevertheless, the *Morissette* line of cases can be broadly read to support a lower mens rea standard in the context of concurrent felonious activity, due to the highly regulated nature of such criminal activity.

Firearms are heavily regulated generally, and are particularly heavily regulated in the context of their relationship to other crimes through mechanisms like sentence enhancements.<sup>176</sup> Even so, the Supreme Court has made clear that the “destructive potential” of firearms, in and of itself, “cannot be said to put gun owners sufficiently on

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<sup>172</sup> See *Langley*, 62 F3d at 614 (Phillips concurring in part and dissenting in part) (“And where, as here, the specific question has been whether such a requirement runs not only to those elements that define the core *conduct* proscribed but also to any elements that define *circumstances* upon which criminality of the conduct turns, the Supreme Court’s answer uniformly has been ‘yes.’”).

<sup>173</sup> See Part I.C.2.

<sup>174</sup> 511 US at 619.

<sup>175</sup> *Langley*, 62 F3d at 607, quoting *United States v X-Citement Video, Inc.*, 513 US 64, 72–73 (1994).

<sup>176</sup> See, for example, 18 USC § 924(c)(1) (providing a sentence enhancement for any defendant “who, during and in relation to any crime of violence or drug trafficking crime . . . uses . . . a firearm”).

notice of the likelihood of regulation” with respect to the circumstance element of an offense.<sup>177</sup>

In considering § 922(g)(1), however, there is an additional factor that justifies the defendant losing his expectation of freedom from heightened regulation—his use of the weapon in furtherance of a concurrent felony offense. The principal and defendant’s involvement in another felony at the time of the § 922(g)(1) violation puts the defendant on notice to expect regulation of weapons in those circumstances. In the context of effectuating a separate felonious activity, the principal and the accomplice are not using the firearm for a lawful purpose, and thus are not engaging in “otherwise innocent conduct.”<sup>178</sup> Even if the principal and the defendant both lacked *any* mens rea with respect to the principal’s status when committing the § 922(g)(1) offense, the firearm would not have been used solely for “otherwise innocent” activity. The defendant therefore should assume that the use of a firearm in the context of felonious activity would be highly regulated, and the rebuttable presumption shifts the burden to the defendant to discover the principal’s criminal history in these circumstances.

4. The rebuttable presumption would maintain the purposivist quality of accomplice liability.

As discussed previously, well-settled notions of accomplice liability suggest that an accomplice must express a purposivist attitude towards the principal’s crime.<sup>179</sup> One concern with strict liability is that this standard makes it easier to convict a defendant who did not purposefully aid a violation of § 922(g)(1).<sup>180</sup> Any lowering of the mens rea requirement across the board, in fact, could potentially eliminate the “purposivist” aspect of § 922(g)(1) accomplice liability. The rebuttable presumption solution, however, helps to ensure that § 922(g)(1) primarily targets “purposivist” violations, and is therefore an improvement over both strict liability and a blanket lowering of the “reasonable cause to believe” standard.

When a defendant aids a § 922(g)(1) violation in the absence of concurrent criminal activity, the defendant likely evinces no special desire to see the venture succeed. Unless the principal pays the defendant for the weapon, in which case the activity would be covered directly under § 922(d)(1), the defendant is unlikely to possess a special interest in the principal’s possession of the firearm.

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<sup>177</sup> *Staples*, 511 US at 612.

<sup>178</sup> See *X-Citement Video, Inc.*, 513 US at 72–73.

<sup>179</sup> See Part I.C.3.

<sup>180</sup> See Part III.A.1.

When the defendant and the principal are engaged in a separate criminal offense, however, the defendant likely maintains a strong desire for the felon to succeed in receiving the firearm, as the felon's possession will assist the criminal enterprise.<sup>181</sup> It is precisely in such circumstances that the defendant is most likely to satisfy Learned Hand's "purposivist" test for accomplice liability.

Notably, the stronger the defendant's desire to effectuate separate felonious activity, the more likely it becomes that the defendant will choose to remain deliberately ignorant of the principal's felon status. Inquiries into the principal's criminal history would only frustrate the defendant's investment in the larger criminal enterprise. As such, in these circumstances the defendant may be *less* likely to possess actual knowledge of the felon's status—precisely because the defendant maintains the "purpose" to have the criminal venture succeed.

Courts should therefore consider the possibility of an overarching criminal purpose when determining whether the defendant satisfies traditional notions of accomplice liability under § 922(g)(1). Although the separate felonious activity does not *prove* a criminal purpose under § 922(g)(1), the activity is strong evidence that such a purpose exists. A rebuttable presumption would account for the defendant's larger criminal goals in circumstances where the defendant engaged in concurrent felonious activity with the principal. Unlike strict liability, the rebuttal presumption proposal thus fully accords with traditional notions of accomplice liability; although it eases the prosecution's burden for a category of cases, the presumption would not trigger the "purposivist" concerns raised by strict liability.

5. The rebuttable presumption would preserve consistency between § 922(g)(1) and 922(d)(1).

By adopting the knowledge or "reasonable cause to believe" standard, the rebuttable presumption solution also remains fully consonant with § 922(d)(1). Although this solution would enable prosecutors to secure § 922(g)(1) convictions more easily in cases of concurrent felonious activity, the proposal is not in tension with the mens rea requirement in § 922(d)(1) because the mens rea would be identical between the two provisions. In addition, firearms vendors—the target of § 922(d)(1) prosecutions—would typically not trigger the rebuttable presumption for accomplice liability under § 922(g)(1). Legitimate vendors are unlikely to be engaged in separate felonious activity with the principal violator of the provision. Prosecutors therefore would not gain

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<sup>181</sup> See, for example, *Gardner*, 488 F3d at 707–08; *United States v Moore*, 936 F2d 1508, 1512–13 (7th Cir 1991).

any advantage by choosing accomplice liability under § 922(g)(1) rather than principal liability under § 922(d)(1). In both cases, the knowledge or “reasonable cause to believe” standard would apply and the rebuttable presumption would not be available to the prosecutor.

A case could arise, of course, that implicated both § 922(d)(1) and the rebuttable presumption solution for § 922(g)(1). For example, a firearms dealer could be charged with selling a gun to a convicted felon, having received payment in cocaine rather than cash. While the mens rea standard would be the same under both provisions, the concurrent felonious activity would afford the prosecutor the advantage of the rebuttable presumption if the defendant were charged under § 922(g)(1).

There may not be anything particularly troubling, however, about allowing the rebuttable presumption to apply under § 922(g)(1) in such a case. After all, when Congress included a mens rea requirement in § 922(d)(1), it was likely concerned about the prosecution of unintentional missteps by otherwise legitimate firearms vendors. Such concerns would not be fully present in the context of concurrent felonious activity, and so prosecution under § 922(g)(1)—even with the rebuttable presumption—is unlikely to abrogate congressional intent.

For that matter, courts should consider applying the rebuttable presumption directly to § 922(d)(1). The text of the provision would not preclude such a presumption, and there are strong policy considerations in support of this construction (similar to those supporting a rebuttable presumption in § 922(g)(1)).<sup>182</sup> The rebuttable presumption solution therefore serves not only as an improvement over strict liability with regard to statutory consistency; it may also provide judges with a new tool to address criminal charges under § 922(d)(1).

### C. The Solution’s Practical Effects

Although the real-world effects of the solution proposed by this Comment are difficult to determine, a few observations can be made. For one, the rebuttable presumption is more likely to alter the plea bargaining process than deter criminal behavior. As previously noted, defendants are rarely charged only with accomplice liability under § 922(g)(1).<sup>183</sup> Rather, prosecutors usually tack on the offense to a more serious charge against the defendant. A charge of accomplice liability under § 922(g)(1) likely serves as a bargaining chip in plea negotiations regarding a greater offense. Prosecutors can induce more plea deals by offering to drop the § 922(g)(1) count in exchange for a

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<sup>182</sup> See Part IV.B.1–4.

<sup>183</sup> See Part I.C.3.

plea bargain.<sup>184</sup> It follows that if the prosecutor were required to prove the defendant's mens rea for the § 922(g)(1) charge, then the defendant might be less enticed to plead guilty. Conversely, strict liability would make a plea deal more attractive.

The rebuttable presumption proposed by this Comment would have two distinct effects on the plea bargaining process, depending on the circumstances. In cases of concurrent felonious activity, the prosecutor could more easily secure a conviction for the § 922(g)(1) charge, thus making the defendant more likely to plead guilty. When no concurrent felonious activity is involved, however, the prosecutor's bargaining power would be reduced accordingly.

The deterrence benefits offered by this solution are harder to predict. An individual that has decided to engage in separate felonious behavior with the principal, despite potential repercussions, is unlikely to be concerned with additional repercussions based on the principal's criminal past. Still, successful § 922(g)(1) convictions would result in longer prison sentences, which may result in general deterrence benefits.

Finally, with regard to the incapacitation effect, the rebuttable presumption would result in increased prison sentences for defendants simultaneously convicted of other—likely more serious—felony offenses. The merits of such an effect can be debated on policy grounds,<sup>185</sup> but this Comment's solution would keep certain criminals in prison for longer than if the mens rea were harder to satisfy, potentially causing some reduction in overall crime.<sup>186</sup>

#### CONCLUSION

This Comment examines the circuit split that has arisen over the appropriate mens rea standard for accomplice liability under § 922(g)(1) with regard to the principal's status as a convicted felon. The Comment analyzes the virtues and drawbacks of the approaches taken by both sides of the circuit split. It ultimately concludes that the knowledge or "reasonable cause to believe" standard must be retained for statutory consistency, as the strict liability standard poses a significant risk of prosecutors circumventing the mens rea requirement in § 922(d)(1), thereby abrogating congressional intent. At the same time, the Comment argues that the "reasonable cause to believe" standard—

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<sup>184</sup> The Supreme Court generally sanctions such plea bargaining. See *Bordenkircher v Hayes*, 434 US 357, 364 (1978) ("[C]onfronting a defendant with the risk of more severe punishment . . . is an inevitable—and permissible—attribute of any legal system which . . . encourages the negotiation of pleas.").

<sup>185</sup> See Sharkey, 105 Yale L J at 1434 (cited in note 96) ("Incapacitation lies at the core of the emotionally and ideologically charged debate about crime.").

<sup>186</sup> See *id.*

at least as applied by the Third and Sixth Circuits—makes § 922(g)(1) accomplice liability far too difficult for prosecutors to prove.

To address this shortcoming, this Comment concludes that the “reasonable cause to believe” standard should be combined with a rebuttable presumption that the defendant possessed “reasonable cause to believe” that the principal was a convicted felon when the § 922(g)(1) offense was committed in furtherance of concurrent felonious activity engaged in by the principal and the defendant. This solution would assist the conviction of defendants who would avoid conviction under a stringent application of the “reasonable cause to believe” standard despite likely possessing the “guilty mind” for the offense. Even when the defendant did not possess knowledge of the principal’s status, this Comment argues that the separate felonious activity puts the defendant on notice with respect to increased firearms regulation and to the increased probability that the principal is a felon, thereby justifying a presumption that transfers the burden to the defendant. This proposal thus represents the best legal and policy solution to the circuit split, as it ensures that § 922(g)(1) remains a valuable law enforcement tool while also preserving congressional intent, statutory consistency, and consonance with traditional notions of accomplice liability.