

Clinging to the Common Law in an Age of Statutes: Criminal Law in the States

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INTRODUCTION

March 20, 2014, the Supreme Court of Illinois affirmed the conviction of Javier Fernandez for aggravated discharge of a firearm in the direction of a peace officer.¹ Taken alone, that's unexceptional, as is the issue of whether the evidence supported that conviction. However, things start to turn strange when we learn that Fernandez neither discharged the

firearm, nor even knew that the confederate who did so was armed.² Thus, unable to affirm the conviction based on his actions, the Court relied on a peculiar notion of accountability known locally as "common design."³ More generally, this odd view parades under the name of the "natural and probable consequences doctrine," whereby guilt for the first offense automatically entails guilt for all subsequent offenses.⁴

Its use here reflects three troubling features of many recent judicial decisions on criminal law: 1. An apparent inability to deal with criminal statutes that alter the common law, 2. A preference for judicial policymaking over conflicting legislative norms, and 3. An indifference to the quality of criminal law doctrine, as that body of law seemingly has few champions.⁵ Fortunately, a major development in the 1960s led

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1. *People v. Fernandez*, 2014 IL 115527, available at <http://www.state.il.us/court/Opinions/SupremeCourt/2014/115527.pdf> (last visited Apr. 26, 2014).

2. "Here, however, the State failed to produce any evidence showing that defendant even knew Gonzalez had a gun, let alone that he knew that Gonzalez would discharge that gun in the direction of a police officer." *Id.* at 4.

3. *Id.* at 5.

4. See generally, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 475 (6TH ed. 2012). As Dressler points out, this reflects the common law view, and is the "law today in most jurisdictions . . ." *Id.*

5. Observing the dismal state of things, the late Bill Stuntz said: "Criminal law scholars may be talking to each other (and to a few judges), but

to widespread criminal law reform, dramatically affecting the codes of numerous states. Remaining to be seen was the depth, breadth and lasting pervasiveness of those changes.

I. SOME DOCTRINAL BACKGROUND

For centuries, Criminal Law contained a veritable morass of peculiar, morally-tinged and nonfunctional doctrine, chiefly in the area of culpability.⁶ For nearly ten years, the American Law Institute worked on the creation of a model code to improve this situation, culminating in its promulgation of the Model Penal Code in 1962.⁷ Through it, this welter of mental states was reduced to four: Purpose, knowledge, recklessness and negligence.⁸ Leading to law reform in dozens of states, the Code stood as a signal achievement in defining the conditions legitimizing the imposition of criminal sanctions on our citizens.

These achievements were particular noteworthy and valuable in the area of accomplice liability, as the common law represented an ungainly, baroque structure often yielding unjust results.⁹ The Code solution, by contrast, proved particularly clean and elegant, predicating liability on an individual's purposeful participation in the criminal enterprise.¹⁰ This formulation perfectly mirrors established predicates for guilt: One must engage in a voluntary act, with the prescribed mental state present.¹¹ However, the challenge here was particularly urgent as, by definition, we're talking about guilt for the criminal conduct of *another*, derivative liability. Rejecting any version of guilt by association, the Code required a linkage between criminal actors demonstrating the accomplice's commitment to achieving each criminal objective.

they do not appear to be talking to anyone else." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001).

6. Concepts such as general and specific intent, abandoned and malignant heart, vicious will, implied and express malice and malice aforethought generally littered criminal cases and confounded juries alike.

7. MODEL PENAL CODE Pt. I: General Provisions (Official Draft and Revised Comments 1985), Pt. II: Definition of Specific Crimes (Official Draft and Revised Comments 1980).

8. MODEL PENAL CODE § 2.02.

9. Its manifold categories of principals and accessories were bedeviling, as were its corresponding culpability notions.

10. MODEL PENAL CODE § 2.06 (3)(a).

11. That is, absolute liability is strongly disfavored by the Code.

The very title of the Code's section on accountability signals this necessary linkage: "Liability for Conduct of Another; Complicity."¹² Too complex to discuss in detail here, that section nevertheless establishes very basic requirements for guilt. Stating that a person is "guilty of an offense if it is committed by his own conduct," it then proceeds to elaborate on the requirements for derivative liability, that is when someone is legally accountable *for the conduct of another that constitutes the target offense*.¹³ For present purposes, this critical section predicates accountability on one's being an accomplice to each crime, which itself requires the purposeful promotion or facilitation of the target offense.¹⁴ As an accomplice then, that conduct is hers, as if she had engaged in it herself.¹⁵

The Illinois code took the same tack, even predating the official Code by one year. Duplicating the same principles and language, it carefully divides the principal Code section, thus making clear its mechanism for establishing when one is accountable for the conduct of another "which an element of an offense."¹⁶ Establishing this closed system for liability, it requires proof of purposeful aid to establish complicity, crime by crime. "Common design" obviously violates this scheme by definition, providing automatic liability for all subsequent offenses.

II. GETTING DOWN TO CASES—BUT NOT STATUTES

Javier Fernandez was convicted of a single count of firearm discharge, and sentenced to 12 years in prison.¹⁷ Part of a botched burglary of a parked car, Fernandez remained in his vehicle while his friend, Gonzalez, tried to steal the car's radio.¹⁸ Moments later, he heard shots, as he pulled out of the

12. MODEL PENAL CODE § 2.06.

13. *Id.* at § 2.06(1). Understand, this entire machinery provides a mechanism through which the conduct of another is imputed to the accomplice, as if she had engaged in it herself.

14. *Id.*

15. For a more extensive discussion of this precise topic, see Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY JOURNAL OF CRIMINAL LAW 388 (2010).

16. 720 ILL. COMP. STAT. ANN. 5/5-1 (West 1993). That section is captioned "Accountability for Conduct of Another" and the following section bears the label of "When accountability exists." 720 ILL. COMP. STAT. ANN. 5/5-2 (West 1993).

17. 2014 IL 115527 at 1.

18. *Id.* at 2–4.

parking space.¹⁹ Gonzalez had fired the shots at a police officer, though Fernandez was unaware that he was even armed at that time.²⁰ They had not been together.²¹

Intuitively, we do see Fernandez as part of the unsuccessful burglary, but also see him as clearly innocent on the firearm charge. Indeed, it would seem wildly disproportionate to sentence him to twelve years for so little participation²². Obviously the courts did not agree. But why not? That's partially answered by the difficulty courts seem to have accepting statutes that depart from the common law, and in coping with those statutes themselves.

Entirely ignoring both statutory language and legislative history, the Fernandez court proclaimed the accountability statute as embodying the "intent" of incorporating "the principle of the common- design rule."²³ Totally unsupported, that remark both flouts the statutory language as well as expert commentary on that language.²⁴ Moreover, though the Illinois legislature recently codified this common design rule, the court failed to even cite to that section, though it could have been dispositive.²⁵ Instead, it turned to ancient case law in

19. *Id.*

20. *Id.*

21. *Id.*

22. See generally, Michael G. Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129 (2013) (explaining the rampant confusion and resultant unfairness among accountability laws).

23. 2014 IL 115527 at 5.

24. Code commentary referred to this "probability consequence" theory as "*incongruous and unjust*," noting that, "if anything, the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct" of that actor and thus "a higher risk of convicting the innocent." (Emphasis supplied.) MODEL PENAL CODE Pt. I: General Provisions (Official Draft and Revised Comments 1985), Pt. II: Definition of Specific Crimes (Official Draft and Revised Comments 1980), comments at note 42. Similarly, the Illinois Committee Comments from 1961 note that the new section "alters and modifies the former law." S.H.A., commentary to section 720 ILL. COMP. STAT. ANN. 5/5-2 (West 1993). Moreover, it clearly provides that "liability under this subsection requires an 'intent to promote or facilitate'" the substantive crime. *Id.* The Court was clearly wrong about so-called "legislative intent."

25. The current code (applicable to this case), in an unlettered paragraph reads: "When 2 or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally responsible for the consequences of those further acts." 720 ILL. COMP. STAT. ANN. 5/5-2 (2008). As previously noted,

support of its assertions, preferring precedent to statutory interpretation.

Forty years previously, a poor *zhlub* named Rudy Kessler had the misfortune to team up with the wrong people at the wrong time.²⁶ Setting out with this group to get their hands on some money, he sat in the passenger seat of the car, as his two unarmed compatriots entered a bar after closing at which Kessler had once worked.²⁷ Somehow, gunfire was exchanged as they fired an available gun inside, as well as from their fleeing vehicle.²⁸ Ultimately, all were convicted on two counts of attempted murder (as well as burglary) and sentenced to 5-15 years on each count.²⁹

The appellate court reversed the attempted murder convictions, finding them unsupported by the governing statute, as Kessler never intended to kill anyone.³⁰ However, grudgingly announcing that result,³¹ it nevertheless expressed its preference for common design as “a more reasonable approach to the law of accountability but one which we cannot adopt in contravention of the language of the Code.”³² The state Supreme Court felt no such compunctions, and has not in the intervening 40 years.

Ultimately, the resurrection of this legal relic was the product of the Court’s interpretation of a single word, “conduct.” In *Kessler*, the state argued that an accomplice to the target offense was responsible for all subsequent conduct of his cohorts even, as there, that unplanned pair of attempted murders. Accepting that argument, that Court latched onto that single word, ignoring both context and the obvious purpose of accountability under the then-recent code. It arrived at this staggering conclusion by citing to the general definition of “conduct” within the code as “an act or series of acts, and the

this section creates an internal conflict within that section on the basis for accomplice liability.

26. *People v. Kessler*, 57 Ill. 2d 493 (1974).

27. *Id.* at 49–95.

28. *Id.*

29. 11 Ill. App. 3d 321, 323 (1973) *aff’d in part, rev’d in part*, 57 Ill. 2d 493 (1974).

30. 57 Ill. 2d 493 (1974). Understand that to purposefully promote something, he must obviously know *of* it and, as here, intend to achieve its objective, here the death of the two victims.

31. The court noted that the “Code provision . . . substantially departs from prior Illinois law . . .” 11 Ill. App. 3d at 327, n.3.

32. *Id.*

accompanying mental state.”³³ Thus was created an open-ended liability wholly ignoring basic principles of culpability. Gone was the requirement that punishment follows one’s *choice* to commit harm, replaced instead by guilt by association.

Naturally, that entirely dissociates that word from its context. An accomplice is responsible for conduct *that is an element of the offense in which she participated*. Of course that includes the act or acts that comprise that conduct, but to read a word apart from surrounding language and context reveals a startling inability to cope with statutes. Whether driven by ideology, incompetence or a simple indifference to results in attempting to clear the docket, the *Kessler* result stood as a low point in Illinois criminal jurisprudence. Accordingly, when *Fernandez* went up to the Court, many hoped to see the demise of common design, through one mechanism or another.

III. STARE DECISIS IN STATUTORY INTERPRETATION

Over a quarter-century ago, Bill Eskridge observed an unduly strong presumption of correctness afforded to statutory precedents.³⁴ In the intervening years, he and others have written on this and, more importantly, created a true discipline of statutory interpretation. Unfortunately, like many courts nationwide, the *Fernandez* court seemed methodologically frozen in time, unaffected by the progress of the academy. That’s poignantly demonstrated by its deference to *Kessler*.

The *Fernandez* appellate court affirmed the conviction, over a marvelous concurrence by Justice Gordon. The only judge in either appellate court to even *cite* to the common-design section, he urged his panel to consider the statute “as an entirety.”³⁵ Rejecting the notion of an anomalous provision providing a separate, conflicting, basis for liability, he harmonized it within that statute, thus requiring proof on intent to promote each particular offense charged. That approach was as soundly dismissed by the Supreme Court, as

33. 57 Ill. 2d at 496 (referencing section 5/2-4).

34. William N. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L. J. 1361 (1988). Eskridge is currently the John A. Garver Professor of Jurisprudence at Yale Law School. He and the late Philip Frickey pioneered the development of interpretation as a serious discipline, bringing it into the modern era, indeed in *creating* that era itself.

35. 2012 IL App (1st) 101913-U, appeal allowed (May 29, 2013), appeal pending (May 2013), *aff'd*, 2014 IL 115527 at 17, *available* at http://illinoiscourts.gov/R23_Orders/AppellateCourt/2012/1stDistrict/1101913_R23.pdf (last visited Apr. 27, 2014).

was the appellate opinion in *Kessler* itself. Its reasoning was rejected “in its entirety.”³⁶

Indeed, three aspects of the Court’s opinion reflect its disdain for legislation and apotheosis of judicial policymaking. First, forsaking statutory analysis, it instead labeled *Kessler* a “textbook application of the common-design rule,” and it dictated the *Fernandez* result.³⁷ Pure *stare decisis* of statutory interpretation, that. Second, it quoted approvingly from the State’s brief, in which it said “conceding his guilt for the burglary . . . defendant has effectively conceded his guilt for [the] aggravated discharge of a firearm.”³⁸ A chilling statement, the Court nevertheless noted, “This is exactly right.”³⁹ Finally, when confronted by recent case law that at least nuanced common design, trying to give some actual meaning to the term (resulting in overturned convictions), it emphatically rejected those cases to “correct that mistake so that similar missteps are avoided going forward.”⁴⁰ With each move, it asserted the primacy of the judiciary in the development of criminal law doctrine, thereby resisting the changes made by the code over 53 years previously.⁴¹

CLOSING REFLECTIONS

Fernandez is remarkable, but this Essay is no mere case note. Rather, providing a snapshot of one facet of our criminal justice system, it offers a disquieting reminder of the uneasy relationship between courts and legislatures. Ronald Dworkin devoted an extraordinary career to distinguishing these roles, noting how “legislation invites judgments of policy that adjudication does not, by observing how inclusive integrity

36. *People v. Fernandez*, 2014 IL 115527 at 6.

37. *Id.* Additionally, the Court found it “difficult to conceive of two unrelated cases that are more factually alike than these two.” *Id.* at 7. Remarkably, the factual similarities consist of the *total unawareness* of the poor accomplice of what his companions were doing.

38. *Id.*

39. *Id.*

40. *Id.* at 10.

41. In fact, the United States Supreme Court decided a similar case on March 5, 2014. *Rosemond v. United States*, 134 S. Ct. 1240 (2014). There, the two offenses were a drug offense and use of a firearm. *Id.* at 1243. Highlighting the relationship between choice and culpability, Justice Kagan noted that “When an accomplice knows nothing of a gun until it appears at the scene, . . . the defendant has not shown the requisite intent to assist a crime involving a gun.” *Id.* at 1249.

enforces distinct judicial constraints of role.”⁴² Always insisting on this distinction between policy and principle, he saw no room for the kind of judicial meddling discussed here. Uniquely suited to making these policy decisions, legislatures properly decide critical issues (with the appropriate tools) about how we treat our citizens in both the fact and severity of the criminal sanctions imposed for transgressions. They have a democratic legitimacy entirely lacking in the judiciary.

By contrast, in perhaps the ultimate irony, the very codification of common design in 2009 represents a perverse victory for common law, a common law smuggled in as a code amendment, and entirely ignored by a court that had been applying the self-same notion for decades, perceiving no need for legislative approval. Formally a part of the Illinois code, it serves little purpose other than as a reminder of the resilience of common law theory.

A law reform commission dominated by prosecutors proposed it as part of a package sent to the state legislature in 2009-10.⁴³ Thus, proclaiming common design the law “for over one hundred and fifty years,” it referred it to the state legislature, which, undoubtedly unwittingly, embedded it in the existing section on accountability.⁴⁴ Indeed, that language coming *verbatim* from *Kessler* was inserted unchanged, containing usage ill suited to legislation.⁴⁵ In all of this we feel that deeper politics of criminal law creation, one Stuntz observed “*always* pushes toward broader liability rules, and toward harsher sentences as well.”⁴⁶

Yet, a technical parsing of these issues should not obscure the fundamental injustices wrought by common law trumping careful legislative deliberations and choices, especially on accountability. “Common design” imposes guilt by metaphor, while the real criminal actors must be *proved* guilty beyond a

42. RONALD DWORKIN, *LAW’S EMPIRE* 410 (1986).

43. Designated, the CLEAR Commission, it replaced one earlier chaired by Paul Robinson, one that emphatically denounced this doctrine. For information on CLEAR, see the materials at <http://clearinitiative.org/> (last visited Apr. 14, 2014).

44. James R. Thompson, et al., *The Illinois Criminal Code of 2009: Providing Clarity in the Law*, 41 J. MARSHALL L. REV. 815, 823 (2008).

45. The language appears in *Kessler*, 57 Ill. 2d at 496-97. The particularly odd language is that saying the acts of one are “considered to be” that of all. That’s not a cognizable legal concept.

46. Stuntz, *supra* note 5, at 51 (emphasis in original).

reasonable doubt as to all material elements of the offense.⁴⁷ As I have said previously, common law notions pervade modern criminal law in the face of flatly conflicting statutes throughout the United States. However, here the results are most malign. Providing an open-ended, culpability-free basis for liability, it permits the punishment of people *who have never committed the offenses charged*. Through that, it thoughtlessly affects countless lives, indeed taking people's lives from them without the slightest justification.

[Editor's Note: In the next issue of this journal, Professor Heyman will examine some very recent developments in this area, and will consider the Constitutionality of the doctrine itself.]

47. Such as Gonzalez in the *Fernandez* case.