A Square Peg in a Round Hole: The Illogical and Impractical Application of *Rosemond* to Strict Liability Sex Crimes

"[W]here the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof. By abandoning that rule in cases involving aiding and abetting . . . the Court creates a perverse arrangement whereby the prosecution must prove something that is peculiarly within the knowledge of the defendant."[1]

I. INTRODUCTION

Imagine a fourteen-year-old girl befriends an older man.[2] The young girl begins visiting the older man at his apartment to use his computer.[3] After some time, the older man and the girl start a relationship.[4] The two decide to create a video—recorded by a male friend—which is eventually discovered by the police.[5] The older man is charged with the production of child pornography, while his male friend is charged with aiding and abetting the production of child pornography.[6] If the male friend claims not to have known the young girl was a minor, can he be convicted of aiding and abetting the creation of child pornography?[7]

Protecting minors from sexual exploitation and abuse is an important goal of the federal and state governments.[8] The effects of victimization on children

1. Rosemond v. United States, 134 S. Ct. 1240, 1256-57 (2014) (Alito, J., concurring in part and dissenting in part) (alteration in original) (internal citations omitted).

2. *See* United States v. Encarnacion-Ruiz, 787 F.3d 581, 584 (1st Cir. 2015) (reporting defendant Vilanova knew minor, KMV, through KMV's family friend).

3. *Id.* (asserting KMV lacked home Internet access and visited Vilanova for Internet use).

4. *Id.* (explaining beginning of sexual relationship between KMV and other defendant). Defendant Encarnacion-Ruiz and other men had relationships with KMV at the same time. *Id.*

5. *Id.* (stating police discovered pornography involving KMV, Vilanova, and Encarnacion-Ruiz one year after production). Police uncovered this video when they were called about Vilanova's neighbors assaulting him for his relationship with KMV. *Id.*

6. *Encarnacion-Ruiz*, 787 F.3d at 584 (articulating Encarnacion-Ruiz's charge of aiding and abetting production of child pornography).

7. *Id.* (requesting briefing on whether aiding and abetting conviction required defendant's knowledge of minor's age).

8. *See* New York v. Ferber, 458 U.S. 747, 756-57 (1982) (acknowledging important governmental interest of preventing sexual abuse and exploitation of minors); Herring v. State, 100 So. 3d 616, 625 (Ala. Crim. App. 2011) (explaining state government's compelling interest in protecting minors); *see also* RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, OFFICE OF CMTY. ORIENTED POLICING SERVS., PROBLEM-ORIENTED GUIDES FOR POLICE NO. 41, CHILD PORNOGRAPHY ON THE INTERNET 12 (2010), http://ric-zai-inc.com/Publications/cops-p104-pub.pdf [http://perma.cc/DC5V-RZLX] (describing growth and

can be devastating.[9] The federal government attempted to achieve its goal of protecting minors by passing statutes criminalizing different sexual acts involving children.[10] These pieces of legislation created strict liability crimes that do not require the principal actor to have any criminal intent.[11]

Along with charging individuals as principals under these strict liability statutes, the federal government can also charge a defendant according to the aiding and abetting statute.[12] Aiding and abetting is commonly defined as an individual assisting another in the commission of a crime with the required mental state.[13] Even with this general definition, the laws surrounding aiding and abetting are described as "'vexing,' 'inescapably complex,' and 'a disgrace.'"[14] *Rosemond v. United States*[15] attempted to provide some clarity.[16]

The *Rosemond* case was the first major Supreme Court decision on aiding and abetting liability in almost thirty-five years.[17] In *Rosemond*, the Supreme

significance of child pornography problem).

9. *See* WORTLEY & SMALLBONE, *supra* note 8, at 15 (stating victimization in child pornography has physical, social, and psychological effects). These children are victimized at least twice: when the abuse first occurs and is recorded, and then each time the recording of the abuse is watched. *Id.* In the short term, victims may exhibit some regressive behaviors, such as not sleeping or eating well, or they may experience disruptions in schoolwork and activities. *Effects of Child Sexual Abuse on Victims*, NAT'L CTR. FOR VICTIMS CRIME, https://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/effects-of-csa-on-the-victim (last visited Mar. 22, 2017) [http://perma.cc/G9B6-CNCK] [hereinafter *Effects of CSA*]. In the long term, victims may develop "alcoholism or drug abuse, anxiety attacks, and insomnia." *Id.*

10. *See, e.g.*, 18 U.S.C. § 2241(c) (2012) (criminalizing aggravated sexual abuse against children); 18 U.S.C. § 2243(a) (2012) (codifying condemnation of sexually abusing children); 18 U.S.C. § 2244(c) (2012) (establishing illegality of sexual contact involving minors); 18 U.S.C. § 2251 (2012) (criminalizing creation or collection of child pornography); 18 U.S.C. § 2251A (2012) (outlawing child trafficking for sexual purpose).

11. *See* 18 U.S.C. § 2241(d) (stating "Government need not prove . . . defendant knew . . . [the victim] had not attained . . . age of 12"); 18 U.S.C. § 2243(d) (explaining "Government need not prove . . . defendant knew" victim's age); *see also* United States v. Encarnacion-Ruiz, 787 F.3d 581, 589 (1st Cir. 2015) (explaining majority of courts hold knowledge of victim's age not required for § 2251(a) conviction).

12. *See* 18 U.S.C. § 2 (2012) (charging principals who "aid[], abet[], counsel[]" or willfully cause act).

13. *See* Candace Courteau, *The Mental Element Required for Accomplice Liability: A Topic Note*, 59 LA. L. REV. 325, 325 (1998) (explaining accomplice liability equates to giving assistance with required mens rea). Professor David Luban offers a useful example to determine the meanings of aid and abet: "Supervisors implicitly or explicitly encourage their subordinates to meet their targets by any means necessary. That's abetting. Supervisors provide assistance and resources. That's aiding." David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 964 (1999) (illustrating definitions' simple distinctions).

14. Kit Kinports, Rosemond*, Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 134 (2015) (citations omitted) (describing unresolved status of mens rea and complicity laws). Despite the regularity of aiding and abetting cases, the law surrounding accomplice liability historically has been "sparse" and confusing, and has garnered "little scholarly interest." *See id.*

15. 134 S. Ct. 1240 (2014).

16. *See id.* at 1245 (granting certiorari to resolve circuit conflict). The Supreme Court's ruling was specifically aimed at resolving the conflict of how individuals "aid and abet a § 924(c) offense." *Id.*; *see also* 18 U.S.C. § 924(c)(1)(A) (2012 & Supp. I 2013) (criminalizing possession of firearm during commission of violent or drug offense, enhancing federal prison sentence).

17. *See* Kinports, *supra* note 14, at 134 (articulating *Rosemond* represents significant ruling on accomplice liability). The *Rosemond* decision was the first major ruling since *Standefer v. United States*, which allowed the conviction of an accessory even though the principal was acquitted in an earlier trial. *See* 447 U.S. 10, 25-26 (1980) (stating "symmetry of results may be intellectually satisfying, [but] . . . is not required" for

Court held that the government must prove the defendant had advanced knowledge of the entire criminal plan to convict him of aiding and abetting an 18 U.S.C. § 924(c) crime—a violent or drug trafficking crime committed while possessing or using a firearm.[18] Applying this holding, the First Circuit held in a later case that the government must prove that the defendant had advance knowledge of the minor's age to be convicted of aiding and abetting the production of child pornography.[19] This decision was the first federal ruling that established the mens rea required for aiding and abetting a strict liability sex crime.[20]

This Note will begin by examining the history of strict liability crimes and the reasoning behind their establishment.[21] In particular, it will delve into the history of strict liability sex crimes.[22] Subsequently, it will consider the history of aiding and abetting laws, the *Rosemond* decision, and how its application has had mixed results.[23] This Note will then analyze the *Rosemond* decision's narrow holding, based on the Court's reasoning and federal courts' application.[24] Finally, it will scrutinize *Rosemond*'s misapplication that mandates advance knowledge in strict liability sex crimes, and will recommend a more effective mens rea requirement for aiding and abetting strict liability sex crimes by demanding accomplices share principals' same requisite mental state.[25]

II. HISTORY

A. Strict Liability

In the common law's early development, judges criminalized conduct without any requirement of a malicious state of mind or mens rea.[26] Mens rea

fair trial); *see also* Kinports, *supra* note 14, at 134 n.3 (demonstrating timeline since last major Supreme Court ruling on complicity).

18. *See Rosemond*, 134 S. Ct. at 1243 (holding government must prove defendant's advance knowledge of confederate's use of gun); *see also* 18 U.S.C. § 924(c) (explaining enhancement when one possesses or uses firearm during crime commission).

19. *See* United States v. Encarnacion-Ruiz, 787 F.3d 581, 596 (1st Cir. 2015) (holding government must prove beyond reasonable doubt defendant knew minor's age in advance).

20. *See id.* at 612 (Thompson, J., dissenting) (recognizing no earlier federal case discusses degree of knowledge required for child pornography complicity). Two state cases dealt with the issue of what mens rea should be required for aiding and abetting a strict liability sex crime, but with very different results. *Compare* Commonwealth v. Harris, 904 N.E.2d 478, 485 (Mass. App. Ct. 2009) (holding present accomplice strictly liable for victim's age in statutory rape case), *with* State v. Bowman, 656 S.E.2d 638, 650 (N.C. Ct. App. 2008) (holding accomplice to statutory rape must have knowledge of minor's age).

21. *See infra* Part II.A.

22. *See infra* Part II.B.

23. *See infra* Part II.C.

24. *See infra* Part III.A.

25. *See infra* Part III.B-C.

26. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 5.1(a), at 253 (5th ed. 2010) (noting early days of common law crimes required only bad act).

became a requirement for criminal culpability in the 1600s.[27] Throughout the development of common law crimes, four categories of criminal intent emerged: intent, knowledge, recklessness, and negligence.[28] The requirement of mental culpability, along with criminal action, shifted the punishment rationale from retaliation and vengeance to deterrence and reformation.[29] Eighteenth and nineteenth-century legal scholars widely accepted this shifting principle with a few exceptions.[30]

1. Strict Liability in the United States

In the United States, statutes define almost every crime, and there are only a few common law crimes still in existence.[31] Until the nineteenth century, all statutory crimes required mens rea.[32] In the twentieth and twenty-first century, some criminal laws were written and interpreted without any required criminal mental state.[33] Not requiring any mens rea caused fact finders to consider only whether the alleged action actually occurred.[34] Those statutes without any mens rea requirement—or strict liability statutes—generally fell into one of eight public welfare categories: prohibited sales of liquors, sales of contaminated foods, sales of misbranded items, violations of state and federal anti-narcotic acts, unlawful nuisances, breaches of traffic regulations, violations

27. *Id.* (stating judges defined common law crimes to require action and some evil state of mind).

28. *See id.* § 5.1(a), at 254 (enumerating mental state classifications). The Model Penal Code continues to use these four mental states to define the levels of culpability required for crimes. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 694-96 (1983) (articulating differences between four levels of intent possible for criminal action).

29. *See* Morissette v. United States, 342 U.S. 246, 250-51 (1952) (describing "instinctive" relationship between mens rea and punishment).

30. *Id.* at 251 (observing acceptance of mental culpability requirement by known commentators). The recognized exceptions to the mens rea requirement were for statutory rape, involuntary manslaughter, and crimes based on an omission of duty. *Id.* at 251 n.8 (listing different crimes lacking intent requirement for conviction).

31. LAFAVE, *supra* note 26, § 5.1(a), at 253-54 (explaining common law crimes nonexistent in some jurisdictions and rarely enforced in others). Even in common law jurisdictions, statute-defined crimes are more common than judge-created crimes. *See id.* § 5.1(a), at 254.

32. *See* Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 62 (1933) (noting judges unwilling to interpret strict liability requirements in statutes until mid-1800s). The mens rea requirement for a guilty conviction was, and remains, the general rule of American criminal jurisprudence. *See* Staples v. United States, 511 U.S. 600, 605 (1994) (explaining common law rule embedded requirement for some type of mens rea); United States v. U.S. Gypsum Co., 438 U.S. 422, 437 (1978) (holding proof of intent vital in almost all crimes); *Morissette*, 342 U.S. at 250 (acknowledging notion injury becomes criminal if and only if committed with intent); United States v. Balint, 258 U.S. 250, 251-52 (1922) (explaining intent necessary for almost every crime, even with statutory silence on subject).

33. *See* LAFAVE, *supra* note 26, § 5.5, at 288 (recognizing legislatures created criminal statutes only requiring conduct without mens rea); *see also* Sayre, *supra* note 32, at 63 (stating eighteenth-century judges held mens rea not required for some statutes, like liquor sales).

34. *See* Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 733 (1960) (emphasizing guilty verdict required if criminal act occurs in strict liability trial).

of motor vehicle rules, and disobediences of general police guidelines.[35] Additionally, strict liability offenses were distinguished from other crimes due to the nature of the statute, the type of actions or items regulated, and the penalties imposed for violations.[36]

One of the first courts to interpret a criminal law as a strict liability statute was *Barnes v. State*,[37] which involved the sale of liquor to a "common drunkard."[38] The *Barnes* court reasoned that declaring the statute one of strict liability was not unimaginable or overly harsh.[39] This interpretation of strict liability in criminal statutes also occurred in Massachusetts during the 1800s.[40] Other states interpreted their own statutes to be strict liability laws as well.[41] Subsequently, in the 1920s, this trend continued with federal courts interpreting federal statutes to require strict liability.[42]

35. Sayre, *supra* note 32, at 84-87. The category of illegal sales of liquors included crimes of selling illegal beverages, selling to children, selling to known drunkards, selling to Native Americans, and selling intoxicating liquors by illegal methods. *Id.* at 84-85. The category of sales of tainted foods included the crimes of selling "adulterated or impure milk," and selling adulterated butter or margarine. *Id.* at 85-86. The Federal Food and Drugs Act or Insecticide Act regulated crimes for selling misbranded articles during the 1900s, and either state or federal anti-narcotic acts regulated the sale of narcotics. *See id.* at 86. Criminal nuisance statutes included actions injuring public health or obstructing highways. *Id.* The issuance of traffic regulations violations and motor vehicle laws controlled the speed and manner of automobiles. *Id.* at 87. Breaches of general police regulations included "health regulations, factory and labor laws, building laws, game laws, railway regulations, and general minor police regulations." *Id.* at 87.

36. *See Staples*, 511 U.S. at 607 (recognizing congressional silence implies strict liability depending on statutory nature and particular character of crimes); *see also* Morissette v. United States, 342 U.S. 246, 255-56 (1952) (explaining strict liability violations do not inflict immediate injury, but create danger of injury); LAFAVE, *supra* note 26, § 5.5, at 288-89 (asserting strict liability statutes generally carry non-severe penalties); Sayre, *supra* note 32, at 72 (articulating strict liability determination depends on character of offense and offense's possible penaly).

37. 19 Conn. 398 (1849).

38. *See id.* at 404 (holding knowledge of person's drunkard character not required for conviction). The court interpreted the statute's language to eliminate any possible defense of not knowing a person was an alcoholic. *See id.* at 404-05 (explaining language, "selling to a *common* drunkard" negates knowledge requirement in statute) (emphasis added).

39. *See id.* at 405 (exemplifying existing situations without ignorance or mistake defense). The court argued lack of knowledge or intent is common when prosecuting the sale of alcohol to minors, sex with a minor, and adultery. *See id.*

40. *See, e.g.*, Commonwealth v. Smith, 44 N.E. 503, 504 (Mass. 1896) (holding no knowledge requirement in statute criminalizing presence in gambling house); Commonwealth v. Farren, 91 Mass. (9 Allen) 489, 490 (1864) (concluding legislature did not intend knowledge requirement for illegal sale of adulterated milk); Commonwealth v. Boynton, 84 Mass. (2 Allen) 160, 160 (1861) (stating knowledge of illegal act not required for sale of intoxicating liquors conviction).

41. *See, e.g.*, Tenement House Dep't of N.Y. v. McDevitt, 109 N.E. 88, 89 (N.Y. 1915) (holding defense of lack of knowledge does not negate illegal use of house for prostitution); People v. Roby, 18 N.W. 365, 367 (Mich. 1884) (explaining opening bar on Sunday violates statute even without intent); Fox v. State, 3 Tex. Ct. App. 329, 334 (1877) (concluding act of adultery remains illegal without knowledge or intent).

42. *See* United States v. Behrman, 258 U.S. 280, 288 (1922) (reasoning no intent element found in statute implies no intent required for conviction); United States v. Balint, 258 U.S. 250, 254 (1922) (holding defendant guilty of violating Narcotic Act even without knowing about possession). The use of strict liability crimes in the federal legal system continued after the 1920s. *See* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1385-86

The decisions in *United States v. Behrman*[43] and *United States v. Balint*[44] heavily relied upon the legislative intent behind the Anti-Narcotic Act.[45] In *Behrman*, the large number of drugs involved supported the Court's ruling.[46] In *Balint*, the Court explained that the legislature recognized the possibility of punishing an innocent person, but still believed the importance of punishing the sale of drugs outweighed that possible risk.[47]

2. Policy Reasons Behind Strict Liability

These classes of statutes were interpreted as strict liability laws for numerous reasons, including the protection of the public.[48] Particularly, because the Industrial Revolution increased the number of injuries to employees, legislatures aimed to protect the public.[49] Additionally, the government sought to deter individuals from engaging in potentially harmful activities without weighing the risks by placing the burden on the individual to determine whether his or her actions fell within a regulated activity.[50] This rationale relied on the theory that a significant number of people would avoid a regulated activity if the statutory punishment outweighed the potential reward.[51] Lastly, the government believed that it was impractical to prove mens rea for such regulated activity.[52]

(2002) (explaining Court's validation of statutes without culpable mental state).

43. 258 U.S. 280 (1922).

44. 258 U.S. 250 (1922).

45. *See Behrman*, 258 U.S. at 288 (explaining clarity of statute without mens rea element supports intent behind strict liability); *Balint*, 258 U.S. at 253-54 (alluding to legislative intent in determining statute's strict liability).

46. *See Behrman*, 258 U.S. at 288-89 (reasoning single drug dose not punishable under statute, but large doses punished differently). The defendant was charged with dispersing "150 grains of heroin, 360 grains of morphine, and 210 grains of cocaine." *Id.*

47. *See Balint*, 258 U.S. at 254 (explaining Congress's statutory considerations).

48. *See* Morissette v. United States, 342 U.S. 246, 253-56 (1952) (explaining increase in city size and population led to new regulations). The Industrial Revolution created numerous new risks to employees, and promoted the need for the law to mandate new precautions and standards. *See id.* at 253-54. These police power enactments emphasized "social betterment" rather than retribution. *See Balint*, 258 U.S. at 252; *see also* Commonwealth v. Farren, 91 Mass. (9 Allen) 489, 490 (1864) (explaining high importance of protecting public from risks in enacting strict liabilty).

49. *See Morissette*, 342 U.S. at 253-55 (analyzing increased injuries during Industrial Revolution due to new machines in workplace). Because of these new machines and energy sources, employers needed to increase safety protocols for their employees. *See id.* at 254-55.

50. *See* Staples v. United States, 511 U.S. 600, 607 (1994) (explaining congressional intent to place duty on individuals to determine legality of actions); United States v. Balint, 258 U.S. 250, 252 (1922) (articulating laws protecting public require individuals risk committing crime without possible ignorance defense); Wasserstrom, *supra* note 34, at 735-36 (arguing certain situations exist where strict liability laws deter criminal activity); Michael Bohan, Casenote & Comment, *Complicity and Strict Liability: A Logical Inconsistency?*, 86 U. COLO. L. REV. 631, 637-38 (2015) (acknowledging use of strict liability successfully deters conduct posing risk to large number of citizens).

51. *See* Wasserstrom, *supra* note 34, at 737 (rationalizing possible risks involved may outweigh any possible reward); Bohan, *supra* note 50, at 638 (noting strict liability results in people acting carefully).

52. *See Balint*, 258 U.S. at 251-52 (explaining modification to general requirement of mens rea when

B. Strict Liability Sex Crimes

When considering strict liability crimes, the best-known examples throughout history are sex offenses.[53] Statutory rape, the most notable strict liability sex crime, is found in literature as early as Hammurabi's Code.[54] The first statute requiring strict liability for sex crimes was created in thirteenth-century England.[55] Following this original statute, the English common law continued to involve strict liability sex crimes.[56]

1. American Strict Liability Sex Offenses

As strict liability laws prohibiting sexual acts against minors were developed in England, American courts and legislatures adopted them.[57] In the United States, strict liability sex crimes were similar to—but not the same as—public welfare offenses.[58] Based on the public policy reasoning behind their lack of mens rea, sex crimes were viewed more as quasi-public welfare offenses.[59] Believing in this public policy rationale, the federal government still uses strict

requirement negates purpose of statute); Tenement House Dep't of N.Y. v. McDevitt, 109 N.E. 88, 90 (N.Y. 1915) (stating lack of mens rea defense invalidates purpose and effectiveness of law); *Farren*, 91 Mass. (9 Allen) at 490 (articulating impracticality of knowledge requirement in select cases).

53. *See Morissette*, 342 U.S. at 251 n.8 (recognizing sex crimes, including rape, fall into intent requirement exceptions); Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 316 (2003) (articulating increasing momentum behind strict liability since origination); Alexandra Hutton Oglesby, Comment, *Eliminating Injustice: Revising Mississippi's Statutory Rape Laws*, 76 MISS. L.J. 1067, 1070 (2007) (explaining U.S. courts continuously classify statutory rape laws under strict liability crimes).

54. Oglesby, *supra* note 53, at 1069 (stating Hammurabi Code criminalized rape of "betrothed virgin, whom the law considered . . . an innocent victim").

55. *See id.* (explaining origin of statutory definition developed in England in 1275). The 1275 Statutes of Westminster definition made it illegal to have intercourse with a female younger than twelve. *Id.* This crime intended to grant special protection to young females in England. *See* Carpenter, *supra* note 53, at 333 (explaining view necessitating protection of young females because too young to understand consequences of sex).

56. *See* Nider v. Commonwealth, 131 S.W. 1024, 1026 (Ky. 1910) (recognizing statutory rape English common law crime based on act passed during Queen Elizabeth's reign). The parliamentary act criminalized sex with a female child under the age of ten, even if the child consented. *Id.*; *see also* Oglesby, *supra* note 53, at 1069 (reviewing changes in English common law age of consent from twelve to ten in 1576).

57. *See Nider*, 131 S.W. at 1026 (explaining Kentucky statutory rape law's recognition of early English common law); *see also* Oglesby, *supra* note 53, at 1069-70 (indicating early American legal system adopted laws, like statutory rape, from English common law). The common law of England became the laws of the United States unless they were superseded by statute or disrupted public policy. *See Nider*, 131 S.W. at 1025.

58. *See* Carpenter, *supra* note 53, at 333 (articulating difficulty in labeling statutory rape under public welfare offense); Sayre, *supra* note 32, at 73 & n.65 (explaining sex offenses against girls under certain age not public welfare offenses).

59. *See* Carpenter, *supra* note 53, at 333 (labeling statutory rape quasi-public welfare offense based on theory of notice). These strict liability sex offenses were created under the public policy ideas of protecting young individuals, and placing the parties engaging in sexual intercourse at their own risk of breaking the law. *See id.*; *see also* Sayre, *supra* note 32, at 74 (articulating requirement of placing peril on defendants necessary to advance public policy of protecting victims).

liability sex offense statutes to protect children today.[60]

2. Policy Rationale Behind Strict Liability Sex Offenses

These statutes were created with specific legislative intent, and the Supreme Court held that congressional intent and meaning should be followed when analyzing statutes.[61] One of the policy reasons behind the enactment of strict liability sex offense statutes was to combat the sexual victimization of children.[62] The goal of protecting youths has existed since such crimes were established in English common law.[63] These statutes have endured modern times because of congressional and other organizations' findings on the extent of child victimization in the United States that note the growth of child pornography from magazines to a multibillion-dollar Internet-based industry, and that victims of child sexual assault have a 1,000% increased risk of revictimization.[64] Some cases validly upheld the protection of children even

60. *See* 18 U.S.C. § 2241(c)-(d) (2012) (creating criminal strict liability offense for aggravated sexual abuse of children); 18 U.S.C. § 2243(d) (2012) (articulating sexual abuse of minor or ward applies strict liability to victim's age); 18 U.S.C. § 2244(c) (2012) (stating sexual contact with child doubles maximum term of imprisonment under other strict liability sections); 18 U.S.C. § 2251(a) (2012) (defining strict liability crime of child pornography production); *see also Citizen's Guide to U.S. Federal Law on Child Pornography*, U.S. DEP'T JUST., http://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-child-pornography (last updated July 6, 2015) [http://perma.cc/V3YP-EABN] (explaining legal definitions and actions criminalized under federal statutes against child exploitation).

61. *See, e.g.*, Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284 (1987) (stating "Congress is the ultimate touchstone" of statute interpretation); New York v. Ferber, 458 U.S. 747, 758 (1982) (stating Court will not "second-guess" legislative intent); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) (explaining role of courts to construe statutes in light most favorable to congressional intent); Gooch v. United States, 297 U.S. 124, 128 (1936) (announcing construction of individual terms does not defeat legislative intent); Johnson v. S. Pac. Co., 196 U.S. 1, 17-18 (1904) (declaring strict construction of statutes cannot contravene legislative intent); *see also* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1373 (2013) (Ginsburg, J., dissenting) (arguing majority's statutory interpretation flawed because they did not adhere to Congress's intent).

62. *See Ferber*, 458 U.S. at 749 (recognizing sexual exploitation of children, especially in child pornography, represents significant problem in United States). States and Congress have an obvious interest in protecting children's wellbeing. *See id.* at 756-57 (identifying compelling governmental interest of protecting physical and psychological well-being of children); *see also* United States v. Williams, 553 U.S. 285, 307 (2008) ("Child pornography harms and debases the most defenseless of our citizens."). As Justice Rutledge stated, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (explaining legislature may use broad range of powers to protect such growing youth from dangers).

63. *See* Regina v. Prince (1875) 2 LRCCR 154 at 174-75 (UK) (Bramwell, B., concurring) (explaining legislature aimed to protect girls, not women, of tender age from wrongful acts). The *Regina v. Prince* court concluded that the statute against the taking of a girl under the age of sixteen was enacted to protect young females and their caretakers. *See id.* at 171-72 (Blackburn, J., concurring) (stating punishment for abductors of girls who could not consent aligned with intent of legislature).

64. *See* Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110-358, 122 Stat. 4001 (2008) (codified at 18 U.S.C. § 2251 (2012)) [hereinafter Child Pornography Prosecution Findings] (finding child pornography multibillion dollar business due to growth of Internet); 137 CONG. REC. 9468-03 (1991), 137 Cong Rec S 9468-03, at *S9479 (Westlaw) [hereinafter CONG. RECORD] (reporting child sexual victimization spiked 175% from 1981 to 1985); WORTLEY & SMALLBONE, *supra* note 8, at 5 (explaining growth of child

though the statutes could impede constitutional rights such as First Amendment rights to produce content or parents' rights to raise their children how they see fit.[65]

In addition to combatting child victimization, legislatures enacted these statutes under the policy rationale that an individual should reasonably be required to ascertain his or her sexual partner's age before engaging in intercourse.[66] This guiding principle came from the belief that individuals, in proximity to each other, have the ability to determine age correctly.[67] Further, legislatures developed strict liability sex offense statutes to assist in arresting, prosecuting, and convicting individuals who exploit children.[68] The difficulty of investigating and prosecuting child sex offenses, including child pornography, created the need for such statutory assistance.[69] The Federal

pornography from 250 magazines in 1977 to vast amount on Internet); *Effects of CSA*, *supra* note 9 (finding child sexual assault victims have 1,000% increased risk of revictimization). Children who are victimized at a young age often suffer both short-term and long-term consequences. *Effects of CSA*, *supra* note 9. The short-term effects range from thumb-sucking, bed-wetting, poor eating habits, problems in school, and an unwillingness to participate in activities. *Id.* In the long term, the psychological injury can manifest into anxiety, drug or alcohol addiction, inability to sleep, and fear of adults characteristically similar to their abusers. *Id.* Additionally, the Surgeon General's Workshop on Pornography declared that nineteen nationally and internationally recognized clinicians and researchers agree that children who participate in pornography experience adverse and long-term effects. *See* CONG. RECORD, *supra*, at *S9480.

65. *See Ferber*, 458 U.S. at 757 (explaining Court upheld legislation to protect children even when limiting First Amendment constitutional rights); Herring v. State, 100 So. 3d 616, 627 (Ala. Crim. App. 2011) (holding parent's right to care for children limited by legislation protecting children from abuse).

66. *See* United States v. Encarnacion-Ruiz, 787 F.3d 581, 591 (1st Cir. 2015) (asserting principals "may be reasonably required to ascertain" their victims' real ages); Commonwealth v. Murphy, 42 N.E. 504, 505 (Mass. 1896) (stating policy requiring everyone to determine whether actions fall within prohibited category).

67. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 72 n.2 (1994) (explaining rationale requiring defendant determine victim's age if interacting with victim personally); Commonwealth v. Harris, 904 N.E.2d 478, 485 (Mass. App. Ct. 2009) (recognizing principal and present accomplice can both judge whether individual can legally consent). The Supreme Court reasoned that a producer of child pornography has a different burden than a viewer of child pornography because producers can easily determine a performer's age due to their interaction with the performer. *See X-Citement Video, Inc.*, 513 U.S. at 76 n.5. Any doubts about an individual's age can be resolved by simply refraining from engaging in sexual intercourse. *See Harris*, 904 N.E.2d at 485 (arguing individuals should walk away if even remote doubt exists regarding age of participant).

68. *See* New York v. Ferber, 458 U.S. 747, 760 (1982) (concluding most efficient method of stopping child pornography involves severe criminal penalties); CONG. RECORD, *supra* note 64, at *S9479 (considering Child Protection Act of 1984 successful in raising prosecutions, convictions, and investigations). Congress, most state legislatures, and a large body of testimony and literature all concluded that stopping the distribution of child pornography was necessary to prevent the sexual abuse of children. *See Ferber*, 458 U.S. at 760.

69. *See* CONG. RECORD, *supra* note 64, at *S9479 (reporting findings of congressional subcommittee on pedophiles and child pornography industry). The subcommittee found that child molesters use child pornography of their victims as blackmail to shame their victims from going to the police about their abuse. *See id.*; *see also* Child Pornography Prosecution Findings, *supra* note 64 (articulating use of child pornography to revictimize children with each view); *Effects of CSA*, *supra* note 9 (explaining abusers sometimes make victims feel responsible for assault). The subcommittee also found that the underground and hidden nature of child pornography rings hindered prosecutions against child pornography producers, as the majority of these rings are privately owned and not used for distribution. *See* RECORD, *supra* note 64, at *S9479; WORTLEY & SMALLBONE, *supra* note 8, at 12 (describing difficulty of finding child pornography websites and sources).

Rules of Evidence relaxed the character rules to permit evidence of prior assaults on children, thus fulfilling the legislature's intent to aid in prosecuting alleged child abusers.[70]

C. Aiding and Abetting

Aiding and abetting laws are some of the most important and frequently used laws in the United States.[71] Aiding and abetting is commonly defined as someone providing assistance to a crime with the requisite mental state.[72] These laws are also known as accomplice liability, complicity, and joint venture liability.[73]

Traditionally, under the common law, all parties involved in a crime were categorized as one of four actors: principal in the first degree, principal in the second degree, accessory before the fact, or accessory after the fact.[74] As time progressed, aiding and abetting laws developed from common law to statutory law.[75] This progression continued until the federal government passed the

Child pornography producers are difficult to track down due to the ease of obtaining child pornography in different jurisdictions, by different means, and without identifying oneself. *See* Child Pornography Prosecution Findings, *supra* note 64 (explaining availability of anonymous child pornography collection from websites, email, newsgroups, and other sources).

70. *See* FED. R. EVID. 414 (permitting previous child molestation evidence in criminal child molestation cases to prove character); FED. R. EVID. 415 (allowing previous child molestation evidence to demonstrate defendant's character in civil case about similar act); *see also* 140 CONG. REC. H8968-01 (1994) (statement of Rep. Susan Molinari), 140 Cong Rec H 8968-1, at *H8991 (Westlaw) (explaining new rules assist in "bringing the perpetrators of these atrocious crimes to justice").

71. *See* Kinports, *supra* note 14, at 134 (asserting accomplice statutes most frequently used for criminal prosecutions); Robinson & Grall, *supra* note 28, at 732 (declaring aiding and abetting law "most important source of criminal liability").

72. *See* LAFAVE, *supra* note 26, § 13.2, at 708 (asserting complicity occurs when assistance given to promote or facilitate crime); Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131, 137 (2015) (noting requirement of act and some mens rea directed at crime for complicity liability); Bohan, *supra* note 50, at 638-39 (stating guilt established if accomplice assisted principal with intent to "promote or facilitate . . . crime"); Courteau, *supra* note 13, at 325 (explaining accomplices liable when they give assistance with required mens rea).

73. *See* Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 369 (1997) (equating aiding and abetting with complicity and accomplice liability); *see also* Commonwealth v. Harris, 904 N.E.2d 478, 483 (Mass. App. Ct. 2009) (explaining joint venture liability in two theories, present or nonpresent).

74. Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 223 & n.11 (2000) (categorizing four criminal parties and their differences); Courteau, *supra* note 13, at 326 n.7 (listing four degrees existing under common law). The first category—principal in the first degree—was the actual person who committed the crime at the crime scene. Weisberg, *supra*, at 223; Weiss, *supra* note 42, at 1357. The second category—principal in the second degree—was the person who was present, either constructively or at the crime scene, and assisted the principal in the first degree. Weisberg, *supra*, at 223; Weiss, *supra* note 42, at 1357; Courteau, *supra* note 13, at 326. The third category—an accessory before the fact—was an individual who aided the principal in the first degree before the crime occurred, but was not at the crime scene. Weisberg, *supra*, at 223 & n.11; Weiss, *supra* note 42, at 1357. The final category—an accessory after the fact—was someone who helps the principal after the crime occurred. Weiss, *supra* note 42, at 1357.

75. *See* United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (detailing history of aiding and abetting statutes and early common law). Judge Learned Hand explained that the idea of complicity liability was

current aiding and abetting statute, which eliminated the difference between principals and accessories.[76]

1. Pre-Rosemond

Even though aiding and abetting statutes are some of the most frequently used by prosecutors in the United States, the mens rea requirement remains unclear.[77] Courts have recognized "purpose" as one category of mens rea necessary for aiding and abetting liability.[78] This requirement emerged from Judge Learned Hand's reasoning based on the history of aiding and abetting law: "It will be observed that all these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory's conduct. . . . All the words used—even the most colorless, 'abet'—carry an implication of purposive attitude towards it."[79] The courts have also recognized "knowledge" as sufficient mens rea for accomplice liability.[80] This is due to the belief that a defendant should not be acquitted solely based on a lack of purposefulness because knowing about criminal activity and assisting the principal is itself criminal.[81]

In addition to acting purposely and knowingly, judges have also held that an

developed in fourteenth century England, and led to the first aiding and abetting statute in 1790. *Id.* (noting first statute criminalized aiding murder, robbery, or piracy).

76. *See* 18 U.S.C. § 2 (2012) (punishing anyone who commits offense or aids in commission under title of principal); *see also* Weiss, *supra* note 42, at 1355-56 (explaining Congress's intent to eliminate distinction between principal and accomplice with federal statute).

77. *See* Kadish, *supra* note 73, at 371 (explaining confusion about requirement of intent in accomplice liability); Kinports, *supra* note 14, at 136 (acknowledging complex nature of proving accomplice's intent toward crime committed); Sarch, *supra* note 72, at 133 (describing long, chaotic history of disagreement on requisite mens rea); Weisberg, *supra* note 74, at 222 (discussing attention spent on "troublesome problem of mens rea"); Weiss, *supra* note 42, at 1348 (questioning which level of mental state triggers federal accomplice law); Bohan, *supra* note 50, at 640 (recognizing confusion exists about which level of mens rea required for complicity); Courteau, *supra* note 13, at 325 (articulating concern over longstanding debate on level of intent required for aiding and abetting liability); *see also supra* note 71 and accompanying text (discussing frequent use of aiding and abetting statutes).

78. *See* Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (holding desire to bring about criminal venture required for accomplice liability); Hicks v. United States, 150 U.S. 442, 449 (1893) (requiring words of encouragement spoken with intent of aiding principal); United States v. Folks, 236 F.3d 384, 389 (7th Cir. 2001) (holding desire to achieve crime necessary for aiding and abetting liability); United States v. Hill, 55 F.3d 1197, 1204 (6th Cir. 1995) (declaring intent to further crime required for aiding and abetting); *Peoni*, 100 F.2d at 402 (explaining accomplice must have purposive standpoint concerning crime success).

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

80. *See* Bozza v. United States, 330 U.S. 160, 164-65 (1947) (holding petitioner guilty of aiding and abetting because of knowledge about distillery operation); Hanauer v. Doane, 79 U.S. 342, 347 (1870) (holding knowledge of another's intent to commit crime enough to convict accomplice); United States v. Campisi, 306 F.2d 308, 311 (2d Cir. 1962) (holding defendants' sale of illegal possessions demonstrated sufficient knowledge for accomplice liability).

81. *See Bozza*, 330 U.S. at 165 (explaining knowledge about illegal distillery equates to knowing actions violate law); *Hanauer*, 79 U.S. at 347 (stating man who aids in preparation with knowledge of crime cannot plead innocence).

accomplice must share the same mental state as the principal to be convicted.[82] This method—the "derivative approach"—is based on the idea of completely erasing any differences between the accomplice and principal.[83] The federal aiding and abetting statute—18 U.S.C. § 2—embodies the derivative approach's equalizing principle.[84]

Along with requiring different mens rea for aiding and abetting, courts also disagree on the significance of the defendant's presence during the commission of the crime.[85] Courts applying a discrepancy between present and nonpresent theories of complicity analyze where and when the accomplice gave assistance to the principal.[86] On the other hand, federal courts interpreting the federal aiding and abetting statute do not currently consider a difference between presence and nonpresence.[87]

2. Rosemond

With the existing turmoil surrounding the appropriate level of mens rea required for accomplice liability under the federal statute, the Supreme Court attempted to clarify the statute and accomplice liability.[88] *Rosemond* was the

82. *See* United States v. Ismoila, 100 F.3d 380, 387 (5th Cir. 1996) (holding accomplice must associate self with crime and share principal's intent); United States v. Grey Bear, 828 F.2d 1286, 1292 (8th Cir. 1987) (declaring shared criminal intent between accomplice and principal "most important element" of complicity), *vacated in part*, 836 F.2d 1088 (8th Cir. 1987); United States v. Campa, 679 F.2d 1006, 1010 (1st Cir. 1982) (requiring prosecution show "vital element" of shared intent between accomplice and principal); United States v. Hewitt, 663 F.2d 1381, 1385 (11th Cir. 1981) (asserting accomplice must share principal's criminal intent); United States v. Beck, 615 F.2d 441, 449 (7th Cir. 1980) (holding accomplice and principal must have shared mental state required by statute); Commonwealth v. Zanetti, 910 N.E.2d 869, 883 (Mass. 2009) (explaining conviction of accomplice depends on whether they had shared intent required for underlying crime).

83. *See* Sarch, *supra* note 72, at 148-49 (considering Congress intended for aider and abettors to share one mens rea pursuant to derivative approach); Weiss, *supra* note 42, at 1410 (describing derivative approach equates accomplice's mens rea with underlying crime's mens rea).

84. *See* 18 U.S.C. § 2 (2012) (equating aider and abettor with principal actor); United States v. Jones, 308 F.2d 26, 31 (2d Cir. 1962) (stating § 2 enacted to eliminate any differences between classes of criminal parties); *see also* Sarch, *supra* note 72, at 148-49 (reasoning Congress intended principals and accomplices have mental state for underlying crimes); Weiss, *supra* note 42, at 1411 (explaining *Jones* extended intent behind § 2 to accomplice mens rea issue).

85. *Compare* United States v. Encarnacion-Ruiz, 787 F.3d 581, 596 (1st Cir. 2015) (explaining federal law has no distinction between present and nonpresent accomplice), *with* Commonwealth v. Harris, 904 N.E.2d 478, 483-84 (Mass. App. Ct. 2009) (noting distinction between present and nonpresent accomplice under joint venture liability).

86. *See Harris*, 904 N.E.2d at 483-84 (explaining difference between present and nonpresent theory of accomplice liability). Under the present theory of aiding and abetting, a defendant is liable if he or she was present during the crime, had knowledge that the principal intended to commit a crime, and agreed to help the principal if needed. *Id.* at 483. In contrast, the nonpresent theory of aiding and abetting applies only if the defendant assisted the principal before he committed the crime. *Id.* at 483-84.

87. *See Encarnacion-Ruiz*, 787 F.3d at 596 n.12 (contrasting *Commonwealth v. Harris*, 904 N.E.2d 478 (Mass. App. Ct. 2009) holding with federal aiding and abetting law). The court in *Encarnacion-Ruiz* relied on the federal aiding and abetting statute and federal precedent to justify federal courts not distinguishing between accomplices according to their presence at the crime scene. *See id.* at 596.

88. *See* Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014) (granting certiorari to clarify

first case to discuss aiding and abetting liability in over thirty years.[89] In *Rosemond*, three individuals, including Rosemond, planned to sell marijuana to two men.[90] The group drove their car to meet the two buyers, but the deal did not go as planned.[91] Consequently, either Rosemond or one of his co-defendants—the principal actor is unclear—fired a handgun at the two fleeing buyers.[92] Before they could catch up to their targets, however, a police officer pulled over and arrested Rosemond and his co-defendants.[93]

The question before the Court was which actions and mental states were needed to convict Rosemond of aiding and abetting a § 924(c) crime.[94] The Court held that to aid and abet a § 924(c) crime, an accomplice must have advance knowledge of the firearm, or in other words, he must have an opportunity to alter or leave the venture and fail to do so in order to be liable.[95] The Court hypothesized that without this advance knowledge requirement, an accomplice may be liable if he saw the firearm only during the transaction and chose not to leave due to the high threat of potential harm.[96] The Court held that the district court's jury instructions were flawed for failing to include the advance knowledge mens rea requirement, and remanded the case back to the Tenth Circuit.[97]

requirements for aiding and abetting § 924(c) crimes).

89. *See supra* note 17 and accompanying text (explaining significance of *Rosemond* decision).

90. *Rosemond*, 134 S. Ct. at 1243 (recounting Perez, Joseph, and Rosemond's arrangement to sell Gonzalez and Painter marijuana).

91. *See id.* (stating Gonzalez sat in backseat of car with either Joseph or Rosemond). While sitting in the backseat of the car, instead of paying for the marijuana, Gonzalez decided to punch the individual in the backseat with him, and fled with Painter. *Id.*

92. *Id.* (articulating how either Joseph or Rosemond began firing at fleeing men). It was contested at trial which man, Joseph or Rosemond, fired a handgun at the fleeing buyers. *See id.*

93. *Id.* (explaining federal prosecution began after police officer pulled defendants' car over during chase).

94. *See* Rosemond v. United States, 134 S. Ct. 1240, 1243 (2014) (considering what government must prove when charging individual with aiding and abetting § 924(c) crime). The Court summarized Rosemond's charge by stating, "The Government charged Rosemond with . . . violating § 924(c) by using a gun in connection with a drug trafficking crime, or aiding and abetting that offense under § 2." *Id.*

95. *See id.* at 1249-50 (explaining advance knowledge of firearm, allowing defendant to decide whether to walk away, required). The Court further explained that the advance knowledge requirement was necessary because, without any advance knowledge, the defendant did not intend to aid in an armed offense, just a drug deal. *See id.* at 1249, 1251.

96. *See id.* at 1251 (noting potential increased gun violence if accomplice walked away during drug deal after seeing firearm). The Court explained that the government's definition of foreknowledge was too broad. *See id. But see id.* at 1254 (Alito, J., concurring in part and dissenting in part) (arguing Court's mens rea requirement removes defense of necessity and places undue burden on prosecution). Justice Alito argued that the majority's new mens rea requirement should not be a required element at all, but should continue to be an affirmative defense like necessity or duress. *See id.* Justice Alito believed that Rosemond had the mens rea required under § 924(c) once he saw his cohort's gun, and the majority's reasoning only supports a possible necessity defense, which is a legal excuse for breaking the law. *See id.* at 1254-55.

97. *Id.* at 1252 (majority opinion) (remanding case to determine consequence for misleading instruction). The Court held that the district court's jury instructions failed to explain that Rosemond needed advance knowledge of the principal's use of a firearm. *See id.*

3. Post-Rosemond

Following the *Rosemond* decision, various applications of its holding arose, just as Justice Alito predicted in his dissent.[98] The majority of the cases that applied and agreed with *Rosemond* also involved the use of firearms.[99] There were also numerous courts that did not follow *Rosemond*'s holding on accomplices' mental states.[100] One case, *United States v. Encarnacion-Ruiz*,[101] applied *Rosemond* to aiding and abetting a crime not involving the use of a firearm: the production of child pornography.[102] The *Encarnacion-Ruiz* court held that the government must prove the defendant had advance knowledge that the minor's age was below the legal age of consent to convict the defendant of aiding and abetting the production of child pornography.[103]

In *Encarnacion-Ruiz*, the defendant was charged with aiding and abetting child pornography because he was involved in the filming of sexual intercourse between an adult male and a fourteen-year-old girl.[104] The defendant agreed to a plea bargain, admitting that he was guilty of aiding and abetting the production of child pornography after the trial judge rejected his mistake of age

98. *See Rosemond*, 134 S. Ct. at 1253 (Alito, J., concurring in part and dissenting in part) (stating majority's use of purpose and knowledge leaves case law in "conflicted state"). Justice Alito pointed out that the majority's holding did not clarify aiding and abetting law, but instead kept the case law as it had previously existed: in utter confusion over the mens rea requirement under § 2. *See id.*

99. *See* United States v. Manso-Cepeda, 810 F.3d 846, 850-51 (1st Cir. 2016) (applying *Rosemond* mental state requirement to co-defendant's firearm possession); United States v. Robinson, 799 F.3d 196, 201 (2d Cir. 2015) (holding mens rea requirement satisfied when defendant did not walk away after seeing firearm); United States v. Henry, 797 F.3d 371, 376-77 (6th Cir. 2015) (stating defendant could have lacked advance knowledge about firearm in robbery, proving flawed instruction); United States v. Goldtooth, 754 F.3d 763, 768-69 (9th Cir. 2014) (explaining, under *Rosemond*, defendant must have advance knowledge of armed robbery for conviction); United States v. Davis, 750 F.3d 1186, 1193 (10th Cir. 2014) (articulating requirement of advance knowledge of firearm in jury instruction on aiding and abetting); Tann v. United States, 127 A.3d 400, 433-34 (D.C. 2015) (explaining defendant lacked advance knowledge for aiding and abetting armed robbery conviction).

100. *See* United States v. Shorty, 628 F. App'x 524, 526 (9th Cir. 2016) (considering *Rosemond* irrelevant when defendant had sufficient intent to aid and abet false statement); Troiano v. Warden Allenwood USP, 614 F. App'x 49, 51-52 (3d Cir. 2015) (distinguishing instructions for aiding and abetting § 924(c) in *Rosemond* from aiding and abetting robbery); United States v. Persaud, 605 F. App'x 791, 801 (11th Cir. 2015) (stating *Rosemond* holding does not apply outside aiding and abetting § 924(c) crimes); Faul v. Wilson, No. 15-CV-1541, 2016 WL 54195, at *2 (D. Minn. Jan. 5, 2016) (explaining *Rosemond* only applicable to § 924(c)); Oscar v. Martin, No. 3:15-CV-90-CWR-FKB, 2015 WL 5297267, at *2 (S.D. Miss. Sept. 10, 2015) (declining to extend *Rosemond* holding to aiding and abetting murder); United States v. Greene, Nos. 14-C-431, 08-CR-124, 2015 WL 347833, at *2 (E.D. Wis. Jan. 23, 2015) (ruling *Rosemond* does not extend beyond aiding and abetting § 924(c) crime to § 2113(d) crime); Rodgers v. United States, Nos. 11-20481, 13-13836, 2014 WL 7341133, at *3 n.3 (E.D. Mich. Dec. 23, 2014) (stating *Rosemond* holding not relevant to robbery count for inapplicability of § 924(c)).

101. 787 F.3d 581 (1st Cir. 2015).

102. *See id.* at 596 (stating court will "[a]dher[e] to *Rosemond*'s analysis of aiding and abetting mens rea").

103. *See id.* (holding government needed to prove Encarnacion's advance knowledge of minor's age for conviction). The court reasoned that this holding was based on the *Rosemond* decision and established principles of complicity liability. *See id.* at 596-97.

104. *Id.* at 584.

defense.[105] The First Circuit vacated his conviction based on the *Rosemond* holding requiring advance knowledge to convict an accomplice of aiding and abetting a § 924(c) crime.[106]

Specifically, the court explained that "longstanding law" rejected the argument that strict liability applied to accomplices of no-fault crimes.[107] The court reasoned that if such strict liability were applied to accomplices, then anyone briefly or inadvertently involved with the crime could be convicted—including a set decorator.[108] Additionally, the court rationalized that without knowledge of the victim's age, the law would punish an individual for assisting in legal conduct: producing adult pornography.[109] Lastly, the court rejected the argument that *Rosemond* applied only to crimes requiring two distinct actions for conviction.[110]

III. ANALYSIS

A. Narrow Holding of Rosemond

The *Encarnacion-Ruiz* First Circuit decision relied heavily on the Supreme Court's holding in *Rosemond*.[111] In *Rosemond*, the advance knowledge requirement was narrow and only referred to § 924(c) crimes.[112] Such a requirement developed based on the premise that an accomplice with prior knowledge of a crime could either stop the crime or at least stop aiding the furtherance of the crime.[113] The Court referred to all aiding and abetting crimes—departing from its specific analysis of § 924(c) crimes—only when it

105. *See Encarnacion-Ruiz*, 787 F.3d at 585 (recounting defendant's plea agreement and fifteen-year sentence).

106. *See id.* at 588, 597 (stating application of *Rosemond* requires knowledge of minor's age when still able to refuse participation). The majority explained that producing child pornography is illegal because the videos show minors engaged in sexual activity, and without knowledge of a minor's participation, a defendant could not have wanted to bring about the crime of producing child pornography. *See id.* at 588.

107. *See* United States v. Encarnacion-Ruiz, 787 F.3d 581, 589-90 (1st Cir. 2015) (reciting Professor LaFave's reasoning behind strict liability's inapplicability to aiding and abetting). Professor LaFave stated that the argument for convicting accomplices without knowledge of essential facts has been rejected. LAFAVE, *supra* note 26, § 13.2(f), at 721.

108. *Encarnacion-Ruiz*, 787 F.3d at 590 (explaining thought process behind protecting parties without knowledge of criminal aspect of act). The court agreed that principals could be held strictly liable because of their personal contact with the minor, but they reasoned that the same logic is inapplicable to other parties who may have been involved with the child pornography. *See id.* at 591.

109. *See id.* at 590 (stating victim's minor age only fact criminalizing actions). Producing pornography involving adults is protected by the Constitution. *See id.*

110. *See id.* at 591 (explaining *Rosemond* not limited to "double-barreled crimes").

111. *See supra* note 106 and accompanying text (explaining application of *Rosemond* decision necessary to *Encarnacion-Ruiz* end result).

112. *See* Rosemond v. United States, 134 S. Ct. 1240, 1249 (2014) (mentioning "advance knowledge" about § 924(c) defendants specifically).

113. *See id.* (articulating failure to withdraw or change plan demonstrates intent to aid in armed crime). The Court reasoned that without advance knowledge, the defendant may have "no realistic opportunity to quit the crime," and therefore lacks the necessary intent for aiding and abetting an armed crime. *See id.*

stated: "[F]or purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission."[114] Professor Kinports, writing on the *Rosemond* holding, agreed that the mens rea requirement left the realm of aiding and abetting law in confusion, but the holding was specific in answering the question of which mens rea was required for aiding and abetting a § 924(c) crime.[115]

It is clear that *Rosemond* was a narrow decision, applying only to § 924(c) crimes because the majority of lower federal courts employing *Rosemond* involved crimes using firearms.[116] One such crime was aiding and abetting under § 924(c), the same crime discussed in *Rosemond*.[117] Another was aiding and abetting a bank robbery.[118] Lastly, one court applied *Rosemond* to a robbery on a Native American reservation using a firearm.[119]

Additional lower federal courts have refused to apply *Rosemond* to aiding and abetting crimes other than § 924(c).[120] Most of these courts distinguished *Rosemond* by explaining how the case was not factually relevant to the other crimes.[121] Some courts argued that because the Supreme Court did not explicitly state the *Rosemond* decision applied beyond aiding and abetting § 924(c) crimes, they would not be the ones to extend its holding.[122]

114. *Id.* When discussing previous cases involving aiding and abetting, the Court acknowledged the requirement of "knowing" that the criminal acts would be occurring, but did not acknowledge that any previous cases required "advance knowledge." *See id*. The Court reviewed four cases that use the "knowledge" mens rea requirement for accomplice liability to conclude that aiders and abettors must know the principal's intended criminal scope. *See id.* at 1248-49; *see also supra* note 80-81 and accompanying text (considering knowledge mens rea requirement for aiding and abetting).

115. *See* Kinports, *supra* note 14, at 141 (agreeing with Justices Alito and Thomas about confusing state of mens rea, except with § 924(c) crimes).

116. *See supra* note 99 and accompanying text (enumerating cases following *Rosemond*'s requirement of "advance knowledge").

117. *See* United States v. Robinson, 799 F.3d 196, 201 (2d Cir. 2015) (stating *Rosemond* requirement of advance knowledge met in defendant's § 924(c) complicity charge); United States v. Davis, 750 F.3d 1186, 1193 (10th Cir. 2014) (holding § 924(c) complicity jury instruction must conform to *Rosemond* holding); Rodgers v. United States, Nos. 11-20481, 13-13836, 2014 WL 7341133, at *3 (E.D. Mich. Dec. 23, 2014) (finding defendant's plea agreement met *Rosemond* requirements for aiding and abetting a § 924(c) crime).

118. *See* United States v. Henry, 797 F.3d 371, 376-77 (6th Cir. 2015) (applying *Rosemond* advance knowledge requirement to bank robbery appeal).

119. *See* United States v. Goldtooth, 754 F.3d 763, 768-69 (9th Cir. 2014) (stating *Rosemond* mens rea requirement necessary for aiding and abetting robbery).

120. *See supra* note 100 and accompanying text (listing courts finding *Rosemond* not applicable beyond § 924(c) offenses).

121. *See* Troiano v. Warden Allenwood USP, 614 F. App'x 49, 51-52 (3d Cir. 2015) (explaining advance knowledge requirement irrelevant to Troiano's case); United States v. Persaud, 605 F. App'x 791, 801 (11th Cir. 2015) (noting *Rosemond* not factually similar to present case); *Rodgers*, 2014 WL 7341133, at *3 n.3 (finding *Rosemond* irrelevant to Rodger's pharmacy robbery charge).

122. *See Persaud*, 605 F. App'x at 801 (noting Supreme Court did not apply *Rosemond* to other crimes besides § 924(c) offenses); Oscar v. Martin, No. 3:15-CV-90-CWR-FKB, 2015 WL 5297267, at *2 (S.D. Miss. Sept. 10, 2015) (explaining Supreme Court did not extend *Rosemond* beyond § 924(c)); United States v. Greene, Nos. 14-C-431, 08-CR-124, 2015 WL 347833, at *2 (E.D. Wis. Jan. 23, 2015) (stating court "will not

Additionally, one court distinguished the language of § 924(c) and the crime charged to argue that *Rosemond* was inapplicable.[123]

Although most courts that considered different aiding and abetting crimes elected to distinguish *Rosemond*, *Encarnacion-Ruiz* applied *Rosemond*'s advance knowledge mens rea requirement to a nonfirearm crime.[124] The First Circuit believed that *Rosemond* applied to all aiding and abetting crimes.[125] Even if *Rosemond*'s holding is not so narrow and can apply to aiding and abetting crimes outside of § 924(c), the *Rosemond* decision is inapplicable to strict liability sex crimes.[126]

B. Inapplicability of Rosemond *to Aiding and Abetting Federal Sex Crimes*

The advance knowledge requirement stated in *Rosemond* is inapplicable to strict liability sex crimes because courts must follow legislative intent when interpreting laws.[127] The legislature enacted federal strict liability sex crime laws with the intent of protecting children.[128] Additionally, Congress wanted to improve the process of investigating and convicting individuals who sexualize children.[129] The courts should follow this legislative intent behind federal sex crime laws, especially in light of the shocking statistics on violence and abuse against children.[130] The majority in *Encarnacion-Ruiz* failed to consider the legislative intent behind the child pornography statute, but the dissenter purposely began her argument by looking at the congressional objective.[131] When determining the mens rea required of an accomplice to the production of

overstep its authority by extending *Rosemond* beyond its actual holding").

123. *See Greene*, 2015 WL 347833, at *2 (explaining both statutes similar, but not identical, so *Rosemond* holding could lead to different results). The court illustrated that advance knowledge of a cohort's use of a fake weapon would lead to a conviction under § 924(c), but would not result in a § 2113(a) conviction, which requires an actually dangerous weapon. *See id.*

124. *See supra* Part II.C.3 (explaining *Encarnacion-Ruiz* decision different from pattern of other courts discussing *Rosemond*).

125. *See* United States v. Encarnacion-Ruiz, 787 F.3d 581, 588 (1st Cir. 2015) (discussing *Rosemond*'s requirements apply to aiding and abetting any crime). The First Circuit extended the advance knowledge requirement to aiding and abetting other federal crimes, including the production of child pornography. *See id.*

126. *See infra* Part III.B (arguing inapplicability of *Rosemond* due to legislative intent and impracticability of proving knowledge of age).

127. *See supra* note 61 and accompanying text (explaining legislative intent should determine statutory interpretation).

128. *See supra* note 62 and accompanying text (discussing compelling interest for governments to protect youth from abuse).

129. *See supra* note 68 and accompanying text (addressing legislative intent to increase arrests and prosecutions of child exploiters); *see also Encarnacion-Ruiz*, 787 F.3d at 607 (Thompson, J. dissenting) (explaining Congress intended for strict liability of § 2251(a) without mistake of age defense).

130. *See supra* note 64 and accompanying text (discussing statistics and findings on child sexual abuse and victimization).

131. *Compare* United States v. Encarnacion-Ruiz, 787 F.3d 581, 588 (1st Cir. 2015) (announcing straightforward application of *Rosemond* without mentioning legislative intent), *with id.* at 599 (Thompson, J., dissenting) (detailing importance of intent behind child pornography statute).

child pornography, considering legislative intent is imperative.[132]

Courts should also recognize the intent behind the aiding and abetting statute when determining the requisite level of mens rea for accomplices of strict liability sex crimes.[133] The aiding and abetting statute envisioned an eradication of all distinctions between parties to the same crime; therefore, Congress logically intended principals and accomplices to be treated the same in every aspect of a crime.[134] Consequently, the accomplice should also share the principal's mens rea regarding the victim's age: strict liability.[135]

In addition to legislative intent, *Rosemond* is inapplicable to federal strict liability sex crimes because of its impracticality.[136] In *Encarnacion-Ruiz*, the court held that the government had to prove the defendant knew the victim was under the legal age of consent.[137] Applying *Rosemond*'s advance knowledge requirement to a strict liability sex crime creates an unreasonable burden on the government and erases the mistake of age affirmative defense.[138] This requirement forces prosecutors to prove an almost impossible fact: the thought process of the defendant and whether he knew the victim was under the legal age of consent.[139] Moreover, this requirement can produce perverse results—like the vacated conviction in *Encarnacion-Ruiz* where the defendant engaged in intercourse with the minor in addition to filming his co-defendant.[140] The

132. *See id.* at 599 (Thompson, J., dissenting) (explaining necessity of keeping legislative intent in mind when deciding Encarnacion-Ruiz's case); *see also supra* note 61 and accompanying text (discussing Supreme Court's reliance on legislative intent for holdings).

133. *See supra* note 84 and accompanying text (explaining intent and interpretation of federal aiding and abetting statute).

134. *See* Sarch, *supra* note 72, at 148-49 (explaining language of § 2 may infer principals and accomplices should share same intent); Weiss, *supra* note 42, at 1355-56 (highlighting Congress's intent to make principals and accomplices interchangeable in all aspects).

135. *See supra* notes 82-83 and accompanying text (articulating idea of derivative approach with principals and accomplices sharing same intent); *see also Encarnacion-Ruiz*, 787 F.3d at 610 (Thompson, J., dissenting) (opining implied holding of *Rosemond* equates to principal and accomplice sharing same intent). Justice Thompson explained that, under *Rosemond*, an accomplice to a strict liability sex crime should not need more knowledge than the principal, but needs the same mens rea to be convicted. *See Encarnacion-Ruiz*, 787 F.3d at 611 (Thompson, J., dissenting).

136. *See* Rosemond v. United States, 134 S. Ct. 1240, 1256 (2014) (Alito, J., concurring in part and dissenting in part) (arguing majority erred by mistaking elements of crime with elements of affirmative defense). Justice Alito explained how this burden shift created a conundrum forcing the government to prove something that is found solely within the defendant's mind. *Id.* at 1257.

137. United States v. Encarnacion-Ruiz, 787 F.3d 581, 596 (1st Cir. 2015) (holding government must prove beyond reasonable doubt defendant knew victim's minor status).

138. *See id*. at 606 (Thompson, J., dissenting) (analyzing whether defendant asserts affirmative defense or government proves advance knowledge); *see also Rosemond*, 134 S. Ct. at 1256-57 (Alito, J., concurring in part and dissenting in part) (explaining how majority's advance knowledge requirement abolishes necessity and duress defenses).

139. *See Rosemond*, 134 S. Ct. at 1256-57 (Alito, J., concurring in part and dissenting in part) (arguing burden shift to prosecution forces them to prove something known only to defendant). Justice Alito even questioned how exactly the government would be able to show that the defendant was not able to walk away after learning of all aspects of the crime. *See id.* at 1257.

140. *See Encarnacion-Ruiz*, 787 F.3d at 584 (noting Encarnacion-Ruiz engaged in sexual intercourse with

majority of the court even recognized the "repugnant conduct that Encarnacion is accused of committing."[141]

C. Recommendations

Given the inapplicability of the *Rosemond* holding to federal strict liability sex crimes, it is logical to solve this issue by applying the derivative approach to aiding and abetting strict liability sex crimes.[142] This method satisfies the legislative intent behind both the aiding and abetting, as well as the federal strict liability sex crime statutes.[143] While the majority in *Encarnacion-Ruiz* claimed that "longstanding law" rejected the use of the derivative approach for strict liability crimes, this statement is conclusory and without support.[144]

Although using the derivative approach could arguably end with injustice for individuals who are minimally involved with the crime, this potential issue can be avoided by adopting present and nonpresent distinctions in federal aiding and abetting liability.[145] Using these distinctions, perverse results involving accomplices that engaged in sex with the victim, as in the *Encarnacion-Ruiz* case, would not transpire.[146] Employing the present and nonpresent distinction also recognizes the legislature's belief that someone in proximity to the victim can reasonably determine his or her age before engaging in sexual relations.[147]

IV. CONCLUSION

While aiding and abetting is one of the most frequently prosecuted crimes in the United States, it is also one of the most confusing. In particular, the mens rea requirement for aiding and abetting crimes has vexed lawyers,

minor and filmed pornography). This was not a disputed fact—Encarnacion-Ruiz admitted that he had sex with KMV, the fourteen-year-old, during his original plea agreement hearing. *Id.* at 598 (Thompson, J., dissenting).

141. *Id*. at 596-97 (majority opinion) (asserting opinion does not endorse child pornography and its harm to children).

142. *See supra* note 82-83 and accompanying text (describing derivative approach and its application to aiding and abetting).

143. *See supra* note 84 and accompanying text (describing intent behind § 2 to erase distinctions between criminal parties); *see also* Commonwealth v. Harris, 904 N.E.2d 478, 485 (Mass. App. Ct. 2009) (holding specific intent requirement for accomplices of strict liability sex crimes inconsistent with public interest).

144. *See supra* note 107 and accompanying text (describing "longstanding law" rejecting application of strict liability to accomplices); *see also* United States v. Encarnacion-Ruiz, 787 F.3d 581, 611 n.27 (1st Cir. 2015) (Thompson, J., dissenting) (explaining flaws with reliance on Professor LaFave's research and conclusory statement).

145. *See supra* note 108 and accompanying text (explaining *Encarnacion-Ruiz* argument against derivative approach due to fear of injustice to certain nonpresent participants); *see also Harris*, 904 N.E.2d at 485-86 (stating resolution to potential harm to slight participants by using present and nonpresent distinction).

146. *See supra* note 140 and accompanying text (noting Encarnacion-Ruiz's sexual relationship with minor created unpopular result); *see also Harris*, 904 N.E.2d at 485-86 (explaining present and nonpresent distinctions grant sufficient protections to defendants and justice to public).

147. *See* United States v. X-Citement Video, Inc., 513 U.S. 64, 72 n.2, 76 n.5 (1994) (noting ease with which present participators' can determine minors' age compared to nonpresent participators); *Harris*, 904 N.E.2d at 485 (explaining present accomplice and principal have equal abilities to judge minor's age).

judges, and legal scholars for decades. The Supreme Court tried to add some clarity in *Rosemond*, but seemingly only added more confusion, especially regarding its application to crimes other than § 924(c) crimes.

This confusion resulting from *Rosemond* is exacerbated when applied to strict liability sex crimes. The First Circuit was the first court to apply *Rosemond* to a federal strict liability sex crime, but the opinion seems illogical and impractical. To fix this impracticality, the derivative approach, along with a present and nonpresent distinction for accomplices, is necessary to fulfill the legislative intent, avoid impractical burdens, and effectuate justice.

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