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Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent

Audrey Rogers
Elisabeth Haub School of Law at Pace University

ACCOMPLICE LIABILITY FOR UNINTENTIONAL CRIMES: REMAINING WITHIN THE CONSTRAINTS OF INTENT

*Audrey Rogers**

The doctrine of accomplice liability delineates when a person may be guilty of a crime committed by someone else.[1] By definition, accomplice liability is derivative in nature since the actor is removed from direct involvement in the commission of the crime.[2] Because of this lack of direct involvement, the classic model of accomplice liability requires that an accomplice intends to promote or facilitate the commission of an offense and, consequently with this intent, aids the principal actor.[3] This intent requirement ensures that the accomplice has a stake in the principal's acts; in effect, the accomplice makes the acts his or her own. Since the accomplice's conscious objective is that the underlying crime be committed, and thus aids in its commission, it is fair to hold the accomplice as criminally culpable as the principal.

The extent to which a person may be an accomplice to an unintentional crime[4] is an area that has received relatively little judicial or scholarly examination.[5] The predominant reason for this dearth of

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1. This Article uses the terms "accomplice liability" and "complicity" to describe instances where a party—the secondary actor—is found criminally responsible for the acts of another, the primary actor or principal.

2. *See infra* note 11 and accompanying text.

3. *See infra* Part I.B..

4. This Article uses the term "unintentional" to cover crimes requiring a mental state of something less than intent or knowledge. Courts, however, sometimes refer to such crimes simply as "unintended." *See, e.g.,* State v. Satern, 516 N.W.2d 839 (Iowa 1994). In fact, "unintended" crimes typically connote situations where the principal commits offenses other than what the accomplice intended. *See infra* notes 30-32 and accompanying text. For a discussion of the ambiguity raised by the duality of the term "unintentional," see *infra* notes 36-37 and accompanying text.

5. Professor Joshua Dressler noted the scarcity of scholarly commentary on

attention appears to be simply that an intrinsic component of classic *mala in se* crimes is intent. Premeditated murders, rapes, and robberies are not performed unintentionally. Perhaps as a result of the doctrinal insistence on intent, some courts view the concept of intending to aid in the commission of an unintentional crime as oxymoronic. Yet situations exist where imposing accomplice liability on a secondary actor is appropriate. When a person intends to aid another in performing a specific culpable act that inadvertently results in harm, that person is as equally accountable as the principal. Indeed, a growing number of courts have found secondary actors responsible for another individual's unintentional crime. While some of these cases withstand scrutiny, in many instances courts have extended culpability beyond the proper reach of accomplice liability doctrine.

Two fact patterns best illustrate the problem in ascertaining the proper scope of accomplice liability for unintentional crimes. In the first example, an automobile passenger who is late for an appointment demands that the driver exceed the speed limit. The driver complies, and because of the excessive speed, cannot stop in time to avoid hitting another car that stops suddenly, and the driver of that other car is killed. The driver and the passenger are charged with criminally negligent homicide.[6] Here, the passenger fits into the paradigm of accomplice liability because he or she intended that the driver engage in the specific act that resulted in the unintentional death. The mens rea requirement for accomplice liability is satisfied because, analogous to requiring that the accomplice intend to promote or facilitate the commission of the offense, here the accomplice intended to promote or facilitate the *act* underlying the unintentional offense.[7] That the crime charged is founded on criminal negligence is irrelevant in assessing the secondary actor's culpability.

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accomplice liability in general in his excellent article on the topic. *See* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem,* 37 HASTINGS L.J. 91 (1985). *See generally* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.7(e), at 584-86 (2d ed. 1986) (advocating that one who encourages or assists another to engage in negligent conduct which results in an unintentional crime be held liable under the theory of criminal negligence rather than accomplice liability); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine,* 73 CAL. L. REV. 323 (1985) (discussing the complicity doctrine and its relationship to causation and the rules of disability).

6. *See* MODEL PENAL CODE § 2.04(4) (now § 2.06(4)) commentary at 34 (Tentative Draft No. 1, 1953).

7. Some commentators advocate directly assessing the secondary actor's culpability under causation principles. *See* LAFAVE & SCOTT, *supra* note 5, at 585; *infra* note 78 (comparing Professors LaFave and Scott's position regarding causation

In the second example, a car owner gives a person the keys to his or her car, knowing that person is intoxicated. The intoxicated driver falls asleep at the wheel, loses control of the car and kills a pedestrian. The driver and the owner are charged with reckless manslaughter. In this situation, it is more problematic to find the owner guilty as the driver's accomplice. While one could say that the owner intended to aid the principal's act of driving while intoxicated, it is much less clear that the owner intended that the driver fall asleep and lose control of the car.[8] Applying accomplice liability here raises troubling questions about whether the complicity doctrine is being stretched beyond its proper limits merely to find a means of punishing the owner. This doctrinal contortion creates a risk of excessive punishment and subverts the purpose of derivative liability as a means of punishing a secondary actor only upon proof that the secondary actor has associated himself or herself with the principal's culpable conduct.

This Article addresses the issue of the proper extent of a secondary actor's culpability for unintentional crimes committed by another. Part I reviews accomplice liability and its mens rea requirements generally. Part II discusses the history of the application of complicity theory to unintentional crimes. Part III examines whether accomplice liability for unintentional crimes is proper, and concludes that in keeping with complicity's doctrinal requirements, liability is appropriate only when the secondary actor has the intent to aid in the commission of the culpable act that results in unplanned harm. It evaluates whether the various categories of accomplice statutes sufficiently delineate the intent requirement of accomplice liability for unintentional crimes. In addition, Part III suggests that courts generally assess liability for unintentional crimes indiscriminately because they misunderstand the intent requirements of accomplice liability.

I. GENERAL PRINCIPLES OF ACCOMPLICE LIABILITY

A. The Nature of Accomplice Liability

Criminal law rests on societal demands that certain conduct be condemned. From the earliest days of civilized society, aiding someone in the commission of a criminal act with the intent that a crime

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with actual case law).

8. *See* Kadish, *supra* note 5, at 348.

be committed has been deemed blameworthy and deserving of punishment.[9] Accomplice liability is a means of holding a person liable for crimes committed by another; complicity is not a separate or distinct crime.[10] Accomplice liability is inherently derivative because the accomplice or secondary actor does not directly perform the acts constituting the substantive crime.[11] Consider, for example, a person who

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9. *See* Francis Bowes Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689, 694-701 (1930). Thus, as early as 1329, the Anglo-Saxon law recognized that "all those who come in company to a certain place with a common consent where a wrong is done, whether homicide or robbery or other trespass, each one shall be held as principal actor, although he was standing by and did no wrongful act." *Id.* at 696 n.31.

At common law, parties to a crime were categorized in four ways: "(1) principal in the first degree; (2) principal in the second degree; (3) accessory before the fact; and (4) accessory after the fact." LAFAVE & SCOTT, *supra* note 5, at 569. For a discussion of the numerous procedural dificulties with these categories, see Dressler, *supra* note 5, at 94-95. As a result of legislative reform, legislators have abolished the distinctions among the first three categories, with second degree principals and accessories before the fact sharing the single classification of "accomplice". *See* LAFAVE & SCOTT, *supra* note 5, at 574-75. The fourth, accessory after the fact, has remained a separate category in recognition that the person so classified is not actually a participant in the crime; rather, the individual has acted in some way to obstruct justice. *See id.* at 569.

10. *See* Dressler, *supra* note 5, at 96-98.

11. Some disagreement exists between commentators as to the nature of accomplice liability vis-à-vis the principal. There is no doubt that at early common law an accomplice's liability was "derived" from the principal's liability, so that if the principal could not be tried for the crime, the accomplice likewise was unconvictable. *See* Kadish, *supra* note 5, at 340; Sayre, *supra* note 9, at 695. Modern complicity rules no longer predicate an accomplice's liability upon the conviction of the principal. *See, e.g.*, Standefer v. United States, 447 U.S. 10 (1980) (holding that the aider or abettor may be properly convicted even after acquittal of the named principal); Jeter v. State, 274 A.2d 337, 338 (Md. 1971) (holding that "subsequent acquittal of a principal in the first degree does not affect the trial or conviction of a principal in the second degree"); People v. Kief, 27 N.E. 556 (N.Y. 1891) (stating the question of one defendant's guilt is an independent issue to be tried alone and may not turn upon the establishment of the other's guilt). *See generally* Kadish, *supra* note 5, at 340-42 (discussing the legal consequences—that an accomplice can be liable even when the principal is acquitted—of the evolution of accomplice liability from being grounded in principal's guilt to being grounded in the causation doctrine); Sayre, *supra* note 9, at 695 (commenting that after 1848 it was "possible to indict, try, convict and punish an accessory before the fact 'in all respects as if he were a principal felon'"). Therefore, while it is still essential that a crime be committed for accomplice liability to exist, *see, e.g.*, United States v. Ruffin, 613 F.2d 408, 412 (2d Cir. 1979), the state may establish the accomplice's culpability without first obtaining a conviction against the principal as long as the state can establish the principal's guilt at the accomplice's trial. *See, e.g.*, Moore v. State, 94 S.E.2d 80 (Ga. Ct. App. 1956); Maddox v. Commonwealth, 349 S.W.2d 686 (Ky. 1960); State v. Howes, 432 A.2d 419 (Me. 1981). As Professor Kadish states, "[w]hat grounds the liability of the

acts as a lookout in a robbery. The lookout's actions do not technically fulfill the definition of robbery—forcible taking of the property of another—because the lookout did not take anything from the victim. Society, however, demands that the lookout be held accountable for his or her actions;[12] therefore, the doctrine of accomplice liability creates the means for finding the accomplice in violation of the statute.

The reasons for imposing culpability upon a secondary actor stem from an innate sense of justice: one who willingly participates or aids in the commission of a crime deserves punishment. The interrelationship between blame and punishment is the foundation of all criminal law and justifies the doctrine of accomplice liability.[13] Some

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accomplice is the liability of the principal *at the time he acted*, even though it was not and could [not] . . . be imposed upon him." Kadish, *supra* note 5, at 340-41 (emphasis added).

Moreover, the accomplice can still be convicted even though the principal is not guilty because of some defense available to the principal. In this situation, the courts reason that the defense is personal to the principal. *See, e.g.*, United States v. Azadian, 436 F.2d 81 (9th Cir. 1971) (holding that entrapment defense extended only to principal); Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938) (stating that diplomatic immunity shielded principal only); Vaden v. State, 768 P.2d 1102 (Alaska 1989) (holding that public authority justification defense is personal and non-transferable to principal). Additionally, modern complicity rules permit the accomplice to be convicted of a different level of crime than the principal. *See, e.g.*, Pendry v. State, 367 A.2d 627 (Del. 1976) (holding that principal's conviction for manslaughter does not prevent conviction of accomplice for first-degree murder); State v. Walker, 843 P.2d 203 (Kan. 1992) (determining that defendant could be properly convicted of aiding and abetting aggravated criminal sodomy despite the principal's conviction for the lesser offense of attempted criminal sodomy); State v. McAllister, 366 So. 2d 1340 (La. 1978) (principal's acquittal of first-degree murder and subsequent conviction for manslaughter not a bar to accessory's conviction for first-degree murder); Jones v. State, 486 A.2d 184 (Md. 1985) (convicting accomplice of first-degree murder although principal found guilty only of second-degree murder).

Because contemporary complicity rules no longer completely link the accomplice's liability to the principal, some commentators stress that the accomplice's liability is personal and not derivative. *See* PAUL H. ROBINSON, CRIMINAL LAW § 6.1, at 323-24 (Aspen 1997). Other scholars, notably Professor Kadish, stress the derivative nature of accomplice liability. *See* Kadish, *supra* note 5, at 337-42. The issue appears to be one of semantics. Accomplice liability is by nature derivative because the criminal actions are being committed by one other than the accomplice. Perhaps a better term would be "indirect." *Cf. id.* (suggesting that the term "dependent" be used instead of "derivative").

12. Some commentators have questioned whether all accomplices should be punished equally and instead have suggested creating a mechanism to measure the level of the accomplice's contribution to the completed offense. *See generally* Dressler, *supra* note 5, at 121-30 (discussing three possible ways to more fairly allocate liability among accomplices).

13. *See* Kadish, *supra* note 5, at 329-36. Commentators have elaborated on

measuring device is necessary to assess blame and a corresponding level of punishment. That device is found in the intent and act[14] requirements that are components of accomplice liability.

B. The Mens Rea of Accomplice Liability

From its inception, accomplice liability required some concept of intent.[15] However, as Professors LaFave and Scott note, "[c]onsiderable confusion exists as to what the accomplice's mental state must be in order to hold him accountable for an offense committed by another."[16] Broadly stated, the accomplice must act with the intent to aid in the commission of an offense.[17] Courts and commentators generally agree that this definition actually involves two mens reas: first,

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the moral justifications for accomplice liability. Some make an analogy to civil rules of agency. *See* Dressler, *supra* note 5, at 109-10; Kadish, *supra* note 5, at 354. Under civil law, the secondary actor—the principal in civil law nomenclature—is responsible for the acts of his agent, the primary actor, because he is deemed to have directed or ratified the agent's actions. *See* Kadish, *supra* note 5, at 354. In the criminal law setting, the primary actor—now labeled the principal—is akin to being the accomplice's delegate. The accomplice is in agreement with the principal's actions, thereby adopting them, and the accomplice is therefore worthy of punishment. *See* Dressler, *supra* note 5, at 110. The agency analogy works best when the accomplice is the driving force or mastermind of the criminal act since this most resembles the civil law principal. In other situations where the accomplice makes less of a contribution to the crime, the agency doctrine is less satisfying because the element of control over the primary actor's actions is missing. *See id.* Agency theory is most often used to explain the basis of conspiracy liability where all those who have formed an agreement to commit a crime are held responsible for the criminal acts undertaken in furtherance of the conspiracy. *See* Pinkerton v. United States, 328 U.S. 640, 647 (1946).
As a further justification, punishing secondary actors also accomplishes utilitarian goals of deterrence and incapacitation. *See* Dressler, *supra* note 5, at 111.

14. For a discussion of the act requirements, see LAFAVE & SCOTT, *supra* note 5, at 576-79 and Kadish, *supra* note 5, at 342-46.

15. *See supra* note 9 and accompanying text. One explanation for requiring proof of intent is the lack of the direct causal link between the accomplice and the resultant harm. *See* Sayre, *supra* note 9, at 700-01. Courts and legislatures typically judge acts as deserving of punishment by the harmful result they cause. *See* Dressler, *supra* note 5, at 104-06. Since, by definition, the accomplice does not "cause" any result, we must establish the accomplice's blameworthiness some other way. Where a person intends to aid another to commit a crime, that person has manifested a willingness to participate in culpable conduct, and therefore is deserving of punishment.

16. LAFAVE & SCOTT, *supra* note 5, at 579.

17. The abolition of the common-law categories of accessorial liability, *see supra* note 9, was accompanied by the enactment of accomplice liability statutes. *See infra* notes 42-52 and accompanying text (reviewing the various types of accomplice liability statutes).

the accomplice must have the intent to aid the principal in the commission of the offense; and second, the accomplice must have the mens rea required by the underlying offense.[18]

With intentional crimes, this dual intent requirement is uncomplicated because when an accomplice intends that the principal commit the offense, he or she customarily also possesses the intent required by the underlying offense.[19] The matter becomes murky, however, when the underlying offense is unintentional because it is more difficult to pinpoint the accomplice's mens rea. To best understand the tension that exists in applying accomplice liability to unintentional crimes, we need to explore a number of preliminary issues.

The most controversial aspect of the mens rea requirement to date has been with respect to the requirement that the accomplice aid with the *intent* that the principal commit a crime. At common law, the term "intent" covered two mental states: purpose and knowledge.[20] Thus, a question arises as to whether a person, who aids

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18. *See* LAFAVE & SCOTT, *supra* note 5, at 579-80; Kadish, *supra* note 5, at 349.

In fact, accomplice liability requires *three* mens rea inquiries: first, an accomplice must intentionally aid the principal's actions; second, the accomplice must do so with the intent that the principal commit a crime; and third, the accomplice must possess the mens rea of the underlying crime. *See* Kadish, *supra* note 5, at 346-49. The initial requirement of intentional aid protects those who may recklessly render aid. Otherwise the person who leaves keys in a place where there is a risk that a perpetrator will use them to start the principal's car to use in a robbery would be liable for any reckless acts. *See* Grace E. Mueller, Note, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2175 (1988) ("The question is whether [the] intent . . . is directed toward the act or toward the commission of a crime."). Mueller notes that the question has not caused courts any great difficulties; they have easily found that the accomplice must intend that the aid be directed toward conduct which the accomplice knows to be criminal. *See id.* She further notes that the "proposition is so basic that courts generally fail to mention it." *Id.* at 2175 n.28. It becomes crucial, however, in the context of accomplice liability for unintentional crimes. *See infra* Part III.

19. For example, for A to be an accomplice to P's larceny, he must not only intentionally aid P in taking the victim's property—the first mens rea—but A must also intend that P commit a crime—the second mens rea—and A must also have the intent required by the larceny statute to permanently deprive V of V's property—the third mens rea. In other words he must intentionally aid, he must do so with the intent that P commit a crime, and he, too, must possess the mens rea of the underlying crime. If he does not meet all three intent requirements, he is not guilty. *See* Wilson v. People, 87 P.2d 5 (Colo. 1939).

20. *See generally* LAFAVE & SCOTT, *supra* note 5, at 216-18 ("[T]he traditional view is that a person who acts . . . intends a result . . . under two quite different circumstances; (1) when he consciously desires that result . . . ; and (2) when he knows that that result is practically certain to follow from his conduct, whatever his desire

another with *knowledge* that the latter is committing a crime, has the mental state required for accomplice liability.

The archetypal case involves suppliers of goods or services who act with the knowledge that the goods or services will be used to commit a crime.[21] Courts differ sharply over whether such knowledge suffices to impose accomplice culpability.[22] In *United States v. Peoni*,[23]

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may be as to that result.").

21. A parallel controversy exists as to whether knowledge or purpose is required for conspiracy. *See* Direct Sales Co. v. United States, 319 U.S. 703, 709-13 (1943) (holding that intent is required but may be inferred from knowledge in certain circumstances); United States v. Falcone, 109 F.2d 579, 581 (2d Cir. 1940), *aff'd*, 311 U.S. 205 (1940) (concluding that knowledge alone is insufficient to sustain conspiracy conviction); People v. Lauria, 251 Cal. App. 2d 471, 481, 59 Cal. Rptr. 628, 634 (1967) (suggesting that knowledge will suffice to show intent for serious crimes). *See generally* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 751-56 (1983) (describing the analytical difficulty presented by the elements of conspiracy).

22. *Compare* United States v. Peoni, 100 F.2d 401 (2d Cir. 1938) (holding defendant was not culpable as an accomplice because he could not foresee later actions by the principle), *and* State v. Gladstone, 474 P.2d 274 (Wash. 1970) (holding defendant was not guilty because his communications only suggested another might commit a crime), *with* Backun v. United States, 112 F.2d 635 (4th Cir. 1940) (holding that defendant was an accomplice because he knew the contemplated crimes could not occur without his action).

The major arena for the purpose/knowledge controversy has been in those jurisdictions whose accomplice statutes are vague in their mens rea requirement. *See, e.g.*, 18 U.S.C. § 2(b) (1995) (a person is punishable as a principal if he "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States"); CAL. PENAL CODE § 31 (West 1988). Much more specificity as to the requisite mental state for an accomplice is stated in most state complicity statutes. *See infra* notes 42-52 and accompanying text. Nonetheless, even in those states whose statutes appear to require intent, the issue of whether knowledge will suffice has been raised. *See generally* Louis Westerfield, *The 'Mens Rea' Requirement of Accomplice Liability in American Criminal Law—Knowledge or Intent*, 51 MISS. L.J. 155, 167-69 (1980) (outlining the development of mens rea requirements in California for accomplice liability and noting the strengths and weaknesses of the current approach).

23. 100 F.2d 401 (2d Cir. 1938). In *Peoni*, the defendant sold counterfeit bills to another, who then sold the same bills to a third party. *See id.* at 401. All three knew the bills were counterfeit. *See id.* Peoni was convicted on three counts of possessing counterfeit money and one for conspiracy to possess it. *See id.* The question considered on appeal to the Second Circuit was whether the defendant was guilty as an accessory to the third party's possession of the counterfeit money, based on the probability that it would pass into the hands of such a person and be circulated unlawfully. *See id.* at 401-02. In finding that Peoni could not be convicted as an accessory, the court looked to the traditional definitions of accomplice liability and found that they had nothing to do with the probability that the forbidden result would follow upon the accessory's conduct. *See id.* at 402. Rather, these definitions all stated that accessorial liability arose only where the defendant purposely associated himself with the venture. *See id.* Since Peoni

the Second Circuit ruled that nothing less than true purpose suffices for accomplice liability. According to *Peoni*, the law requires that the accomplice "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, [and] that he seek by his action to make it succeed."[24] In pointed contrast, the Fourth Circuit held that knowledge is sufficient, reasoning that "[g]uilt as an accessory depends, not on 'having a stake' in the outcome of the crime . . . [,] but on aiding and assisting the perpetrators. . . . The seller may not ignore the purpose for which the purchase is made if he is advised of that purpose. . . ."[25]

In an effort to reconcile the *Peoni* and *Backun* opinions, some commentators and courts have suggested that mens rea be linked to the seriousness of the crime and the degree of assistance the secondary party gave the perpetrators.[26] Specifically, they urge that knowledge should suffice for major crimes.[27] Other jurisdictions have codified the American Law Institute's *Model Penal Code* approach which rejects the lesser standard of knowledge in favor of purpose to

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had not directly associated himself with the third party, he could not be considered an accessory to that person's criminal conduct and his conviction was reversed. *See id.* at 403.

24. *Id.* at 402.

25. *Backun*, 112 F.2d at 637. In *Backun*, the defendant sold silverware he knew was stolen to one Zucker, knowing that Zucker would then transport the silverware across state lines to sell it. *See id.* at 636. Defendant was convicted of transporting stolen merchandise of a value in excess of $5000 in interstate commerce in violation of the National Stolen Property Act. *See id.* On appeal, he argued that the prosecution had not presented evidence that he had anything to do with the transportation of the goods. *See id.* In finding no merit to this argument, the Fourth Circuit Court of Appeals held that this was a case of "a sale of stolen property by a guilty possessor [Backun] who knows that the buyer will transport it in interstate commerce in violation of law and who desires to sell it for that reason." *Id.* Therefore, the court held there was direct evidence of Backun's participation in the crime. *See id.* at 636-38.

26. *See* Cramer v. United States, 325 U.S. 1 (1945) (concluding that knowledge is sufficient for crime of treason); United States v. Aponte-Suarez, 905 F.2d 483, 490-91 (1st Cir. 1990) (holding that knowledge is insufficient for crime of conspiracy to import narcotics); Graves v. Johnson, 60 N.E. 383, 383 (Mass. 1901) (concluding that knowledge is insufficient for unlawful sale of liquor).

27. *See* People v. Lauria, 251 Cal. App. 2d 471, 481, 59 Cal. Rptr. 628, 634 (1967). In *Lauria,* the court classified the seriousness of a crime according to whether it was a felony or a misdemeanor, with knowledge sufficing for the former only. *See id.*; *see also* United States v. Fountain, 768 F.2d 790 (7th Cir. 1985) (under theory of accomplice liability, purpose required for lesser crimes, but knowledge sufficient for major crimes). Some jurisdictions have resolved the issue by enacting complicity statutes requiring only knowledge. *See, e.g.*, WASH. REV. CODE ANN. § 9A.08.020(3)(a) (West 1988).

promote the commission of the offense.[28] Additionally, some jurisdictions have responded to the issue by enacting criminal facilitation statutes that penalize knowing assistance as a separate crime, rather than changing its complicity standards.[29]

Controversy also rages over the extent of the accomplice's culpability when the perpetrator commits crimes other than that which the accomplice intended to aid. For example, a secondary actor aids a principal in planning a bank robbery by providing the principal with plans to the bank's security system. Unbeknownst to the secondary actor, on the day of the robbery, the principal steals a car to get to the bank. Although the secondary actor is clearly guilty of bank robbery, is that actor an accomplice to the auto theft?[30]

Under a strict application of accomplice liability rules, the courts should not hold the secondary actor as an accomplice because that actor did not intend to aid in the commission of the auto theft. Some jurisdictions, however, have held that the secondary actor is culpable under the "natural and probable consequence" doctrine which states that individuals may be held as accomplices for crimes they did not intend to aid, if those crimes are the "natural and probable consequence" of the crime they did intend to assist.[31] By intending to aid

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28. *Compare* MODEL PENAL CODE § 2.04(3) (currently § 2.06(3)) commentary at 24-32 (Tentative Draft No. 1, 1953) (advocating a mens rea standard of knowledge), *with* MODEL PENAL CODE § 2.06(3) commentary at 21 (Tentative Draft No. 4, 1955) (noting that the American Law Institute disapproved a lowering of the requisite mental state from purpose to knowledge). The American Law Institute issued its Proposed Official Draft of the Model Penal Code in 1962. It requires a mental state of purpose for accomplice liability. *See* MODEL PENAL CODE § 2.06(3) (Proposed Official Draft 1962).

29. *See* ARIZ. REV. STAT. ANN. § 13-1004 (West 1989); KY. REV. STAT. ANN. § 506.080 (Michie 1990); N.Y. PENAL LAW § 115 (McKinney 1998); N.D. CENT. CODE § 12.1-06-02 (1985).

30. Regardless of whether A is guilty of auto theft as P's accomplice, he may very well be guilty of the auto theft under the laws of conspiracy that traditionally have found conspirators guilty of all substantive offenses a co-conspirator commits in furtherance of the conspiracy. *See* Pinkerton v. United States, 328 U.S. 640, 642-43 (1946). Much of the controversy that swirls around the extent of accomplice liability for the unintended crimes of the principal also surrounds the extent of conspiracy liability for such crimes. *See generally* LAFAVE & SCOTT, *supra* note 5, at 587-90 (discussing the limits of accomplice liability).

31. *See* People v. Prettyman, 14 Cal. 4th 248, 926 P.2d 1013, 58 Cal. Rptr. 248 (1996) (holding that a defendant may be held criminally responsible not only for the crime he or she intended to aid and abet, but also for any other crime that is the natural and probable consequence of the target crime); *see also* People v. Luparello, 187 Cal. App. 3d 410, 445, 231 Cal. Rptr. 832, 853 (1987) (holding that an accomplice is liable for the natural and reasonable or probable consequences of any act that the accomplice knowingly aided or encouraged); Chance v. State,

the principal in the commission of one crime, the accomplices have identified themselves with the principal and are responsible for the foreseeable harms of their acts, regardless of whether the principal deliberately commits a crime that the accomplices did not intend to aid.[32]

Most commentators strongly oppose this doctrine as both "incongruous and unjust" because it imposes accomplice liability solely upon proof of foreseeability or negligence when typically a higher degree of mens rea is required of the principal.[33] The American Law Institute fashioned a compromise on this issue, requiring generally that an accomplice act with purpose,[34] but tempering this

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685 A.2d 351, 357-89 (Del. 1996) (holding that an accomplice for assault could be held responsible for unintended death of victim); People v. Cole, 625 N.E.2d 816, 820-21 (Ill. App. Ct. 1993) (holding that an acomplice can be liable for any acts in furtherance of a common criminal design or agreement); State v. Bowman, 588 A.2d 728, 731 (Me. 1991) (holding that a reckless or criminally negligent killing by the principal was a reasonably foreseeable consequence of the defendant's own conduct); State v. Fillipi, 335 N.W.2d 739, 742 (Minn. 1983) (holding that culpability rested on whether a defendant knew or reasonably could foresee the consequences of defendant's actions). *But see* Bogdanov v. People, 941 P.2d 247, 251 n.8 (Colo. 1997) (finding that the Colorado General Assembly chose not to extend accomplice liability to reasonably foreseeable crimes but rather limited such liability to those particular crimes which the accomplice intended to promote or facilitate).

Some states have codified the "natural and probable consequence" rule in their complicity statutes. *See, e.g.*, KAN. STAT. ANN. § 21-3205(2) (1988) ("A person liable under subsection (1) hereof [accomplice section] is also liable for any other crime committed in pursuance of the intended crime if reasonably foreseeable by such person as a probable consequence of committing or attempting to commit the crime intended."); ME. REV. STAT. ANN. tit. 17-A, § 57(3)A (West 1983); MINN. STAT. ANN. § 609.05 (West 1987).

32. *See Luparello*, 187 Cal. App. 3d 410, 442-45, 231 Cal. Rptr. 832, 851-53 (1987).

33. *See* MODEL PENAL CODE § 2.06 commentary at 312 (Proposed Official Draft 1962). The commentary notes 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 engaged in by the accomplice, and thus a higher risk of convicting the innocent." *Id.*; *see also* LAFAVE & SCOTT, *supra* note 5, at 590; Dressler, *supra* note 6, at 97-98 (criticising the extension of accomplice liability for unintended crimes); Kadish, *supra* note 5, at 351-52.

Thus, in the auto theft example, under the natural and probable consequence doctrine, the accomplice would be guilty of auto theft if the accomplice should have foreseen that the principal would steal a car as part of the bank robbery; whereas, the principal would not be guilty unless the State could prove that the principal intended to steal the car—a higher mens rea than negligence.

34. Section 2.06(3)(a) of the *Model Penal Code* provides, in pertinent part, that "[a] person is an accomplice of another person in the commission of an offense if [he acts] . . . with the *purpose* of promoting or facilitating the commission of the offense . . . ." MODEL PENAL CODE § 2.06(3)(a) (Proposed Official Draft

requirement for crimes that require a particular result.[35] For these offenses, the *Model Penal Code* requires that the accomplice purposely aid the principal's conduct, but only have the mens rea as to the result that is required by the crime committed.[36] The Commentary to the *Model Penal Code* states that this modification was meant to address the harshest aspects of the natural and probable consequence doctrine.[37] This compromise does not affect the accomplice in the

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1962) (emphasis added).

35. Crimes that require a particular result are "result-oriented" crimes. Typically this label covers homicides and assault since part of their statutory requirements are that they cause death or injury. Crimes whose elements are solely prohibited acts, such as robbery, which prohibits forcible takings, or burglary, which prohibits breaking and entry, are not result-oriented crimes.

36. Section 2.06(4) of the *Model Penal Code* states that:

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result, that is sufficient for the commission of the offense.

MODEL PENAL CODE § 2.06(4) (Proposed Official Draft 1962).
The *Model Penal Code*'s general accomplice liability section has been adopted by at least 25 jurisdictions; however, not all the jurisdictions that have adopted a *Model Penal Code*-based penal law have included this subsection. *See, e.g.*, ALA. CODE § 13A-2 23 (1994); ARIZ. REV. STAT. ANN. § 13-301 (West 1989); MINN. STAT. ANN. § 609.17 (West 1987); MO. ANN. STAT. § 562.041 (West 1979); OR. REV. STAT. § 161.155 (1990); S.D. CODIFIED LAWS § 22-3-3 (Michie 1988).

Most commentators agree that section 2.06(4) explicitly endorses the view that a person may be an accomplice to an unintended crime. *See, e.g.*, LAFAVE & SCOTT, *supra* note 5, at 585 n.105; Kadish, *supra* note 5, at 347; Robinson & Grall, *supra* note 21, at 737. See *infra* notes 53-54 and accompanying text for a description of the courts' treatment of this section.

37. *See* MODEL PENAL CODE § 2.06(3) commentary at 311 (Proposed Official Draft 1962). The commentary to section 2.06 states that subsection (4) is most relevant "where unanticipated results occur from conduct for which the actor is responsible under Subsection (3)." *Id.* It adds:

> One who solicits an end, or aids or agrees to aid in its achievement is an accomplice in whatever means may be employed, insofar as they constitute or commit an offense fairly envisaged in the purposes of the association. *But when a wholly different crime has been committed, thus involving conduct not within the conscious objectives of the accomplice, he is not liable for it unless the case falls within the specific terms of Subsection (4).*

Id. (emphasis added); *see also id.* at 311-13 (advocating the need for intent in specifically different crimes).

A fair interpretation of the relationship between subsections (3) and (4) is that once the state can establish that the secondary actor had the purpose to promote or facilitate the commission of one particular offense, as required under subsection (3), that actor will also be liable for additional, unplanned, result-oriented crimes the principal commits as long as that actor possesses the mens rea required by the crime for that result. As discussed *infra* Part III, many courts and commentators have not viewed section 2.06(4) as limiting the natural and

auto theft example because it is not a result-oriented crime. It does, however, ameliorate the unfairness that previously existed in the following situation: an accomplice aids a principal in committing an assault by providing the principal with the victim's address and telling the principal just to "rough up" the victim.[38] If the principal instead kills the victim during the assault, under the natural and probable consequence doctrine the accomplice would be guilty of murder simply upon proof of the foreseeability of the principal's actions. In contrast, under the *Model Penal Code* approach, the accomplice would be guilty of a homicide commensurate with his or her mens rea.

In short, accomplice liability rests on intent. Thus, generally a person is responsible for a crime when, intending to promote its commission, that person renders aid to the principal. Although substantial disagreement exists over the meaning and extent of a secondary actor's intent, courts fundamentally seek a sufficiently blameworthy link between the secondary actor and the crime.

II. HISTORY OF ACCOMPLICE LIABILITY FOR UNINTENTIONAL CRIMES

In addition to the issues discussed in Part I, the standard definition of accomplice liability also raises an issue of whether a person can be an accomplice to a crime that requires a mental state less than intent or knowledge. This question most commonly arises in connection with homicides that have resulted from some reckless or negligent conduct. For example, improper use of an automobile—either by drag-racing or by allowing one's car to be driven by an intoxicated or unlicensed driver—serves as the factual predicate for the majority of cases in which the issue arises.[39] The issue also commonly occurs with assaults that unintentionally result in death,[40] although other factually distinct cases also give rise to the issue.[41] Resolving whether

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probable consequence doctrine. Instead, they have interpreted the section as expanding an accomplice's liability for unintentional crimes.

38. *See, e.g.*, People v. Luparello, 187 Cal. App. 3d 410, 231 Cal. Rptr. 832 (1987).

39. *See, e.g.*, Story v. United States, 16 F.2d 342 (D.C. Cir. 1926); People v. Marshall, 106 N.W.2d 842 (Mich. 1961); State v. Etzweiler, 480 A.2d 870 (N.H. 1984); People v. Abbott, 445 N.Y.S.2d 344 (App. Div. 1981).

40. *See, e.g.*, People v. Wheeler, 772 P.2d 101 (Colo. 1989); State v. Foster, 522 A.2d 277 (Conn. 1987); State v. Bridges, 604 A.2d 131 (N.J. Super. Ct. App. Div. 1992); People v. Gramaglia, 423 N.Y.S.2d 78 (App. Div. 1979); Mendez v. State, 575 S.W.2d 36 (Tex. Crim. App. 1979).

41. *See, e.g.*, State v. DiLorenzo, 83 A.2d 479 (Conn. 1951) (involving an ille-

one may be an accomplice to an unintentional crime requires, at the outset, a consideration of the various types of complicity statutes.

Legislation concerning the extent of accomplice liability falls into three categories. The first category of statutes contains language that predicates accomplice liability solely on the intent to aid in the commission of a specific offense.[42] For example, under Arizona law an accomplice must act "with the intent to promote or faciliate the commission of an offense."[43] This category most closely resembles a common law view of accomplice liability.[44] Unlike some of the statutory schemes discussed below, statutes in the first category do not appear to provide for complicity for unintentional crimes.[45]

The second category of statutes are those patterned on the *Model Penal Code*.[46] Similar to statutes in the first category, the *Model Penal Code* requires that the accomplice act with the intent to promote or facilitate the commission of the offense.[47] Notably, however, it further provides that for result-oriented crimes, an "accomplice in the conduct causing such result" is culpable if he acts with the requisite mens rea for that offense.[48] Although the commentary to the *Model Penal Code* notes that this provision allows

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gal still operation that ignited and caused the death of two children); State v. McVay, 132 A. 436 (R.I. 1926) (involving an explosion of a defective steamship boiler that killed numerous passengers).

42. *See, e.g.*, ALA. CODE § 13A-2-23 (1994) ("the intent to promote or assist the commission of the offense"); ALASKA STAT. § 11.16.110 (Michie 1996) ("intent to promote or facilitate the commission of an offense"); ARIZ. REV. STAT. ANN. § 13-301 (West 1989) (holding same); DEL. CODE ANN. tit. 11, § 271 (1995) (holding same); GA. CODE ANN. § 16-2-20(3) (Harrison 1994) ("[i]ntentionally aids or abets in the commission of the crime"); 720 ILL. COMP. STAT. 5/5-2 (West 1993) ("with the intent to promote or facilitate such commission [of an offense]"); MO. REV. STAT. § 562.041 (1979) ("purpose of promoting the commission of an offense").

43. ARIZ. REV. STAT. ANN. § 13-301.

44. *See, e.g.*, ALA. CODE § 13A-2-23 commentary ("What this section does is define complicity in clear, direct and explicit terms .... The test will be whether the accused [acted] with the intent to promote or assist the perpetration of an offense ....").

45. *See infra* note 89 and accompanying text.

46. *See, e.g.*, ARK. CODE ANN. § 5-2-403 (Michie 1997); HAW. REV. STAT. ANN. § 702-223 (Michie 1993); KY. REV. STAT. ANN. § 502.020 (Michie 1990); N.H. REV. STAT. ANN. § 628:8 (1996).

47. *See* MODEL PENAL CODE § 2.06(3) (Proposed Official Draft 1962).

48. *Id.* § 2.06(4) (Proposed Official Draft 1962). This Article considers statutes that adopt the *Model Penal Code* scheme but leave out subsection (4) as part of category one. *See, e.g.*, ALA. CODE § 13A-2-23; ARIZ. REV. STAT. ANN. § 13-301; MINN. STAT. ANN. § 609.05 (West 1987 & Supp. 1998); MO. REV. STAT. § 562.041; OR. REV. STAT. § 161.155 (1990); S.D. CODIFIED LAWS § 22-3-3 (Michie 1988).

accomplice liability for unintentional crimes,[49] some courts have rejected this view.[50]

The third category is a hybrid. Without differentiating between crimes on the basis of whether they have a result element as in the second category, category three statutes require only that the accomplice intentionally aid the principal's conduct and have the mens rea required by the underlying crime. For example, *New York Penal Law* section 20.00 states: "When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."[51] Courts have ruled that this category covers unintentional crimes.[52]

Over the years, the courts have treated the issue with mixed results and with little regard to statutory directives.[53] Some cases hold that a person cannot be an accomplice to an unintentional crime because one cannot, as a matter of logic, intend to commit an unintentional crime.[54] Thus, in *State v. Etzweiler*,[55] the Supreme Court of

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49. *See* MODEL PENAL CODE § 2.04(4) (currently § 2.06(4)) commentary at 34 (Tentative Draft No. 1, 1953).

50. *See infra* notes 100-02 and accompanying text.

51. N.Y. PENAL LAW § 20.00 (McKinney 1998); *accord* CONN. GEN. STAT. ANN. § 53a-8 (West 1994).

52. *See, e.g.*, People v. Flayhart, 536 N.Y.S.2d 727 (1988); People v. Gramaglia, 423 N.Y.S.2d 78 (N.Y. App. Div. 1979). *But see* MODEL PENAL CODE § 2.06(3) commentary at 322 n.71 (Proposed Official Draft 1962).

53. For example, the Colorado complicity statute provides that one is responsible as an accomplice only if he acts "with the intent to promote or facilitate the commission of the *offense*," making no provision for a different standard for result-oriented crimes. COLO. REV. STAT. § 18-1-603 (1986) (emphasis added). Nevertheless, the Colorado courts have allowed accomplice liability for unintended crimes, interpreting the Colorado complicity statute's language as requiring only that the accomplice has the "intent to promote or facilitate the *act or conduct* of the principal." People v. Wheeler, 772 P.2d 101, 103 (Colo. 1989) (emphasis added). The interpretation raises due process concerns. *See infra* note 89.

In contrast, although the New Hampshire and Arkansas complicity statutes track the language of *Model Penal Code* section 2.06(4), courts in these states have refused to allow accomplice liability for unintended crimes. *See* Fight v. State, 863 S.W.2d 800, 805 (Ark. 1993); State v. Etzweiler, 480 A.2d 870, 874-75 (N.H. 1984).

54. *See* Maughon v. State, 71 S.E. 922, 926 (Ga. Ct. App. 1911).

Confusion in this area is due in part to the courts' failure to differentiate between the two types of manslaughter: voluntary and involuntary. Voluntary manslaughter is an intentional killing committed under extenuating circumstances, such as sudden passion or extreme emotional disturbance. *See* LAFAVE & SCOTT, *supra* note 5, at 653. Early common law rules held that one could not be an accessory to voluntary manslaughter because it was not a premeditated crime. *See* Young v. State, 236 S.E.2d 586, 586-87 (Ga. 1977); Sams v. Commonwealth, 171 S.W.2d 989,

New Hampshire dismissed an indictment that charged a defendant with criminally negligent homicide for a death that occurred after the defendant lent his car to a friend whom he knew to be intoxicated. The court found that the New Hampshire criminally negligent homicide statute requires that an actor be unaware of the risk of death his conduct created.[56] The accomplice liability statute, however, also requires that the accomplice's acts be designed to aid the principal in committing a crime.[57] Therefore, the court held that, as a matter of law, a person may not be an accomplice to criminally negligent homicide, because one cannot intentionally aid a principal in a crime that the principal was unaware he or she was committing.[58]

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993 (Ky. Ct. App. 1943); State v. O'Shields, 161 S.E. 692, 693 (S.C. 1931). This rule was due in part to the complicated categorization of accomplices and concomitant procedural difficulties that existed at common law. *See supra* note 9. Notwithstanding the abolition of these classifications, vestiges of common law precedent barring the concept of an accomplice to manslaughter remain. *See, e.g.*, State v. McVay, 132 A. 436 (R.I. 1926). Modern authority correctly holds that since voluntary manslaughter is an intent-based crime, no conceptual bar prevents finding one to be an accomplice to it. *See, e.g.*, Webb v. State, 696 So. 2d 295, 296 (Ala. Crim. App. 1996); Thomas v. State, 510 N.E.2d 651, 654 (Ind. 1987); Commonwealth v. Rosario-Hernandez, 666 A.2d 292, 296 (Pa. Super. Ct. 1995).

The greatest confusion arises from the two branches of involuntary manslaughter. *See infra* notes 113-21 and accompanying text. In contrast to voluntary manslaughter, no intent to kill exists with involuntary manslaughters. Instead, involuntary manslaughter can take two forms: (1) unintended deaths that occur as a result of a lawful act committed in a reckless manner; or (2) unintended deaths that occur during the performance of an unlawful act. *See, e.g.*, CAL. PENAL CODE § 192 (West 1988) ("Manslaughter is the unlawful killing of a human being without malice. It is of three kinds. . . . Involuntary-in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act . . . in an unlawful manner, or without due caution and circumspection."); GA. CODE ANN. § 16-5-3 (Harrison 1994); *see generally* LAFAVE & SCOTT, *supra* note 5, at 675-83 (discussing the interpretation and limitation of Unlawful-Act Involuntary Manslaughter).

55. 480 A.2d 870 (N.H. 1984).

56. *See id.* at 874; N.H. REV. STAT. ANN. § 630:3.

57. *See* N.H. REV. STAT. ANN. § 630:3. For a discussion of courts' interpretations of the accomplice statute, see *infra* notes 101-02 and 137-38.

58. *See Etzweiler*, 480 A.2d at 874-75; *see also* Fight v. State, 863 S.W.2d 800, 805 (Ark. 1993); State v. Gartland, 263 S.W. 165, 170 (Mo. 1924).

The *Etzweiler* court left open the question of whether accomplice liability lies for reckless crimes. Subsequently, in *State v. Horne*, 480 A.2d 121 (N.H. 1984), the court sent mixed signals on this question. The Supreme Court of New Hampshire reversed an accomplice's conviction of second-degree assault, a crime requiring a mental state of recklessness, because the indictment did not specifically allege that defendant had "the purpose of promoting or facilitating the commission of the offense." *Id.* at 122 (citation omitted). The court's reasoning that, pursuant to *Etzweiler*, the accomplice must intend to aid in the commission of the offense appears to reject the applicability of accomplice liability for any unintentional crime. However, the *Horne* court also noted that "the facts alleged could support a conviction

Other cases reject accomplice liability when the secondary actor is not in the presence of, or controlling, the principal's actions. Thus, in *People v. Marshall*,[59] the Supreme Court of Michigan held that a car owner was not an accomplice to involuntary manslaughter for lending his car to someone he knew was intoxicated because the owner was at home in bed at the time of the fatal accident.[60] The court reasoned that the killing "was not counselled by [the car owner], accomplished by another acting jointly with him, nor did it occur in the attempted achievement of some common enterprise."[61]

On the other hand, many courts have found that a defendant can be an accomplice to unintentional crimes, because, as one court stated: "[O]ne who engages with others in a common purpose to carry on an activity in a reckless manner or with wanton disregard for the safety of others is guilty" of participating in the resulting death.[62] *State v. McVay*[63] is an early case that courts and commentators often cite as the preeminent example of the application of accomplice liability doctrine to unintentional crimes. In *McVay*, defendant Kelly, an officer of a steamboat company, was indicted as an accessory before-the-fact to manslaughter based on criminal negligence. Kelly had ordered the ship's captain, McVay, and the engineer, who were

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upon re-indictment." *Id.* (citation ommitted). The court did not explain how to reconcile this statement with its reliance on *Etzweiler*. See *infra* Part III for a possible analysis. *See generally* John S. Davis, *Accomplice Liability for Unintentional Crime: Etzweiler and Horne Revisited*, 30 N.H.B.J. 95 (Winter 1989) (discussing whether one may be charged as an accomplice in connection with a criminal offense committed unintentionally).

59. 106 N.W.2d 842 (Mich. 1961).

60. *See id.* at 843.

61. *Id.* at 844. The court noted that "an entirely different case would be presented" had the owner been in the car and permitted the driver to proceed. *Id.* at 843. The presence of the car owner in the car or following closely behind has been a critical factor in the courts' determinations that the owner may be held as an accomplice to involuntary manslaughter. *See, e.g.*, Story v. United States, 16 F.2d 342, 344 (D.C. Cir. 1926); Lewis v. State, 251 S.W.2d 490, 493 (Ark. 1952); State v. Satern, 516 N.W.2d 839, 844 (Iowa 1994).

The courts have not explicitly explained the significance of the owner's presence, but it appears to be based on a sense that the owner is ratifying or condoning the specific acts of principal when he allows him to drive while intoxicated in the owner's presence. *See* Kadish, *supra* note 5, at 348-49 n.50. Whether this rationale is appropriate for the imposition of accomplice liability is explored *infra* Part III.

62. State v. DiLorenzo, 83 A.2d 479, 481 (Conn. 1951); *accord, e.g.*, Stacy v. State, 306 S.W.2d 852, 854 (Ark. 1957); People v. Wheeler, 772 P.2d 101, 103 (Colo. 1989)(en banc); State v. Foster, 522 A.2d 277, 282 (Conn. 1987); People v. Pitts, 270 N.W.2d 482, 484 (Mich. Ct. App. 1978); People v. Gramaglia, 423 N.Y.S.2d 78, 80 (App. Div. 1979); Commonwealth v. Bridges, 381 A.2d 125, 128 (Pa. 1977); Mendez v. State, 575 S.W.2d 36, 37-38 (Tex. Crim. App. 1979).

63. 132 A. 436 (R.I. 1926).

indicted as principals, to fire up the ship's boiler although he knew the boiler was old and unsafe. The boiler exploded, killing many of the passengers. Kelly demurred to the indictment that charged him with "maliciously" aiding and inciting the manslaughter on the ground that he could not, as a matter of law, be an accomplice since involuntary manslaughter is an unintentional crime.[64]

The court rejected defendant's contention. It first delineated the various types of manslaughter: sudden heat or passion; unlawful act resulting in an unintentional killing; and lawful act committed with gross negligence that results in death.[65] It reasoned that "[t]here is no inherent reason why, prior to the commission of [involuntary manslaughter] one may not aid, abet, counsel, command, or procure the doing of the unlawful act or of the lawful act in a negligent manner."[66] Applying this reasoning, the court ruled that the defendant could be charged with counseling and procuring the principals to disregard their duties and negligently create steam.[67]

The majority of recent cases has followed *McVay's* reasoning and has permitted accomplice liability for unintentional crimes.[68] Rather than insisting that the accomplice intend to promote the commission of an *offense*, these courts require only that the accomplice intend to aid the principal in the *acts* that unintentionally result in death.[69] For example, in *People v. Turner*,[70] defendant was convicted of involuntary manslaughter as an aider and abettor for giving guns to two acquaintances and directing them to settle their dispute in a "trial by battle."[71] Defendant asserted on appeal that since intent

64. *See id.* at 437-39.

65. *See id.* at 437-38. The court correctly distinguished between voluntary and involuntary manslaughter. *See supra* note 54. However, its statement that one cannot be an accessory to voluntary manslaughter, while reflective of the early law on accomplice liability, *see supra* note 54, is no longer correct. *See, e.g.*, Webb v. State, 696 So. 2d 295 (Ala. Crim. App. 1996); Thomas v. State, 510 N.E.2d 651 (Ind. 1987); Rainey v. State, 572 N.E.2d 517 (Ind. Ct. App. 1991) (person may be accessory to voluntary manslaughter because, while the accessory may not share or contribute to the sudden heat present in the mind of the principal, the accessory may readily contribute to the homicide knowing that the principal is acting under sudden heat); Commonwealth v. Rosario-Hernandez, 666 A.2d 292 (Pa. Super. Ct. 1995).

66. *McVay*, 132 A. at 438.

67. *See id.* at 439.

68. *See supra* note 65.

69. *See, e.g.*, State v. DiLorenzo, 83 A.2d 479 (Conn. 1951); State v. Travis, 497 N.W.2d 905 (Iowa Ct. App. 1993); People v. Gramaglia, 423 N.Y.S.2d 78 (App. Div. 1979).

70. 336 N.W.2d 217 (Mich. Ct. App. 1983).

71. *Id.* at 218.

was not an element of involuntary manslaughter, he could not, as a matter of law, be an accomplice. In rejecting defendant's contention, the appellate court reasoned that even though the defendant did not intend that the principal kill the victim, he was responsible because he intended the very act that led to death—the pointing of a loaded gun at the victim.[72]

Most commentators approve of the result in *McVay*.[73] Professor Kadish notes that there is nothing doctrinally improper in permitting accomplice liability for unintentional offenses since the "requirement of intention for complicity liability is satisfied by the intention of the secondary party to help or influence the primary party to commit the act that resulted in the harm."[74] He cautions, however, that accomplice liability for unintentional crimes should be narrowly confined to situations where the accomplice intentionally promotes the particular act that causes the unintended result.[75]

In stark contrast, Professors LaFave and Scott reject entirely the suitability of accomplice doctrine for unintentional crimes.[76] They note that accomplice liability doctrine is most needed for crimes that prohibit specific culpable conduct, rather than for crimes that penalize an actor for causing an undesirable result.[77] In the latter situation, Professors LaFave and Scott favor assessing an actor's culpability directly and limiting liability to cases where the actor is the legal cause of harm. They raise concerns that employing complicity rules could improperly impose liability on remote or insignificant forms of assistance.[78]

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72. *See id.* at 219.

73. *See* Dressler, *supra* note 5, at 138; Kadish, *supra* note 5, at 347; Mueller, *supra* note 18, at 2190. *But see* LAFAVE & SCOTT, *supra* note 5, at 585-86.

74. Kadish, *supra* note 5, at 347.

75. *See id.* at 348. Kadish states in pertinent part:

> It is important to distinguish these [McVay-type] cases from those in which the criminal liability of the principal arises from actions that go beyond those that the accomplice intended . . . . So, for example, a defendant who lends his car keys to a driver he knows to have just had several drinks is an accomplice to the driver's crime of driving under the influence of alcohol. But strictly, he would not be liable for manslaughter as an accomplice of the driver if the driver's liability arises out of particular acts of reckless driving—for example, driving in the wrong direction on an expressway and colliding with an oncoming vehicle—that the defendant did not intend.

Id. The significance of this distinction is extensively discussed *infra* Part III.

76. *See* LAFAVE & SCOTT, *supra* note 5, at 584-86.

77. *See id.* at 585-86.

78. *See id.* Under general principles of causation, a person is the cause of death when he meets two requirements. *See id.* at 277. He must be the actual or but-for

Notwithstanding scholarly admonitions, a number of courts have upheld the imposition of accomplice liability in situations far beyond

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cause of death, and he must be the legal or proximate cause of death. *See generally id.* at 277-83 (stating that it must be determined that the defendant's conduct was the cause in fact or result, and once cause in fact is established, it must be determined that any variation between the result intended and the result achieved is not so extraordinary that it would be unfair to hold the defendant responsible). Under the first prong, most courts hold that a person need not be the sole actual cause of death, rather he need only be a "substantial factor" in the victim's death. *See id.* at 279-81. Under the second prong, legal cause is typically measured in terms of whether the result is foreseeable. *See id.* at 281-83.

Professors LaFave and Scott's position that utilizing causation principles rather than accomplice doctrine will better protect defendants from excessive punishment may be unfounded. Although traditional causation provided that the intervening act of an individual may break the chain of causation between a secondary actor and the ultimate harm, a number of courts have modified this strict view of free will and have held that the existence of another actor should not, per se, eliminate the possibility of direct liability, particularly where the primary actor's ability to act freely is compromised. *Compare* People v. Campbell, 335 N.W.2d 27, 30 (Mich. Ct. App. 1983) (stating that the defendant could not cause the death of an individual whom the defendant encouraged to commit suicide), *with* State v. Marti, 290 N.W.2d 570, 579 (Iowa 1980) (stating that the victim's act of shooting herself did not preclude defendant's culpability in causing her death). By analogy, one could argue that where an owner of a car provides alcohol or drugs to another and then gives him the keys to his car, the driver's actions do not break the causal chain of responsibility. Thus, while accomplice liability may not be appropriate because the owner does not intend the principal's specific deadly acts, courts could find that the owner was a direct cause of death. For example, in *United States v. Brown*, 22 M.J. 448, 449 (C.M.A. 1986), defendant allowed a drunk acquaintance to drive his car. The defendant, who was not in the car at the time it was involved in a fatal accident, was convicted of involuntary manslaughter. *See id.* In upholding defendant's conviction, the Court of Military Appeals noted that it need not address whether defendant was an accomplice of the negligent driver because his actions in lending his car to an intoxicated driver was itself culpable and a proximate cause of death. *See id.*

Even when the principal's actions are wholly volitional, a significant number of courts have adapted their causation rules to extend liability beyond the principal actor. For example, courts have had little difficulty in imposing direct liability against a parent for failing to act to prevent a third party from inflicting injury to his or her child. *See, e.g.*, State v. Austin, 172 N.W.2d 284 (S.D. 1969); *see generally* Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993) (discussing the meaning of motherhood as enforced by the criminal law's treatment of mothers who abuse or fail to protect their children). Similarly, in a number of drag-racing cases courts have imposed direct liability against a participant in a drag race where death was caused by a co-participant. *See, e.g.*, Jacobs v. State, 184 So. 2d 711 (Fla. Dist. Ct. App. 1966); State v. McFadden, 320 N.W.2d 608 (Iowa 1982).

Some courts appear to be modifying traditional causation principles to punish secondary actors. *See* Kadish, *supra* note 5, at 399-400. The danger of overpunishment may, in fact, be heightened if courts use causation principles to assess culpability because, as one court stated, accomplice liability is based on concepts of intent, whereas causation is based on concepts of foreseeability. *See McFadden*, 320 N.W.2d at 613.

McVay.[79] For example, in *People v. Wheeler*,[80] the defendant was convicted of criminally negligent homicide as an accomplice.[81] The defendant got into a fight with the victim, who lived in the same apartment complex as the defendant. The defendant's common-law husband, Anderson, walked in while they were fighting, and he also began fighting with the victim. The fight subsided, and the victim returned to his apartment. Some time later, Anderson went to the victim's apartment with a knife and resumed the fight, stating that he was going to kill the victim. The defendant had followed Anderson up to the apartment and while he was fighting with the victim, she jumped on the victim's back and pulled his hair. The victim died from a stab wound that Anderson inflicted in his side.[82]

At trial, a witness testified that the defendant was not trying to help Anderson stab the victim. The trial court set aside the jury conviction on the grounds that it was logically impossible to assist another in the commission of acts that the principal does not have the intent to commit.[83] The Supreme Court of Colorado reinstated the conviction, reasoning that all that is required for complicity culpability is that the secondary actor know that the principal is engaging in criminal conduct, that she aid or abet the principal in that conduct, and that death occur.[84]

The difficulty with *Wheeler* is that the court did not specify what the defendant did to aid the principal, although one can infer that it was defendant's general participation in the assault that formed the basis of her aid. It therefore appears that the court imposed accomplice liability upon the defendant when proof was lacking that she intended to aid in the principal's specific harmful act of stabbing the victim.

As this section has described, legislative, judicial, and scholarly treatment of accomplice liability for unintentional crimes has been decidedly conflicting. Some statutes state that accomplice liability is predicated on intent to aid in the commission of an offense. Accordingly, some courts reason that complicity exists only for intent-based crimes. Other jurisdictions find the necessary intent by focusing on

79. *See, e.g.*, Chance v. State, 685 A.2d 351 (Del. 1996); People v. Cole, 625 N.E.2d 816 (Ill. App. Ct. 1993); State v. Satern, 516 N.W.2d 839 (Iowa 1994).
80. 772 P.2d 101 (Colo. 1989) (en banc).
81. *See id.* at 101.
82. *See id.*
83. *See id.*
84. *See id.* at 105.

whether the secondary actor intended to aid the specific conduct producing the culpable harm and therefore permit accomplice liability for crimes that require only recklessness or negligence. Still other jurisdictions impose accomplice liability without detailing the secondary actor's role in aiding the principal in producing the unintended harm. The propriety of these legislative and judicial approaches is analyzed in Part III.

III. ANALYSIS OF THE SCOPE OF ACCOMPLICE LIABILITY FOR UNINTENTIONAL CRIMES

The proper test of accomplice liability is founded on intent, regardless of whether the crime itself is intentional. With intentional crimes, the accomplice's intent is established by showing that the accomplice acted with the intent that the offense be committed. There is no need to delineate whether the secondary actor intended to aid the principal's acts or the results of those acts.[85] What differs in assessing accomplice liability for unintentional crimes is that we can no longer evaluate the secondary actor's culpability by simply asking whether the actor intended to aid in the commission of the offense. Instead, the proper test of the secondary actor's culpability should measure whether the actor intended to aid the commission of the particular acts which led to the unintentional harm. As noted by Professor Kadish, this test does not change the intent requirement of accomplice liability doctrine; it merely reflects a fine-tuning necessitated by the unintentional nature of some crimes.[86]

A. Legislative Variations

The mixed views of courts on whether a person can be an accomplice to an unintentional crime are due, to a great extent, to a misapprehension of accomplice liability's intent requirement. This misapprehension is due in part to legislative failure to adequately delineate the scope of accomplice liability for intentional and unintentional crimes.[87] For example, Category One complicity statutes[88] require that a person act with the intent to assist in the commission of an offense. Such language appears to preclude accomplice liability for unintentional crimes because its language presupposes awareness

85. *See supra* notes 18-19 and accompanying text.
86. *See* Kadish, *supra* note 5, at 347.
87. *See supra* notes 42-52 and accompanying text.
88. *See supra* notes 42-45 and accompanying text.

of the intended crime. No principled reason exists for banning accomplice liability for unintentional crimes since, if properly focused, no doctrinal change is implicated by permitting accomplice liability for unintentional crimes. One could argue, however, that the plain language of the statutes does not permit accomplice liability for unintentional crimes and that courts do not have the ability to go beyond the plain meaning of the statute.[89]

At least one court has so held. In *Echols v. State*,[90] the Court of Appeals of Alaska ruled that a defendant could not be an accomplice to an unintentional crime based on the plain language of the Alaska complicity statute that required the secondary actor to act with the "intent to promote or facilitate the commission of the offense."[91] The court further reasoned that the statute's legislative history indicated that it was meant to codify Alaska common law which limited accomplice liability to specific intent crimes.[92] As discussed below, the

89. Constitutional rules of due process mandate that a defendant is entitled to fair notice of what the law prohibits. *See* United States v. Lanier, 117 S. Ct. 1219, 1224-25 (1997); United States v. Harriss, 347 U.S. 612, 617 (1954) (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)); State v. Goodwin, 813 P.2d 953, 967 (Mont. 1991). Additionally, the canons of statutory construction state that criminal statutes be narrowly construed. *See* Screws v. United States, 325 U.S. 91, 105 (1945); State v. Pardo, 712 P.2d 737, 740 (Idaho Ct. App. 1985); State v. Ahitow, 544 N.W.2d 270, 273 (Iowa 1996).

90. 818 P.2d 691 (Alaska Ct. App. 1991); *accord* People v. Marshall, 106 N.W.2d 842 (Mich. 1961). The *Marshall* court indicated that finding an owner of a vehicle guilty as an accomplice to involuntary manslaughter when he was not with the driver at the time of the accident would be unconstitutional. *See Marshall*, 106 N.W.2d at 844; *see also* LAFAVE & SCOTT, *supra* note 5, at 586 (discussing that accomplice liability theory is required to impose liability of persons who did not themselves engage in the unlawful conduct).

91. *Echols*, 818 P.2d at 692 (emphasis omitted).

92. *See id.* On a similar issue, some courts have held that a person may not *attempt* an unintentional crime. *See, e.g.*, People v. Harris, 377 N.E.2d 28 (Ill. 1978); State v. Zupetz, 322 N.W.2d 730 (Minn. 1982); State v. Hembd, 643 P.2d 567 (Mont. 1982); People v. Campbell, 72 N.Y.S. 2d 602 (1988); People v. Burress, 505 N.Y.S. 2d 272 (App. Div. 1986); State v. Smith, 534 P.2d 1180 (Or. Ct. App. 1975); State v. Kimbrough, 924 S.W.2d 888 (Tenn. 1996); State v. Dunbar, 817 P.2d 1360 (Wash. 1991). *But see infra* notes 134-35 and accompanying text. These courts have premised their analysis on the plain language of their jurisdictions' attempt statutes, which require that the actor act with "the intent to commit a specific offense." *Harris*, 377 N.E.2d at 31 (quoting ILL. COMP. STAT. ANN., 38/8-4(2) (West 1977)). They reason that it is inherently contradictory to attempt the unintended. These cases are germane because of the similarities between the language of the attempt statutes and Category One accomplice statutes. Accordingly, courts in Category One jurisdictions could rule that accomplice liability does not extend to unintentional crimes because their accomplice statutes require that one intend to aid in the commission of an offense.

Echols court decision is illustrative of an excessively narrow view of accomplice liability's intent requirement, which we can trace directly to the wording of the complicity statute.[93]

Category Two statutes,[94] which fully adopt *Model Penal Code* section 2.06, also do not adequately address the scope of accomplice liability for unintentional crimes. The intent of the drafters of the *Model Penal Code* was to create a statute that would specifically allow accomplice liability for unintentional crimes.[95] The outcome was section 2.06. In addition to requiring that an accomplice have the intent to "promot[e] or facilitat[e] the commission of an offense,"[96] the *Model Penal Code* specifies that for result-oriented crimes "an accomplice in the conduct causing such [a] result is an accomplice in the commission of that offense," if he meets the mens rea requirement of the underlying crime.[97]

An ambiguity exists between two subsections of section 2.06. Section 2.06(4) uses the term "an accomplice in the conduct" without defining what the term means or whether it overrides the requirement of section 2.06(3) that the secondary actor intend to promote or facilitate the commission of a specific offense.[98] The drafters of the

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93. *See supra* notes 90-92 and accompanying text.
94. *See supra* notes 46-49 and accompanying text.
95. *See supra* note 49 and accompanying text.
96. MODEL PENAL CODE § 2.06(3) (Proposed Official Draft 1962).
97. *Id.* § 2.06(4) (Proposed Official Draft 1962).
98. Tentative Draft No. 1 of *Model Penal Code* 2.04(4), which was renumbered as 2.06(4) in the final version of the Code, stated the following:

> When causing a particular result is an element of a crime, a person is an accomplice in that crime if:
>
> (a) he was an accomplice in *behavior* causing such result; and
>
> (b) he shared such purpose or knowledge with respect to that result as may be required by the definition of the crime.

MODEL PENAL CODE § 2.04(4) (Tentative Draft No. 1, 1953) (emphasis added). The commentary to this version states that "[t]his paragraph makes clear that *complicity in conduct* causing a particular criminal result entails accountability for that result so long as the accomplice shared the purpose or the knowledge with respect to the result that is demanded by the definition of the crime." MODEL PENAL CODE § 2.04(4) commentary at 34 (Tentative Draft No. 1, 1953) (emphasis added). Although a fair reading of the caveat is that the drafters of the Code did not intend that one could be an accomplice to an unintentional crime, in support of this section, the commentary states that a passenger who urges a driver to increase speed would be just as culpable as the driver if death or injury occurred. *See id.* This example makes clear that the drafters supported the idea of accomplice liability for unintended crimes.

The next revision of the complicity section changed the language of subsection 4 to the following:

Model Penal Code could have meant that for result-oriented crimes, a person need only intend to promote the perpetrator's conduct rather than intend to promote the commission of the offense.[99] This interpretation, however, is subject to dispute and has already been rejected by two jurisdictions.[100] While on the bench of the Supreme Court of New Hampshire, Justice David Souter stated that the language used in 2.06 failed to make the relationship between subsections (3) and (4) clear.[101] Souter opined that New Hampshire's *Model Penal Code*-based complicity statute was constitutionally infirm because, in failing to define what was an "'accomplice in the conduct,'" the statute failed "to give any comprehensible, let alone fair, notice of its intended effect."[102]

> When causing a particular result is a *material* element of *an offense*, a person is an accomplice in *the commission of that offense* if:
> (a) he was an accomplice in *conduct* causing such result; and
> (b) he *acted with the kind of culpability with respect to that result that is sufficient for the commission of the offense.*

MODEL PENAL CODE § 2.06(4) (Tentative Draft No. 4, 1955).

The drafters of the Code do not explain the change in terminology from "crime" to "offense" and "behavior" to "conduct" other than to state generally that "[v]erbal changes have been made by the Reporter to conform to style of other sections." *Id.* § 2.06.

The comments to the final version of 2.06 states that it was presented to the Institute in the Proposed Official Draft and approved at the May 1962 meeting. MODEL PENAL CODE § 2.06 commentary at 295 (Proposed Official Draft, 1962). No explanation is given for the changes between Tentative Draft No. 4 and the final version.

The version of section 2.06 included in Tentative Draft No. 4 more clearly states the parameters of accomplice liability for result-oriented crimes, and by extension for unintentional crimes based on recklessness and negligence, than does the final version of 2.06. First, it states more clearly that one may be an accomplice to a result-oriented crime when he is an accomplice in conduct. Second, because it tracks the language of subsection 3 with respect to defining when one is an accomplice in the commission of an offense, the apparent ambiguity between subsections 3 and 4 is eliminated.

99. *See, e.g.*, State v. Bridges, 604 A.2d 131 (N.J. Super. Ct. App. Div. 1992); *see generally* Davis, *supra* note 58, at 99-102 (discussing whether one can be charged as an accomplice to a crime the principal committed unintentionally).

100. *See* Fight v. State, 863 S.W.2d 800, 802-03 (Ark. 1993); State v. Etzweiler, 480 A.2d 870, 874 (N.H. 1984).

101. *See Etzweiler*, 480 A.2d at 876 (Souter, J., concurring specially).

102. *Id.* at 876-77 (Souter, J., concurring specially); *see also* State v. Horne, 480 A.2d 121, 122 (N.H. 1984) (Souter, J., concurring specially) (holding that improper indictment of the defendant by the state warranted a reversal of his conviction).

Another problem exists with *Model Penal Code* section 2.06(4). Its drafters explained that its purpose was two-fold. First, it was created to limit the "natural and probable consequence" doctrine. *See supra* note 37 and accompanying text. Second, as described above, the drafters of the *Model Penal Code* wanted to *extend* accomplice liability to unintentional crimes. *See* MODEL PENAL CODE § 2.06 com-

One can argue that Category One and Two statutes provide adequate notice because it is within the courts' interpretive powers to examine the term "offense" as used in these statutes and rule that it extends to unintentional offenses.[103] Nevertheless, since some jurisdictions have ruled otherwise, a sounder approach entails revamping unclear statutes to specify whether a person can be an accomplice to an unintentional crime. Patterning accomplice statutes after Category Three statutes[104] will help to avoid notice and ambiguity problems. These statutes specify that the gravamen of accomplice liability is intentionally aiding in the principal's conduct and possessing the mental culpability required by the underlying crime. Courts interpreting Category Three statutes have had little difficulty imposing accomplice liability for unintentional crimes.[105] Even in Category Three jurisdictions, however, courts must carefully evaluate whether the secondary actor's intent was directed to the specific conduct causing harm.

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mentary at 312 n.42, 321-22 n.71; *see also id.* § 2.04 commentary at 34 (Tentative Draft No. 1, 1953). However, drafting one general statute, section 2.06(4), to address competing goals was unwise because it fails to use language specific to each situation. Thus, it is unclear exactly what section 2.06(4) covers. Looking to legislative history to ascertain the drafters' intent, when they intended competing goals is unhelpful since on the one hand, the section could be viewed as trying to limit accomplice liability and on the other hand one can find language showing that liability is to be extended. *Compare* Davis, *supra* note 58, at 97 ("Subsection IV [a state corollary to 2.06(4)] broadens the scope of accomplice liability."), *with* Commonwealth v. Bridges, 381 A.2d 125, 127 (Pa. 1977) ("Subsection (d) of 306 [the state corollary to 2.06] . . . limits the culpability of accomplices.").

103. In fact, many courts have examined whether a person can be an accomplice to an unintentional crime, notwithstanding legislative language that suggests otherwise. *See* Weidler v. State, 624 So. 2d 1090, 1091 (Ala. Crim. App. 1993); People v. Wheeler, 772 P.2d 101, 103 (Colo. 1989); State v. Foster, 522 A.2d 277, 283 (Conn. 1987). However, since some courts in jurisdictions with Category Two accomplice statutes have ruled that they do not have the power to extend accomplice liability to unintentional crimes, the issue remains uncertain. *See* Fight v. State, 863 S.W.2d 800, 802-03 (Ark. 1993); State v. Etzweiler, 480 A.2d 870, 874 (N.H. 1984).

104. *See supra* notes 51-52 and accompanying text.

105. *See, e.g.*, People v. Flayhart, 533 N.E.2d 657 (N.Y. 1988). In *Flayhart*, defendants, who were charged as accomplices to criminally negligent homicides, claimed that the New York accomplice statute required a secondary actor to intentionally aid the principal to "'fail to perceive a substantial and unjustifiable risk' of death," and that this was logically impossible. *Id.* at [need page]. The New York Court of Appeals rejected this construction of section 20.00, stating:

> Penal Law § 20.00 imposes accessorial liability on an accomplice not for aiding or encouraging another to reach a particular mental state, but rather for intentionally aiding another to engage in *conduct* which constitutes the charged offense while himself 'acting with the mental culpability required for the commission' of that offense.

Id.; *accord* State v. Foster, 522 A.2d 277 (Conn. 1987).

Some courts are unnecessarily restrictive, while others go beyond the proper reaches of accomplice liability whether because of unartfully phrased accomplice statutes or independent judicial misapprehension of the proper focus of accomplice liability's intent requirement. The following subsections discuss judicial treatment of this issue.

B. Overextension of Accomplice Doctrine

In comporting with a refined definition of accomplice liability's intent requirement that focuses on the actor's intent to promote or facilitate the principal's acts, courts should adhere to other aspects of traditional accomplice rules, specifically the rejection of the natural and probable consequence doctrine.[106] Additionally, they must distinguish between accomplice liability based on the commission of an unlawful act from accomplice liability based on the commission of a lawful act in a reckless or negligent manner. Finally, courts should reject knowledge as the requisite mens rea in favor of intent to promote the principal's conduct. Some courts have failed to do so, and the result has been an unwarranted expansion of accomplice liability doctrine.

1. The natural and probable consequence doctrine

In examining whether the secondary actor meets the intent requirements of accomplice rules for unintentional crimes, courts must differentiate between acts that the accomplice intends to aid and those that are merely a foreseeable consequence of the aid; only the former should lead to liability. This rule parallels the analysis of the extent of a secondary actor's culpability when intending to aid the commission of a specific crime but the principal commits crimes beyond what the secondary actor intended. In such a case, commentators overwhelmingly reject the natural and probable consequence doctrine which would extend accomplice liability to those offenses that are merely foreseeable.[107] Analogously, when assessing accomplice liability for crimes based on recklessness or negligence, courts should limit liability to those acts the accomplice intended to promote.

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106. *See supra* notes 31-33 and accompanying text.

107. *See supra* note 33 and accompanying text. *But see supra* note 31 and accompanying text.

Limiting liability makes sense because a distinction exists between situations where the secondary actor actively encourages the principal to engage in specific conduct that causes the unintended harm, such as in *McVay* or the speeding-to-the-airport scenario, from instances where the secondary actor intends that the principal engage in reckless behavior but does direct the specific act that causes harm, such as many of the drag-racing and assault cases. Accomplice liability should not apply in the latter situations because the principal's culpability stems from conduct that differs or exceeds what the accomplice intended, albeit that the principal's acts may be foreseeable.[108] Yet some jurisdictions have extended accomplice liability to just these types of situations under a general finding that the intended aid resulted in foreseeable acts.[109]

In the *Wheeler* assault case, there was no evidence that the defendant intended to aid her common-law husband's specific act of stabbing the victim.[110] At best, one could argue that she intended to aid in his fight with the victim and the stabbing was a natural and probable consequence of the initial fight. Similarly, in the drag racing cases, the secondary actor intends only to promote the act of driving at high speeds. Although it may be foreseeable to the secondary actor that his adversary may drive erratically by swerving around and passing other cars, one cannot say that the secondary party intended those specific acts. The courts should find that this lack of intent precludes the imposition of accomplice liability should a death result from the drag race.[111] Cases that impose accomplice

108. *See* Kadish, *supra* note 5, at 348. Professor Kadish gives as an example the situation where a person gives his car keys to an intoxicated individual. Kadish would hold the car owner only guilty of being an accomplice to the crime of driving under the influence of alcohol. He would not find the secondary party guilty of involuntary manslaughter for the particular acts of reckless driving such as driving over a median that the accomplice did not intend because, while these acts may be probable or foreseeable, they are not what the accomplice intended. *See id.*

109. *See* Simmons v. State, 649 So. 2d 1282 (Ala. 1994) (holding that defendant who shot into crowded street could be convicted of reckless murder as an accomplice based on his knowledge that the principal was engaging in reckless conduct and his intentional assistance and encouragement thereof); State v. Garza, 916 P.2d 9 (Kan. 1996) (holding that where defendant and another were engaged in a gunfight, defendant could be properly convicted of murder of bystander under the theory of accomplice liability although he did not fire the fatal shot because the two were acting in concert as to bystanders and the defendant's participation could be considered encouragement); People v. Abbott, 84 A.D.2d 11 (N.Y. App. Div. 1981) (drag-racing participant was guilty in death of bystander).

110. *See* People v. Wheeler, 772 P.2d 101, 103 (Colo. 1989).

111. Where the victim is a co-participant, accomplice liability is precluded be-

liability for unintentional crimes upon a generalized finding that the principal's acts were foreseeable violate the rejection of the natural and probable consequence doctrine and are unwarranted extensions of accomplice liability. The danger of the imposition lies in the risk of punishing a person who does not possess the requisite intent.[112] Since the natural and probable consequence doctrine flouts the most fundamental tenet of criminal law that punishment be based on blameworthiness, courts should be especially mindful of it when assessing accomplice liability for unintentional crimes.

2. Misdemeanor-manslaughter rule

Involuntary manslaughter can take two forms: (1) unintended deaths that occur as a result of a lawful act committed in a reckless or negligent manner; or (2) unintended deaths that occur during the commission of an unlawful act.[113] Historically, lawmakers and commentators have referred to the latter as misdemeanor-manslaughters. Under this rule, a person who commits an unlawful act is responsible for a death that occurs in its commission, without regard to a culpable mental state with respect to the death.[114] Commentators who view the misdemeanor-manslaughter doctrine as a junior version of the felony-murder rule have leveled the same harsh criticism against

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cause homicide statutes typically call for causing the death "of another." State v. McFadden, 320 N.W.2d 608, 610 (Iowa 1982). Some courts have applied a causation analysis to this type of situation and have ruled that the surviving racer is liable because it is foreseeable that a death would occur. *See id.* at 610-14 (stressing that causation is based on concepts of foreseeability, whereas accomplice liability is based on concepts of intent). *But see* Commonwealth v. Root, 170 A.2d 310, 314 (Pa. 1961).

Courts have been more willing to impose both direct and derivative liability against a drag-racer when the death is of a non-participant. *See McFadden*, 320 N.W.2d at 610; Abbott, 445 N.Y.S. at 347.

112. Some courts and commentators have stressed the danger of inappropriate punishment. *See, e.g.*, Jacobs v. State, 184 So. 2d 711 (Fla. Dist. Ct. App. 1966) (Carroll, J., dissenting); *see generally* Dressler, *supra* note 5, at 93 (suggesting that accomplice liability rules may be unjust and not counter-utilitarian because they are not tied to the doctrine of causation).

113. *See supra* note 54.

114. The unlawful act typically is a misdemeanor, although courts have held that it can encompass civil wrongs and felonies that do not fall within the scope of felony-murder rules. *See generally* LAFAVE & SCOTT, *supra* note 5, at 675-76 (discussing the "Unlawful-Act Involuntary Manslaughter" rule and the vagueness of the expression "Unlawful Act"). *See also* Martin R. Gardner, *The [Mens Rea] Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 705-06 (discussing the *versanti in re illicitae* principle that one who acts unlawfully should be held responsible for all the consequences of his conduct).

both—they impose punishment without regard to blame.[115] The only mens rea needed for misdemeanor-manslaughter is the mental state required to commit the underlying crime. Consequently, a person may be an accomplice to misdemeanor-manslaughter solely on proof that he or she intended to aid another in the commission of the underlying offense.[116]

The misdemeanor-manslaughter doctrine has a significant impact on the issue of accomplice liability for unintentional crimes. Professors LaFave and Scott note that the problem of whether a person may be an accomplice to an involuntary manslaughter "does not exist when the involuntary manslaughter is of the unlawful-act type."[117] This is so because the secondary actor need not have any mental state with regard to the death. Intentional aid in the commission of the predicate offense will suffice to impose liability for the resulting death.[118] Therefore, the entire issue of whether a person can be an accomplice to an unintentional crime is side-stepped; liability for the unintentional manslaughter is boot-strapped to liability for the underlying misdemeanor.

Courts, however, sometimes fail to note the distinction between the two types of involuntary manslaughter.[119] For example, in *Mendez v. State*[120] the Court of Criminal Appeals of Texas considered whether a defendant could be an accomplice to involuntary manslaughter that resulted from a random shooting by the defendant's companion. Although the court specified that "[t]he gist of our involuntary manslaughter offense is reckless conduct," in affirming

115. *See, e.g.*, MODEL PENAL CODE § 210.3 commentary at 77.
116. *See* LAFAVE & SCOTT, *supra* note 5, at 584 n.102.
117. *Id.* at 584.
118. *Id.* at 585.
119. *See, e.g.*, State v. Satern, 516 N.W.2d 839 (Iowa 1994); Wade v. State, 124 S.W.2d 710 (Tenn. 1939). *But see* State v. DiLorenzo, 83 A.2d 479 (Conn. 1951). Part of the problem is based on judicial conflict as to whether lawful acts committed recklessly may serve as the predicate "unlawful act." *See* LAFAVE & SCOTT, *supra* note 5, at 676 n.13. Another problem is that some jurisdictions temper the misdemeanor-manslaughter doctrine with rules that the actor is responsible only for deaths that are a foreseeable consequence of the predicate misdemeanor. *See id.* at 676-77. Perhaps the best solution is to continue the trend of modern legislatures and abolish misdemeanor- manslaughters, leaving involuntary manslaughter solely for reckless or negligent homicides. Not only are misdemeanor-manslaughters incompatible with modern criminal law theory which imposes punishment based on individual blameworthiness, (the problems noted here also lend support for its abolition.)
120. 575 S.W.2d 36 (Tex. Crim. App. 1979).

defendant's conviction, the court relied extensively on misdemeanor-manslaughter cases.[121]

This lack of judicial precision is troublesome because it can lead to sloppiness in the courts' examination of the parameters of accomplice liability for unintentional crimes based on recklessness or criminal negligence. Broad pronouncements that precedent exists for holding that a person may be an accomplice to an involuntary manslaughter may cause some courts to take a superficial approach in their examination of the scope and extent of such liability.[122] Courts must be wary of relying on precedent that, in fact, is not on point because the issue involved a different type of involuntary manslaughter. Instead, courts must take care to scrutinize the factual underpinnings of a case to ensure that the secondary actor's liability is predicated on his intent to aid in the specific harm-producing acts.

3. Knowledge v. purpose

As discussed in Part II, many jurisdictions reject knowledge as an acceptable mens rea for accomplice liability. With specific intent crimes, the secondary actor must do more than just have knowledge of the offense that the primary actor is planning to commit; he must have the intent to promote or facilitate the commission of the offense. The courts should apply a parallel mens rea requirement before imposing accomplice liability for unintentional crimes and require that the accomplice intend to promote the commission of the culpable act. Against this backdrop, the holdings of cases that have imposed accomplice liability upon car owners for their drivers' acts are called into question.[123] A classic scenario involves the automobile owner who lends his or her car to a drunk driver. Under a strict mens rea analysis, the owner has the intent that the principal drive, but query whether the owner intends that the driver commit the specific acts that cause the unintentional harm.[124]

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121. *Id.* at 37-38. The *Mendez* court relied on *Wade v. State*, 124 S.W.2d 710 (Tenn. 1939), and *Black v. State*, 133 N.E. 795 (Ohio 1921). In both cases liability was predicated on aiding the commission of an unlawful act. *See* State v. Satern, 516 N.W.2d 839 (Iowa 1994) (holding defendant vicariously liable for the acts of his friend with whom he had gone drinking and allowed to drive his truck).

122. *See, e.g.*, People v. Turner, 336 N.W.2d 217 (Mich. Ct. App. 1983) (citing *Mendez* as support for principle that one can be an accomplice to involuntary manslaughter based on reckless conduct).

123. *See supra* note 39 and accompanying cases.

124. Interestingly, in *People v. Marshall*, 106 N.W.2d 842 (Mich. 1961), where the court refused to find a car owner to be an accomplice where he was home at the time of the fatal accident, the court noted that the owner was guilty only of a statute

The car owner cases are similar to the archetypal example of the gun supplier selling a gun to someone whom the supplier knows is planning to kill his or her spouse. The court in *United States v. Peoni* ruled that knowledge was insufficient for accomplice liability.[125] The supplier would not be an accomplice to first-degree murder because the supplier lacked the necessary intent to aid in the commission of the offense. Yet is it not true that the supplier intended to sell the principal the gun? Of course it was the supplier's conscious objective to do so. The supplier is not an accomplice because the supplier did not do so with the intent that the principal kill his or her spouse; at best the supplier had knowledge of what the principal intended. Therefore the gun supplier could only be guilty of criminal facilitation. By analogy, the car supplier's liability should be similarly limited.[126]

Some commentators have acknowledged that holding the secondary actor as an accomplice to an unintentional crime does not violate the *Peoni* principles because the accomplice is being held to the same mens rea requirement as the principal actor and that it is not unjust to punish the accomplice as a perpetrator.[127] This may very well be true, but it does not obviate the primary consideration that

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that made it punishable for the owner of an automobile to "*knowingly* . . . permit it to be driven by a person" who was intoxicated. *Id.* at 844 (emphasis added). One may take this statement to mean that the owner acted only with knowledge rather than the requisite intent for accomplice liability, and that this was a reason for exculpating the defendant.

125. *See supra* note 23 and accompanying text.

126. This is particularly so if the car owner is not in the car with the driver at the time of the accident. Some courts have held that the owner's failure to stop the driver is silent encouragement of the reckless behavior and therefore fulfills the mens rea of accomplice liability. *See* Kadish, *supra* note 5, at 348 n.50.

Because courts have ruled that a secondary actor may be convicted of a different level of homicide than a primary actor, in the gun supplier situation, it appears possible that in jurisdictions whose accomplice statutes contain a section akin to *Model Penal Code* section 2.06(4), the gun dealer could be guilty of an unintentional homicide. This is because the dealer intended to aid in the commission of P's act of purchasing the gun, and one assumes that the prosecutor could easily prove the dealer was reckless as to the risk that the gun would be used to kill someone. Such a finding has serious implications. First, because it holds the supplier responsible for a form of homicide, it conflicts with the judicial rulings and legislative directives that accomplice liability not be based on a mens rea of knowledge, particularly in the commercial setting. *See supra* notes 21-22 and accompanying text. Second, it calls into question the necessity of criminal facilitation statutes, which were enacted as a means of imposing some sanction upon suppliers and providers. Legislatures may need to take specific corrective action if this is not the result they desire.

127. *See* LAFAVE & SCOTT, *supra* note 5, at 585.

the secondary actor acts with intent to promote the specific act that causes the harm.

C. Improperly Narrow Use of Intent

Some courts have ruled that, as a matter of law, it is logically impossible to intend to aid the principal in performing a reckless or negligent crime.[128] For example, with unintentional homicides, these courts reason that it is impossible to find that the secondary actor "knew that the principal intended to perpetrate an unintentional killing."[129] In fact, the intent element is satisfied if the accomplice has the conscious objective that the principal perform certain specific acts which are reckless or negligent. It is not necessary that the accomplice intend that the result occur any more than it is necessary that the principal intend the result.

We can make an analogy to the law of reckless endangerment on this point. A person is guilty of reckless endangerment when that person "recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."[130] Courts have interpreted this language to mean that a person is liable for engaging in conduct with a conscious awareness that a substantial and unjustifiable risk of harm exists.[131] Moreover, a number of courts have found defendants guilty of reckless endangerment as accomplices.[132] None

128. *See, e.g.*, Fight v. State, 863 S.W.2d 800, 805 (Ark. 1993); State v. Etzweiler, 480 A.2d 870, 874 (N.H. 1984); People v. Wheeler, 772 P.2d 101 (Colo. 1989); *cf.* Echols v. State, 818 P.2d 691 (Alaska Ct. App. 1991) (reversing a conviction of first-degree assault because the defendent merely acted recklessly, but did not intend for her daughter to suffer serious injury from defendant's husband beating the daughter).

129. *Wheeler*, 772 P.2d at 105; *see Etzweiler*, 480 A.2d at 874-75.

130. N.Y. PENAL LAW § 120.20 (McKinney 1987). Reckless endangerment statutes were enacted to criminalize unintentional conduct that fell short of causing harm to another. *See* N.Y. PENAL LAW ARTICLE 120 PRACTICE COMMENTARY at 126. Some courts have interpreted their jurisdictions' attempt statutes to allow a crime of attempted reckless manslaughter. *See, e.g.*, People v. Thomas, 729 P.2d 972 (Colo. 1986) (en banc). Most courts and commentators have rejected this approach and hold that reckless conduct that does not result in harm is punishable only under a reckless endangerment statute. *See supra* notes 84 and 121-22 and accompanying text on the parallels between attempted manslaughter and accomplice to manslaughter.

131. *See, e.g.*, Albrecht v. State, 658 A.2d 1122 (Md. Ct. Spec. App. 1995); Rainesalo v. P.A., 566 N.W.2d 422 (N.D. 1997); People v. Einaugler, 208 A.2d 946 (N.Y. App. Div. 1994); Commonwealth v. Silay, 694 A.2d 1109 (Pa. Ct. 1997); State v. Brooks, 658 A.2d 22 (Vt. 1995).

132. *See, e.g.*, People v. Albritton, 629 N.Y.S.2d 270 (1995); *cf.* People v. Smith, 543 N.Y.S.2d 511 (1989) (holding the defendant not guilty based on insufficient evi-

of these cases has questioned the applicability of accomplice liability to the crimes of reckless endangerment. Implicit in these cases is the finding that the person *intended* to engage in the conduct but was reckless as to the risk of harm resulting therefrom.[133] Analogously, in assessing accomplice liability for unintentional homicides, courts need only find that the secondary actor intended to have the principal engage in reckless conduct, not that the secondary actor intended that the result occur.

Similar reasoning has allowed some jurisdictions to find that one may attempt to commit an unintentional crime.[134] The Supreme Court of Colorado is the foremost proponent of this position. In a series of cases, it has stressed that what is significant is the actor's intent to engage in certain *conduct* rather than an intent to commit an offense.[135] This shift in focus away from the result has allowed the Colorado courts to hold that even if a crime is unintentional, one may take steps to attempt it.[136]

The reasoning employed by the courts in an attempt and reckless endangerment cases is instructive on what the courts' focus should be in the accomplice arena. As these courts make clear, we can find that the secondary actor possessed the requisite intent by focusing on the

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dence that either he *or his accomplice* engaged in reckless conduct).

133. The finding of intentional conduct is not explicitly made because the gravamen of the offense is the performance of the conduct with reckless disregard of the risks. Intentional conduct in this sense is nothing more than voluntary behavior.

134. *See* State v. Galan, 658 P.2d 243 (Ariz. Ct. App. 1982); *Thomas*, 729 P.2d 972.

135. *See Thomas*, 729 P.2d at 975; People v. Castro, 657 P.2d 932, 938 (Colo. 1983) (en banc); *cf. Wheeler*, 772 P.2d 101 (allowing accomplice liability for an unintended crime).

The emphasis of the Colorado Supreme Court on the intent to perform the culpable act is correct. *See supra* note 84 and accompanying text. However, this Article takes issue with the extent of the Colorado court's reach. It has held that one may be an accomplice to an unintentional crime by borrowing the reasoning employed in the attempt cases. However, it has not focused on whether the secondary actor intended to aid in the very act that results in harm. Accordingly, its extension of accomplice liability for unintended crimes is too broad.

136. *See supra* note 129 and accompanying text. As noted earlier, most courts have found that it is illogical to attempt to commit an unintentional crime. *See supra* note 92. An in-depth analysis of whether one can attempt to commit an unintended crime is beyond the scope of this Article; however, it appears that the same reasoning that allows one to be an accomplice to an unintended crime by focusing on the intent to commit an act that may unintentionally result in harm can be used in the attempt arena. *See Wheeler*, 772 P.2d 101. *But see* State v. Foster, 522 A.2d 277, 281 (Conn. 1987) (distinguishing accessory liability from attempt liability by stating, in dicta, "persons cannot attempt or conspire to commit an offense that requires an unintended result").

conduct promoted rather than on the intent to cause a particular result. The harm engendered by an unnecessarily restrictive view of the term "intent" is the failure to punish blameworthy conduct. This, in turn, eliminates the potential for deterring others from promoting culpable conduct.

Another improper ground for a court's refusal to apply an accomplice theory of liability to an unintentional crime is by making a distinction between crimes based on recklessness from those based on negligence, allowing accomplice liability only in the former.[137] These courts appear to base this categorization on the subjective awareness of the risk involved. As the courts in one jurisdiction reasoned, as a matter of law, an accomplice cannot aid in a crime that the principal was unaware that he was committing, although he could aid in one where the principal was aware that a risk of harm existed.[138]

Courts that use the presence or absence of subjective risk awareness by the principal as the litmus test of whether accomplice liability exists again improperly focus on the principal's state of mind. Proper analysis should examine whether the secondary actor had the conscious objective to have the principal engage in an act, and whether both the secondary actor and the perpetrator knew or should of known of a substantial and unjustifiable risk that harm will result.

IV. CONCLUSION

The doctrinal components of accomplice liability do not neatly address the issue of accomplice liability for unintentional crimes since complicity rules typically require that one intend to aid in the commission of a crime. Allowing accomplice liability for unintentional crimes does not, however, involve an extension of accomplice doctrine, but merely merits a refocusing of its intent requirements away from the results produced by the principal and toward the conduct producing the result. Courts that have been imprecise in their application of accomplice liability doctrine to unintentional crimes have not refined the focus of their intent inquiry. This is due in part to the inexact language of many complicity statutes and also because of a misapprehension of the form and extent of complicity's intent requirements. To comport with the protection offered by this stringent

137. *See, e.g*, *Wheeler*, 772 P.2d at 107 (Erickson, J., dissenting); State v. Etzweiler, 480 A.2d at 870, 875 (N.H. 1984).

138. *See Etzweiler*, 480 A.2d at 874.

intent requirement, courts must ensure that they are neither overinclusive by allowing liability to rest on merely foreseeable or knowing acts, nor underinclusive by improperly limiting accomplice liability to intentional crimes.