Due Process Limits on Accomplice Liability

Abstract

In a prior piece in this journal, I noted some disturbing developments in the law of accomplice liability.[1] By definition, complicity law attaches guilt to the accomplice for the criminal acts of others.[2] Thus, no matter how trivial the assistance or commitment, she is as guilty as the actual criminal actor.[3] The notion of guilt for subsequent crimes committed by confederates magnifies this injustice, resulting in the conviction of the innocent through the deployment of some version of the "natural and probable consequences doctrine."[4] The application of that doctrine results in her conviction for all subsequent offenses, provided they meet the criteria for natural and probable.[5] Unfortunately, since no functional criteria exist, it provides a form of absolute, vicarious liability, dispensing with any requirement for personal conduct or culpability.

That prior piece noted the strengthening, even expansion, of that doctrine through recent case law.[6] Worse, it is now enshrined in the statutes of Illinois, capturing it as the doctrine of "common design."[7] Though in utter conflict with other relevant statutory provisions, its robust survival attests to its traction, and its codification appears to forestall future attacks. So, too, for the dozens of versions of that doctrine existing among the states, usually parading under that rubric of natural and probable.

However, relief may come from a two-pronged Due Process challenge. First, Due Process clearly requires proof of guilt beyond a reasonable doubt. Worse than conclusive presumptions of guilt, "common design" and its siblings attach guilt without *any* proof at all. It's automatic, once satisfied. Moreover, these notions also fail because void for vagueness. There's nothing meaningful *to* satisfy. Not reducible to any workable decisional rules, they provide unfettered discretion throughout the system for standardless, arbitrary accusations and convictions.

Introduction

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[1] Michael G. Heyman, *Clinging to the Common Law in an Age of Statutes: Criminal Law in the States*, 99 MINN. L. REV. HEADNOTES 29 (2014).
[2] *Id.* at 31.
[3] *Id.*
[4] *Id.*
[5] Michael G. Heyman, *The Natural and Probable Consequences Doctrine: A Case Study in Failed Law Reform*, 15 BERKELEY J. CRIM. L. 388 (2010).
[6] Heyman, *supra* note 1.
[7] 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2010), providing that acts of "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."

The frequent subject of criticism, American accomplice law is a "disgrace."[8] Unlike some of its European counterparts, it doesn't distinguish among degrees or levels of participation, instead treating all actors alike, however peripheral their involvement. All are as guilty as the actual perpetrator, and the punishment potentially the same.[9] Indeed, elsewhere, I discussed the case of a nineteen-year-old boy sentenced to ten years in prison as an accomplice to a drug sale.[10]

Walking with a friend who unexpectedly encountered a drug dealer, he translated a few words of Spanish between the two.[11] A sale occurred.[12] That triggered California's mandatory sentencing laws and that ten-year sentence.[13] But at least he did *something* (albeit minimal) that furthered the transaction. Under the doctrines discussed here, he would have been liable for any further crimes committed by his friend, provided they passed under the banner of "common design."[14] Greatly magnifying the existing injustice of complicity law, that result is wholly unacceptable.

The Supreme Court recently addressed this injustice, in the context of a sentencing enhancement provision in federal law.[15] That provision augmented the punishment for a drug trafficking if the violator used or carried a gun in connection with the offense.[16] Though the perpetrator had, Rosemond was unaware that he even possessed a gun at that time.[17] Frequently emphasizing the relationship between "choice" and moral and legal responsibility, the Court reversed the conviction.[18] Repeatedly, Justice Kagan insisted that liability required that "defendant's knowledge of a firearm must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice."[19]

But that decision required an instruction on *mens rea*, because the federal statutes apparently required it, or at least the majority read in such a requirement, consistent with a long string of its cases basing criminal liability on personal wrongdoing. It did not hold that Due

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[8] Joshua Dressler, *Reforming Complicity Law: Trivial Assistance As a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 427 (2008).
[9] *Id*.
[10] Michael G. Heyman, *Losing All Sense of Just Proportion: The Peculiar Law of Accomplice Liability*, 87 ST. JOHN'S L. REV. 129, 133 (2013).
[11] *Id.* at 133–34.
[12] *Id.* at 133.
[13] *Id.*
[14] I will use both common design and natural and probable language hereafter, hopefully without creating confusion. They are alike in providing virtually automatic liability for criminal conduct in which the accused did not participate, though slightly different in theory, as the latter is founded on a causal model. Nevertheless, both are repugnant to Due Process.
[15] Rosemond v. United States, 134 S. Ct. 1240 (2014).
[16] *Id.* at 1243.
[17] *Id.* at 1252.
[18] *Id.* at 1249.
[19] *Id*.

Process requires it. However, in our context, any scheme attaching guilt without proof, indeed where there is nothing required *to be proved*, fails any Due Process scrutiny.

Liability and proof of guilt beyond a reasonable doubt

All case law chatter about common design (and natural and probable) shares a common flaw, thus losing sight of something painfully fundamental: it fails to specify the elements that comprise it. Remarkably, these discussions sometimes consist of recitations from Nineteenth Century cases dealing with watermelon thieves and the like. There, on an entirely different legal landscape, courts spoke vaguely about "criminal purpose," "hazardous" enterprises and the liability of con-conspirators for the acts of all.[20] Unfortunately, more recent case law more candidly concedes that convicting based on common design only requires proof of the target crime--or less. As I explained in that earlier piece in this journal, in March, 2014 the Illinois Supreme Court responded chillingly to the state's assertions from its brief.[21]

Specifically, the state claimed that defendant, in "conceding his guilt for the burglary . . . has effectively conceded his guilt for the aggravated discharge of a firearm."[22] Embracing that view, the Court said "that is exactly right."[23] With that, it conflated proof of guilt for the target crime with that for subsequent crimes. That constitutes a clear Constitutional violation, as common design acts as a rhetorical expedient, thus obviating any need to actually prove defendants' guilt.

In re Winship properly exalted the presumption of innocence and the linked requirement of proof of guilt beyond a reasonable doubt.[24] There, New York State insisted that Due Process need not extend that standard of proof to a juvenile proceeding.[25] Emphatically rejecting that position, the Court noted that "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."[26] It thus extended that standard to proof of all "facts" necessary to prove guilt. But apologists for common design would argue its consonance with that standard, as these cases all apply it. But do they?

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[20] See, for example, the reliance on just such nonsense in *People v. Kessler*, 57 Ill.2d 493, 497–98 (1974). That case arose under the current Illinois scheme, one patterned after the Model Penal Code, and its requirement for personal wrongdoing by the accomplice in furthering the criminal endeavor.

[21] Heyman, *supra* note 1 at 34–35.

[22] People v. Fernandez, 2014 IL 115527, at 6, *available at* http://www.state.il.us/court/Opinions/SupremeCourt/2014/115527.pdf (last visited Jan. 26, 2015).

[23] *Id*.

[24] 397 U.S. 358 (1970).

[25] *Id*.

[26] *Id.* at 363–64. The Court said "we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

Just as *Winship* condemned forsaking the reasonable doubt standard explicitly, cases following it have condemned mechanisms that subvert it *sub rosa*. Despite their intricacy, these cases read *Winship* to prohibit burden-shifting mechanisms as well as conclusive presumptions, when those mechanisms relieve the prosecution of its full burden of proof.

Key here is *Sandstrom v. Montana*.[27] There the judge, instructing the jury on *mens rea*, told it that "the law presumes that a person intends the ordinary consequences of his voluntary acts."[28] Although potentially understood by the jury as a permissive inference, a unanimous Court nevertheless reversed the conviction, as the jury could have been misled by the instruction. It could have either determined that mere proof of the defendant's acts triggered an irrebuttable presumption of guilt, or that the defendant had to disprove the essential fact of his mental state once the act had been proved. As the Court concluded, either possibility "would have deprived defendant of his right to the due process of law" and thus was unconstitutional.[29]

But presumptions exist throughout the law, providing a kind of metaphysical bridge between the known and the unclear. For example, Sandstrom was convicted of murder.[30] Had the judge told the jury that the state must prove the *intent to kill*, but it might *infer* that in beating the woman with a scoop shovel and stabbing her, he intended to cause her death that would have been permissible. As one commentator has noted, a presumption is constitutionally valid, provided the existence of a "significant correlation between the proved facts and the fact inferred is inconclusive."[31]

However, nothing like that is at work here. Instead, we're dealing with doctrine that automatically breaches that gap upon proof of the target offense. Indeed, no gap in knowledge exists, as we have the simple formula of guilt for offense one results in that for all subsequent offenses. *Winship* is clearly violated.

Indeed, common design is even worse than it appears. In most places, the natural and probable approach results in guilt for subsequent crimes, provided the defendant was an active participant in the target offense. Common design, by contrast, is pure imputed liability, not even requiring any criminal conduct *at all* by the accused.[32] For that reason, it violates the Constitutional mandate that criminal statutes must provide citizens with fair warning of prohibited activities, a warning clearly embodied in precise decisional rules, to avoid arbitrary law enforcement.

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[27] 442 U.S. 510 (1979).
[28] *Id*. at 512.
[29] *Id*. at 524.
[30] *Id*. at 513.
[31] Ronald J. Allen, *The Restoration of* In re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 59 (1978).
[32] *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 638 (1984) (criticizing natural and probable variants as often being supported by "weak causal connections" as well as requiring no personal culpability).

The Void for Vagueness Requirement

Typically, this Constitutional doctrine has been applied to render void vague criminal statutes, dealing with such matters a loitering, vagrancy, status crimes and the like. That's its fair warning component, requiring that proscribed conduct be clearly specified.

But it likewise condemns laws that vest "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied [its requirements]."[33] Due Process, then, requires both fair warning *and* clear decisional rules for all, including prosecutors and the courts that apply the law and instruct juries on it. Without that clarity, laws are simply unjustified and cannot stand.

People v. Phillips demonstrates just how violently common design violates this mandate.[34] There, Phillips and another set out to avenge an attack on his ex-girlfriend. Realizing the opposition was too great, they abandoned their plan and set out for home.[35] However, before leaving, his companion fired a single shot from a .22-caliber rifle indiscriminately in the direction of the crowd, killing one member.[36] The two were convicted of aggravated discharge of a firearm, unlawful possession of a weapon by a felon and, worst, first degree murder.[37] That was so, though Phillips personally committed no crime at all.[38]

Affirming his conviction on all counts, the Illinois appellate court sounded like the mirror image of the Court in *Rosemond*.[39] Whereas Justice Kagan repeatedly premised liability on personal fault, this Court utterly dispensed with that requirement or, more accurately perhaps, found wrongdoing in simply setting out to commit a crime. Thus, it said "[E]ven if Grimes had hidden the rifle from defendant, or found the rifle on the ground after he stepped outside defendant's view, defendant would still be guilty of first degree murder. *By setting out to commit a crime with Grimes, defendant rendered himself legally accountable for Grimes's shooting of Maclin*."[40]

Attempting to justify this remarkable result, it flailed about citing to the felony-murder doctrine, even though that (oft repudiated) doctrine carries its own basis for liability. However, ultimately, talking tough, the Illinois Court said "the common-design rule provides harsh medicine for those who willingly join with others to engage in criminal acts."[41] Those last few words underscore the extraordinary scope of this Constitutional violation.

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[33] Kolender v. Lawson, 461 U.S. 352, 358 (1983).
[34] People v. Phillips, 2014 IL App (4th) 120695 *appeal denied,* No. 118050, 2014 WL 4799683 (Ill. Sept. 24, 2014).
[35] *Id.* at *2.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] Rosemond v. United States, 134 S. Ct. 1240 (2014).
[40] *Phillips,* 2014 WL 4799683, at *8 (emphasis added).
[41] *Id*.

Assuming a state is free to enact laws along the lines of common design, it must do so carefully to protect the liberty interest of its citizens. Consider the difficulties involved in crafting workable attempt statutes, for example. Providing a potentially open-ended basis for liability, attempt law has been closely scrutinized, and the Model Penal Code finally arrived at the substantial step test, an approach highlighting the salience of personal wrongdoing.[42]

No such limitations exist within common design as constituted. Nothing in the statute or case law remotely cabins it. Thus, there's no indication of the point along the path at which liability attaches, of how far the non-actor must go to be liable for subsequent acts. Presumably it consists of more than the act of agreement, but perhaps not.[43] Moreover, whereas attempt law (codified in the Illinois statutes) has an express act requirement, common design has none. Perhaps the mere criminal combination is the core basis for liability. How close must the relationship be between or among actors? Would presence in a mob or gang alone suffice? But these questions assume too much, assuming a doctrine that *somewhere* has a fixed meaning, yet to be uncovered. Because it has none, it utterly fails Due Process analysis. And, juries are just told the gobbledygook of common design and nothing else, with the expected results.

<u>If you can't explain it in Plain English, it may be plain nonsense</u>.

Amazingly, common design does not even admit to the possibility of a defense. So long as a connection to the actual wrongdoer is established and the criminal conduct proved, liability inescapably attaches. In theory, that does not hold true for the natural and probable variant, as it speaks in causal terms that can be attacked or otherwise not satisfied. In theory. Whereas "common design" is arguably based on a double misnomer, as it is neither, natural and probable has its own internal incoherence. There, following a mechanistic model, adherents are positing pathological human behavior as both natural and probable. Despite the admittedly criminal context, that is still odd.

California provides various sentences for attempted murder.[44] The punishment may be five, seven or nine years. However, if it is "willful, deliberate, and premeditated," it carries a term of life imprisonment.[45] Brandon Favor was part of a group that robbed a liquor store.[46] During that robbery, his co-defendants committed murder and attempted murder.[47] For the latter

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[42] 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). Section 5.01 expressly requires culpability as well as conduct "strongly corroborative of the actor's criminal purpose." *Id*.

[43] The statute does say, however, that liability is predicated on entry into a common design "or agreement." 720 ILL. COMP. STAT. ANN. 5/5-2(c) (West 2010). That surely can be interpreted to create liability at the very earliest point, and even dispense with *any* involvement beyond that point on the part of the "accomplice."

[44] CAL. PENAL CODE § 664 (West 2012).

[45] *Id.*

[46] People v. Favor, 54 Cal. 4th 868, 872 (2012).

[47] *Id.* at 872–73.

offense, the jury found that it met the standards for life imprisonment.[48] However, the jury was only instructed that if it found that attempted murder was "reasonably foreseeable," it could convict Favor on a natural and probable consequence basis.[49] It was not asked to find further whether a "premeditated" attempted murder was foreseeable.

The California Supreme Court upheld the conviction, over a vigorous dissent by Goodwin Liu. In large part, the Court divided over the fact that attempted murder is but one crime, and a finding of premeditation simply triggers a harsher sentence, based on the jury's finding. But that's largely sophistry, in that the perpetrators had to have premeditated to be found guilty, and natural and probable seems to require that their "conduct" was foreseeable. Accordingly, Justice Liu posed the question: "How can defendant be convicted of *premeditated* attempted murder on a natural and probable consequences theory when the jury was never asked to determine whether *premeditated* attempted murder was a natural and probable consequence of the target offense?"[50] Since *Winship* requires proof of all necessary "facts," premeditation was a fact of the assailant's conduct, and Justice Liu is correct.

But we enter a kind of never-never land, as we try to connect natural and probable to California's definition of premeditated murder. An instruction on liability for the lesser versions would require that the non-participant foresaw that his confederates would try to kill someone. When we add premeditation and deliberation to this mix, liability would require foresight of that intent to kill *plus* the additional factors of their preconceived plan and their reflection on that objective, all in the context of the chaos of a robbery. This pyramiding of prescience simply cannot be sensibly explained to jurors, or anyone for that matter.

This doctrine thus produces bizarre, unjustifiable results, as in the conviction of a robber for the rape committed by his confederate, on the thinking that the business robbed had an "aura" of sexuality about it.[51] It is sheer nonsense to yoke notions of natural and probable to human choices, with the result being liability for terribly serious offenses never considered by the defendant. Moreover, unguided by any workable standards for affixing blame, juries are left to guess—or worse.

This absence of clear decisional rules, explainable in functional language demonstrates the deep Constitutional defects of both common design and natural and probable. Leaving so much to guesswork makes a mockery of the presumption of innocence, resulting in the conviction of the innocent in violation of all Constitutional norms.

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[48] *Id.* at 874.
[49] *Id.*
[50] *Id*. at 882 (Goodwin, J. dissenting) (emphasis in original).
[51] The California statute on complicity assigns liability to those who are "concerned in the commission of an offense." CAL. PENAL CODE § 31 (West). Accordingly, in *People v. Nguyen*, 26 Cal. Rptr. 2d 323, 332 (Ct. App. 1993), natural and probable produced liability for rape to an accomplice to robbery of a massage salon on this sexual aura theory.

Closing Reflections

That necessary link between personal fault and criminal liability is too basic, too fundamental to even require explanation. It so inheres in our notion of criminal responsibility as not even to require justification, as we cannot properly assign blame—or even conceive of doing so—in the absence of personal wrongdoing. Clearly, the doctrines under discussion conflict with these core notions of fault and punishment.

This translates into a notion of substantive Due Process that cannot tolerate punishment without fault, thus condemning these doctrines. Perhaps Justice Kagan's language reflects that.[52] But those comments do not stand alone. Analyzing decades of Supreme Court opinions, one commentator noted that:

> At its core, the rule prohibits 'guilt by association' in the absence of a substantial relationship between the defendant and the third party's criminal activity. An individual cannot be held vicariously liable merely because she associates with a group or third party that commits a crime. There must be a sufficient, 'non-tenuous,' link between her association and the third party's criminal actions.[53]

Neglected too long by commentators, this topic has begun to develop some salience among criminal theorists.[54] As the quoted passage indicates, for decades the Court has addressed this indissoluble, indispensable link between fault and liability. But, as it is unlikely that legislatures will voluntarily address these issues, perhaps only a Constitutional challenge along the lines described here can help restore the law to a more just and humane state.

[52] Rosemond v. United States, 134 S. Ct. 1240 (2014).

[53] Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton*, 57 AM. U. L. REV. 585, 606 (2008) (footnote omitted).

[54] See, for example, Robinson, *supra* note 32. Indeed, for a fascinating, comprehensive analysis, see Mark Noferi, *Towards Attenuation: A "New" Due Process Limit on Pinkerton Conspiracy Liability*, 33 AM. J. CRIM. L. 91 (2006).